

Govinda Choudhary v. The Saraswat Co-operative Bank Ltd. & Ors.

Govinda Choudhary

...Appellant

The Saraswat Co-operative Bank Ltd. & Ors.

...Respondent

Case No: Misc. Appeal No. 67/2023

Date of Judgement: 15/09/2023

Judges:

Mr Justice Ashok Menon, Chairperson

For Appellant: Mr V.N. Ajikumar, Advocate.

For Respondent: Mr Charles D'Souza along with Mr Rupak Sawangikar, i/b M/s V. Deshpande & Co., Mr Mayank Bagle, i/b Mr Durgesh Rege, Advocate.

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Facts:

The case concerns an appeal (Misc. Appeal No. 67/2023) filed by Govinda Choudhary (Appellant) against an order passed by the Debts Recovery Tribunal-I, Mumbai (D.R.T.) in I.A. No. 468/2023 in Securitisation Application (S.A.) No. 62/2023. The Appellant had filed the S.A. challenging the SARFAESI (Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interests Act, 2002) measures initiated by the Saraswat Co-operative Bank Ltd. (Respondent No. 1) for recovery of debt due from the second Respondent borrower by proceeding against a flat (secured asset) owned by the Appellant. The Appellant claims to be the exclusive owner in possession of the

secured asset by virtue of a registered agreement for sale executed in his favor by the third Respondent builder on 29.04.2019. The Appellant claims to be a bona fide purchaser of the property and has paid the entire sale consideration after availing a loan from the fourth Respondent, Axis Bank Ltd. The first Respondent bank contends that the secured asset was purchased by the second Respondent on 17.02.2017 by way of a registered agreement to sell from the third Respondent builder after availing a loan from the first Respondent and had provided the title deeds of the flat as security and created a mortgage by deposit of title deeds. The Appellant filed the S.A. as an aggrieved person affected by the SARFAESI measures and also filed I.A. No. 468/2023 for an interlocutory order to protect his possession. The Ld. Presiding Officer declined to grant any protection order, stating that the Appellant is a subsequent purchaser of the property which was already mortgaged and hence cannot be protected.

Arguments by the Appellant:

The Appellant contends that there is sufficient evidence to establish his actual possession of the flat, including a possession certificate, occupancy certificate, certificate of registration from the Assistant Registrar of Co-operative Societies, and a share certificate issued by the housing society. The Appellant argues that the society had also issued a 'no objection certificate' in favor of the secured creditor (Axis Bank) before granting a loan to the Appellant. The Appellant contends that the report produced by the first Respondent does not indicate that the property was occupied by anyone else, and the photographs provided by the first Respondent do not match the actual property, suggesting that a proper inspection was not done. The Appellant argues that the CERSAI (Central Registry of Securitisation Asset Reconstruction and Security Interest of India) registration of Axis Bank, which lent money to the Appellant, is dated 24.06.2019, whereas the CERSAI registration of the first Respondent bank is dated 04.03.2021. The Appellant relies on a letter dated 11.08.2022 issued by the third Respondent builder to the first Respondent bank, stating that the agreement with the second Respondent regarding the intended sale of the secured asset has been canceled and money refunded to him.

The Appellant filed a police complaint on 20.03.2023, and an FIR was registered for offenses punishable under Sections 465 and 468 of the IPC, alleging that the mortgage in favor of the first Respondent was forged. The Appellant contends that the Ld. Presiding Officer erroneously observed that the Appellant had admitted knowledge of the agreement of sale dated 13.02.2017 in favor of the second Respondent borrower.

Arguments by the First Respondent (Saraswat Co-operative Bank Ltd.):

The first Respondent argues that the agreement for sale in favor of the second Respondent borrower by the third Respondent on 13.02.2017 was a registered document, and neither the Appellant nor his creditor (fourth Respondent bank) conducted proper due diligence before purchasing or financing the secured asset. The first Respondent contends that the existence of a registered agreement to sell could not have gone unnoticed, and there is a tripartite agreement dated 01.02.2021 between the first Respondent bank, second Respondent borrower, and third Respondent builder, where the existence of the agreement of sale between the second Respondent and third Respondent is admitted. The first Respondent argues that the Housing Society was not yet registered in 2017 and could not have issued a share certificate in favor of the second Respondent. The first Respondent points out that the builder has subsequently challenged the execution of the tripartite agreement and accused the bank of forgery, which is being investigated. The first Respondent contends that a registered agreement for sale could not have been canceled by an unregistered memorandum relied upon by the third Respondent. The first Respondent argues that the Appellant and the fourth Respondent did not perform due diligence, as the encumbrance certificate was obtained by the Appellant only for a period of one year from 12.06.2019.

Court's Elaborate Opinions:

The court relied on the decision of the High Court of Delhi in Sh. Ishar Dass Malhotra vs. Sh. Dhanwant Singh & Ors. 1983 SCC OnLine Del 284, which, in turn, relied on the Supreme Court's decision in K.J. Nathan vs. S.V. Maruthi Rao AIR 1965 SC 430. The court held that the

question of the subsequent purchaser (Appellant) having bought the property subject to a mortgage by deposit of title deeds bona fide, with or without notice, is irrelevant. The subsequent purchaser cannot avoid the mortgage by leading evidence to show that he made reasonable inquiries to find out if the property is subject to a mortgage by deposit of title deeds or not. The court stated that Section 48 of the Transfer Property Act does not admit any such exception, and when a person purports to create, any transfer at different times, rights in or over the same immovable property, and such rights cannot exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created. The court further noted that the proviso to Section 48 of the Registration Act enacts that the mortgage by deposit of title deeds shall take effect against any mortgage deed subsequently executed and registered relating to the same property. Thus, a subsequent sale could not have priority over a mortgage by deposit of title deeds created before the sale. The court relied on the Supreme Court's decision in Dahiben vs. Arvindbhai Kalyanji Bhanusali (2020) 7 SCC 366, which held that even if the averment of the plaint is that the entire sale consideration had not been paid, it could not be a ground for cancellation of the registered sale deed. The parties have other remedies in law for recovery of the balance sale consideration but cannot be granted the relief of cancellation of the registered sale deed. The court found no reason to interfere with the findings of the Ld. Presiding Officer in the impugned order and held that the Appellant is not entitled to any stay of the impugned order.

Cases Cited:

Sh. Ishar Dass Malhotra vs. Sh. Dhanwant Singh & Ors. 1983 SCC OnLine Del 284

K.J. Nathan vs. S.V. Maruthi Rao AIR 1965 SC 430

Dahiben vs. Arvindbhai Kalyanji Bhanusali (2020) 7 SCC 366

Sections and Laws Referred:

Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interests Act, 2002 (SARFAESI Act)

Section 13(4) and Section 14 of the SARFAESI Act

Section 48 of the Transfer Property Act

Proviso to Section 48 of the Registration Act

Sections 465 and 468 of the Indian Penal Code (IPC)