

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

Second Appeal No.22 of 1994

(Bhavik Narayan Khobragade and others v. Smt. Umraabee Shaikh Ibrahim Qureshi and others)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

Shri Apurv De, Advocate for Appellants.

Shri S.Z. Qazi, Advocate for Respondent Nos.1 to 6, 7(a to c)
and 8.

Coram : R.K. Deshpande, J.

Dated : 24th February, 2015

In Regular Civil Suit No.278 of 1979 for partition and separate possession, the Trial Court passed a decree on 8-12-1982 granting a declaration “that the plaintiff No.1 has got 1/3rd share in the suit land, plaintiff Nos.2, 3 and 4 each have got 1/12th share therein, plaintiff Nos.5 and 6 each have got 5/36th share therein, plaintiff No.7 and defendant No.5 each have got 1/36th share therein, and defendant No.4 has got 1/12th share”. The Commissioner was directed to be appointed to effect partition and to place them in separate possession of their respective shares. In Regular Civil Appeal No.18 of 1983, the Appellate Court has reversed the decree passed by the Trial Court by its judgment and order dated 27-9-1993 and dismissed the suit after setting aside the decision of the Trial Court. Hence, this second appeal by the original plaintiffs.

Both the Courts below have concurrently held that the suit property is an ancestral property. This finding has attained the finality. However, that by itself is not enough to pass a decree for partition and separate possession because of certain

intervening events. The suit property was sold by the defendant No.4 Ramchandra Narayan Khobragade to one Dwarkaprasad Gupta by a registered sale-deed executed in the year 1967. In the year 1975, the said Dwarkaprasad Gupta sold the property to the defendant Nos.2 and 3, viz. Shakuntala wd/o Jagoba Khobragade and Jairam Konduji Poyam. On 21-8-1979, the suit property was further sold to the defendant No.1 Shaikh Ibrahim Qureshi. The present suit was filed on 5-10-1979. In spite of having knowledge of all these transactions, there is no relief claimed in the suit for declaration that the sale of suit property in the years 1967, 1975 and 1979 is not binding upon the plaintiffs. Dwarakaprasad Gupta, who was the purchaser of the suit property from the defendant No.4 Ramchandra Narayan Khobragade, was not joined as the party-defendant in the suit. The defendant No.4 filed his written statement accepting the claim of the plaintiffs that the suit property was not sold for legal necessity. In view of this, the burden of proof to establish legal necessity was upon Dwarakaprasad Gupta, the first purchaser of the suit property from the defendant No.4 Ramchandra Narayan Khobragade. In view of this, for non-joinder of Dwarakaprasad Gupta as the party-defendant in the suit, no decree could be passed for partition and separate possession. The Appellate Court might have committed an error in holding that the burden of proof was on the plaintiffs to establish legal necessity for sale of the suit property in the year 1967 to Dwarakaprasad Gupta. But that by itself would not be enough to cure the material defect of non-joinder of necessary party and failure to claim the relief of declaration that the sale-deeds are not binding upon the plaintiff does not give rise to the substantial questions of law as are framed.

The second appeal is dismissed. No costs.

Judge.