

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
(Civil Appellate Jurisdiction)**

SECOND APPEAL NO. 91 of 1993

- 1] Sanjay Babu Kadam
2] Sou. Subhadra Babu @ Shankar
Kadam
(Org.Pl'tff. Nos. 1 and 2) .. **APPELLANTS**

.. **Versus** ..

- 1] Shri Babasaheb Balu Kadale
(deleted). (Org.Deft No.1)
2] Sou. Shakuntalabai Vasantrao Gavali
(Org. Deft No.2) .. **RESPONDENTS**

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Mr. T.S.Ingale, Advocate, for appellants.
None for Respondents

**CORAM : R.K.Deshpande, J.
DATED : 18th JUNE, 2015.**

ORAL JUDGMENT

- 1] The trial Court passed a decree on 11.04.1984 in Regular Civil Suit No. 264 of 1979 for partition and separate possession. The trial Court recorded a categorical finding that the House Property No. 11 which has already been sold by the defendant No.1 to defendant No. 15 be allotted to the share of

the defendant No.1 at the time of the partition. The plaintiff and the defendants both preferred two separate appeals i.e. Regular Civil Appeal No. 266 of 1984 was preferred by the plaintiffs, whereas Regular Civil Appeal No. 289 of 1984 was preferred by the defendant No. 1. The lower appellate Court dismissed the Regular Civil Appeal No. 266 of 1984 filed by the plaintiffs. The Regular Civil Appeal No. 289 of 1984 filed by the defendant no.1 was partly allowed by deleting the house property at Sr. No. 11 from the partition and separate possession. This decision of the lower appellate Court delivered on 13.05.1991 is the subject matter of challenge in this second appeal by the original plaintiffs.

2] On 11.03.1993, this Court admitted the second appeal without framing any substantial question of law. On 06.04.2015, this Court (Shri R.G.Ketkar, J.) noted that second appeal was admitted without formulating the substantial question of law and hence passed an order that the appeal will have to be heard for admission so as to find out whether any substantial question of law is involved in the matter or not?. Accordingly, the matter is listed before this Court for final hearing without any substantial question of law being framed.

3] The dispute raised in the present second appeal pertains only to house property No.11 which was included in the partition by the trial Court and was excluded from partition by the lower appellate Court. The trial Court held that this property was sold by the defendant No.1 to defendant No.15 without any legal necessity. The appellate Court has reversed this finding and it is held that the legal necessity for sale of the property was established and the plaintiffs had no personal knowledge about the absence of such legal necessity because they were not living with the defendant no.1 when the property was sold. The appellate Court has further held that in the suit for partition, there was no relief claimed for declaration that the sale effected by the defendant No.1 to defendant No. 15 on 27.04.1979 in respect of House Property No.11 and hence, no decree for partition could be passed in respect of this property. The decree for partition granted by the trial Court in respect of the other properties has been maintained in appeal.

4] It is the contention of the learned counsel for the appellant that the question as to whether such a declaration has to be claimed or not, depends upon the facts and circumstances of each case. He submits that in a suit for

partition of a joint family property, it is not necessary to claim such a declaration regarding the sale of the property being not binding upon the plaintiffs. The learned counsel has further challenged the findings recorded by the lower appellate Court holding that the defendant no.1 has established that the sale on 27.04.1979 was for legal necessity.

5] It is not disputed that the sale deed dated 27.04.1979 has not been admitted in evidence and it has not been proved. The defendant no.1 who has sold the property to defendant no. 15 has expired. The defendant no.15 is in possession of the property and she is the respondent no. 2 in this second appeal. Neither before the trial Court, nor before the lower appellate Court, the defendant no.15 has appeared or contested the claim and she was proceeded ex parte before the trial Court on 14.12.1979. The defendant No. 15 who is the respondent no. 2 in this second appeal has also not appeared before this Court. It appears that since no relief was claimed against the defendant no. 15 in the suit, she did not appear throughout the proceedings. In the absence of any relief of declaration that sale deed dated 27.04.1979 executed by the defendant No.1 in favour of the defendant no. 15 is not binding upon the plaintiffs, no substantial question of law arises in the

second appeal. The second appeal is dismissed.

(R.K.Deshpande, J.)

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Rvjalit/P.A.