

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.248 of 2001

Marium Bibi, W/o Md. Hafiul Haque, aged about 32 years, Occupation Agriculturist, R/o Village Bilma, P.S. Dhorpur, Tahsil Lundra, Distt. Sarguja (C.G.)

(Plaintiff)
---- Appellant

Versus

1. Prabandhak, Bhumi Vikash Bank, Head Office Ambikapur, Distt. Sarguja (C.G.)

(Dfd. No.1)

2. Bikri Adhikari, Bhumi Vikash Bank Maryadit, Ambikapur, Distt. Sarguja (C.G.)

(Dfd. No.6)

3. Rustum Ali (Died and deleted)

(Dfd. No.3)

4. Brijmohan (Dead) Through LRs

(Dfd. No.4)

4.a) Durgavati, W/o Late Brijmohan, aged about 38 years

4.b) Prabhunarayan, S/o Late Brijmohan, aged about 16 years, through her mother Durgavati.

All R/o Village Bilma, P.S. Dhorpur, Tahsil Lundra, District Surguja (C.G.)

5. Md. Khalil, S/o Rustum Ali, Aged about 50 yrs., Occupation Agriculture, R/o Village Bilma, P.S. Dhorpur, Tah. Lundra, Distt. Sarguja (C.G.)

(Dfd. No.5)

6. The State of M.P. (Now C.G.), Through Collector, Sarguja, Ambikapur.

(Dfd. No.7)

---- Respondents

For Appellant: Mr. A.K. Prasad, Advocate.

For Respondents No.1 and 2: -

Mr. Sunil Tripathi, Advocate.

For Respondents No.4.a and 4.b: -

Mr. Neeraj Choubey, Advocate.

For Respondent No.5: Mr. Anurag Singh, Advocate.

For Respondent No.6 / State: -

Mr. Ashish Surana, Panel Lawyer.

AND

Second Appeal No.249 of 2001

Marium Bibi, W/o Md. Hafizul Haque, aged about 32 yrs., Occupation Agriculture, R/o Village Bilma, P.S. Dhorpur, Tahsil Lundra, Distt. Surguja.

(Plaintiff)
---- Appellant

Versus

1. Brijmohan (Dead) Through LRs

(Dfd. No.4)

1.a) Durgavati, W/o Late Brijmohan, aged about 38 years

1.b) Prabhunarayan, S/o Late Brijmohan, aged about 16 years, through her mother Durgavati.

All R/o Village Bilma, P.S. Dhorpur, Tahsil Lundra, District Surguja (C.G.)

2. Md. Rustum Ali (Died and deleted)

(Dfd. No.3)

3. Md. Khalil, S/o Rustum Ali, aged about 40 years, R/o Village Bilma, Tah. Dhorpur, Distt. Surguja (C.G.)

(Dfd. No.5)

4. Prabandhak, Bhumi Vikas Bank, Head Office Ambikapur, Distt. Surguja (C.G.)

(Dfd. No.1)

5. The State of M.P. (Now C.G.), through Collector, Surguja, Ambikapur.

(Dfd. No.7)

---- Respondents

For Appellant: Mr. A.K. Prasad, Advocate.

For Respondents No.1.a and 1.b: -

Mr. Neeraj Choubey, Advocate.

For Respondent No.3: Mr. Anurag Singh, Advocate.

For Respondent No.4: Mr. Sunil Tripathi, Advocate.

For Respondent No.5 / State: -

Mr. Ashish Surana, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

23/10/2018

1. Since both these appeals involve common substantial questions of

law, they are being disposed-off by this common judgment.

2. The substantial questions of law commonly involved, formulated and to be answered in both these second appeals preferred by the plaintiff are as under: -

“1. Whether the judgment of the first appellate Court in reversing the finding of the trial Court on the basis that the suit is not maintainable is proper or not, particularly, when the suit of the plaintiff was for declaration of title and permanent injunction?

2. Whether the suit property could have been mortgaged by Mohd. Khalil or Baitul Bibi on account of the fact that the suit property was already sold to one Tajuman Bibi on 11.7.1973 by a registered sale deed?”

(For sake of convenience, parties would be referred hereinafter as per their status shown in the trial Court.)

3. Marium Bibi – the plaintiff, filed a suit for declaration of title and permanent injunction stating inter alia that she is the owner of the suit land bearing Khasra No.754/2, area 0.713 hectare. She further averred that the suit property was originally held by Baitul Bibi, wife of Rustam Ali, who sold the property through registered sale deed dated 11-7-1973 (Ex.P-1) to Tajmun Bibi (mother of the plaintiff) and possession was delivered to said Tajmun Bibi and Tajmun Bibi gifted the suit property to the plaintiff by gift deed dated 10-9-1974 (Ex.P-2) and mutation was done in her favour on 13-10-1974. It was further stated that Mohd. Khalil – defendant No.5, being Karta of Muslim Undivided Family, took a loan of ₹ 8,500/- from the defendant Bank and along with other properties, the plaintiff's suit land was also erroneously mortgaged and mortgage deed Ex.D-2 was executed by Mohd. Khalil and Baitul Bibi, though Baitul Bibi had already transferred the property to Tajmun Bibi and Tajmun Bibi had gifted the property to the plaintiff. When the loan was not repaid, the plaintiff's property was

also auctioned by the Bank in favour of defendant No.4 Brijmohan as such, since the property was not owned by defendant No.3 Rustam Ali or Baitul Bibi, therefore, the Bank was not entitled to auction the same and as such, the plaintiff is entitled for declaration of title and further declaration that the auction sale is void.

4. Defendants No.1 and 6 Bank have filed their written statement stating inter alia that loan was taken by Mohd. Khalil and the suit land was rightly mortgaged in favour of the Bank whereas, defendant No.4 claimed to be the bona fide purchaser and defendant No.5 accepted the claim of the plaintiff stating inter alia that the suit land belongs to Baitul Bibi and it did not belong to him.
5. The trial Court after appreciating oral and documentary evidence on record, decreed the suit holding that Baitul Bibi transferred the suit land in favour of Tajmun Bibi and Tajmun Bibi gifted the property to the plaintiff vide Ex.P-2 on 10-9-1974 and as such, Baitul Bibi was not having any mortgageable right in favour of the Bank. Appeals were preferred by the auction purchaser – defendant No.4 as well as by defendants No.1 & 6 – Bank before the first appellate Court separately. Both the appeals have been allowed by the first appellate Court holding that the suit was barred under Sections 82(3), 89 and 90 of the Madhya Pradesh Co-operative Societies Act, 1960, and therefore two separate appeals have been preferred by the plaintiff under Section 100 of the Code of Civil Procedure, 1908 in which substantial questions have been framed and set-out in the opening paragraph of the judgment.
6. Mr. A.K. Prasad, learned counsel for the plaintiff / appellant, submits that the mortgage made by Mohd. Khalil – borrower along with Baitul

Bibi and Rustam Ali – defendant No.3 vide Ex.D-2 in favour of the Bank was not in accordance with law, as the mortgage deed is dated 10-4-1974, whereas the suit land was already sold by Baitul Bibi in favour of Tajmun Bibi vide Ex.P-1 on 11-7-1973 and was gifted to the plaintiff on 10-9-1974 vide Ex.P-2 and therefore Baitul Bibi or her husband or Mohd. Khalil – defendant No.5 had no right to mortgage the suit land in favour of the Bank and as such, the suit for declaration of title and permanent injunction and for cancellation of auction proceeding was void.

7. Mr. Sunil Tripathi, learned counsel appearing for the Bank, Mr. Neeraj Choubey, learned counsel appearing for the auction purchaser, and Mr. Anurag Singh, learned counsel appearing for the borrower – Mohd. Khalil, would support the impugned decree.
8. I have heard learned counsel for the parties and considered their submissions and went through the records with utmost circumspection.
9. It is appropriate to notice that the trial Court after appreciating oral and documentary evidence on record found established that originally the suit land was held by Baitul Bibi who sold the land in favour of Tajmun Bibi vide Ex.P-1 on 11-7-1973 and delivered the peaceful possession and thereafter, Tajmun Bibi gifted the suit property in favour of the present plaintiff vide Ex.P-2 on 10-9-1974, but the mortgage was made by Mohd. Khalil – defendant No.5 along with Rustam Ali and Baitul Bibi on 10-4-1974 holding the property to be of Baitul Bibi for a loan advanced to Mohd. Khalil for bore-well and when the loan was not paid, it was auctioned on 18-6-1992 and ultimately, the sale was confirmed by the Assistant Registrar, Co-operative Societies on 31-7-

1992. The trial Court has decreed the suit on the ground that the suit land was already sold on 11-7-1973 by Baitul Bibi in favour of Tajmun Bibi before the date of mortgage i.e. 10-4-1974 and as such, the plaintiff's mother (Tajmun Bibi) had already acquired the title vide Ex.P-2 dated 10-9-1974. Though the plaintiff has acquired title after the date of mortgage, but on the date of mortgage, the plaintiff's mother – Tajmun Bibi was the owner and title holder of the suit land, therefore it could not have been mortgaged even by Baitul Bibi in favour of the Bank vide Ex.D-2 on 10-4-1974. As such, the trial Court has rightly held that the plaintiff was the title holder of the suit land and Mohd. Khalil – defendant No.5 or Baitul Bibi had no right and title to mortgage the suit land in favour of the Bank. The trial Court did not accept the plea of the defendant Bank based on Sections 26 and 34 of the Madhya Pradesh Sahakari Krishi Aur Gramin Vikas Bank Adhiniyam, 1999 which state as under: -

“26. Power to sell property charged without intervention of Court.—(1) Notwithstanding anything contained in the Madhya Pradesh Co-operative Societies Act, 1960 (No. 17 of 1961) or the Trustee and Mortgagees Power Act, 1886 (No. 28 of 1886) or any other law for the time being in force, where a security has been furnished in respect of movable or immovable property in favour of the State Development Bank or a District Development Bank, the Bank or any person authorised for the purpose shall, in case of default in the payment of sums due to the Bank, have power, in addition to any other remedy available to it to bring to sale the property to which the security relates without intervention of any court of law.

34. Title of purchaser not to be impeachable.—When a sale has been made and confirmed under this Chapter, the title of the purchaser shall not be impeachable on the ground that no cause had arisen to authorise the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised; but any person damaged by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the State Development Bank or the District Development Bank, as the case may be.”

10. The first appellate Court on appeals preferred by the defendants has held that suit to be barred under Sections 82(3), 89 and 90 of the Madhya Pradesh Co-operative Societies Act, 1960. Admittedly, auction was conducted in accordance with Sections 26, 27 and 28 of the Madhya Pradesh Sahakari Krishi Aur Gramin Vikas Bank Adhiniyam, 1999. Therefore, the first appellate Court is absolutely unjustified in invoking the provisions of the Madhya Pradesh Co-operative Societies Act, 1960 which are wholly inapplicable to the auction sale of the suit land made by the Bank.
11. The question for consideration would be, whether Section 34 of the Madhya Pradesh Sahakari Krishi Aur Gramin Vikas Bank Adhiniyam, 1999 would apply and the plaintiff is entitled only for damages against the State Development Bank who has made the auction?
12. A careful perusal of Section 34 of the Madhya Pradesh Sahakari Krishi Aur Gramin Vikas Bank Adhiniyam, 1999, would reveal that where an auction sale has been made and confirmed under Chapter V of the Adhiniyam, 1999, the title of the purchaser shall not be impeachable on the ground that no cause had arisen to authorise the sale or that due notice was not given or that the power was other-wise improperly or irregularly exercised, but the concerned person shall have the remedy of damages against the Bank. But it is not the case here. Here the Bank has mortgaged the property of a person (plaintiff) at the behest of defendant No.5 Mohd. Khalil who was having no title over the suit land on the date of mortgage and thereafter, further, without making any enquiry, proceeded to auction the property held by the plaintiff. No Bank is entitled to auction the property by illegally mortgaging the land which is not owned by the person who has

mortgaged the land. Right to property though is not a fundamental right, but is a constitutional right guaranteed under Article 300A of the Constitution of India and therefore no person can be deprived of his property except in accordance with law. Therefore, in case of illegal deprivation of the property of a person who has a valid title over the suit land, the provisions of Section 34 of the Madhya Pradesh Sahakari Krishi Aur Gramin Vikas Bank Adhiniyam, 1999 would not be applicable, as it would be a case of gross illegality.

13. In view of the aforesaid legal analysis, this Court is of the opinion that the first appellate Court is absolutely unjustified in holding that the suit is not maintainable to question the auction proceeding.
14. As a fallout and consequence of the aforesaid discussion, the substantial questions of law are answered in favour of the plaintiff and against the defendants. Consequently, the judgment and decree passed by the first appellate Court are set aside and that of the trial Court are restored. The second appeals are allowed to the extent of suit land owned by the appellant / plaintiff bearing Khasra No.754/2, area 0.713 hectare situate at Village Bilhma, Patwari Halka No.2, RI Circle Dhorpur, Tahsil Lundra, Distt. Surguja. There shall be no order as to cost(s).
15. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge