(2008) 01 CHH CK 0005

In the Chhattisgarh High Court

Shashibhusan (dead) through L.Rs. APPELLANT

Vs

District Co-operative Land Development Bank Ltd. and Others RESPONDENT

Date of Decision : 16-01-2008

Acts Referred:

Madhya Pradesh Shahkari Bhoomi Vikas Bank Adhiniyam, 1966 — Section 18(2), 21

Citation : AIR 2008 Chh 46 : (2008) 1 CGLJ 512 : (2008) 2 MPHT 22

Hon'ble Judges : Dhirendra Mishra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Dhirendra Mishra, J.—By this petition the petitioners have challenged the auction proceedings initiated by respondent No. 3-Sales Officer in respect of the mortgaged property of Late Shashibhusan and its subsequent confirmation by the Assistant Registrar (Admn.), Co- operative Societies, Ambikapur vide order dated 22-4-1993 of Annexure P-14.

2. The case of the petitioners as reflected from the averments of petition and the documents annexed therewith is that the petitioners, who are the legal representatives of the deceased Shashibhusan, have filed this petition with the allegations that Shashibhusan was the owner of land bearing Khasra No. 218/1 (piece) area 1.700 hectare situated at Village Koilari, Tehsil Dhaurpur, District Sarguja (M.P.). He had borrowed a loan of Rs. 8,775/- from respondent No. 1-District Co-operative Land Development Bank, Ambikapur against various heads and made repayment of Rs. 1,500/- on 2-3-1977, Rs. 1,500/- and Rs. 3,250/- on 13-4-1977, Rs. 1,000/- on 21-5-1977, Rs. 500/- on 6-6-1997 and Rs. 600/- on 18-7-1977 and thus, repaid Rs. 8,350/- out of Rs. 8,775/- in the year 1977 itself as per entries made in the rin pustika and only a sum of Rs. 425/- was remaining unpaid. Respondent No. 1 on 13-11-1990 issued a notice (Annexure P-2) to the said Shashibhusan for sanction of new loan, however, the same was not availed as by then the said Shashibhusan was dead. No amount, as mentioned in the notice, was due because the amount of Rs. 425/- was to be subsidized.

Petitioner-Ghanshyam made a compliant to respondent No. 4-Collector vide Annexure P-3. The deceased was also entitled for debt relief as per scheme of the Government, i.e., M.P. Agriculturist Debt Relief Scheme, 1990 (for short ''the Scheme''), as the loan borrowed was less than Rs. 10,000/-. Respondent No. 3 on 24-12-1992 issued notice (Annexure P-5) for sale of immovable property showing amount to be recovered as Rs. 18,000/- and subsequently, sent a notice dated 8-1-1993 of Annexure P-6 whereby said Shashibhusan was informed that because of non-payment of loan the disputed land has been auctioned and in case he wants to redeem the land, then he should deposit the balance of loan by 6-2-1993 alongwith interest of 5%, failing which the sale shall be forwarded for confirmation to the Assistant Registrar. The petitioners namely Ghanshyam, Tejram & Ravinarayan sent legal notice dated 18-1-1993 (Annexure P-7) to respondent No. 3-Sales Officer, disputing the liability of their deceased father and also mentioning that their father Shashibhusan died in the year 1985 and therefore, any auction of the land of their deceased father is illegal and the same should be cancelled. By yet another notice dated 20-1-1993 addressed to respondent No. 3- Sales Officer copies of auction proceedings were sought and thereafter again a legal notice dated 25-1-1993 was sent. An objection dated 27-1-1993 against the confirmation of sale was filed vide Annexure P-10 before the Assistant Registrar, Co-operative Societies, who vide memo dated 12-4-1993 (Annexure P-12) issued in the name of deceased Shashibhusan invited his objections against the confirmation of sale of the disputed land and thereafter, the sale was confirmed vide order of Annexure P-14, dated 22-4-1993.

3. Respondent Nos. 1 and 3 in their joint reply to the petition have averred that since the father of the deceased did not pay back the loan borrowed by him from the respondent No. 1-Bank, his land was put to auction sale in accordance with law and the auction sale has been subsequently confirmed by the Assistant Registrar, Co-operative Societies vide order dated 22-4-1993 (Annexure R-l). Repayment of loan, as claimed, has been denied, however, the applications as per Annexures P-7 and P-8; notice of Annexure P-9 and application of Annexure P-10 have been admitted.

4. Respondent No. 5-Auction Purchaser, in his reply have submitted that the disputed questions of facts are involved in the instant petition, which can be decided by leading evidence by the parties and therefore, the petition is not maintainable. Respondent No. 5 is a bonafide purchaser of the land who has purchased the land through registered sale deed after paying full consideration on 12-5-1993. His name has been duly recorded in the revenue papers, the petitioners were aware about the registration of sale and its confirmation by the Assistant Registrar, but they did no object. The land was mutated in the name of respondent No. 5 after publication of notice of Annexure R-l. The petitioners have concocted the story that the entire proceeding has been done against the dead person and obtained status quo order and because of the status quo order respondent No. 5 is deprived of his legitimate right.

5. Learned Counsel for the petitioner submits that said Shashibhusan was advanced loan in the year 1977, he had already repaid the major portion of the loan, as reflected from the documents of Annexure P-l wherein entries have been made by the bank officers themselves regarding repayment. Deceased Shashibhusan was entitled for debt relief as per the Scheme, as the loan was less than Rs. 10,000/-, however, the authorities of respondent No. 1 Bank without extending the benefit of the Scheme to Late Shashibhusan initiated recovery proceedings by resorting to sale of mortgaged property against a dead borrower in the year 1993 vide Annexures P-5 and P-6. The authorities were informed about the death of said Shashibhusan on 18-1-1993 and objection against the confirmation of sale was also made on 27-1-1993, but without considering the objections and even without considering the fact that Shashibhusan was already dead way back in the year 1985, the sale of land mortgaged by deceased Shashibhusan was confirmed vide Annexure P-14. Reliance is placed on the judgment of Hon''ble Supreme Court rendered in the matter of Kishori Lal v. Sales Officer, District Land Development Bank and Ors. reported in 2006 SAR 788.

6. On the other hand, learned Counsel for respondent No. 5 has submitted that auction proceedings were initiated after due notice to the borrower, no objection, as contemplated u/s 21 of the Adhiniyam was made to the Sales Officer by the mortgagor or any person having right or interest therein and affected by the said sale, within the stipulated period and in these circumstances the sale was confirmed vide Annexure P-14. Respondent No. 5 is a bonafide purchaser, the sale in his favour has been confirmed u/s 21 of the Adhiniyam and therefore, the title of purchaser is not impeachnble on the ground that there was no occasion to authorize the sale or that due notice was not given to the mortgagor and the only remedy available to the petitioners is to claim damages against the respondent No. 1-Bank.

7. From the pleadings of the respective parties and documents annexed with the pleadings the un-controverted facts are that Shashibhusan, father of the petitioner Nos. 1 to 3 and husband of petitioner No. 4, had borrowed the loan in the year 1977 and died in the year 1985. Fact of his death was communicated to respondent No. 1-Bank/its officers on 18-1-1993 (Annexure P-7), 20-1-1993 (Annexure P-8), 25-1-1993 (Annexure P-9) & 27-1-1993 (Annexure P-10), however, the land was auctioned in favour of respondent No. 5 on 8-1-1993, notice of confirmation of sale was issued in the name of deceased Shashibhusan by the Assistant Registrar, Co-operative Societies on 12-4-1993 (Annexure P-12) and subsequently, the sale was confirmed on 22-4-1993 vide order of Annexure P-14/R-1.

8. Affairs of respondent No. 1-Bank are governed by M.P. Shahkari Bhoomi Vikas Bank Adhiniyam, 1966 (for short ''the Adhiniyam''). Chapter III of the Adhiniyam deals with power to advance loan, Chapter IV deals with distraint and sale of produce of mortgaged land, Chapter V deals with the sale of mortgaged property.

Section 18 of the Adhiniyam confers power of sale to the committee of the Bank or any person authorized by such committee in this behalf, in case of default of payment of mortgage money or any part thereof. Section 18 (2) reads as under:

Section 18(2) No such power shall be exercised unless and until:

(a) the Board has previously authorized the exercise thereof after hearing the objections. If any, of the mortgagor or mortgagors:

Provided that the Board shall be deemed to have authorized the exercise such power if no reply is received from the Board within thirty days of making a reference by the committee of the Bank or any person authorized by the committee for the purpose.

(b) notice in writing requiring payment of such mortgage money or part thereof has been served upon-

(i) the mortgagor or each of the mortgagors;

(ii) any person who has any interest or charge upon the mortgaged property or in or upon the right to redeem the same so far as known to the Committee;

(iv) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property; and

(c) default has been made in payment of such mortgaged money or part thereof for three months after service of the notice.

Section 20 of the Act provides for procedure of filing application to set aside the sale, which reads as under:

20. Application to set aside sale.- (1) When any mortgaged property has been sold u/s 19, the mortgagor or any person having a right or interest therein affected by the sale may at any time within thirty days from the date of sale, apply to the sale officer to have the sale set aside on his depositing at the office or such officer-

(a) for payment to the committee of the development bank the amount specified in the proclamation of sale together with subsequent interest and the costs, if any, incurred by the committee in bringing the property to sale; and

(b) for payment to the purchasers, a sum equal to five per cent of the purchase money.

(2) If such deposit is made, a sale officer shall make an order setting aside the sale.

Section 21 of the Adhiniyam envisages that ''where no application is made under Sub-section (1) of Section 20, or if such application is made and disallowed, an order confirming the sale shall become absolute''.

9. It has already been held in the foregoing paragraphs that from the evidence

available on record the death of Shashibhusan in the year 1985 is uncontroverted and the petitioners have also filed death certificate of Shashibhusan, which is available on record. Sub-section (2) (b) of Section 18 of the Adhiniyam clearly envisages that power to sale the mortgaged property shall not be exercised unless and until the notice in writing requiring payment of said mortgaged money or part thereof has been served upon the mortgagor or any person who has any interest or charge upon the mortgaged property. In the instant case, the owner of mortgaged property had already died in the year 1985, proceedings for sale were commenced in the year 1993 and the factum of death was communicated to respondent No. 1-Bank on 18-1-1993. Specific objection was taken against the auction of land of the dead person vide Annexure P-7. Objection against the confirmation of sale was also taken before the Assistant Registrar, Co-operative Societies on 27-1-1993 vide Annexure P-10, however, the sale was confirmed vide Annexure P-14 without considering the written arguments of Annexure P-13 of the petitioners.

10. In the matter of Kishori Lal (supra), recovery proceedings were initiated against the borrower and their mortgaged lands, as security of loan, were sold by the bank and sale certificate was issued in the name of the auction purchaser. The Joint Registrar, Co-operative Society dismissed their appeal against the confirmation of sale, however, the Board of Revenue allowed their second appeal and set aside the sale. The Sales Officer of the Bank filed a writ petition against the decision of the Board of Revenue and the writ petition was allowed by the High Court on the ground that in view of Section 27 of the Adhiniyam irregularities in the auction cannot be a ground for impeaching the title of the purchaser and non-service of the notice was a procedural irregularity. The Letters Patent Appeal was also dismissed by the Division Bench of the High Court as not maintainable. However, the Hon''ble Apex Court allowed the appeal of the appellant/borrower with the following observations:

9. The High Court, however, proceeded on the basis that Section 27 of the 1966 Act validated such auction. It reads as under:

27. Title of purchases not impeachable for irregularities.-When a sale has been made in professed exercise of a power of sale u/s 19 and has been confirmed u/s 21, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised of the power shall have his remedy in damages against the Development Bank.

Section 27 of the Act does not state that no notice is necessary to be served. It speaks of due notice. Where a service has been effected but not in accordance with the known procedure, the matter may be different. The appellant in view of the finding of fact arrived at, was not living in the village at all. He was living in Gwalior. Admittedly no notice was served as one person refused to accept the same. Whether she was a family member at all or not has not been proved. We may notice, the auction purchaser did not question the findings of fact arrived at by the Board of Revenue.

11. In the instant case, as already held, respondent No. 1-Bank initiated recovery proceedings against the deceased borrower and has sold the land mortgaged by him as security for loan advanced to him without serving due notice, as contemplated u/s 18 (2) (b) of the Adhiniyam. It is settled law that any proceeding against a dead person is nullity and void ab initio and therefore, the sale of mortgaged property effected on 8-1-1993 and its subsequent confirmation vide Annexure P-14 dated 22-4-1993 is nullity and the same does not confer any right or title to respondent No. 5.

12. In the result, the petition is allowed. Auction of disputed mortgaged land on 8-1-1993 vide Annexures P-5 and P-6 and its subsequent confirmation by the order of Assistant Registrar (Administration), Co-operative Societies, Ambikapur, dated 22-4-1993 (Annexure P-14) are hereby set aside.

13. However, it shall be open to respondent No. 5 to recover the amount of consideration paid by him for purchase of the land alongwith damages from the respondent No. 1-Bank and it shall also be open to respondent No. 1-Bank to recover the unpaid loan amount standing in the name of deceased Shashibhusan from his legal heirs in accordance with the provisions of Adhiniyam.

