

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 344 OF 2003

1. Narayandas s/o. Devidas Vaishnav,
Age 37 years, Occu. Labourer,
R/o. Vaijapur, Tal. Vaijapur,
Dist. Aurangabad.

2. Haridas s/o. Devidas Vaishnav,
Age 35 years, Occu. Labourer,
R/o. Vaijapur, Tal. Vaijapur,
Dist. Aurangabad.

**....Appellants.
(Ori. Plffs.)**

Versus

1. Devidas s/o. Kashidas Vaishnav,
Age 66 years, Occu. Labourer,
R/o. Vaijapur, Tal. Vaijapur,
Dist. Aurangabad.
(Abated as per Court's Order
dated 12/4/2007)

2. Kesarbai w/o. Devidas Vaishnav,
Age 61 years, Occu. Labourer,
R/o. Vaijapur, Tal. Vaijapur,
Dist. Aurangabad.
(Abated as per Court's Order
dated 12/4/2007)

3. Arjunsing s/o. Laxmansing Rajput,
Age 51 years, Occu. Agril.,
R/o. Pardeshi Galli, Vaijapur,
Dist. Aurangabad.
(Deleted as per Court's Order
dated 12/4/2007)

4. Chandrabhagabai w/o. Karbhari Dangare,
(Died through L.Rs.)

4-a) Bhausahab s/o. Karbhari Pandit,
Age 45 years, Occu. Agri.,

- 4-b) Bhaginath s/o. Karbhari Pandit,
Age 42 years, Occu. Agri.,
- 4-c) Babasaheb s/o. Karbhari Pandit,
Age 40 years, Occu. Agri.,
- 4-d) Appasaheb s/o. Karbhari Pandit,
Age 38 years, Occu. Agri.,
- Both R/o. Aghol, Tq. Vaijapur,
Dist. Aurangabad.
- 4-e) Kashabai w/o. Dashrath Dhangar,
Age 35 years, Occu. Household,
R/o. Hanumantgaon, Tq. Vaijapur,
Dist. Aurangabad.
- 4-f) Asarabai w/o. Laxmanrao Dhanger,
Age 35 years, Occu. Household,
R/o. Bivgaon, Tq. Vaijapur,
Dist. Aurangabad.
- 4-g) Kadu Karbhari Pandit,
Age 40 years, Occu. Service,
R/o. New Hanuman Nagar,
Galli No. 6, N-4, Aurangabad.
5. Balwanta s/o. Khandu Avhale,
Age 56 years, Occu. Agril.,
R/o. Aghoor, Tal. Vaijapur.
6. Shantilal s/o. Sonudas Vaishnav,
Age 51 years, Occu. Agril.,
R/o. Aghoor, Tal. Vaijapur.
(Deleted as per Court's order
dated 12/4/2007)

....Respondents.
(Ori. Defts.)

Mr. P.R. Katneshwarkar, Advocate for appellants.

Mr. D.R. Irale-Patil, Advocate for respondent Nos.4a to 4F & 4g.

CORAM : T.V. NALAWADE, J.
DATED : 26th October, 2015.

JUDGMENT :

1) The appeal is filed to challenge the judgment and decree of Regular Civil Appeal Nos. 145/1992 and 152/1992, which were pending in the Court of District Judge, Aurangabad. The appeals filed by purchasers, defendants against judgment and decree of Regular Civil Suit No. 28/1984, which was pending in the Court of Civil Judge, Junior Division, Vaijapur, are allowed by the first appellate Court. The suit was filed by present appellants Shri. Narayandas and Shri. Hardas for relief of partition and separate possession in respect of some portion of land Gat No. 134 situated at village Aghur, Tahsil Vaijapur. The trial Court had held that the sale deeds executed in favour of defendant No. 3 (subsequent purchaser, defendant No. 4) and defendant No. 5 are null and void and they are not binding on the share of plaintiffs. Similar finding was given in respect of portion purchased by defendant No. 6. Defendant No. 6 did not challenge the decision and it is only defendant Nos. 4 and 5, who challenged the decision of the trial Court. Both the sides are heard.

2) Plaintiffs are real brothers *interse* and they are sons of defendant No. 1 - Devidas and defendant No. 2 - Kesarbai. It is the case of plaintiffs that Gat No. 137, admeasuring 35 Acres, is

ancestral property of plaintiffs and defendant Nos. 1 and 2. It is contended that property was standing in the name of Kashidas, father of defendant No. 1 and during his lifetime, this land was partitioned amongst Kashidas, defendant No. 1 and Girdhardas, a brother of defendant No. 1. It is contended that in the partition, defendant No. 1 got 12 Acres of land, Girdhardas got 12 Acres of land and Kashidas kept with himself the portion of 4 Acres 28 Gunta land. It is contended that after the death of Kashidas, his wife Godhabai is in possession of that portion. Godhabai was not made party to the suit and the suit was filed only as against defendant No. 1 by contending that they are entitled to have share in the property, which had come to Devidas, defendant No.1 in the aforesaid partition.

3) It is the case of plaintiffs that defendant No. 1 is addicted to liquor and he is also womanizer. It is contended that defendant No. 1 is very lazy person and he never worked to earn for livelihood. It is their case that defendant No. 1 had kept one lady and he was living with said lady continuously for about 15 years. It is contended that the said lady was even using the name of defendant No. 1 as her husband. It is contended that defendant No. 1 had habit of gambling also.

4) It is the case of plaintiffs that when there was no legal necessity to dispose of any portion of the property, which had come to the share of defendant No. 1, for satisfaction of aforesaid bad habits, defendant No. 1 obtained loan and then he sold the property to defendant Nos. 3 to 6. They contended that there was no legal necessity. They also contended that the transactions made in favour of defendant Nos. 3 to 6 were sham and bogus transactions. It is the case of plaintiffs that each of them has right to get 1/4th share in the portion of 12 Acres, which was allotted to the share of defendant No. 1. They had claimed the relief of partition and separate possession as per this case.

5) Defendant No. 1 did not appear in the matter and exparte order was made against him. Defendant No. 2, mother of plaintiffs, filed written statement to support them.

6) Defendant No. 4 admitted the relationship of plaintiffs with defendant No. 1, but he denied the aforesaid contentions made against defendant No. 1 and other defendants. He contended that he purchased 5 Acre portion of the land from Gat No. 137 for valuable consideration of Rs. 5000/- from defendant No. 3 and defendant No. 3 had purchased

this land from defendant No. 1 and his father. It is contended that this portion was sold for legal necessity to defendant No. 3. It is contended that the transaction took place 20 years back and plaintiffs have shown false age to bring the suit within limitation.

7) Defendant No. 5 filed written statement and he also contended that defendant No. 1 was in need of money like performing marriage of his daughter and so, he sold 5 Acres portion to defendant No. 5 under sale deed dated 9.10.1970 for valuable consideration of Rs. 2900/-. He also made similar contentions with regard to the age of plaintiffs and also contended that suit is not within limitation. The case of the plaintiffs of partition is also disputed by these defendants.

8) As defendant No. 6 did not challenge the decision of the trial Court, there is no need to mention and discuss the pleading of defendant No. 6 and the evidence given by defendant No. 6.

9) On the basis of aforesaid pleadings, issues were framed by the trial Court. The trial Court decided the suit against defendant Nos. 4 and 5 by holding that legal necessity was not proved. Importance was given to the evidence of one lady also,

who was allegedly living with defendant No. 1 for some time as his keep.

10) The first appellate Court held that in view of the provisions of sections 6 to 9 of Limitation Act and Article 109 of Limitation Act, the suit is not within limitation. It is held that the suit ought to have been filed within three years from the date of attaining majority of plaintiff No. 1, who had crossed the age of 21 years. It is further held that as plaintiff No. 2 had joined with plaintiff No. 1 in the action, he is not entitled to claim the benefit of disability and the time needs to be counted as against both together. The first appellate Court has also held that there is sufficient material on record to show that the property purchased by defendant No. 4 was sold to defendant No. 3 in the year 1969 and this transaction was made by father of defendant No. 1 and so, the contention of the plaintiffs that there was no legal necessity for defendant No. 1 and he spent the amount for the satisfaction of his bad vices cannot be accepted. The first appellate Court further held that defendant No. 1 and his father were expected to spend on the marriages of the daughters of defendant No. 1 and so, the family was benefitted due to the sales and that evidence is sufficient to prove that the sale was made for legal necessity. It is further held that the witness

examined by the plaintiffs had no personal knowledge and so, there is virtually nothing in rebuttal to the evidence given by defendant Nos. 4 and 5 in that regard. The first appellate Court considered the recitals of second sale deed made in favour of defendant No. 5 by defendant No. 1 and considered the circumstance that in the year 1970, the marriages were to be performed of two daughters and so, there was legal necessity in respect of this transaction also. The first appellate Court has held that there is possibility that there is collusion between plaintiffs and defendant No. 1 as defendant No. 1 remained away from the Court.

11) The appeal was admitted by this Court on following substantial questions of law.

(i) Whether the First Appellate Court on the pleadings and material brought on record was right in holding that the impugned sale deeds dated 14.11.1969 and 9.10.1970 are for legal necessity and as such binding on the plaintiff ?

(ii) Whether the First Appellate Court rightly held on the material on record that the suit was barred by limitation ?

12) The first sale deed was executed by father of defendant No. 1, Kashidas. There are no allegations as against Kashidas, though in the sale deed, it is mentioned that the portion which was being sold, was given to the share of defendant No. 1. There is no convincing evidence that the specific portion was given to the share of defendant No. 1 and partition was effected prior to the date of said transaction. Defendant No. 1 has signed on this document as consenting party. It can be said that the transaction was made by father of defendant No. 1 and he had collected the consideration. Both the plaintiffs have no personal knowledge about this transaction and that can be seen from the pleadings also.

13) The second sale deed was executed in the year 1970 by defendant No. 1. The necessity for selling the property is mentioned in the document itself which is already quoted. The first appellate Court has considered the evidence given by the plaintiffs, defendants and their witnesses and the finding is given that there were marriages of two daughters in the family like Girjabai and Tarabai. The first appellate Court is the last fact finding Court and in view of the nature of evidence given by the plaintiffs, who have no personal knowledge, this Court holds that it is not possible to interfere in the findings given by the first

appellate Court on this point.

14) On the point of limitation, in view of the wordings of section 7 of Limitation Act, this Court holds that it is not possible to interfere in the decision of the first appellate Court. The provision of section 7 of the Limitation Act runs as under :-

"7. Disability of one of several persons.—Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Explanation I.— This section applies to a discharge from every kind of liability, including a liability in respect of any immovable property.

Explanation II.— For the purposes of this section, the manager of a Hindu undivided family governed by the Mitakshara law shall be deemed to be capable of giving a discharge without the concurrence of the other members of the family only if he is in management of the joint family property."

It was necessary for the plaintiffs to show that plaintiff No.1 had not completed the age of 21 years on the date of suit when in the title of the suit, plaintiff No. 1 had given his age as 21 years. There was period of limitation of 3 years for challenging the transaction in view of the provision of section 6 and 8 of Limitation Act. Thus, there is no error in the decision of the first

appellate Court on this point also.

15) It can be said that there was virtually collusion between plaintiffs and defendant No. 1. Surprisingly, the lady who was allegedly keep of defendant No. 1, gave evidence in favour of plaintiffs. However, she contended in cross examination that defendant No. 1 had not spent anything on her. Thus, there was no convincing evidence to prove that defendant No. 1 spent his money on bad habits and he was womanizer. If defendant No.1 was not making sufficient income from the agriculture, then it was necessary for the plaintiffs to show that as to how and who were spending on them and as to how they were brought up. No such evidence is given and so, it is clear that plaintiffs were benefitted due to the transactions in question. In the result, both the points are answered against appellants/plaintiffs and appeal stands dismissed.

[T.V. NALAWADE, J.]

ssc/