

(2013) 11 MP CK 0050

In the Madhya Pradesh High Court

Case No : Second Appeal No. 798 of 2000

Muhammad Ayoob Khan (since deceased) through L.Rs. Smt. Samsun Nisha APPELLANT

Vs

Krishnapratap Singh and Others RESPONDENT

Date of Decision : 22-11-2013

Acts Referred:

Citation : (2014) 3 MPLJ 279

Hon'ble Judges : K.K. Trivedi, J

Bench : Single Bench

Advocate : J.L. Mishra, for the Appellant; Aditya Adhikari and Shri Abhishek Gulati, Learned Counsel, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Trivedi, J.—This is a second appeal u/s 100 of the CPC by the defendants against the judgment dated 12.5.2000 passed in Civil Appeal No. 106-A/1997 by the Second Additional District Judge, Chhatarpur arising out of judgment and decree dated 18.7.1996 passed in Civil Suit No. 18-A/1989 by the Civil Judge, Class-I, Chhatarpur. The original respondent/plaintiff filed a suit alleging that the agriculture land in certain khasra numbers, as indicated in the plaint, total area 26.571 hectares situated in village Goriya, Tehsil and District Chhatarpur was owned by him. It was contended that since he was in need of money, he mortgaged the said land with the appellant/defendant on 23.9.1969. The land was never transferred as an out and out sale to the appellant/defendant, on the other hand, the same was being cultivated by the appellant as permitted by the mortgage deed. Claiming appellant/defendant himself as occupancy tenant, he moved an application before the Tehsildar for the purposes of recording of his name on the revenue entries of the said disputed land. When respondent/plaintiff came to know about the said fact, he objected to the same, but the Tehsildar passed an order and directed transfer of the land in the name of appellant/defendant. Since the land was never transferred to the appellant, such an action

on the part of the Tehsildar was bad in law. Therefore, the suit was required to be filed.

2. Upon service of the notice of the suit, a written statement was filed by the appellant denying such contentions of the respondent/plaintiff and it was contended that the land was ever since in possession of the appellant/defendant. He was cultivating the said land and, therefore, treating him as an occupancy tenant, his right was perfected under the provisions of Section 190 of the M.P. Land Revenue Code. In fact, the appellant was put in possession by the respondent/plaintiff, as they were having good relations and on 23.9.1969 some document was shown to the appellant/defendant by the respondent/plaintiff on the pretext that it was a document to get the name of appellant mutated on the land. It was agreed that a regular sale deed would be executed. However, the appellant was in possession of the land as an occupancy tenant and therefore rightly his name was mutated in the revenue record. Since no such document of mortgage was executed, the respondent/plaintiff had no title over the land in suit. He categorically alleged that vide sale deed dated 4.11.1972 the land in suit was transferred in the name of appellant by the original respondent/plaintiff.

3. The trial court, after framing of the issue, recorded the evidence of the parties and reached to the conclusion that in fact the document placed on record was not an out and out sale and therefore, no title was conferred on the appellant. On the other hand, the original respondent/plaintiff having the title on the land in suit, was entitled to such a declaration and the order passed by the Tehsildar, Chhatarpur for mutation of the name of the appellant in the revenue records of the land in suit dated 29.3.1984 was void and ineffective.

4. The appellant preferred an appeal against such a finding of the trial court. The lower appellate court, after marshaling the evidence available on record and after examining the documents, came to the conclusion that no error of law was committed by the court below in decreeing the suit of the respondent/plaintiff and dismissed the appeal. Hence, this second appeal. After summoning of the record, an interim protection was granted by this Court on 14.10.2000. The appeal is admitted on the following substantial questions of law:

(1) Whether in view of the fact that the document dated 23.9.1969 (Ex. P-1) was the mortgage deed, the suit for declaration as filed by the appellant as owner of the land in question would have been decreed by the Courts below?

(2) Whether the finding regarding possession recorded by the Courts below is perverse?

(3) Whether in the facts and circumstances of the case the conclusion recorded by the Courts below is justified in law?

5. On consideration of the first question of law, if the documents said to be produced by the respondent/plaintiff are examined, it would be amply clear that Ex. P-1 was nothing but a mortgage deed. Opening of this document indicates

that the same was written for the purpose of executing a usurpatory mortgage for Rs. 1000/-. This particular document indicates that there was a condition that in case the amount of loan obtained by the respondent/plaintiff is not paid within a period of two years, the mortgagee would be entitled to get a sale deed executed for the property mortgaged. This particular document further indicates that the respondent/plaintiff agreed that for a period of two years the land in suit is given in possession of the appellant and from the crops of the said land respondent/plaintiff will get nothing as the same would be payable to the appellant/defendant, the mortgagee in lieu of the interest and repayment of the amount of loan. It was further agreed that till the amount of loan is not repaid, the land mortgaged would not be transferred to any other person. The said document was executed in presence of witnesses. Yet another document is placed on record as Ex. P-2, a statement of the appellant himself recorded on affidavit wherein he admitted that the land in suit was mortgaged with him right from the year 1969 and that is how he is in possession of the said land. He further admitted that the land in suit in fact was belonging to respondent/plaintiff and it was recorded in the revenue record in the name of the respondent/plaintiff. In the objection, which was raised by the appellant in one of the proceedings for attachment of the land in suit by the revenue authorities on account of non-payment of revenue dues of the State Government, again it was admitted that the land was belonging to the respondent/plaintiff, but the appellant was put in possession of the said property. As against this evidence though some sort of sale deeds were produced to show that the land was in fact purchased by the appellant, however, there was no reference of payment of sale consideration. Further, the sale deeds were not for the entire area, which was said to be placed in mortgaged with the appellant. The area said to be sold to the appellant by the aforesaid sale deeds Ex. D-1 and D-2 was not the area or the land which was mortgaged with the appellant. Certain other documents were produced by the appellant in evidence to show that the facts were admitted by the respondent/plaintiff with respect to the execution of sale deeds, but the fact remains that description of the property said to be mortgaged and the description of the property sold under the sale deeds was not specifically proved nor tallied.

6. The respondent/plaintiff examined the witnesses to prove that there was a mortgage of the land in suit with the appellant and no out and out sale was executed. For the said purpose, the respondent/plaintiff examined the witness from the Registry Office, who categorically deposed that a document of mortgage was registered on 23.9.1969 in the office of the Registrar, Chhatarpur. One Govind Singh, as a attorney of the respondent/plaintiff, was examined as a witness, who exhibited all the relevant documents referred to hereinabove. In the extensive cross-examination of this witness, nothing material has been brought on record to show that the Ex. P-1 was not a mortgage, but an out and out sale. The other witness of the respondent/plaintiff stated that the respondent/plaintiff had given the land in possession to the appellant. As against this

evidence of the respondent/plaintiff, the appellant/defendant examined himself and categorically deposed that no mortgage deed was executed by the respondent/plaintiff in respect of the land in suit mortgaging the same with the appellant/defendant. He further categorically contended that the respondent/plaintiff agreed to sell the land for a sum of Rs. 3000/- of which some part of the amount was paid by him, but he could not point out as to why the sale deed was not executed. In paragraph-3 of his court statement, he categorically stated that the land was never mortgaged with him by the respondent. On the other hand he contended that the land was given to him as a Sikmi agriculturist. In his cross-examination, again he could not point out as to why he has not taken any step to get the sale deed executed in respect of the agreement said to be executed. He again could not disclose as to why an available document of sale of the land in his favour could not be produced by him even after obtaining a certified copy of the same from the Registrar Office. He could not depose as to why the agreement of putting the appellant as a Sikmi agriculturist could not be executed. There was nothing to show in the entire evidence of the appellant that the land was ever purchased by him in out and out sale. Likewise, the other witnesses examined by the appellant could not support the contentions of the appellant. Even DW-3 Lachchu son of Mullu stated that he was not aware whether any mortgage deed was executed in respect of the land in suit or there was an out and out sale.

7. Marshalling these evidence, if the trial court reached to the conclusion that the respondent/plaintiff had categorically proved that he was the owner of the land and that the said land was mortgaged with the appellant/defendant, it cannot be said that such a finding was erroneous. Though a counter claim was filed by the appellant, but from the facts, as have been indicated hereinabove, the learned trial court has rightly held that none of the issue framed on the counter claim of the appellant could be found proved. These evidence were marshalled by the first appellate court in appeal filed by the appellant and the learned lower appellate court also reached to the conclusion that the land in fact was mortgaged, therefore, such an order of mutation of the name of the appellant on the land in suit could not have been passed by the Tehsildar. The factum of payment of amount of loan or release of the property after the realization of the whole of the amount of loan with interest, on account of receiving the produce from the said land, was also thus found proved.

8. The law in this respect is well settled. On various occasions the courts of law have looked into the provisions of Section 58 of the Transfer of Property Act, 1882 where the "mortgage" is defined. A simple mortgage may be a transaction where money is paid on loan wherein a condition is agreed expressly or impliedly that in the event of failure of the mortgagor to repay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied. Similar was the wordings in the document Ex. P-1. IF this particular aspect is examined, in view of the law laid down by the Apex Court in the case of C. Cheriathan Vs. P. Narayanan Embranthiri and

Others, , no iota of doubt is left that Ex. P-1 was nothing but a mortgage deed. The condition implied was payment of loan, receipt of the loan amount in repayment through agricultural proceeds of the suit in land, mortgaged with the appellant and therefore if a right is conferred on the respondent/plaintiff by the courts below by decreeing the suit, it cannot be said that the error of law was committed by the courts below. It is also well settled that a test of sale and mortgage by conditional sale is to be applied looking to the evidence available on record, as has been held by the Apex Court in the case of Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, . If this test is applied in view of the specific evidence led by the parties, again nothing is left to consider whether the Ex. P-1 was a document of sale or a document of mortgage. Lastly, the appellant himself has denied such a document and has very categorically contended in his written statement as also in the court statement that the document Ex. P-1 was never executed by him. He himself could not produce any document of sale of the land in suit in his favour by the respondent/plaintiff. Even when a counter claim was made in this respect, the burden was not discharged by him. In view of this, it cannot be said that error of law is committed by the courts below in rejecting the counter claim of the appellant and decreeing the suit of the respondent/plaintiff. Accordingly, there is no substance in this appeal. In fact, Ex. P-1 is a mortgage deed and as such the declaration granted by the courts below in favour of the respondent/plaintiff and the decree passed in this respect is just and proper. The substantial questions of law are answered accordingly. The appeal fails and is hereby dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.