

(2007) 05 UK CK 0004

In the Uttarakhand High Court

Case No : Second Appeal No. 292 of 2001 and Old No. 344 of 1984

Union of India

APPELLANT

Vs

Sri Rajendra Kumar Goel

RESPONDENT

Date of Decision : 11-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 80

Citation : (2007) 3 UC 1683

Hon'ble Judges : B.C. Kandpal, J

Bench : Single Bench

Advocate : Ms. Krishi Shukla, for the Appellant; Mr. Sarvesh Agarwal, Learned Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble B.C. Kandpal, J.—This Second Appeal, u/s 100 Code of Civil Procedure, has been preferred against the judgment and decree dated 19.9.1983, passed by Additional District Judge, Dehradun in Civil Appeal No. 121 of 1978 arising out of Suit No. 214 of 1976.

2. Brief facts giving rise to this appeal are that Respondent Rajendra Prasad Goel filed a suit before the Civil Judge, Dehradun, for declaration that the property given at the schedule of the plaint was not liable to attachment and sale in the decree passed in suit No. 194/1950 by the Civil Judge Saharanpur and in Misc. Case No. 123/67 of the Court of Civil Judge, Roorkee (Saharanpur). According to plaint case Jagat Gram Sanyukta Sahkari Samiti, Jagat Gram, Ashok Ashram, Dehradun has been a duly constituted and registered society, which is registered with the Registrar, Cooperative Societies Meerut in the year 1969 and the disputed property had been transferred under the control and management of the said Cooperative Society. The Cooperative Society had mortgaged the said property with the District Cooperative Bank, Dehradun by a registered mortgaged deed dated 14-12-1970 for the development of the said land and for agriculture on the basis of cooperative system. On failing to repay the debts of

the mortgage, the said society vide its resolution No. 2 dated 13.2.1975 resolved to sell the property which was approved by the District Cooperative Bank, Dehradun. The property was sold to the Plaintiff/respondent (sic) vide sale deed dated 25.3.75, which was registered on 28-4-1975, for the consideration of a sum of Rs. 6,930/-. The Plaintiff was also delivered the possession of the property. The Plaintiff's case further is that he developed the said property after making investment of a huge amount. On 3-4-1976 the Plaintiff received a notice from Sri N.K. Sharma, Advocate on behalf of Sri Shiv Chand Kumar, that the disputed land was attached in execution No. 2 of 1975 in the Court of Addl. District Judge, Dehradun. The Plaintiff moved an application under Order 21 Rule 58 CPC before the Additional District Judge, Dehradun, but the same was rejected for the reason that the application was moved after expiry of six months. The Plaintiff/respondent alleged that at the time of attachment the disputed property was in his possession and he was recorded as Bhumidhar of the same, Shiv Chand Kumar was not the owner of the land nor he was in possession and he had no right to transfer the property in suit. The Plaintiff has no concern with the decree passed in suit No. 194 of 1950, hence the property was not liable to attachment. The Defendants were served with notice u/s 80 CPC but they did not agree to leave the property in suit, hence the suit was instituted.

3. The Defendant Union of India contested the suit on the ground that there is no cooperative society as alleged in the plaint, and no property was entrusted in the management of such a society; that the land was not mortgaged to the Cooperative Bank; that the proposal, if any, made to sell part of the property, was with malafide intention to defeat the realization of the decretal amount against the mortgagor and as such the act of the mortgagor is unlawful; that there has been no sale of the property in favour of the Plaintiff nor is the same lawful and is void and in order to defraud the decree holder/creditor, i.e. Union of India, who is executing the decree against Sri Shiv Chand Kumar, the real owner of the land and against whom execution is pending in the Court of Addl. District Judge, Dehradun; that it is wrong to say that the Plaintiff was in possession of the property or cultivating the same and the name of the Plaintiff, if mutated has been done clandestinely when the land was already under attachment and as such the same is unlawful; that Sri Shiv Chand Kumar and Plaintiff were colluding to file a false objection against the execution proceedings; that the order of attachment is correct and has rightly been passed and that the suit has been filed merely with malafide intention to safeguard the interest of said Shiv Chand Kumar. It was also alleged that no notice u/s 80 CPC has been served upon the Union of India.

4. On the pleadings of parties the following issues were framed by the trial court:

1- Whether Jagat Gram Sayunkta Sahkari Krishi Samiti Jagat Ram, Ashok Ashram, Dehradun is a Cooperative Society, registered under the U.P. Cooperative Societies Act?.

2- Whether the Jagat Ram Sanyukta Sahkari Krishi Samiti Ltd. was entitled to mortgage the property in suit?.

3- Whether the Plaintiff is transferee for consideration and is in possession of the property in suit?. If so, its effect?.

4- Whether any valid notice u/s 80 CPC has been given?.

5- Whether the alleged sale in favour of the Plaintiff is void and has been done with intent to defraud and delay the creditors?.

6- To what relief, if any, is the Plaintiff entitled?.

5. Parties led evidence in support of their claims. Thereafter the Civil Judge, after hearing counsel for parties and having perused the material on record held that Jagat Gram Sanyukta Krishi Sahkari Samit Ltd is a society registered under the Cooperative Societies Act; that the Plaintiff is not transferee for consideration and in possession of the property in suit; that the Samiti was not entitled to mortgage the property; that the Union of India was not served with valid notice and that Shiv Chand Kumar or the Society had not executed the sale deed with a view to defraud the creditors rather the Society executed the sale-deed with a view to pay of the loan of the bank. Accordingly the suit was dismissed with cost.

6. Feeling aggrieved by the judgment and decree passed by the Civil Judge, the Plaintiff preferred appeal before the Addl. District Judge, who vide its judgment and decree dated 19-9-93 allowed the appeal and decreed the suit for the declaration that the land in suit was not liable to be attached and sold in execution of the decree obtained by Union of India, in suit No. 194/50 passed by Civil Judge, Saharanpur and Misc. case No. 123/67 pending in the court of Civil Judge, Roorkee, Saharanpur.

7. Being aggrieved by the judgment and decree passed by the Additional District Judge, the Union of India has preferred this appeal in the High Court at Allahabad, which has been transferred to this Court after creation of new State.

8. This Second Appeal was admitted on the following substantial questions of law, which were framed by the Court:

1- Because, the finding of the learned Additional District Judge on the question of the right of the Society to mortgage of the property of its members is based on a misreading of Section 86 of the U.P. Cooperative Societies Act, 1965?.

2- Because, in any case, the view of the learned District Judge, regarding the power of the Society to sell is upheld it would render various proviso to Section 79(1) nugatory and would defeat the very scheme of the Act?.

3- Because, in view of the categorical finding of the trial court that the Plaintiff was not the bonafide purchaser, the Plaintiff was not entitled to any decree and the learned Addl., District Judge has not considered this aspect of the matter?.

4- Because, the trial Court, gave a categorical finding that contents of the notice

u/s 80 CPC as well as its receipt by the Defendants have not been proved and the finding of the Lower Appellate Court on the point that the service of notice was not necessary is not legally sustainable and the case reported in Union of India (UOI) Vs. Parvati Kuwar and Others, is clearly distinguished?.

9. Heard Learned Counsel for the parties and perused the record.

10. The first ground taken in this appeal relates to the right of the Society to mortgage the property. Section 86 of the U.P. Cooperative Societies, Act, 1965, suggests that a Cooperative Society has a right for the purpose of raising a loan from the State Government or any Cooperative society, mortgage without possession any land held by it in its own name and, after obtaining an authorization in writing from the members concerned the land contributed by its members. In the present case the Jagat Gram Sanyukta Sahkari Samiti did not own the suit property in its own name, but it was authorized to mortgage it after obtaining a written authorization from its members. The, owner of the suit property Sri Shiv Chand Kumar had expressed his willingness to authorize the society to mortgage his land for the purpose of raising the loan from the Cooperative Bank, which is a cooperative society duly registered under the Act. The validity of the authorization of Sri Shiv Chand Kumar has been doubted by the trial court on the ground that the written authorization is not attested by some officer. Provisions of Rule 310 of U.P. Cooperative Societies Rules, subclause 3 provides that the authorization for mortgage has to be attached by a Gazetted Officer or an Officer of Cooperative Department not below the rank of group second inspector. The authorization dated 20-10-69 on record is attested copy original attested by the Secretary Jagat Gram ety Sanyukta Sahkari Samiti and superintendent of co-opertive Department Society, Dehradun. The authorization given by Shiv Chand Kumar, member of the Society, has not been challenged by the said member. He had duly authorized the Society to mortgage his land. The need of loan of the Society has not been challenged. There is nothing on record to show that the transaction of the mortgage was sham or it was conducted in order to defraud the creditors. Further Sri S.K. Sharma has deposed that the Society had taken loan from the Bank for development of the farming. Therefore, possibility of there being any foul play is ruled out.

11. The first appellate court has given categorical finding on the issue. The finding of the first appellate court on the point does not require any interference of this Court. Accordingly it is held that the Society had right to mortgage the property of its member in order to raise loan for farming of the Society. The trial court did not misread the provision of Section 86 of the U.P. Cooperative Societies Act, 1965. The substantial question of law is decided accordingly.

12. The ground No. 2, above, relates to the power of the Society to sell the property under mortgage. It is to be noted here that there is no prohibition in the Act which eclipses the Society's power to sell its landed property. The Society, which has power and authority to create encumbrance on its property, also had a power to discharge the said obligation. If the Society was competent to take loan

by mortgaging the land of its members, it had full authority to repay that loan by selling the land under mortgage. Rule 338 of the U.P. Cooperative Societies Rules postulates that no immoveable property shall, except as provided in the Act, be sold in execution of an award or order unless it has been previously attached, provided it that where the award or order has been obtained on the basis of a mortgatge of such property, it shall not be necessary to attach it. In view of these provisions it may be observed that the rule impliedly authorizes a society to get its land sold. The land under mortgage can be sold even without attachment provided as award has been obtained on the basis of a mortgaged property. In the present case Sri S.K. Sharma, the Officer of the Cooperative Bank has proved; that the Bank had obtained before sale the award from the Secretary of the Cooperative Department on the basis of the mortgaged property. It has further been proved by Sri Sharma that the sale was negotiated between the society and purchaser by the Bank itself and he was authorized to be a witness of the sale deed. The evidence of this witness finds corroboration from the sale deed in favour of the Plaintiff. When the Bank had obtained an award against the society, it was fully competent to negotiate the sale transaction in consultation with the society. Further the resolution dated 13.2.75, of the Samity has duly authorized Sri Shiv Chand Kumar to execute the sale deed of the land under mortgage in order to repay the loan of the Cooperative Bank. It has come in evidence that the sale proceed was paid to the Bank.

13. I have also perused the finding of the first appellate court on the point. The first appellate court has recorded categorical finding on the point. I am of the view that the finding of the first appellate court holding that the Society was competent to sell the mortgaged property, is well reasoned. Accordingly the substantial question of law is decided in favour of the Plaintiff/respondent and against the Appellant/defendant.

14. So far as the point on the finding of bonafide purchaser is concerned, it has come in evidence that the land was purchased by the Plaintiff/respondent through registered sale deed and the land has also been mutated in his name. The sale consideration was paid to the Society and the Society paid this amount to the Bank to clear its debts. Paper No. 10-A/1 is extract of Khautani which shows that Naib Tehsildar on 12-1-76 passed order for mutation of the name of the Plaintiff in place of Jagat Gram Sanyukta Krishi Sahkari Samiti Ltd. Further the Plaintiff purchased the land long before the date of attachment, and, therefore the attachment is not legal from this point of view also. It is also settled law that the court had no jurisdiction to attach the property which does not belong to the judgment debtor. Even the trial Court had held that the the Society had executed the sale deed with a view to pay of the loan of the bank and not in order to defraud the creditors. In the facts and circumstances of the case it can be inferred that the Plaintiff/respondent, was a bonafide purchaser of the disputed land. The substantial question of law is decided accordingly.

15. Now coming to point No. 4 above, it has come in the judgment of the Civil

Judge, that notice paper No. 4-C dated 17.5.76 and receipt paper Nos. A-8 and A-10 dated 15-5-76 are on record. The suit was filed on 23-7-76 hence the trial court held that it was not possible to presume that notices were served on the Defendants before 23-5-76, i.e. two months prior to filing of the suit. The presumption drawn by the trial court is imaginary in the event when the suit was filed after two months of sending the notice and the copy of notice and the postal receipt have been brought on record. It is also important to note here that the notice sent to the Defendant was not received back and a presumption would have been drawn by the trial court that it was served upon the addressee. It may also be noted here that at the time of admission of the suit, no preliminary objection has been shown to be raised and for the first time formal objection was raised in the written statement after the admission of the suit. In the aforesaid circumstances this substantial question of law is also decided in favour of the Plaintiff/respondent and against the Appellant/defendant.

16. In view of the findings given on the questions above, framed in the appeal, the appeal lacks merit and is liable to be dismissed.

17. The appeal is dismissed. The judgment and decree dated 19-9-1983 passed by Addl. District Judge, Dehradun, in Civil Appeal No. 121 of 1978 is hereby affirmed. No order as to costs.