

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

SECOND APPEAL NO.479/2003
WITH CIVIL APPLICATION NO.4756/2003
IN SECOND APPEAL NO.479/2003

1. Abdul Kadar s/o Ab.Samad
Since deceased, through Legal
Heirs:

1-A. Tahera Kadar Pathan
Age 50 years, Occu: Household
& Agriculture, R/o Nandar,
Tal.Paithan, Dist.
Aurangabad.

1-B. Riyaz s/o Kadar Pathan
Age 26 years, Occu: Labour
R/o As above.

1-C. Uhhaz s/o Kadar Pathan
Age 22 years, Occu: Labour
R/o As above.

1-D. Saddam s/o Kadar Pathan
Age 15 years, Minor,
Under guardianship of
Appellant No.1-A.
R/o As above.

1-E. Sajeda d/o Kadar Pathan (W/o
Akhtar Shaikh,
Age 28 years, Occu: Household
R/o Pimpalwada, Tal. Paithan
District: Aurangabad.

1-F. Samayya d/o Kadar Pathan
Age 20 years, Occu:
Household
R/o Nandar Tq. Paithan
District Jalgaon.

1-G. Sumera d/o Abdul Samad
Age 16 years, Minor

Under guardianship of
Applicant No.1-A,
R/o Nandar Tq. Paithan
District Jalgaon.

2. Abdul Faiyaz s/o Abdul Samad, ... **Appellants**
Age 35 years, Occu: (Orig.Defts.2&3)
Agriculture, R/o Nandar,
Tal.Paithan, Dist.
Aurangabad.

VERSUS

1. Sachin s/o Savta Sonawane
Age 7 years, Occu: Education
Under Guardian ship of
Plaintiff No.4 mother
R/o Nandar, Taluka Paithan,
Dist. Aurangabad.
2. Surekha d/o Savta Sonawane
Age 6 years,
Under Guardian ship of
Plaintiff No.4 mother
R/o Nandar, Taluka Paithan,
Dist. Aurangabad.
3. Saroj d/o Savta Sonawane
Age 2 years,
Under Guardian ship of
Plaintiff No.4 mother
R/o Nandar, Taluka Paithan,
Dist. Aurangabad.
4. Sau. Ranjanabai w/o Savta
Sonawane
Age 30 years, Occu: Agri.
R/o Nandar, Taluka Paithan,
Dist. Aurangabad.
5. Savta s/o Bhaurao Sonawane
Age 35 years, Occu: Agri.
R/o Nandar, Taluka Paithan,
Dist. Aurangabad.

6. Malaksingh @ Maniksing s/o
Hiralal Pardeshi
Since deceased through Legal
Heirs.

6-A Prabhabei Malaksingh @
Maniksing Pardeshi
Age 52 years, Occu: Household
R/o Pardeshipura, Paithan,
Taluka Paithan,
Dist. Aurangabad.

6-B Charan Malaksingh @ Maniksing ... **Respondents**
Pardeshi
Age 30 years, Occu: Labour
R/o Pardeshipura, Paithan,
Taluka Paithan,
Dist. Aurangabad.

Mr. Anand P. Bhandari, Advocates for Appellants
Mr. S G Chapalgaonkar, Advocate for Respondents :

WITH

SECOND APPEAL NO. 648 OF 2003
WITH CIVIL APPLICATION NO.7361/2003
IN SECOND APPEAL NO.648/2003

Malaksingh @ Maniksing s/o
Hiralal Pardeshi
Since deceased through Legal
Heirs.

1) Prabhabei Malaksingh @
Maniksing Pardeshi
Age 53 years, Occu: Household
R/o Pardeshipura, Paithan,
Taluka Paithan,
Dist. Aurangabad.

2) Charan Malaksingh @ Maniksing ... **Appellants**
Pardeshi
Age 30 years, Occu: Labour
R/o Pardeshipura, Paithan,
Taluka Paithan,
Dist. Aurangabad.

VERSUS

1. Sachin s/o Savta Sonawane
Age 16 years, Occu: Education
Under Guardian ship of
Plaintiff No.4 mother
R/o Nandar, Taluka Paithan,
Dist. Aurangabad.
2. Surekha d/o Savta Sonawane
Age 15 years,
Under Guardian ship of
Plaintiff No.4 mother
R/o Nandar, Taluka Paithan,
Dist. Aurangabad.
3. Saroj d/o Savta Sonawane
Age 11 years,
Under Guardian ship of
Plaintiff No.4 mother
R/o Nandar, Taluka Paithan,
Dist. Aurangabad.
4. Sau. Ranjanabai w/o Savta
Sonawane
Age 39 years, Occu: Agri.
R/o Nandar, Taluka Paithan,
Dist. Aurangabad.
5. Savta s/o Bhaurao Sonawane
Age 44 years, Occu: Agri.
R/o Nandar, Taluka Paithan,
Dist. Aurangabad.
6. Abdul s/o Abdul Samad
Age 49 years, Occu: Agri.
R/o Nandar, Taluka Paithan,
Dist. Aurangabad.
(deleted as per order
dt.30.8.13 in CA No.9695/13)
7. Abdul Faiyaj s/o Abdul Samad, ... **Respondents**
Age 44 years, Occu: Agri.
R/o Nandar, Taluka Paithan,
Dist. Aurangabad.

Mr. N. K. Kakade & Mr. A. N. Kakade, Advocates for the appellants.

Mr. S G Chapalgaonkar, Advocate for Respondents 1 to 5

CORAM : T. V. NALAWADE, J

DATE : 15th April, 2016

J U D G M E N T:

1. Heard. Admit. Notice after admission made returnable forthwith. Heard both sides in both the appeals for final disposal.

2. Regular Civil Suit No. 148/1995 which was pending in the Court of Civil Judge, Junior Division, Paithan was filed by Sachin Sonawane, his two sisters and his mother Ranjanabai for the relief of partition and separate possession of their shares in the ancestral property. Sachin and his two sisters were minor and their mother Ranjanabai had filed the suit as next friend, as natural guardian of her issues. Defendant No.1 is father of plaintiff Nos.1 to 3. Defendant Nos. 2 to 4 are purchasers of some portion of the suit property.

3. It is the case of plaintiffs that Gat No. 377/2 admeasuring 8 Acres and 3 Gunthas which is known as Mathyacha Wavar, situated at village Nandar, Taluka Paithan, District Aurangabad is ancestral and a joint

family property of plaintiffs and defendant No.1. It is the case of the plaintiffs that defendant No.1 is addicted to bad vices and when there was no legal necessity, defendant No.1 sold 60 R portion to defendant No.2 and 61 R portion to defendant No.3 from the suit property and the amount was used for satisfying the bad vices by defendant No.1. It was contended that defendant No.1 was attempting to dispose of the remaining property also and so the suit was required to be filed. The plaintiffs had claimed their 2/3rd share in the suit property by partition. During pendency of the suit, some portion was sold by defendant No.1 to defendant No.4 and so defendant no.4 was added in the suit.

4. Defendant Nos. 2 and 3, purchasers prior to the date of the suit, filed written statement and contested the matter. They contended that they purchased the portion shown in the plaint under registered sale deeds about 6/7 years prior to the date of suit from defendant No.1. They contended that the property was standing in the name of defendant No.1 and they are *bonafide* purchasers. They contended that they have developed the portion purchased and they have even taken loan for digging well in the said portion. They

had prayed for dismissal of the suit.

5. Defendant No.4 also filed written statement and contested the matter. He contended that he has purchased 40 R portion from defendant No.1 and that portion was sold for legal necessity by defendant No.1. He contended that he was not aware of the pendency of the suit and even of the status quo order made by the court in the suit.

6. On the basis of aforesaid pleadings, issues were framed by the trial court. Both sides gave evidence. Plaintiff No.4 Ranjana gave evidence and she placed reliance on the revenue record. She examined mother of defendant no.1 to show that defendant No.1 is addicted to bad vices and there was no legal necessity for sale of the aforesaid property.

7. Defendants 2 and 3 examined witnesses like Bhausahab Shelke and Kadar. Defendant No.4 Maniksing Pardeshi also gave evidence. One Baban Shinde was examined by defendant No. 4 to prove execution of the sale deed. The plaintiffs have not disputed the execution of sale deeds and so there is no need to discuss the evidence given by some witnesses examined by the defendants. There were following issues:

- 1) Whether the suit property is ancestral property of plaintiffs and defendant No.1 ?
- 2) Whether the plaintiffs have share in the suit property ?
- 3) Whether defendant Nos. 2 and 3 prove that they are *bonafide* purchasers for value without notice ?
- 4) Whether defendant No.4 proves that defendant No.1 had sold the portion to him for legal necessity and he is *bonafide* purchasers for valuable consideration without notice ?

8. All the aforesaid issues were answered in favour of the plaintiffs but the suit was dismissed by holding that Section 8 of the Hindu Minority and Guardianship Act, 1956 comes in the way of issues of defendant No.1 and they cannot challenge the alienation made by defendant No.1 during their minority.

9. The first appellate court has set aside the aforesaid decision of the trial court on the basis of the observations made by the Apex Court in the case reported in **AIR 1958 Supreme Court 1091 (Kokka Mannu Vs. Kakumanu Akkamma and another)**. The first appellate court has held that even minor coparcener has right to challenge such transaction. It is clear that the trial court had committed error in holding that section 8 of

the Hindu Minority and Guardianship Act comes in the way of minors to challenge the transactions. The purpose behind section 8 of the said Act is totally different.

10. Against the decision of the trial court, only the plaintiffs filed appeal. The record shows that the defendants purchasers did not challenge the finding given against them by the trial court.

11. The learned counsel for the appellants placed reliance on the following reported cases:

- 1) 1999 (1) Bom. C.R. 508(Supreme Court), K. Muthuswami Gounder Vs. N. Palaniappa Gondur
- 2) (1970) 3 SCC 722, Smt. Rani and another Vs. Smt. Sant Bala Debnath and others.
- 3) (2007) 10 SCC 296, Gannmani Anasuya and others Vs. Parvatini Amarendra Choudhary and others
- 4) AIR 1954 Bom 386, Shivaji Ganpati Muthal and others Vs. Murlidhar Daji Muthal and others,
- 5) 1994 (2) Bom. C.R.161, Narayan Laxman Gilankar Vs. Udaykumar Kashinath kaushik and others.

Relying on the above cases, the learned counsel submitted that in appeal also this court can consider the issues again in view of provisions of Order 41

Rule 33 and Section 100 of the Civil Procedure Code.

12. On the interpretation of Section 8 of the Hindu Minority and Guardianship Act, 1956 and Section 29 of Guardian and Wards Act, 1890, these cases are not in support of the contention made by the appellants/defendants. It cannot be disputed that there is power with natural guardian to alienate undivided interest of minors of Joint Hindu Family and for that purpose, section 6 and 8 of the Hindu Minority and Guardianship Act cannot be used against the natural guardian. However, the fact remains that alienation when made by father *karata*, it needs to be for legal necessity. If the legal necessity is not proved, then such transaction cannot bind undivided interest of minors.

13. This Court has carefully gone through the evidence given in the trial court and also the rival pleadings. There was no specific pleading of defendant Nos. 2 and 3 about the legal necessity and pleading of defendant No.4 was very vague. Though in the contents of sale deed, there is mention that for satisfying family needs and for payment of loan, transactions were made, no such evidence is given. It was the duty of the purchaser to ascertain

that there was such loan taken for needs of family by defendant No.1. There is no whisper about any inquiry made by the purchasers. On the other hand there is substantive evidence of mother of defendant No.1 to the effect that defendant No.1 is addicted to bad vices and only to satisfy the bad vices, he sold the properties. The circumstance that even when there was order of status quo and the suit was pending, some more portion was sold by defendant No.1 to defendant No.4 itself shows that defendant No.1 was ready to do anything to satisfy the bad vices. The findings given on these point are on the question of facts and they are concurrent and there is no convincing material to show that there was legal necessity. This court holds that it is not possible to interfere in the findings given on this point by the courts below.

14. Second Appeal No. 479/2003 is filed by original defendant Nos. 2 and 3 who had purchased the property from defendant No.1 before filing of the suit. Second Appeal No. 648/2003 is filed by defendant No.4, the person who purchased some portion during pendency of the suit and even when there was order of status quo. As the courts below have come to the conclusion that there was no legal necessity, the transactions made by

defendant No.1 only to the extent of his share could have been protected to protect the interest of defendant Nos. 2 to 4. Considering the area which comes to the share of defendant No.1 during partition which is $1/3^{\text{rd}}$ portion, it can be said that to some extent the transactions made in favour of defendant Nos. 2 and 3 could have been protected but there was no possibility of protecting transaction made in favour of defendant No.4. In spite of all these circumstances, the first appellate court has directed that portion of the field sold to defendant Nos. 2, 3 and 4 be allotted to defendant No.1. Practically, such partition is not possible as the portion sold to the defendants 2 to 4 is more than the share of defendant No.1. Even from the possession of defendant Nos. 2 and 3, some portion will have to be taken back for giving it to the share of plaintiff as they have $2/3^{\text{rd}}$ share. The first appellate court did not grant equitable partition and the order is made to protect the property sold to defendant Nos. 2 to 4. This decision is not challenged by the original plaintiffs by filing appeal or by filing cross objection. In view of this circumstances, this court holds that the both the appeals needs to be decided on following substantial

questions of law:

- 1) Whether it was proper on the part of the first appellate court to set aside the judgment and decree of the trial court in view of the established position of law ?
- 2) Whether it was proper on the first appellate court to protect the interest of purchasers, defendant Nos. 2 to 4 when the portion sold to them exceeds the share which can be given to defendant No.1 ?

15. This Court has considered the relevant material and the provisions of the two special Acts. The trial court has committed grave error in holding that in view of provisions of Section 8 of the Hindu Minority and Guardianship Act, the suit could not have been filed. So, to that extent, the first appellate court has not committed any error. However, the District Court/first appellate court has committed error in protecting the interest of purchasers when the property sold to them exceeds the share of defendant No.1. So, the first point is answered in the affirmative and second point is answered in the negative and following order is made:

O R D E R

- (1) Second Appeal No.479/2003 is partly allowed.
- (2) Judgment and decree of the first appellate court delivered in Regular Civil Appeal No. 348 of 1999 is modified as under:
- i. The interests of the appellants/ original defendant Nos. 2 and 3 are protected to the extent of share to which defendant no.1 is entitled and land purchased only to that extent is allowed to be kept with defendants 2 and 3. During execution, the remaining area as mentioned above can be taken back for giving it to the plaintiffs.
 - ii. Decree given in favour of defendant No.4 to the effect that the sale deed made in his favour is to be protected and the land allotted to the share of defendant no.1 is to be given to him is hereby set aside.
- (3) Decree be prepared accordingly.
- (4) Second Appeal No. 648/2003 is dismissed.
- (5) Civil applications also stand disposed of.

(**T. V. NALAWADE, J.**)

JPC