

(1983) 12 BOM CK 0046
In the Bombay High Court
Case No : Writ Petition No. 777 of 1981

Maharashtra State Co-operative Land Development Bank Ltd. APPELLANT
and Another

Vs

Khusal Ramchandra Nehete and Others RESPONDENT

Date of Decision : 02-12-1983

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 43
Transfer of Property Act, 1882 — Section 58

Citation : (1984) 1 BomCR 257 : (1984) MhLj 364

Hon'ble Judges : B.A. Masodkar, J

Bench : Single Bench

Advocate : B.R. Naik and Y.R. Naik, for the Appellant; R.D. Gupte, for respondents Nos. 1 to 3 and A.M. Salik, A.G.P. for respondents Nos. 5, 7 to 9, for the Respondent

Judgement

B.A. Masodkar, J.—The neat question of law that is posed and has arisen in this petition is with regard to the interpretation of section 43 of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter called the Tenancy Act).

2. That question has the context of the following facts and circumstances:

Petitioner No.1 is a Co-operative Society and a Bank. It is so registered and governed by the provisions of the Maharashtra Co-operative Societies Act (hereinafter called the Act). By a registered deed of mortgage, of May 12, 1964, respondents Nos. 1 to 3 mortgaged their property, being Survey No. 59/2, Gat No. 219, admeasuring 5 acres and 7 gunthas, situate at village Belval, Taluka Bhusawal, district Jalgaon, with the petitioner Bank against a loan advance of Rs. 3,500/-. The said property was in the tenancy of one Ramchandra Nehete. He died in the year 1963, and respondents Nos. 1 to 3 are his heirs inheriting his interest in the said property upon his death. Ramchandra got that property on the basis that he was the tenant in possession on the Tiller's Day and thus entitled to statutory purchase u/s 32-G of the Tenancy Act. Pursuant to that

mortgage, as the mortgage dues remained unpaid the property was proceeded against under the provisions of the Act and put to public auction on January 24, 1980. Respondent No. 4 herein purchased the same in that auction.

3. With regard to the entitlement of the petitioner Bank to proceed against such mortgage property in this manner, the Act makes provisions in sections 132, 133 and 134 thereof to that effect. It is also not in dispute that under these provisions, the auction sale was eventually confirmed by the Assistant Collector and on May 7, 1980, a sale certificate u/s 136 of the Act came to be issued in favour of respondent No. 4 who entered upon possession of the said property in June 1980. Thus the said respondent became the owner of the property.

4. Thereafter, suo motu proceedings were initiated under the Tenancy Act for eviction of respondent No. 4 on the ground that the auction sale in his favour was in contravention of section 43 of the said Act. The matter was contested and by the impugned order, the Maharashtra Revenue Tribunal refused to interfere by holding that though the mortgage in favour of the Bank was valid, the auction sale would be invalid without the prior permission of the Collector.

5. That is how the provisions of section 43 of the Tenancy Act fall for consideration. That section reads as follows :---

"43(1). No land purchased by a tenant u/s 32, 32-I, 32-O, 32-C or 43-1D or sold to any person u/s 32-P or 64 shall be transferred by sale, gift, exchange, mortgage, lease or partitioned without the previous sanction of the Collector. Such a sanction shall be given by the Collector in such circumstances, and subject to such conditions, as may be prescribed by the State Government :

Provided that, no such sanction shall be necessary where the land is to be mortgaged in favour of Government or a society registered or deemed to be registered under the Bombay Co-operative Societies Act, 1925, for raising a loan for effecting any improvement of such land.

(2) Any transfer or partition of land in contravention of sub-section (1) shall be invalid."

The present section was added by Amending Act No. 33 of 1952 which substituted the same in place of original section 43. It purports to lay down restrictions on transfer of land purchased or sold under the Tenancy Act. The plain reading of sub-section (1) of section 43 goes to show that it enacts a statutory embargo with regard to the transfer of land by any device like sale, gift, exchange, mortgage, lease or assignment or partition of the land concerned which was purchased by tenant under his statutory entitlement u/s 32, 32-F, 32-O, 32-C or 43-1D or even sold to any person u/s 32-P or section 64 of the Tenancy Act. Having provided for the statutory embargo, the provisions permit, that if the previous sanction of the Collector is available such transfer could be effected. It is further provided that the State Government will prescribe the circumstances and conditions upon which the Collector would sanction such a

transfer. Though sub-section (1) in this manner puts an embargo or a restriction on transfer of the kind mentioned therein, the proviso added to sub-section (1) lifts that embargo as far as certain mortgages are concerned. That proviso operates when the land is to be mortgaged in favour of (i) the Government, or (ii) a society registered or deemed to be registered under the Act and (iii) for raising a loan for effecting any improvement of such land. When these conditions are satisfied, no sanction of the Collector is necessary so as to have valid mortgage.

6. It is in this context, sub-section (2) declares that transfer or partition of land in contravention of sub-section (1) would be invalid. The entire section read together clearly shows that it has an inbuilt scheme of its own. Firstly, it enacts a prohibition against all transfers of land purchased or sold under the provisions of the Tenancy Act; secondly, it enacts a permissive modality in that with previous sanction of the Collector, such transfers could be effected and thirdly, the mortgages mentioned in the proviso are not within the prohibited category. It is only when there is a contravention of sub-section (1) that sub-section (2) declares that the transfer or partition of land would be invalid. In other words, every transfer or partition of the land is not intended to be declared as invalid though the land might be such which was purchased or sold under the provisions of the Act. To the extent of the specified categories of transfers, the invalidity is intended to be attached. That being the plain position, the question is what is the effect of the proviso.

7. It is well settled that the function of such a proviso is to carve out an exception to the general provision available in main section. The present provision enacts clearly an exception to the prohibition available in sub-section (1) and if the conditions thereof are satisfied, then sub-section (1) will not be attracted. By reason of that, sub-section (2) also would not be attracted. Shortly stated, that if the transaction falls within the provision, invalidity enacted by sub-section (2) is not intended to apply.

8. Now the purpose of this proviso. It is part of sub-section (1) and is intended to make it possible for the holder of the property to mortgage the land in favour of the Government or the Society registered under the Act and that too for raising a loan for effecting any improvement of the concerned land. If that be the purposes of the proviso, the relevant law of the mortgage in favour of the Government or the Co-operative Society would govern such transfer of the property and not other provisions. This is more so because it is a recognised mode of transfer on interest in property.

9. Chapter IV of the Transfer of Property Act, particularly section 58 thereof defines the mortgage as the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced by way of loan. That such a device affects the transfer of an interest in the specific immovable property as security for the repayment of such a loan and such interest itself in the immovable property, is well settled. In the case of Rajkumari

Kaushalya Devi Vs. Bawa Pritma Singh and Another, , the Supreme Court observed that the provisions of section 58 of the Transfer of Property Act show that though mortgage is the transfer on an interest in the specific immovable property, the purpose of the transfer is to secure the payment of money advanced by way of loan or to secure an existing or future debt or the performance of an agreement which may give rise to a pecuniary liability. The Court further pointed out that the mortgage in addition to creating the pecuniary liability also transfers interest in the specific immovable property to secure that liability. This well settled position of the juridical contemplation behind the mortgage is to have a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given *Stanley v. Wilde* (1899)2 Ch. 471. Thus, transfer of property by mortgage has two fold legal effect. Firstly, It transfers the interest specified property, and secondly, that interest is so transferred for the purpose of satisfying the loan or the debt. By reason of the second, the mortgage is entitled to proceed against the property so as to have satisfaction of the loan secured by the mortgage.

10. All this will have to be read as a permissive a category of transfer of property by reason of the proviso available in sub-section (1). Once it is understood that the mortgage is a transfer of interest in the property so as to secure the loan, it would follow that it confers and implies transfer of all these rights in favour of the mortgagee so as to proceed against the property once the mortgage-money became due and for that to bring the property to sale in the manner provided by the given statute. That is the implicit incident and as such an entitlement arising from the transaction of the mortgage. Once this position is ascertainable by reason of law, it will follow that the proviso permits not only the transfer of the interest in the property so as to secure the loan, but also the entitlement of the mortgagee to bring such a property so as to recover the loan. If any other construction were to be placed on the proviso, and the matter were governed by the main-sub-section (1), then the mortgage itself would become illusory. Generally, mortgage cannot be conceived of so as to have any clogs on rights and entitlements. If main part of sub-section (1) were to operate, that would be a clog and would diminish the property. Surely, such a position could not be intended, nor could such an intent be attributed to the makers of the law. The wording of the proviso, therefore, is sufficient enough not only to permit mortgages of the kind mentioned therein but also to permit the bringing of the mortgaged property to sale in the manner provided by the given law. It should follow, as a result of this holding, that once the mortgage is within the permissive operation of the proviso, sub-section (2) of the Tenancy Act would have no application.

11. All the conditions of the proviso are admittedly satisfied in the present case with regard to the mortgage and eventual sale. Such a mortgage in favour of the petitioner Bank is not required to be registered by reason of section 122 of the Act, and to that mortgage and the dues secured thereunder, the provisions of

sections 132 to 136 of the Act would be applicable. Once the mortgage is there within the meaning of the proviso, the law that governs the mortgage will also be within the contemplation of the proviso, there being no sale of the mortgaged property to seek validation (sic) from the Collector.

12. At the hearing, reliance was placed on Rule 25 framed under the provisions of the Tenancy Act and particularly on Clause (d) so sub-rule (1), so as to point out that under that clause the Collector can give sanction in cases where the lands are being sold in execution of decree of Civil Courts or for the recovery of the land revenue under the provisions of the Code. From this, it was submitted that it was implicit in sub-section (1) of section 43 that even with regard to the sale of the present kind where the recovery was being effected as if the dues were of the kind of land revenue, the Legislature intended that the previous sanction of the Collector was a must.

13. This approach clearly overlooks that by the Amending Act the entire section 43 was substituted in the present form in place of old section 43 and one of the significant features of the substituting sub-section is to enact the proviso and further enact sub-section (2) regarding the declaration of invalidity. As held earlier, once the proviso which enacts the exception to general provision of sub-section (1) is satisfied, neither sub-section (1) nor sub-section (2) is attracted. It is further obvious that even after the enactment of the present section in this form, Clause (d) of sub-rule (1) of Rule 25-A would still be applicable, for in several cases the land could be proceeded against in execution of a decree of a Civil Court or for the recovery of arrears of land revenue under the provisions of the Land Revenue Code. These will be the cases obviously not governed by the proviso. If the conditions of the proviso are satisfied, sub-section (1) itself does not operate with regard to the mortgage and if the mortgage is valid and permissible, by implication the law that governs that mortgage will have to be applied for the enforcement of the security and to bring the property to sale.

14. That being the position, the revenue authorities were not right in holding that the auction sale held under the provisions of the Act in furtherance of the mortgage would be invalid by reason of sub-section (2) of section 43 of the Tenancy Act. In this view of the matter, the impugned order is unsustainable and the same is set aside. Suo motu proceedings initiated for eviction of respondent No. 4 are adjudged as untenable Rule absolute in these with no order as to costs.