

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH

SECOND APPEAL No.272 OF 2015

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Between:

Smt.Battina Subbalakshmi ... Appellant

and

The Kovvur Co-operative Urban Bank Limited,
Kovvur, represented by its Secretary, Kovvur,
West Godavari District, and others. ... Respondents

DATE OF JUDGMENT PRONOUNCEMENT: 15th
SEPTEMBER,2015

SUBMITTED FOR APPROVAL:

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THE HON'BLE SRI JUSTICE SANJAY KUMAR

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| 1. | Whether Reporters of Local newspapers
may be allowed to see the judgment? | Yes/No |
| 2. | Whether the copies of judgment may be
marked to Law Reporters/Journals | Yes/ No |
| 3. | Whether His Lordship wishes to
see the fair copy of the judgment? | Yes/ No |

***THE HON'BLE SRI JUSTICE SANJAY KUMAR**

+ SECOND APPEAL NO.272 OF 2015

% DATED 15TH SEPTEMBER, 2015

Between:

Smt. Battina Subbalakshmi ..
Appellant ..
Petitioner

and

\$ The Kovvur Co-operative Urban Bank Limited,
Kovvur, represented by its Secretary, Kovvur,
West Godavari District, and others. ... Respondents

<Gist:

>Head Note:

! Counsel for Appellant : Sri Subrahmanyam Kurella

^Counsel for respondent No.1 : Smt. Bobba Vijaya Lakshmi

^Counsel for respondent Nos.2 & 3 : --

? CASES REFERRED:

THE HON'BLE SRI JUSTICE SANJAY KUMAR

SECOND APPEAL NO.272 OF 2015

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J U D G M E N T
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Aggrieved by the reversing judgment and decree of the learned Additional District Judge, Kovvur, West Godavari District, in A.S.No.193 of 2012, the plaintiff in O.S.No.79 of 2000 on the file of the learned Principal Senior Civil Judge, Kovvur, from which the said appeal arose, is before this Court in second appeal.

O.S.No.79 of 2000 was filed for specific performance of the agreement of sale dated 09.07.1997 (Ex.A1), by directing the first defendant in the suit to discharge the mortgage debt due from him to Kovvur Co-operative Urban Bank Limited, Kovvur, the second defendant, thereby redeeming the said mortgage, and to execute a regular registered sale deed in favour of the plaintiff in respect of the suit schedule property. By judgment dated 19.04.2012, the trial Court decreed the suit.

Parties shall hereinafter be referred to as arrayed before the trial Court.

The case of the plaintiff was that the first defendant got the suit

schedule property from his mother under a registered settlement deed dated 03.02.1997 and thereafter offered it for sale, whereupon she agreed to purchase the same for Rs.1,20,000/-. The first defendant was stated to have received the sale price from the plaintiff in several installments and executed Ex.A1 agreement of sale. Therein, he undertook to execute a regular registered sale deed in favour of the plaintiff on or before 08.01.1999 after discharging the simple mortgage debt due from him to Kovvur Co-operative Urban Bank Limited, the second defendant. The plaintiff further claimed that she had been residing in the suit schedule property long prior to the execution of Ex.A1 agreement of sale, as a tenant. On 08.01.1999, being the stipulated date for execution of the registered sale deed, the plaintiff claimed that she asked the first defendant to do so, but he informed her that he could not secure money for discharging the mortgage debt; that he would do so and thereafter execute a regular registered sale deed in her favour within a year. However, he failed to execute the sale deed and therefore, after issuing a registered notice on 01.07.2000, she filed the subject suit.

The first defendant, having filed a written statement, was set *ex parte* thereafter. However, in his written statement, he denied the execution of Ex.A1 agreement of sale and the passing of consideration thereunder. The second defendant bank and the third defendant, the auction purchaser, were added as parties in the suit as per the order dated 22.07.2011 passed by the trial Court in I.A.No.405 of 2007.

The third defendant filed a written statement which was adopted by the second defendant bank. According to the third defendant, the first defendant obtained a loan from the second defendant bank by mortgaging the suit schedule property on 05.05.1997 and thereafter committed default in repayment of the loan. Award dated 20.07.1998 was passed by the Deputy Registrar of Cooperative Societies concerned at the behest of the second defendant bank and the suit schedule property was brought to sale in the execution proceedings

initiated in CEP.No.16 of 2000. She claimed that she became the highest bidder in the said sale and a certificate of sale was also issued in her favour on 16.12.2003. She further stated that she took delivery of the suit schedule property and therefore became the absolute owner of the same with possession. She contested the claim of the plaintiff that Ex.A1 agreement of sale had been executed in her favour and asserted that the sale held in her favour pursuant to the execution proceedings was conclusive. She pointed out that the plaintiff had filed O.S.No.1048 of 2003 before the learned Senior Civil Judge, Kovvur, against her and her husband for a mere injunction after the property was purchased by her and that the said suit was dismissed on 19.02.2004.

The following issues were settled for determination by the trial Court:

1. Whether the alleged sale agreement dated 09.07.1997 is true, valid and binding on the defendant?
2. Whether the sale agreement dated 09.07.1997 is a fabricated and created one?
3. Whether the plaintiff is entitled for specific performance of contract as prayed for?
4. To what relief?

The plaintiff examined herself as P.W.1 and an attester of Ex.A1 agreement of sale as P.W.2. She marked three documents in evidence. Ex.A1 is the suit agreement of sale, Ex.A2 is the office copy of the registered notice dated 01.07.2000 and Ex.A3 is the postal acknowledgment of receipt of the said notice. The third defendant examined herself as D.W.1. The Secretary of the second defendant bank was examined as D.W.2 and two documents were marked in evidence. Ex.B1 is the copy of the sale certificate while Ex.B2 is the certified copy of the delivery proceedings.

Upon due consideration of the pleadings, evidence and material on record, the trial Court held that Ex.A1 agreement of sale was not fabricated and that it was true and valid. Issues 1 and 2 were

answered accordingly. Thereafter, the trial Court took note of the fact that during the pendency of the suit, the plaintiff had filed I.A.No.1195 of 2002 therein seeking a temporary injunction restraining the second defendant bank from auctioning the suit schedule property or in the alternative, restraining the second defendant bank from paying the balance amount from out of the sale proceeds realized by it from such sale to the first defendant. Though no injunction was granted as prayed for in the said IA, the trial Court was of the opinion that the auction sale in favour of the third defendant was hit by *lis pendens*. The trial Court also raised doubts as to the genuineness of the said sale and as to whether the third defendant had even participated in such sale. The sale was therefore held not binding on the plaintiff and she was accordingly held entitled to the relief of specific performance. The first defendant was directed to execute a regular registered sale deed in favour of the plaintiff after discharging the mortgage debt of the second defendant bank within three months, failing which the plaintiff was given the liberty to discharge the said debt and recover the amount from the first defendant.

Aggrieved by the judgment and decree of the trial Court, the second defendant bank and the third defendant filed A.S.No.193 of 2012 before the learned Additional District Judge, Kovvur, West Godavari District.

The following points were framed for determination by the lower appellate Court:

1. Whether the plaintiff proved his case for the equitable relief of specific performance in the light of the material available on record and whether the trial Court rightly exercised jurisdiction in granting such equitable relief in favour of the plaintiff?
2. Whether the trial court rightly appreciated the jurisdiction aspect in the light of Section 121 of A.P. Co-operative Societies Act?
3. To what relief?

The lower appellate Court weighed the probabilities of the case

and more specifically, in terms of the plaintiff parting with the entire sale consideration in favour of the first defendant, being fully aware of the fact that he was liable to discharge the mortgage debt due to the second defendant bank. The manner in which the transaction was entered into was therefore found by the lower appellate Court to be a means to circumvent the mortgage debt and Ex.A1 agreement of sale was categorized as such. The fact that the first defendant chose to remain *ex parte* without contesting the suit was found to be a factor supporting such a conclusion. The lower appellate Court also took note of the fact that the plaintiff filed a claim petition in the execution proceedings initiated pursuant to the Award passed by the Deputy Registrar of Co-operative Societies concerned and suffered its dismissal and thereafter, filed a suit for a mere injunction in O.S.No.1048 of 2003 and again suffered defeat.

As regards the issue of jurisdiction, the lower appellate Court was of the opinion that Section 121 of the Andhra Pradesh Co-operative Societies Act, 1964, barred the jurisdiction of the civil Court and that the sale proceedings initiated under the provisions of the said Act could not be nullified by the civil Court by granting the relief of specific performance in a civil suit and that too, on the facts obtaining. The judgment and decree of the trial Court were accordingly set aside. Hence, this second appeal by the plaintiff.

Heard Sri Subrahmanyam Kurella, learned counsel for the plaintiff, and Smt. Bobba Vijaya Lakshmi, learned counsel for the second defendant bank. Despite service of notice, the third defendant did not choose to enter appearance before this Court either in person or through learned counsel.

This Court does not deem it necessary to venture into the issue of jurisdiction raised by Sri Subrahmanyam Kurella, learned counsel. Even if his contention is accepted that the civil Court alone had jurisdiction and not the Co-operative Tribunal, this Court is of the opinion that the facts obtaining and the legal position fully justified the

reversal of the judgment and decree of the trial Court by the lower appellate Court.

As pointed out by the lower appellate Court, the very manner in which the transaction was effected under Ex.A1 agreement of sale raises any amount of doubt. Being fully conscious of the fact that the first defendant had to discharge a mortgage debt upon the suit schedule property, it is difficult to believe that the plaintiff would have remitted the full sale consideration to him instead of discharging the said debt herself. Further, the very fact that no injunction was granted by the trial Court in I.A.No.1195 of 2012 filed in the suit restraining the second defendant bank from auctioning the suit schedule property clearly established that the second defendant bank was permitted to go on with the sale and therefore, the doctrine of *lis pendens* could not be applied to the auction held thereafter. That apart, the trial Court totally lost sight of the fact that the plaintiff also advanced an alternative plea in the said I.A. to the effect that if the sale was held, the balance amount due from the sale proceeds realized by the bank should not be remitted to the first defendant. This alternative prayer shut out any possibility of applying the doctrine of *lis pendens*. The finding of the trial Court to the contrary, completely overlooking this part of the prayer in I.A.No.1195 of 2012, therefore cannot be sustained.

It may also be noticed that having failed to secure an injunction as prayed for in the aforesaid I.A., the plaintiff did not even choose to participate in the auction sale. The sale was confirmed in favour of the third defendant on 16.09.2003 but it was only in October, 2003 that the plaintiff filed O.S.No.1048 of 2003 for a mere injunction against the third defendant and her husband. This suit was also dismissed. Despite all these events taking place in the years 2002 and 2003, the plaintiff did not even choose to take steps in the suit till the year 2007 as I.A.No.405 of 2007 was filed by her only then to implead the second defendant bank and the third defendant in the suit proceedings. The

said I.A. was ordered only on 22.07.2011 shortly before the decretal of the suit.

That apart, both the Courts below did not take note of Section 35(3) of the Andhra Pradesh Co-operative Societies Act, 1964, which states to the effect that no person shall transfer any property which is subject to a charge in relation to the debt due to a society except with the previous permission in writing of the society which holds the charge and any transfer, without such permission, shall, notwithstanding anything in any law for the time being in force, be void. 'Transfer of property', as defined under Section 5 of the Transfer of Property Act, 1882, means an act by which a living person conveys property in present or in future. Therefore, the act of first defendant in executing Ex.A1 agreement of sale would qualify as a 'transfer' and fall within the ambit of Section 35(3) of the Act of 1964. Admittedly, no prior permission in writing was obtained by him from the second defendant bank before its execution. Therefore, the transaction was void in its very inception. Validating such a void transaction by decreeing specific performance thereof is wholly unsustainable in law.

The issue of jurisdiction raised in the appeal is accordingly left open but on facts, this Court finds that the judgment and decree of the lower appellate Court, upsetting the judgment and decree of the trial Court, do not warrant interference on facts or in law.

The second appeal is devoid of merit and is accordingly dismissed. There shall be no order as to costs.

SANJAY KUMAR,J

15th SEPTEMBER, 2015

Note: L.R. copy to be marked

B/o PGS