IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 244 OF 2019
WITH
CIVIL APPLICATION NO. 490 OF 2019
IN
SECOND APPEAL NO. 244 OF 2019

Smt. Parvati Annaso Garve.
Age:77 years, Occ.Household,
R/o. Hupari, Taluka: Hatakanangale,
District: Kolhapur. … Appellant/Applicant
V/s.

1. The Special recovery officer,
   Janata Sahakari Patsanstha Hupri,
   Through Adgonda Anna Danole
   Age: 42 years, Occ. Service,
   A/p. Village Ingli,
   Taluka : Hatakanangale,
   District : Kolhapur.
2. Shri Rajendra Vasant Nawale,
   Age: 47 years, Occ.Silver work(Jeweller),
   R/o. Hupari,
   Taluka : Hatakanangale,
   District : Kolhapur. ... Respondents

Mr. Prajakt M. Arjunwadkar for the appellant.

Mr. Mandar Bagkar i/b. Mr. Ruturaj P. Pawar for the respondent nos. 1 and 2.

CORAM : SMT. SADHANA S. JADHAV, J
RESERVED ON JANUARY 27, 2020.
PRONOUNCED ON JULY 3, 2020.

P.C. :

1 The Appellant is original defendant in RCS No. 364 of 2012. The learned Civil Judge, Junior Division, Satara by Judgement and Order dated 22/2/2012 was pleased to pass a decree of eviction against the appellant. Being aggrieved by the said Judgment and Order, the appellant had filed RCA NO. 20 of 2017 before the District Judge at Ichalkaranji. The learned District Judge, Ichalkaranji by Judgment and Order dated 2/1/2019 was pleased to dismiss the appeal. Hence, this appeal under section 100 of Civil Procedure Code.

2 The facts of the case in a nutshell are as follows :

(i) In the year 1972 the Government of Maharashtra had floated a scheme for landless labours. The appellant had qualified in the said scheme. The appellant was allotted Plot No. 19 admeasuring 1089 sq.ft. at village Hupari. Financial aid was also extended to her to build a house on the said property. A Sanad was issued in her favour.

(ii) The said suit property is occupant “Class II property”. The Sanad is issued with certain restrictions, which are as follows :

(a) The holder of the Sanad is not entitled to alienate the suit property.

(b) The Sanad holder is not entitled to create any third party interest in the said property.

(c) There are restrictions on its alienation, sale and mortgage.

Thus, the suit property was not capable of being mortgaged or sold without obtaining appropriate permission from the revenue authorities.

(iii) On 21/7/2011 the Special recovery officer of Janata Co-operative Credit Society alongwith Rajendra Nawale (the auction purchaser) filed a suit before the Civil Judge Senior Division contending therein that the plaintiff No. 1 happens to be a Credit Society registered under Maharashtra Cooperative Societies Act, 1960. The Defendant i.e. the present Appellant is the owner and occupier of the suit property. That, she had borrowed Rs. 50000/-

from the Credit Society. That, she had failed to repay the loan and hence, Society had obtained certificate under section 101 of the Maharashtra Cooperative Societies Act, 1960. The plaintiff had obtained sale certificate.

(iv) That, the Credit Society had put the property for auction. The plaintiff No. 2 purchased the subject property and on 14th October, 2008 the Plaintiff No. 1(Special Recovery Officer) had executed the sale deed in favour of plaintiff No. 2.

(v) That, at the stage of execution/taking possession of the property, the defendant filed several proceedings against the plaintiffs and obstructed the transfer of possession. That the defendant had failed in all proceeding. Therefore, the plaintiffs approached to the police authorities. The police directed the plaintiffs to obtain appropriate orders from a court of law. The plaintiffs had therefore, approached the Civil Court seeking eviction of the defendant from the suit property. In fact, the defendant had filed RCS No. 54/2009 seeking injunction to auction and execution of recovery certificate under section 101 of Maharashtra Cooperative Societies Act, 1960. The suit was dismissed and the Judgment had attained finality.

(vi) By way of Written Statement the Defendant had speccifically contended that the suit is bad for non-joinder of necessary parties, as the Government of Maharashtra was the title holder of the property. That, she was one of the beneficiaries of the government scheme and was put into possession by issuance of a sanad and that the sanad was issued to her on certain conditions, that she has no authority to create any third party interest.

(vii) It is pertinent to note that the plaintiffs have admitted in cross-examination that Gopal Chingale and Sunil Ghorpade are the guarantors for the loan transaction. However, there is no material on record to indicate that notice was issued to the guarantors and that they had any knowledge about the grant of 101 certificate.

(viii) The Civil Judge Junior Division had not framed an issue to determine as to whether the mortgage deed executed by the borrower was a valid mortgage. No issue was framed to consider as to whether the suit is bad for non-joinder of necessary parties. The Suit was decreed with cost and a direction to the defendant to deliver the possession within 15 days. The original defendant had impugned the said judgment by filing Regular Civil Appeal No. 20/2017. The said Regular Civil Appeal was dismissed, thereby upholding the Judgment and Order passed by Civil Judge Senior Division, Ichalkaranji.

3 The substantial question of law, according to the Appellant is as follows:

> Ground E of the Appeal memo- reads as follows :
>
> "Whether the courts below ought to have held that the title allegedly transferred in favor of the respondent No. 2 is defective and that the respondent No. 2 does not acquire any title or ownership to the suit property on the basis of invalid document, i.e. a sale deed."

4 It is an admitted position that the suit property was given to the appellant by the government and that her status was that

of an occupier. Sanad was issued incorporating certain conditions. That the appellant is an illiterate widow, a rustic villager. At the stage of borrowing loan from the Credit Society, the appellant had not suppressed the fact that she is an occupier of the suit property. Instead, she had handed over the copy of sanad/original sanad and it was incumbent upon the credit society to verify the title and the authority of the mortgager to mortgage the property as against her loan. It cannot be said that the document was invalid but that the mortgagor had no valid title to the property, but having mortgaged a property without authority she would have to suffer the consequences and further proceedings cannot be invalidated. Hence, the other aspects, which fall for determination before this Court are as follows :

(i) Whether the defendant had the authority to create a third party interest ?

(ii) Whether a mortgage, which was void, can be sold in auction for realization of loan ?

(iii) Whether the auction purchaser in such proceeding would acquire a better title e to the suit property in the absence of the mortgager having a valid title ?

5 Section 58 of the Transfer of Property Act 1882 contemplates as follows :

> "A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed."

6 It is true that the mortgagor had no authority to create a third party interest and that she could not have transferred the title to the said.. property. however the court cannot be oblivious of the fact that her suit seeking stay to the auction proceedings was dismissed and that the said judgment had attained finality.THE ANSWER TO THE FIRST ISSUE NEEDS TO BE ANSWERED in the negative holding that she had no authority to execute the mortgage deed .

7 The credit society had followed the procedure under the provisions of Maharashtra CO-OPERATIVE SOCIETIES Act and obtained a certificate u/s 101. That the suit challenging the said proceedings was dismissed. Although the interest would not devolve upon the society automatically what was put to auction is the property. The auction purchaser has admitted that he had not verified the title to the property, and that, the credit society had not shown the Sanad to him. The Sanad is at Exhibit 43. The auction purchaser had run the risk of purchasing the property without verifying the title hence it cannot be said that the auction proceedings would become null and void.Hence the issue no.2 deserves to be answered in the affirmative by further holding that no fault can be found in the auction proceedings.

8 The learned Judge has rightly observed as follows :

> “In said sanad certain conditions are imposed upon the defendant from restraining its alienation, mortgage and use. However, considering the documents placed on record, it appears that the defendant herself has breached said conditions imposed upon her by obtaining loan from the plaintiff society. Thus, the defendant who is wrong doer is not entitled for protection from the court

> for her own wrong act. Thus, considering conduct of the defendant, who is sliping over her valuable right since from long, is not entitled for protection from the Court."

9 It is true that the defendant cannot take advantage of her own wrongs that she continued with the possession and occupation of the suit property, after the same was put to auction in accordance with law,the sale certificate is issued and the purchaser has paid the auction money That the auction purchaser will not get title over the property but he would be entitled to get possession. Hence the issue no 3 deserves to be answered in the negative. Title and possession are two distinct issues and the present proceeings was for possession and not title.

10 This court would further observe that it would be open for the Government to claim the said property as the Govt would still continue to act upon the Sanad issued in favour of the present appellant which was breached by her. The suit was not filed for seeking a declaration of title but the suit was for eviction on the basis of registered sale deed and hence the concurrent findings recorded by both courts cannot be interferred with.

11 In view of the above discussion the second appeal deserves to be dismissed without cost.

12 In view of disposal of Second Appeal, nothing survives in the civil application. The same is also disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)