

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

SECOND APPEAL NO. 296 OF 2007

1. Suresh Baburao Chaudhari
Age : 57 years, occup. Agril.,
R/o Jalod, Tq. Amalner,
Dist. Jalgaon
 2. Shrikurshna Devchand Chaudhari
Age:75 years, occup.retired teacher
R/o Jalod, Tq. Amalner,
Dist. Jalgaon.
- .. Appellants/
Orig.Defendants

versus

1. Sindhubai w/o Suresh Chaudhari,
(since deceased)
 2. Pravin Suresh Chaudhari,
Age: 23 years, occup. Education,
R/o Dharangaon, Tq. Erandol,
Dist. Jalgaon
 3. Maya Suresh Chaudhari,
Age: 19 years, occup. Education,
R/o Dharangaon, Tq. Erandol,
Dist. Jalgaon
 4. Sandip Suresh Chaudhari,
Age : 18 years, occup. Education,
R/o Dharangaon, Tq. Erandol,
Dist. Jalgaon
- .. Respondents/
Orig. Plaintiffs

Ms. Nima R. Suryawanshi, Advocate h/f Mr. N. L. Choudhary,
Advocate for appellants

Mr. B. S. Deshmukh, Advocate for respondents no. 2 to 4

CORAM : SUNIL P. DESHMUKH, J.
DATE : 24th August, 2016

ORAL JUDGMENT :

1. Heard learned counsel for the parties.
2. The questions which have been framed while admitting the second appeal on 16-06-2008 are :-

" (i) Whether in the facts and circumstances of the present case, the minor plaintiffs could challenge the sale transaction entered into between their father and the appellant No. 2 during their minority and whether as a father, the appellant no. 1 (original defendant No.1) had a special power to alienate the suit property ?

(ii) Whether the first appellate Court committed patent error while reaching conclusion that the sale transaction was not binding on the rights of the plaintiffs since it was without legal necessity and that the recitals of the sale deed in this behalf are overlooked by the first appellate Court ? "

3. This is defendants' second appeal, aggrieved by reversal of judgment and decree dated 26-08-1997 of the court of first instance [Civil Judge, Senior Division, Amalner], dismissing special civil suit no. 19 of 1995 filed by respondents, at the first appellate stage in civil appeal no. 46

of 2001 on 10-01-2007, by the court of second instance [Adhoc District Judge-I, Amalner] [Parties hereinafter are referred to by their original status in suit proceedings.]

4. Plaintiffs had instituted aforesaid special civil suit no. 19 of 1995 for declaration, partition and possession of the suit property, *inter alia*, that sale deed dated 22-02-1995 executed by defendant no. 1 in favour of defendant no. 2 is null and void and for partition and separate possession of 4/5th share each in suit property in gut no. 641/1, ad-measuring 1 hectare, 64 aar situated at village Jalod, taluka Amalner, district Jalgaon.

5. Undisputed position appears to be that aforesaid property had fallen to the branch of defendant no. 1 in the partition that had taken place among defendant no. 1 and other co-parceners in the ancestral property. Defendant No.1 under sale deed dated 22-02-1995 purportedly sold the entire aforesaid property for a consideration of Rs.88,000/- in favour of defendant no. 2 who happens to be defendant no. 1's real uncle leaving nothing for the plaintiffs who were then minors. It appears that there is no dispute about that marital relationship between defendant no. 1 and plaintiff no.1-the

mother of other plaintiffs had been strained. The suit had been filed on 06-03-1995.

6. Learned counsel for defendants Ms. Nima Suryawanshi vehemently contends that the sale could not have been subject-matter of challenge at the instance of plaintiffs no. 2 to 4 during their minority and as such the suit itself could not have been maintained by plaintiff no. 1 at the instance of plaintiffs no. 2 to 4. As such, dismissal of the suit by the court of first instance was legal and proper and the appellate court has committed error in reversing said decision. She contends, while the sale deed depicts that the same has been executed for legal necessity and further the defence of defendant no. 1 also discloses that since there was some loan of co-operative society and other recoveries against defendant no. 1, the property had been sold, yet the appellate court has erroneously observed that the sale could not be said to have been for legal necessity in order to bind the plaintiffs by said sale transaction. According to her, the appellate court has committed an error in unsettling dismissal of the suit, observing that during pendency of the suit proceedings, plaintiffs no. 2 to 4 had attained majority and had continued with the litigation and in the circumstances, removing the

deficiency as had been considered by trial judge to have occurred. She purports to submit that being hindu father, defendant no. 1 was enjoying special powers and progeny cannot question exercise of such powers.

7. The learned counsel for the appellants-defendants purports to refer to and rely on a decision of learned single judge of this court in the case of *Narayan Laxman Gilankar vs. Udaykumar Kashinath kaushik and others*, reported in 1994 (2) Bom. C. R. 161, in order to buttress her submission that the minor's property could be dealt with by natural guardian in case the property was not divided by metes and bounds and minor had undivided unspecified share in the same. In said case, it appears, a construction had been placed on the provision contained in section 8 of the Guardian and Wards Act, 1890 observing that unless the immovable property of minor is a defined property and not fluctuating indefinite interest in the joint family property, section 8 would not apply. It has been further considered that the challenge can be posed only upon attaining majority upon consideration that any action or result during minority can on certain grounds be again challenged by a minor on attaining majority as person bonafide entering into transaction cannot be subjected to endless litigation and

further that many a time transactions are challenged with the blessings and inspiration of the natural guardian with a view to derive advantage arising out of several situations including fluctuations in the market price. It is in that view of the matter, it was considered that the transaction could not have been challenged on behalf of then minor.

8. In the cited case, the vendee had purchased the property in the year 1962 and the challenge to the same was posed in 1968. The proceedings also appear to have been protracted from 1968 to 1993.

9. It does not appear that the case cited may be able to hold the present matter, having regard to distinction on facts in the case on hand and the one relied on.

10. In the present case it ought to be taken into account that the suit has been filed almost immediately if not forthwith as can be gathered from the date of execution of sale deed i.e. 22-2-1995 and 6-3-1995-the date of institution of suit.

11. The factual situation in the present matter is quite different in the sense that it is the uncle who purports to

purchase the property from his nephew, keeping absolutely aside all the persons in the family and keeping nothing for them.

12. For a moment, assuming that aforesaid case applies to the present matter, yet whether one can overlook that the father of plaintiffs no. 2 to 4 though purportedly shown in the sale deed that the property had been sold for legal necessity, could establish the same, for, such a contention has not been supported by any material at all particularly when save and except statements appearing in the recital of the sale deed and the defence taken against the suit, no iota of evidence had been adduced at any stage of the suit. Thus, even going by uncodedified old Hindu law, father could not have dealt with property in the absence of legal necessity. It emerges on record that there is absolutely no necessity proved, legal or otherwise. As a matter of fact, it is contended that certain loans of society were raised and those amounts were to be repaid but the same have been found to be substance-less at both the stages, trial as well as appellate. In the circumstances, special power of the father whether could be involved in present matter is also a question required to be considered and given answer to. A father, by

virtue of his position and fiduciary relations, may have power to deal with the property but exercise of such power cannot be against the interest of his own progeny. If the property is dealt with for benefit of the estate or legal necessity, may be father could have been said to have enjoyed special right. Special right would not mean that it can be exercised at the whims and fancies of the father. In the present matter, it clearly emerges that the wife and the children were to be completely deprived of their legitimate right by defendant no.1 and they were to be exposed to face harsh realities of life leaving them without any share in the property. Under the circumstances, it cannot be said to be a special power to have been exercised by the father. Right not having been exercised in such a capacity cannot be legitimately claimed and sustained. It is not, in fact, a legal right. The position has been changed with the change in the Hindu law.

13. In the present case, it is not in dispute that the property is ancestral property and as such the children by birth, including now a daughter, have a right by birth. The present matter as such cannot be simply looked at from an academic interest and answer will lie in facts, circumstances, and revelations in evidence to the questions as have been

framed by the court,as referred to above.

14. According to uncodified hindu law, a sale of joint hindu family property by *karta*/manager has to be either for legal necessity or for benefit of estate and a purchaser is bound to enquire into the necessity for sale. Burden lies on purchaser to prove either there was a legal necessity in fact, or that he made proper and bonafide enquiry into legal necessity for sale so as to bind minors of the joint hindu family by such sale. Power to sell joint hindu family property, as such, is limited.

15. In the present matter, it clearly emerges that the purchaser happens to be close relative – real uncle of father of plaintiffs no. 1 and 2 – defendant no.1.

16. It will have to be considered that under the legal position as would obtain, it is for the purchaser to show that he made reasonable enquiry about subsistence of legal necessity and has to satisfy himself about the same. Such a burden of purchaser does not appear to have been discharged in the present matter by the purchaser. The purchaser being the uncle of father of plaintiffs no.1 and 2, a fortiori such a burden ought to have been discharged and in the present matter the purchaser has failed in the same. In the

circumstances, the sale deed to the extent of plaintiffs' share is rendered fundamentally deficient and as such is untenable and would not bind the shares of the plaintiff.

17. Here is a case wherein the family members (plaintiffs) of defendant no.1 were being brutally dealt with and in spite of property being available to them, they were sought to be bereaved and grief-stricken by denying the same to them and in the circumstances, the matter cannot be dealt with technically overlooking the basic intendment underlying the enforcement of enactment of Hindu Minority and Guardianship Act, 1956 which is a social legislation in order to secure interest of the weaker section of the society. An option has been given to minor to exercise his right to render a transaction void and ineffective which is voidable. In the present matter though the proceedings have been instituted while plaintiffs no. 2 to 4 were minor, they have continued with the same after attaining majority and had not resiled from the same, giving a complete depiction of that the institution of the proceedings had been for their benefit and interest and that they have opted to go on with the same. After such option appears to have been exercised by their conduct, it cannot be said to be a deficiency on that ground or

for that matter suit should fail. On the date while the plaintiffs attained majority, the proceedings were pending. The objection being raised on this count as such is inconsequential.

18. Under the suit transaction, plaintiffs were absolutely deprived of their share in the ancestral property as far as plaintiffs no. 2 to 4 are concerned when they have share in the same by birth and such a transaction had been intended to defraud their legitimate right in the same in a vindictive rage and it appears that defendant no. 2 was to get some advantage and benefit. Since sale hit the plaintiffs hard and drastically and consideration amount received is more than as depicted in the deed of sale and the plaintiffs were not even offered their legitimate share in the proceeds, the plaintiffs had been left with no option but to proceed against defendants questioning the sale deed and seek partition and possession.

19. In view of aforesaid, it will have to be considered that in the facts and circumstances of the present case, the plaintiffs who had challenged the sale transaction between their father-defendant no. 1 and uncle-defendant no. 2 which had taken

place during their minority and their father could not have exercised special power to alienate the property. It will therefore have to be considered that the appellate court has committed no error while reaching the conclusion that said transaction had not been binding on the rights of the plaintiffs since it was without legal necessity and in the face of evidence discussed by the first appellate court it cannot be said that the recital in the sale deed had been overlooked by the first appellate court. Substantial questions thus framed stand answered accordingly.

20. The second appeal, under the circumstances, is dismissed.

SUNIL P. DESHMUKH,
JUDGE

pnd