(2011) 01 BOM CK 0055

In the Bombay High Court

Case No : Second Appeal No. 210 of 1990

Kashinath Shitole, (since died), through Original Legal representatives (Smt. Muktabai Shitole, Chandrakant Shitole, Dattatraya Shitole, Haribai Magar) — APPELLANT

Vs

Vaijinath Shinde — RESPONDENT

Date of Decision : 17-01-2011

Acts Referred:
Maharashtra Co-operative Societies Act, 1960 — Section 47, 47(2), 47(3), 48

Citation : (2011) 2 ALLMR 4 : (2011) 2 BomCR 31 : (2011) 113 BOMLR 324 : (2011) 3 MhLj 309

Hon'ble Judges : Shrihari P. Davare, J

Bench : Single Bench

Advocate : Milind Patil and K.B. Bhise, for the Appellant; M.M. Patil (Beedkar), for the Respondent

Final Decision : Dismissed

Judgement

Shrihari P. Davare, J.—Heard Shri Milind Patil, learned Advocate, for the Appellant and Shri M.M. Patil (Beedkar), learned Advocate for the Respondent. Parties are hereinafter referred to as per their original status i.e. Plaintiff and Defendant.

2. Present appeal is directed against the judgment and order dated 3.1.1990 rendered by the learned District Judge, Osmanabad, in Regular Civil Appeal No. 246 of 1982, thereby allowing the said appeal and setting aside the judgment and decree passed on 30.9.1982 by the learned Joint Civil Judge, Junior Division, Osmanabad, in Regular Civil Suit No. 156 of 1978, and consequently, dismissing the said suit filed by the Plaintiff.

3. The case of the Plaintiff is that he is the owner of survey No. 66/2 of village Singoli, Taluka and District Osmanabad, in all admeasuring 13 acre 4 guanthas. He obtained loan of Rs. 4000/= from Maharashtra Land Development Bank, Osmanabad, by mortgaging the said survey No. 66/2 with the said bank. It is

further averred by the Plaintiff he had not paid the said loan and, therefore, the bank authorities were pressing hard for recovery of the said amount. It is further averred by Plaintiff that on 29.6.1972, he agreed to sell northern side portion of 2 acres 1 guntha land from the said survey No. 66/2 to the Defendant, for Rs. 4000/=. It is the contention of the Plaintiff that he also made the Defendant aware about encumbrances on the said property. Thereafter, the transaction was completed and the Defendant purchased the suit land for Rs. 4000/= for which the Plaintiff executed registered sale deed dated 29.6.1972 (Exh.31) before the Sub Registrar, Osmanabad, in presence of the witnesses. it is also averred by the Plaintiff that the Defendant was aware about the mortgage deed executed by Plaintiff in respect of the suit land in favour of the said bank, but still no prior permission was obtained from the bank authorities by the Plaintiff or Defendant before completion of sale transaction between them. Therefore, according to the Plaintiff, the sale is void, in view of Section 47(2) and (3) of the Maharashtra Cooperative Societies, Act, 1960 ("MCS Act" for short). Moreover, according to the Plaintiff, no title has been passed in favour of the Defendant in respect of the suit land and, therefore, possession of the Defendant over the suit land is that of tresspasser. Hence, the Plaintiff requested the Defendant to hand over possession of the suit land to him, however, the Defendant avoided to do the same and, therefore, Plaintiff had no option, but to file the suit for declaration that the sale deed dated 29.6.1972 between him and the Defendant is void and Defendant be directed to deliver possession of the suit land back to the Plaintiff and also for consequential reliefs as stated in the plaint, on 18.8.1978.

4. The Defendant filed Written Statement (Exh.13) and resisted the suit claim, contending that he was not aware that the Plaintiff had obtained loan from the Land Development Bank, by mortgaging the suit property with the said bank. It is also contended that, in fact, the Plaintiff represented and assured the Defendant that the land was free from all encumbrances, at the time sale transaction and the Defendant believed in the words of the Plaintiff and proceeded to complete the said sale transaction. it is further contended that the Plaintiff is estopped from challenging the alienation. According to the Defendant, provisions of Sections 47 and 48 of the MCS Act are not applicable. It is further stated that the Defendant has paid various amounts to the banks on different occasions, which were accepted by the bank without any objection. Accordingly, Defendant prayed that the suit of the Plaintiff be dismissed with costs.

5. After considering the evidence adduced by the Plaintiff and the Defendant and considering rival submissions, learned Joint Civil Judge, Junior Division, Osmanabad, decreed the suit in favour of the Plaintiff on 30.9.1982 and directed the Defendant to deliver possession of the suit land i.e. 2 acres 1 guntha from northern side of survey No. 66/2 of village Singoli, to the Plaintiff with costs and enquiry of mesne profit was also directed.

6. Being aggrieved and dissatisfied by the said judgment and decree of the trial court dated 30.9.1982, the Defendant preferred Regular Civil Appeal No. 246 of

1982 before the District Court, Osmanabad, challenging the said judgment and decree passed in aforesaid R.C.S. No. 156 of 1978, and after considering rival submissions advanced by the learned Counsel for the parties, the learned District Judge, Osmanabad, by judgment and order dated 3.1.1990, allowed the said appeal, thereby setting aside the judgment and decree passed by the trial court, and consequently, he dismissed the Plaintiff''s suit with costs.

7. Feeling aggrieved and dissatisfied by the said judgment and order of the learned District Judge, allowing the appeal filed by the Defendant and dismissing Plaintiff''s suit, the Plaintiff has preferred present second appeal, assailing the judgment and order dated 3.1.1990 rendered by the learned District Judge, Osmanabad, in R.C.A. No. .246 of 1982.

8. Entire controversy revolves around the aspect as to whether the sale transaction dated 29.6.1972 is voidable and what is the effect of Sections 47 and 48 of the MCS Act on the said transaction. For the purpose of ready reference, the said Sections 47 and 48 are reproduced hereinbelow.

47. Prior claim of society.

(1) Notwithstanding anything in any other law for the time being in force, but subject to any prior claim of Government in respect of land revenue or any money recoverable as land revenue and to the provisions of Sections 60 and 61 of the Civil Procedure, 1908,

(a) any debt or outstanding demand, owing to a society by any member or past member or deceased member, shall be a first charge,

(i) upon the crops or other agricultural produce raised in whole or in part whether with or without a loan taken from the society by such member or past member or deceased member,

(ii) upon any cattle, fodder for cattle, agricultural or industrial implements or machinery, or raw materials for manufacture, or workshop, go down or place of business supplied, to or purchased by such member or past member or deceased member, in whole or in part, from any loan whether in money or goods made to him by the society, and

(iii) upon any movable property which may have been hypothecated, pledged or otherwise mortgaged by a member with the society, and remaining in his custody;

(b) any outstanding demands or dues payable to a society by any member or past member or deceased member, in respect of rent, shares, loans or purchase money or any other rights or amounts payable to such society, shall be a first charge upon his interest in the immovable property of the society.

Explanation: The prior claim of Government in respect of dues other than land revenue, shall be restricted for the purpose of subsection (1) to the assets created by a member out of the funds in respect of which the Government has a claim.

(2) No property or interest in property, which is subject to charge under the foregoing subsection, shall be transferred in any manner without the previous permission of the society; and such transfer shall be subject to such conditions, if any, as the society may impose.

(3) Any transfer made in contravention of subsection (2) shall be void.

(4) Notwithstanding anything contained in subsections (2) and (3), a society, which has as one of its objects the disposal of the produce of its members, may provide in its bylaws, or may otherwise contract with its members,

(a) that every such member shall dispose of his produce through the society, and

(b) that any member, who is found guilty of a breach of the bylaws or of any such contract, shall reimburse the society for any loss, determined in such manner as may be specified in the bylaws.

48. Charge on immovable property of members borrowing

Notwithstanding anything contained in this Act or in any other law for the time being in force,

(a) any person who makes an application to a society of which he is a member for a loan shall, if he owns any land or has interest in any land as a tenant, make a declaration in the form prescribed. Such declaration shall state that the applicant thereby creates a charge on such land or interest specified in the declaration for the payment of the amount of the loan which the society may make to the member in pursuance of the application, and for all future advances (if any) required by him which the society may make to him such member, subject to such maximum as may be determined by the society, together with interest on such amount of the loan and advances;

(b) any person who has taken a loan from a society of which he is a member, before the date of the coming into force of this Act, and who owns any land or has interest in land as a tenant, and who has not already made such a declaration before the aforesaid date shall, as soon as possible thereafter, make a declaration in the form and to the effect referred to in Clause (a); and no such person shall, unless and until he has made such declaration, be entitled to exercise any right, as a member of the society;

(c) a declaration made under Clause (a) or (b) may be varied at any time by a member, with the consent of the society in favour of which such charge is created;

(d) no member shall alienate the whole or any part of the land or interest therein, specified in the declaration made under Clause (a) or (b) until the whole amount borrowed by the member together with interest thereon, is repaid in full;

Provided that, it shall be lawful to a member to execute a mortgage bond [in respect of such land or any part thereof in favour of [a Cooperative Agriculture and Rural Multipurpose Development Bank] or of the State Government] under the Bombay Canal Rules made under the Bombay Irrigation Act, 1879 or under any corresponding law for the time being in force for the supply of water from a canal to such land, or to any part thereof;

Provided further that, if a part of the amount borrowed by a member is paid [the society with the approval of the Central Bank to which it may be indebted] may, on an application from the member, release from the charge created under the declaration made under Clause (a) or (b), such part of the movable or immovable property specified in the said declaration, as it may deem proper, with due regard to the security of the balance of the amount remaining outstanding from the member;

(e) any alienation made in contravention of the provisions of Clause (d) shall be void.

(f) [Subject to all claims of the Government in respect of land revenue or any money recoverable as land revenue, and all claims of the [Cooperative Agriculture and Rural Multipurpose Development Bank] in respect of its dues, in either case whether prior in time or subsequent,] and to the charge (if any) created under an award made under the Bombay Agricultural Debtors Relief Act, 1947 or any corresponding law for the time being in force in any part of the State, there shall be a first charge in favour of the society on the land or interest specified in the declaration made under Clause (a) or (b), for and to extent of the dues owing [by the member] on account of the loan.

(g) and in particular, notwithstanding anything contained in [Chapter X of the Maharashtra Land Revenue Code, 1966), the Record of Rights maintained thereunder shall also include the particulars of every charge on land or interest created under a declaration under Clause (a) or (b), [and also the particulars of extinction of such charge].

Explanation: For the purposes of this section, the expression "society" means

(i) any resource society, the majority of the members of which are agriculturists and the primary object of which is to obtain credit for its members, or

(ii) any society, or any society of the class of societies, specified in this behalf by the State Government, by a general or special order.

9. Admittedly, Plaintiff is the owner of the property and subject to above referred mortgage, he has authority to transfer the suit land. It is also apparent that the condition or restrictions imposed on alienation of the land, is not the absolute condition, but the Plaintiff could sell, transfer or alienate the property with the prior permission of the bank authorities, as the property was mortgaged with the bank. A bare reading of Section 47(2) of the MCS Act indicates that no property, which is subject of the charge under earlier subsection, shall be transferred in any manner without the previous permission of the society and the transfer shall

be subject to such condition as the society may impose. Hence, it is reasonable to infer and hold that the condition regarding non transferability of the property is subject to the previous permission of the society, and, therefore, it is apparently clear that the Plaintiff could sell and transfer the suit land in favour of the Defendant subject to such conditions as prescribed by the Maharashtra Land Development Bank, or with prior permission of the said bank. Accordingly, the Plaintiff was competent to sell the suit land, but with the previous permission of the aforesaid bank and, therefore, the sale transaction dated 29.6.1972 entered into between the Plaintiff and Defendant in respect of the suit property cannot be said to be voidabinitio, but at the most it may be said to be voidable.

10. As regards restrictions imposed by Section 47 of the MCS Act, considering the scheme under the said Act, it would be reasonable to infer and hold that the said condition of non transferability is imposed on the property mainly with a view to secure and safeguard amount of loan which the owner of the land has taken from the society or the bank, which leads to the position that the restrictions placed upon the transfer cannot be said to be absolute, and the owner can sell the property, subject to conditions/restrictions as aforesaid.

11. Moreover, the other fact also cannot be ignored, namely, Defendant was served with the notice by the said bank after the suit transaction in respect of the land that was mortgaged with the bank and the Defendant has paid the entire outstanding amount to the bank, in the name of the Plaintiff and the receipts to that effect are also placed on record and, therefore, the equity also will be in favour of the DefendantRespondent herein.

12. Besides that, sight also cannot be lost of the aspect that the Plaintiff herein made representation to the Defendant that the suit property was free from all encumbrances and relying upon the said representation, the Defendant purchased the suit property and the said aspect has been substantiated by recitals in the sale deed (Exh.31) to the effect that the suit property is owned by the Plaintiff and that the same is free from all encumbrances. Further, it is also recited in the sale deed to the effect that if there is any encumbrance or arrears in respect of the suit land, may be of the government or semigovernment, the Plaintiff will be responsible for the same and the Defendant will not be put to any loss and, accordingly, the said recital is also in favour of the Defendant and consequently, the Plaintiff will be estopped from raising the contention that the property is encumbered with the bank and since such prior permission of the bank is not obtained before execution of the sale deed, the said transaction is void. Thus, the Plaintiff cannot be permitted to blow hot and cold at the same time and he cannot be allowed to take advantage of his own wrong and consequently, there is substance in the submission advanced by the learned Counsel for the Defendant that the Plaintiff is estopped from challenging the validity of the sale transaction between the Plaintiff and the Defendant.

13. The PlaintiffAppellant herein, in support of his contention that the sale transaction between him and the Defendant is void and violative of Section 47 of

the M.C.S. Act, relied upon the judgment of this Court in Malhari Gangaram Kale deceased through LRs. and Babu Kale and Others Vs. Shenfad Namdeo Tayade and Others, and of the Hon''ble Apex Court in Sindav Hari Ranchhod Vs. Jadev Lalji Jaymal and others, .

14. However, there is another alternative angle that, assuming without admitting that the sale transaction is void, it could be void only to the extent of the Land Development Bank in whose favour the Plaintiff had executed mortgage in respect of the suit property prior to the sale transaction in favour of the Defendant and the Plaintiff will not get any benefit of it, as claimed by him. Besides that, it is apparently clear from the evidence that the Defendant had already paid the dues of the said bank, in the name of the Plaintiff and, therefore, the bank has also not taken any action in respect of the said sale transaction between the Plaintiff and the Defendant.

15. It is to be noted that while admitting the present second Appeal, no substantial question of law was formulated, and hence, no finding in that respect.

16. In the circumstances, the judgment and order recorded by the learned District Judge, Osmanabad, in R.C.A. No. 246 of 1982 allowing the said appeal and dismissing the suit bearing R.C.S. No. 156/1978 filed by the Plaintiff, does not warrant any interference in the present appeal and, accordingly, present appeal deserves to be rejected.

17. In the result, present second appeal, which is sans merits, stands dismissed. No costs.