

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 223 OF 1989

Jagannath Tatya Bhosale.

...Appellant

versus

1. Bhaskar Vithal Bhosale.
2. Sudhir Vithal Bhosale
Aged : 15 years, Minor Under
Guardianship of Respondent No. 3.
3. Putlabai w/o Vithal Bhosale.
4. Sambhaji Ganpati Salunke.
5. Kashinath Govinda Terkar
6. Vithal Krishan Bhosale.

(Respondent Nos. 1 to 3 Original
Plaintiffs & Respondent Nos. 4 to 6
Original Defendant Nos. 2 to 4)

...Respondents

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Mr. K. K. Kulkarni, Advocate for appellant.

Mr. K. J. Suryawanshi, Advocate for respondent Nos. 1 to 3.

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WITH
SECOND APPEAL NO. 294 OF 1992

Sambhaji Ganpati Salunke,
Died 4-1-2004
his legal heirs as under:

- 1) Subhadrabai Sambhaji Salunke,
Age: 75 years, Occu : Household,
- 2) Shivaji Sambhaji Salunke,
Age: 55 years, Occu : Agril.,
- 3) Shahaji Sambhaji Salunke,
Age: 53 years, Occu : Agril.,

- 4) Narayan Sambhaji Salunke,
Age: 50 years, Occu : Agril.,
- 5) Bhagarathibai Abhiman Kshirsagar,
Age: 48 years, Occu : Household,
- 6) Shardabai Vijaykumar Shete,
Age: 45 years, Occu : Household,

All residing of Gausaud,
Tal & Dist. Osmanabad.

...Appellants

versus

- 1) Bhaskar s/o Vithal Bhosale,
Age: 22 years, Occu : Agriculture,
R/o Gavsud, Tq. Osmanabad.
- 2) Sudhir s/o Vithal Bhosale,
Age: 15 years, Minor Under
Guardianship of mother.
- 3) Putalabai w/o Vithal Bhosale,
Age: 45 years, Occu : Household,
R/o Gavsud, Tq. Osmanabad.
- 4) Vithal s/o Krishna Bhosale,
Age: 55 years, Occu & R/o as above
- 5) Jagannath s/o Tatyia Bhosale,
Age: 45 years, Occu : Agril.
R/o Gavsud, Tq. Osmanabad.
- 6) Kashinath s/o Govind Terkar,
Age: 65 years, Occu : Agril.,
R/o Gavsud, Tq. Osmanabad,
District Osmanabad.
(Abated against respondent No. 6
vide Hon'ble Court's order dated
6.1.93)

...Respondents

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Mr. V. S. Solshe, Advocate h/f Mr. C.G. Solshe, Advocate for appellants.
Mr. S. T. Ghute, Advocate h/f Mr. K. B. Bhise, Advocate for
respondent Nos. 1 to 3.

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CORAM : N.W. SAMBRE, J.

DATE : 11th AUGUST, 2015

JUDGMENT :

. Present second appeals are arising out of the judgment and order dated 13/07/1989 passed by the 2nd Additional District Judge, Osmanabad in Regular Civil Appeal No. 71 of 1982 thereby reversing the judgment and decree passed by the Joint Civil Judge, Junior Division, Osmanabad dated 30/09/1981 in Regular Civil Suit No. 193 of 1977.

2. So far as Second Appeal No. 223 of 1989 is concerned, same is preferred by the original defendant No. 1, whereas Second Appeal No. 294 of 1992 is preferred by original defendant No. 2.

3. Defendant No. 4 claimed to be owner of the property bearing Survey Nos. 6/2, 97/C, Grampanchayat House No. 26 and 3/4th share in Survey No. 5/2 situated at village Gaosud, Taluka Osmanabad.

4. Plaintiff Nos. 1 and 2 are sons of defendant No.4, whereas plaintiff No. 3 was his wife.

5. It is the case of the plaintiffs before the trial Court that, all of them are members of the joint Hindu family and were staying jointly and the properties mentioned herein above are joint family properties. It is further alleged that, defendant No. 4 since had addicted to bad vices and as such, sold 1 Acres 38 Gunthas land from Survey No. 97/C to defendant No. 1 on 17/12/1958.

6. Defendant No. 4 further sold some of the land out of Survey No. 5/2 to defendant No. 2 vide sale deed dated 19/07/1975. It is further alleged that, defendant No. 4 alongwith his brother sold one house to defendant No. 3.

7. It is the case of plaintiffs that as the transactions in question were made without legal necessity and not for the benefit of the members of the joint family, the said sale deeds are not binding on the plaintiffs as at the time of transactions by defendant No. 4, plaintiff Nos. 1 and 2 were minor. The plaintiffs demanded their shares in the suit properties through suit for partition and separate possession of their shares in the suit properties, so also for declaration that the sale deeds referred supra are not binding on them.

8. Defendant No.1 filed his written statement at Exhibit-33, wherein he has stated that plaintiff Nos. 1 and 2 were born when the transaction dated 17/12/1958 took place in his favour. According to him, plaintiff No.1 was born on 01/06/1968. It is further claimed by defendant No.1 that the income received out of sale transaction was spent on maintaining the family, buying bullocks and satisfying the debts, as the income received from agricultural property was not enough to maintain the family.

9. So far as defendant No. 2 is concerned, he filed his written statement at Exhibit-34 and denied the claim of the plaintiffs that defendant No. 4 was addicted to bad vices. According to him, as defendant No. 4 was not able to maintain his family from the income of the land shown in the schedule, same has prompted him to sell the land in question. It is also denied by him that defendant No. 4 was not addicted to gambling and drinking. It is further claimed that sale deed was executed on 22/12/1974 in his favour for consideration of Rs. 3000/-. As such, prayed for dismissal of the suit.

10. The pleadings are restricted to defendant Nos. 1 and 2 as the appeals are at the behest of defendant Nos. 1 and 2.

11. While countering the above referred claim, defendant

No. 4 in his written statement at Exhibit-47 has admitted that the suit properties in question are joint family properties and the income from joint family properties is sufficient to maintain his family. According to him, plaintiff No.1 was born on 17/12/1958, as his date of birth was 31/12/1956 and not on 01/06/1958 as alleged by defendant No. 1. Defendant No. 4 then has gone on record to give admission that he was addicted to bad vices. He has also admitted that the transactions in question were not for legal necessity, as according to him, at the relevant time, there was no loan or Government dues as against him.

12. In the light of rival claims, learned trial Court framed issues at Exhibit-42, which reads thus :

Issues

- (1) Are the Plaintiffs Nos. 1 and 2 the members of Joint family and they are entitled to challenge sale deed dated 17th December 1958?
- (2) Do Plaintiff prove that Defendant No. 4 was addicted to vices as alleged?
- (3) Is the suit barred by limitation?
- (4) Is the suit valued properly for court fees?
- (5) Are Plaintiffs entitled to relief claimed?
- (6) Relief and order?

Findings on the above mentioned issues are as under:

- (1) Yes.
- (2) No.
- (3) Yes.
- (4) Yes.
- (5) Only to S.No. 6/2.
- (6) As per order.

Additional Issues

- (7) Does Defendant No.1 prove that, Plaintiff No.1 was not born at the time of his transaction as alleged in his written statement?
- (8) Do the Defendants prove that the alienation which the Defendant No.4 made in their favour was for legal necessity and therefore binds the Plaintiffs right?
- (9) Does Defendant No. 3 prove that the suit house is the self acquired property of Defendant No. 4?

Findings on the above stated additional issues are as under :

- (7) Yes.

(8) Yes.

(9) No.

13. Learned trial Court having noticed that plaintiff No. 1 was not born on the date of execution of the sale deed and since sale in favour of defendant No. 1 by defendant No. 4 was for legal necessity, as such, granted declaration that the sale deed is binding on the plaintiffs. Learned trial Court answered the issue as regards joint family of the plaintiffs in favour of plaintiffs, however, negated the claim of the plaintiffs that defendant No. 4 was addicted to bad vices. The trial Court also noticed that the suit was barred by limitation and the suit was under valued.

14. Learned trial Court accordingly partly allowed the suit granting share in favour of the plaintiffs from Survey No. 6/2 to the extent of 3/4th share and decreed the suit for partition.

15. In the appeal by present appellants i.e. Regular Civil Appeal No. 71 of 1982, preferred by plaintiffs in the Court of Additional District Judge, Osmanabad, learned lower appellate Court, having regard to the grounds and pleadings raised in the appeal, has framed the points for its consideration and negated the claim of defendant Nos. 1 to 3 as regards, as according to the said findings,

said sale was not for legal necessity and as such, sale deed is not binding on the plaintiffs. Learned lower appellate Court also negated the point of limitation and answered the same in favour of the plaintiffs. According to lower appellate Court, the plaintiffs were entitled to the decree for partition and separate possession, which has prompted lower appellate Court to pass the order on 13/04/1989 which reads thus:

The appeal is allowed.

The judgment and decree passed by the lower court is set aside. The suit of the Plaintiffs-Appellants is decreed with costs against the Defendants. The Plaintiffs are entitled for partition and separate possession of their 3/4th share in the half portion of land Survey No. 6/2, half portion of land Survey No. 97/C, half portion of house bearing Gram Panchayat House No. 26 and 3/4th share in the entire land Survey No. 5/2 of village Gaosud taluka Osmanabad, it is hereby declared that the alienation made by the Defendant No. 4 in favour of the Defendant Nos. 1 to 3 in respect of land Survey No. 97/C, 5/2 and the house bearing Gram Panchayat House No. 26 of the village Gaosud taluka Osmanabad is not binding on the shares of the Plaintiffs in the suit properties.

The Collector Osmanabad is appointed as a Commissioner to effect the partition of suit lands to the extent of their 3/4th share in the half portion of land Survey No. 6/2, half portion of land Survey No. 97/C

and 3/4th share in the entire land Survey No. 5/2 of village Gaosud taluka Osmanabad, as per section 54 of the Code of Civil Procedure. The court Commissioner be appointed in execution for effecting the partition of the suit house to the extent of their 3/4th share in the half portion of Gram Panchayat House No. 26 of village Gaosud taluka Osmanabad. An enquiry be held as per Order XX rule 12(1)(c) of the Code of Civil Procedure.

Decree be drawn accordingly.

16. In view of the judgment of the Additional District Judge, Osmanabad in Regular Civil Appeal No. 71 of 1982, set aside the decree passed by learned trial Court and decreeing the suit of the plaintiffs against the defendants granting entitlement of partition and separate possession to the extent of 3/4th share in the half portion of Survey No. 6/2, half portion in Survey No. 97/C, half portion of Grampanchayat House No. 26, and 3/4th share in the entire land Survey No. 5/2 of village Gaosud, Taluka Osmanabad and by declaration that alienation made by defendant No. 4 in favour of defendant Nos. 1 to 3 in respect of land Survey No. 97/C and 5/2 and Grampanchayat House No. 26 are not binding on the share of plaintiffs. Present appellant Nos. 1 and 2 preferred above referred second appeals respectively.

17. Second Appeal No. 223 of 1989 was finally heard on

23/09/2004 and came to be dismissed by this Court. The fact remains that other two second appeals i.e. Second Appeal Nos. 294 of 1992 and 258 of 1992 were not tagged and heard with the said Second Appeal No. 223 of 1989 though cognate appeals arising out of one and the same judgment should have been heard together. The same has prompted the parties to prefer review which came to be allowed on 01/10/1989 and the judgment of dismissal of Second Appeal No. 223 of 1989 came to be set aside, by an order dated 23/09/2004.

18. The order in review appears to be subject matter of S.L.P. (Civil) No. 32885 of 2009, however said S.L.P. came to be dismissed, as such, the appeals are heard together. It is not in dispute that Second Appeal No. 258 of 1992 was already dismissed for want of prosecution and no steps were taken for restoration of the same, hence present two appeals are heard together and decided by this common judgment.

19. It is informed at bar by the parties to the present appeals that the appeal by defendant No. 3 was dismissed for non prosecution and no steps were taken for its restoration since long.

20. Having heard the learned Counsel for the appellants and

learned Counsel for the respondents, learned Counsel for the appellants would urge that the suit in question initiated by the plaintiffs was collusive suit, as apparent from the fact that the suit was supported by defendant No. 4. According to the appellants, the claim in the suit was hit by the provisions of Limitation Act and both the sisters of the plaintiffs namely Shobha and Mangal were not before the trial Court and the suit should have been dismissed for non joinder of necessary parties.

21. According to the appellants, sale in question was proved to be for legal necessity. The plaintiffs were born after transaction in question. In addition to above, learned Counsel for the appellants would urge that though there was no prayer for enquiry and payment of mesne profits, however, the lower appellate Court, in exercise of its jurisdiction, has proceeded to grant the same and as such, according to him, the appeals are liable to be allowed.

22. While countering the above referred submissions, learned Counsel for the respondents-original plaintiffs and that of defendant No. 4 supported the judgment delivered by the lower appellate Court. According to him, having regard to the fact that the property in question was joint family property and parties were joint in mess, defendant No. 4 for satisfying his own needs of gambling and

drinking, has sold the property, which would established through cogent evidence. According to respondents, sale deeds were rightly held to be not binding on the plaintiffs and decree passed by the lower appellate Court, as according to them, decree was for partition and separate possession, was rightly passed by ignoring the sale deed in favour of original defendants.

23. Having considered the rival contentions of the parties, this Court is required to be looked into question of law as regards whether the sale in question was for legal necessity and whether the suit is barred by limitation?

24. In the present case, the execution of the sale deeds by defendant No. 4 in favour of present appellant vide Exhibits-89, 95 and 79 are not in dispute.

25. Defendant No. 1 in his evidence has brought on record that since defendant No. 4 was in need of money to purchase pair of bullocks for cultivating his field, so also for the payment of loan and as such, defendant No. 4 has decided to dispose of part of the land from Survey No. 79/C. It is required to be noted that the sale deed dated 17/12/1958 executed by defendant No. 4 in favour of the appellant for area of 1 Hector 38 Guntha for which initially

consideration of Rs.300/- was paid on 27/10/1957 when the possession was handed over to the appellant. Similar appears to be case the appellant in another appeal who has purchased the land area of 38 Guntha out of Survey No. 5/2 pursuant to the *Isar pawati* dated 22/11/1974 and sale deed dated 19/04/1975.

26. If the above referred evidence, which is brought on record by the present appellant is analyzed in the background of burden that was on the appellant to prove that the transaction of transfer of property was for legal necessity, it is required to be noted that the said burden was not discharged by present appellant-defendant by adducing enough evidence so as to prove that at the relevant time, defendant No. 4 was in debt incurred because of financial constraints and so as to maintain his family, he was required to sell the property for legal necessity. Perusal of the evidence that was brought on record by the present appellant does not reflect to establish the case as regards dire need of defendant No. 4 at the relevant time to sell the property so as to satisfy the debt.

27. Admittedly, in the present case, the alienation that was made by defendant No. 4 was in the capacity of Karta of joint Hindu family. Such transfer of property of Joint Hindu family may be subjected to legal scrutiny, provided the claim is established in

accordance with law. The evidence of appellant is also silent on the aspect as to the nature of inquiry that was made by them prior to purchase of part of joint Hindu family property. The appellant has not examined single witness so as to establish his case that the property was purchased after due inquiry. It is also not brought on record as regards indebtedness of defendant No.4 which compelled him to sell the property in question to appellant herein.

28. The degree of proof that is required to consider so as to discharge the burden of sale for necessity by the appellant is required to be reasonable and bonafide. In the present case, but for the defence raised to that effect, nothing is elicited in the evidence of the defendant-appellant so as to establish the said case. Merely the recitals in the conveyance, that too vague recitals that amount was required by defendant No. 4 for satisfying his debt cannot be read down and stretch to the extent of benefit of present appellant, so as to infer that the appellant has discharged his burden so as to establish the case of sale for necessity. The claim that sale deed has taken place on 17/12/1958 which was preceded with agreement to sell on 27/12/1957 will be of hardly any assistance to the appellant-defendant, particularly in the background of provisions of Section 54 of the Transfer of Property Act. Under Section 54 of the Transfer of Property Act, the agreement of sale does not create any interest in

the property of the party to the said agreement and ownership in the property transferred by means of deed of conveyance only, since the alienation had taken place on 17/12/1958, the claim of limitation as such also fails.

29. The appellant has relied upon the judgment of the Apex Court in the matter of ***Sunder Das and others vs. Gajananrao and others*** reported in ***AIR 1997 SC 1686***, particularly paragraph-11 of the said judgment, which deals with the alienation of the joint Hindu family property by Karta, however, it is required to be noted that the facts about the said case and present case are altogether different. It is required to be noted herein that the present appellant has failed to discharge the burden of proving that the sale was for necessity.

30. The other contentions as regards sisters have not been joined as party to the suit, in my opinion, does not need any consideration in view of the fact that the claim as is brought against the present appellant is only to the extent of setting aside of sale deed.

31. The said issue was also not raised by the appellant before the Court below. Hence, said contentions are also rejected.

32. In view thereof, the case that is sought to be canvassed by the present appellant that the appellant has discharged his burden to establish the case of sale for legal necessity by defendant No.4 is liable to be rejected as the appellant has utterly failed in establishing the said case.

33. The another submission of learned Counsel for the appellant as regards the suit being barred by limitation is concerned, it is required to be noted that plaintiff No. 1 was born on 01/06/1958 which fact was disputed by the appellant, as according to him, plaintiff No.1 was born on 31/12/1958. The sale in question which is objected is dated 17/12/1958 and as such, before the birth of plaintiff No.1, sale in question was effected. So as to establish the date of birth of plaintiff No.1, the plaintiffs have produced school leaving certificate of plaintiff No.1 so as to demonstrate the correct date of birth and has examined one Mr. Motilal, headmaster of primary school where plaintiff No. 1 took education. The said witness Motilal has produced relevant register in which the name of plaintiff No.1 could be noted at Serial No. 88 wherein the date of birth is mentioned as 01/06/1958 to establish that plaintiff No.1 was born on 01/06/1958 and not on 31/12/1958. It is required to be noted here that the said register is of the school maintained by statutory authority i.e. Zilla Parishad and the plaintiff rather has adduced evidence to

demonstrate his case as regards his date of birth as 31/12/1958. Once the fact about said date of birth of plaintiff No.1 is denied by the appellant herein, he was duty bound to bring on record about correct date of birth. It is noted in the present case that the appellant herein has failed to place on record any evidence so as to substantiate his claim that the date of plaintiff No.1 was 31/12/1958 and not 01/06/1958.

34. Both the Courts below have appreciated the said evidence and have given findings of fact on the said issue.

35. In my opinion, the case as is sought to be canvased by the present appellant so as to submit that the suit was not within limitation is also, in view of above, liable to be rejected.

36. As such, present second appeals, which are devoid of merit, fail, same stand dismissed.

[N.W. SAMBRE, J.]