

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

**SECOND APPEAL NO. 350 OF 2014
WITH
CIVIL APPLICATION NO.2432 OF 2014**

1. Ramchandra s/o Shankar Bagal,
Age: 44 years, Occ: Agri.,
R/o. Pardi (Bk), Tq. Basmath,
Dist. Hingoli.
 2. Ganesh s/o Shankar Bagal,
Age: 42 years, Occ: Agri.,
R/o. Pardi (Bk), Tq. Basmath,
Dist. Hingoli.
 3. Kailas s/o Shankar Bagal,
Age: 40 years, Occ: Agri.,
R/o. Pardi (Bk), Tq. Basmath,
Dist. Hingoli.
 4. Anjanabai w/o Shankar Bagal,
Age: 61 years, Occ: Agri.,
R/o. Pardi (Bk), Tq. Basmath,
Dist. Hingoli.
- ...Appellants

versus

1. Shankar s/o Dhondji Bagal,
Age: 74 years, Occ: Agri.,
R/o. Pardi (Bk), Tq. Basmath,
Dist. Hingoli.
2. Shankar s/o Jairam Ware,
since died through his L.Rs.
- 2/1 Anusayabai w/o Shankar Ware,
Age: 68 years, Occ: Agri.,
R/o. Murumba, Tq. Basmath,
Dist. Hingoli.
- 2/2 Ramrao s/o Shankarrao Ware,
Age: 43 years, Occ: Agri.,
R/o. Murumba, Tq. Basmath,
Dist. Hingoli.
- 2/3 Balaji s/o Shankarrao Ware,

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Age: 38 years, Occ: Agri.,
R/o. Murumba, Tq. Basmath,
Dist. Hingoli.

2/4 Gorakhnath s/o Shankarrao Ware,
Age: 33 years, Occ: Agri.,
R/o. Murumba, Tq. Basmath,
Dist. Hingoli.

2/5 Bharat s/o Shankarrao Ware,
Age: 29 years, Occ: Agri.,
R/o. Murumba, Tq. Basmath,
Dist. Hingoli.

2/6 Radhabai w/o Raosaheb Narwade,
Age: 32 years, Occ: Household,
R/o. Pardi (Kh), Tq. Basmath,
Dist. Hingoli.

2/7 Sunitabai w/o Dadarao Sawandkar,
Age: 38 years, Occ: Household,
R/o. Tembhurni, Tq. Basmath,
Dist. Hingoli.

...Respondents

.....
Mr. V.D. Hon, Senior Counsel I/b Mr. Mahesh P. Kale, Advocate for
appellant.
Mr. P.R. Katneshwarkar, Advocate for respondent Nos. 2/1 to
2/6.

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CORAM : N.W. SAMBRE, J.

Reserved on : 27/02/2015
Pronounced on: 06/05/2015

ORDER :

Heard respective Counsel for the parties.

2. With the consent of the parties, the second appeal is
taken out for final disposal at admission stage.

3. The appeal is by original plaintiffs, who filed Regular Civil Suit No. 65 of 1995 for partition, separate possession of their 4/5th share along with declaration that the sale deed executed by original defendant No. 1 in favour of defendant No. 2 on 29/06/1984 is not binding on the share of the plaintiffs.

4. The plaintiffs-appellants and original defendant No.3 are brothers and sisters and are sons and daughters of original defendant No. 1 Shankar and plaintiff No.4 Anjanabai.

5. The suit property bearing Gat No. 174 admeasuring 2 Hecter 11 Are, out of which, 1 Hecter 25 Are and land Gat No. 268 total admeasuring 2 Hecter 4 Are land, out of which 1 Hecter 2 Are, located at village Pardi, are the subject matter of the litigation. The plaintiffs claimed to be in possession of the said property being the ancestral joint family properties and sought partition thereof.

6. The plaintiffs further claimed that plaintiff No.1 Ramchandra was manager of the joint family property. Their father defendant No.1 Shankar was addicted to bad vices and as such, sold land Gat No. 174 to defendant No. 2 without any legal necessity and without consideration. It is claimed that the father of plaintiffs i.e.

defendant No.1 at the time of sale deed was not manager of the joint family and as such, claimed that the sale deed is not binding on the share of the plaintiffs and sale deed by declared void.

7. In the written statement by defendant No.1 at Exhibit-31, while supporting the case of the plaintiffs, he has narrated that defendant No. 2 purchaser was money lender and as defendant No.1 obtained certain loan from defendant No. 2 by way of security, sale deed in question was executed. The loan amount of Rs.3000/- was obtained and the sale deed of land Gat No. 174 was executed.

8. In the first round of litigation, in Second Appeal No. 658 of 2010, the High Court delivered judgment on 22/11/2010 remanding the matter back to the trial Court to frame the issue of limitation.

9. The said issue was framed in respect of suit and counter claim preferred by defendant No.2, who sought the decree for possession by way of counter claim.

10. The trial Court having framed the issue of limitation, decreed the suit and also partly decreed the counter claim by judgment and decree dated 07/10/2011. The trial Court gave declaration that the plaintiffs have proved that the suit properties are

ancestral joint family properties and are having 4/6th share. It is also held by the trial Court that defendant No. 2 failed to prove that sale was for necessity. The trial Court also held that defendant No. 2 has failed to prove dispossession at the time of Gudipadwa in 1995 with finding that both the suit and counter claim were within limitation.

11. The appeal by original defendant No. 2 vide Regular Civil Appeal No. 21 of 2011 before learned District Judge-1, Vasmatnagar came to be allowed, whereby Regular Civil Suit No. 65 of 1995 was partly decreed granting partition qua 1/6th share each to the plaintiffs in land Gat No. 268, however, reversed the same qua Gat No. 174, the counter claim for possession by defendant No. 2 was decreed. As such, present appeal.

12. Mr. Hon, learned Senior Counsel for the appellant would urge that learned lower appellate Court just because different views on appreciation of evidence are possible, has reversed the decree passed by the trial Court. According to him, though the burden to prove that the sale was for legal necessity, was on defendant No. 2, he has failed to discharge the burden, which onus was wrongly shifted on appellant by learned lower appellate Court, which according to learned Senior Counsel, is an error of law.

13. According to him, wrong appreciation of evidence has resulted into the prejudice to the present appellant and as such, prayed for allowing the appeal.

14. Mr. Katneshwarkar, learned Counsel for respondent Nos. 2/1 to 2/6 would urge that the suit is decreed based on proper appreciation of evidence by the lower appellate Court, which is permissible in accordance with the provisions of Section 96 read with Order 41 Rule 31, 33 of Code of Civil Procedure. According to him, the suit came to be decreed upon appreciation of contents of sale deed at Exhibit-128. In addition to above, learned Counsel for respondents would urge that the evidence of PW-2 and DW-2 was rightly appreciated by learned trial Court. According to him, the appeal is liable to be rejected since sans merit.

15. If this Court examines the contentions raised by the respective parties in the back ground of Sections 96 and 100 of the Code of Civil Procedure, it is required to be noted that the lower appellate Court is armed with the jurisdiction to reverse or affirm the findings by the Court below and while doing so, the first appellate Court is required to be alive of the principle that concluding evidence which was analyzed while arriving at finding by the trial Court must weigh before the appellate Court. While reversing finding of fact, the

lower appellate Court must assign its own reasons for arriving at different findings including independent analysis of the judgment of trial Court.

16. If we analyze the judgment delivered by learned lower appellate Court, it is required to be noted that lower appellate Court framed following points for its consideration and answered the same accordingly.

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|--|----------------------------|
| (1) Does defendant no.2 prove that defendant No.1 executed sale deed of 1 H. 25 R. land in his favour for legal necessity? | ...Yes |
| (2) Does defendant no.1 prove that he executed the sale deed of 1 H. 25R. Land in favour of defendant no.2 by way of security to the land? | ...No |
| (3) Whether defendant no.2 has proved he was put in possession of 1H. 25R. Land out of GAT No. 174 and he was dispossessed at the time of Gudipadwa of 1995? | ...Yes |
| (4) Whether the suit is within limitation? | ...Yes |
| (5) Whether counter claim is within limitation? | ...Yes |
| (6) Whether the plaintiffs are entitled to partition and separate possession in the suit land? What is their share? | ...Yes, only in Gat No.268 |

(7) Whether the defendant no.2 is entitled for the possession of 1H. 25R. Land out of Gat No. 174?

...Yes

(8) What order and decree?

...As per final order.

17. Learned lower appellate Court has analyzed the evidence independently of that of by learned trial Court and noticed that father of plaintiffs was not manager of the joint Hindu family as is claimed by the plaintiffs, is required to be established by appellant from cogent evidence, by showing disqualification under Hindu Law qua said status of defendant No.1. Learned lower appellate Court while re-appreciating the evidence has noted that PW-2 Narayan Dalvi in his cross examination has admitted about the transaction which took place at the house of defendant No.1 i.e. father of plaintiffs. It is also stated by him that at that time, plaintiff No. 1 Ramchandra and plaintiff No. 4 Anjanabai i.e. so called manager and mother of plaintiff Nos. 1 to 3 were personally present. This admission shows that the plaintiffs were having knowledge about sale transaction in question. It is also required to be noted that the sale deed took place in the year 1984 and the suit in question was filed in 1995.

18. From the evidence of PW-2 Narayan, lower appellate Court rightly inferred about intention of the plaintiffs, particularly when

the sale deed in question was agreed to be executed, in their presence.

19. Defendant No. 1-father, while responding to above referred plea of the plaintiffs that the sale deed was without any legal necessity and was without any consideration, lower appellate Court has noticed that defendant No.1 on his own has come out with the case that sale transaction was at the time of sowing season and his financial position was very much critical as one from pair of bull died. According to defendant No.1, he being only earning member was under obligation to maintain the family. Defendant No.1 raised loan through Government and private authorities and was in need of additional amount, he demanded the amount from defendant No.2. Learned lower appellate Court considered the said pleadings in the written statement as an admitted fact about the sale of legal necessity. Though case was sought to be canvassed about status of defendant No. 2 as money lender, however, in absence of pleadings thereof, said issue was rightly overlooked by lower appellate Court. Lower appellate Court also noticed that PW-2 Narayan was friend of plaintiff No.1 and observed that defendant No.1 has come out with the case of sale for legal necessity and as such, burden cannot be shifted on defendant No. 2. In my opinion, the learned lower appellate Court was right in arriving at said view.

20. Learned lower appellate Court analyzed on the evidence of Shankar, who is son of defendant No. 2 as defendant No. 2 expired during pendency of the suit.

21. Defendnt No.1 Shankar in his cross examination voluntarily stated that 70 Are land out of Gat No. 247 was sold by him to Rangrao Narwade vide sale deed dated 31/03/1999. So far as the sale deed is concerned, the plaintiffs have not taken out any action questioning the said sale deed though it was also by defendant No.1. As such, the intention of plaintiffs-appellants of filing of the suit only against defendant No.2 demonstrate about the bonafides of plaintiffs.

22. The evidence of Shankar, son of defendant No. 2 and other witness Hanumant Kadam-nephew of defendant No. 2 was taken in to account by lower appellate Court for reaching to a conclusion that defendant No. 2 was in cultivating possession, to which the said witness Hanumant was party and deposed that in 1995 Gudipadwa, the plaintiffs have dispossessed them. The said evidence was analyzed by lower appellate Court for giving the finding as regards dispossession.

23. The issue of limitation is also looked into and was

answered rightly in favour of both the parties.

24. In my opinion, the view taken by lower appellate Court is just and proper, particularly having regard to the principle which is discussed supra.

25. In my opinion, no substantial question of law is involved in the present second appeal. As such, the appeal fails, stands dismissed.

26. Consequently, the civil application stands disposed of.

[N.W. SAMBRE, J.]