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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 252 OF 2016
WITH
CIVIL APPLICATION NO.4028 OF 2015

Balaji Jalindar Gore
Age-27 years, Occ – Agriculture
R/o Hinglajwadi,
Taluka and District - Osmanabad

APPELLANT

VERSUS

1. Suresh Vasant Zakane,
Age – 63 years, Occ – Agriculture
2. Jalindar Maruti Gore,
Age – 76 years, Occ – Nil
3. Tanibai w/o Jalindar Gore,
Age – 71 years, Occ – Household
4. Ashabai Rajendra Shinde,
Age – 38 years, Occ -

RESPONDENTS

Respondents No.1 to 4 R/o Hinglajwadi,
Taluka and District – Osmanabad

5. Mangalbai Hanumant Padole,
Age – 38 years, Occ – Household
R/o Sarola (B)
Taluka and District – Osmanabad
6. Kewal Rajendra Machale,
Age – 33 years, Occ – Household
R/o Bhanasgaon, Taluka – Barsi,
District – Solapur
7. Janabai Chandrakant More,
Age – 31 years, Occ – Household
R/o Tandulwadi, Taluka – Barshi,
District – Solapur

8. Kasturbai Jalindar Gore,
Age – 67 years, Occ – Household
R/o Hinglajwadi,
Taluka and District – Osmanabad
9. Lata Shivaji Gadekar,
Age – 45 years, Occ – Agriculture & Household
R/o Hinglajwadi,
Taluka and District – Osmanabad
10. Chandrabhagabai Bhairu Gore
Age – 52 years, Occ – Agriculture & Household
R/o Hinglajwadi,
Taluka and District - Osmanabad

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Mr. V. D. Salunke, Advocate for the appellant

Mr. P. R. Katneshwarkar h/f Mr. V. S. Undre, Advocate for
Respondents No.1, 9 and 10

Mr. S. A. Wakure, Advocate for respondents No.4 to 8

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 30th AUGUST, 2016

ORAL JUDGMENT :

1. Heard learned advocates for the appearing parties finally with consent.
2. Facts not in dispute are that – Defendant No.1 is the purchaser of the suit property from defendant No.2. Defendant No.2 is father of the plaintiff, defendant No.3 Tanibai is first wife of defendant No.2. Defendants No.4 to 7 are sisters of the

plaintiff. Defendant No.8 – Kasturbai is second wife of defendant No.2 and mother of plaintiff. Defendants No.9 and 10 are the subsequent purchasers of the suit property from defendant No.1.

3. Plaintiff in Regular Civil Suit No.15 of 2008 filed in the court of Civil Judge, Senior Division, Osmanabad is son of defendant No.2 from second marriage, during subsistence of first marriage and that both the wives of defendant No.2 are alive. It is also not in dispute that from the first marriage, defendant No.2 had not begotten any issue. Marriages of two daughters, begotten from second marriage, were performed in the year 1994. Defendant No.1 is son of sister of first wife of defendant No.2 i.e. nephew of Tanibai-defendant No.3. Registered sale deed had been executed in favour of said nephew of defendant No.3 by defendant No.2 on 27th June, 1994 for a consideration of Rs.33,000/- in respect of land measuring about 1 hectare 42 *Are*. It further transpires that the registered sale deed had not been placed on record before the court since being admitted on either side. The plaintiff is born in 1989 and the suit has been instituted in 2008.

4. The plaintiff had been to the court seeking cancellation of aforesaid sale deed in favour of defendant No.1 – nephew of

defendant No.3 – Tanibai contending that defendant No.2 – Jalindar, father of the plaintiff had been addicted to bad vices and had executed the sale deed in favour of defendant No.1 without any legal necessity. The property being ancestral, the plaintiff claimed right to the same and sought cancellation of the sale deed. The plaintiff further claimed that at the time of alienation of suit property, market price of the suit land had been around Rs.1,50,000/- per acre, whereas a piece of land of 1 hectare 42 Are is shown to have been sold for a paltry sum of Rs.33,000/-.

5. Save defendant No.1, none of the defendants had put in appearance after summons were served in the suit.

6. Mr. Salunke, learned advocate appearing for original plaintiff – present appellant contends that the two courts have missed out on vital considerations, which should have largely influenced decision making in the suit, particularly that it cannot be said that defendant No.1 has been able to prove that there subsisted legal necessity while the suit land is purportedly sold to defendant No.1.

7. According to learned advocate, perusal of the sale deed would show that as a matter of fact no consideration had been

paid at the time of execution of the sale deed, save and except the averments that till execution, entire consideration has been parted with from time to time. Nor it has come on record as to exactly when the two daughters, Ashabai and Mangalbai got married. In the circumstances, requirement for alienation of the property to be sustained in law, of subsistence of legal necessity cannot be said to have been proved in the present matter.

8. He, coupled with aforesaid, submits that while it is the contention of the plaintiff that the suit land would fetch Rs.1,50,000/- per acre, consideration been paid of only Rs.33,000/- having not been denied and further that it could not have been ignored that on quite a few occasions, there had been police cases against defendant No.2 on account of consumption of liquor, all these aspects have been ignored while judgments have been rendered by both the courts below.

9. Mr. Salunke further purports to submit that in view of section 16 of the Hindu Marriage Act, even an illegitimate child can stake claim to the father's property and this being admittedly, an ancestral property and no other person than the father having the stake in the property, the plaintiff could lay claim to the suit property. Learned advocate further submits that

no issue in this respect had been framed.

10. Countering aforesaid submissions, Mr. Katneshwarkar, learned advocate appearing for respondent – defendant No.1 contends that admittedly, the suit land is ancestral property of defendant No.2 and that he has dealt with the same. He contends that factually speaking, the property had been dealt with by defendant No.2 for marriages of two daughters, who have been begotten from second marriage with defendant No.8. Marriage of said two daughters have taken place in 1994, is not a disputed fact.

11. Apart from aforesaid, he submits that even if it comes to that the plaintiff has any share in the property, the property to his share has been retained and stands in his name. This submission, of course, is being made as an alternative submission, that in case it is considered that the plaintiff has any right to ancestral property of father. He submits that no evidence of whatsoever nature has been placed on record to show that the property carried the price as is being claimed by the plaintiff. Save and except oral statement there is nothing on record, which would lend credence to that the price of land was Rs.1,50,000/- per acre at the relevant time. He purports to point

out that the sale deed contains recitals for alienation being for legal necessity of the marriages performed of two daughters. He submits that apart from above, as far as bad habits of defendant No.2 are concerned, nothing has been placed on record save and except statement by the plaintiff. Neither the so called complaints with the police have been placed on record nor any evidence in respect of the same is coming forth. He as such, urges for dismissal of the second appeal.

12. It appears that the trial court has given elaborate reasoning finding that despite opportunity to examine witnesses, the plaintiff has failed to examine any witness to show that no amount was paid for consideration of the sale deed. As far as marriages of two sisters of the plaintiff are concerned, it is not denied that those have taken place in 1994. However, no contemporaneous evidence has been placed on record to show that as to when the marriages of two sisters had been solemnized. Further, from the evidence the trial court has considered that the ancestral land holding of the father of plaintiff had not been having any irrigation source and had been a dry land and agriculture was the only source of income for the family. Failure of the plaintiff to produce evidence in support of his contention that a canal of Terna dam flows from suit land has

also been noted by the trial court. The trial court has also taken note of that after 1990, sale deeds are registered as per market value determined by the government and the instrument has been allowed to be registered. Further, there is contemporaneous evidence that sale deed has been acted upon and possession had been transferred. The trial court has also noted that sale deed contains recitals regarding necessity for which the property was being parted with. The trial court with reference to a judgment in the case of "*Sundar Das and Others V/s Gajanan and Others*" reported in 1997 SAR (Civil) SC 765 has considered that alienation by father in case of legal necessity can be sustained. Thus, the trial court dismissed the suit under its order dated 3rd August, 2010.

13. Regular Civil Appeal No.235 of 2010 carried from the decision of the trial court has also been dismissed by District Judge-2, Osmanabad under its judgment dated 4th November, 2015 showing agreement with the observations based on the evidence made by the trial court. Perusal of the decision by the appellate court shows that it has been considered that the plaintiff is begotten to defendant No.2 from his second wife and the same having not been shown to have taken place before 1956, the marriage could not be legal. The appellate court, with

reference to section 16 of the Hindu Marriage Act, has referred to that the property being ancestral and defendant No.2-father being alive, the plaintiff would not be able to stake claim to the suit property. The appellate court has referred to that performance of marriages of two sisters from second marriage are contemporaneous with the sale deed and that the sale deed refers receipt of consideration from time to time. The appellate court has also, apart from the reasons as are appearing in the judgment of the trial court, observed that contemporaneous nature of transaction of the sale deed and interpretation being placed by the plaintiff after attaining majority is not reliable, having regard to age of the plaintiff at the time of the transaction.

14. Mr. Salunke, learned advocate contends that the very property which has been sold under the sale deed of 1994 is now being sold at a hefty price of Rs.8,28,000/- in 2016, during pendency of the second appeal, gives an indication of that the price which allegedly paid in 1994 is far too low and almost negligible which tantamounts to low consideration for the sale of landed property.

15. Although this being contended to be so, two fact finding

courts on appreciation of evidence having concurrently found that the property having been sold for the contemporaneous legal necessity as is depicted in the face of undisputed position that the two marriages had taken place in 1994 itself and the family had no other source of income other than agricultural land and that the lands being not irrigated lands, the appreciation placed by the two courts in such a situation may not be said to be perverse, since it is a finding of fact based on appreciation of evidence by the two courts.

16. Aforesaid apart, having regard to admitted position that the plaintiff is a son begotten from second marriage during subsistence of first marriage and the father being alive, dealing with the property by the father who is Hindu by religion hardly be amenable to challenge by the plaintiff. In the face of factual and legal situation, non framing of issue does not appear to have caused any prejudice to the plaintiff's claimed and / or alleged right. Questions of fact having been decided on the basis of evidence as have come on record, decisions by the courts below about that the sale deed being not hollow, void and bogus and the sale deed being for legal necessity, cannot be faulted with. Apart from aforesaid, it emerges that the instrument / document sought to be cancelled, itself is not before the court and further

that the relief of cancellation does not appear to be accompanied the relief of declaration and even cancellation is not sought properly. As such, the second appeal does not appear to give rise to any substantial question of law and the same stands dismissed.

17. In view of dismissal of the second appeal, the civil application No.4028 of 2016 does not survive and stands disposed of.

[SUNIL P. DESHMUKH, J.]

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