

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

SECOND APPEAL NO.84 OF 2003

Along with

SECOND APPEAL NO.137 OF 2003

SECOND APPEAL NO.84 OF 2002

1. Pawan @ Vishal s/o Rameshchandra
Runwal (Jain),
Aged about 25 years,
Occupation – Cultivator.
2. Ku. Sweta d/o Rameshchandra
Runwal (Jain),
Aged about 23 years,
Student.
3. Ku. Basanti d/o Rameshchandra
Runwal (Jain),
Aged about 21 years,
Student.
4. Sau. Chandrakanta w/o Rameshchandra
Runwal (Jain),
Aged about 45 years,
Occupation – Household Work.

All R/o Budhwara Chowk,
Nandgaon Khandeshwar,
Tq. Nandgaon Khandeshwar,
Distt. Amravati.

... Appellants
Ori. Plaintiffs

Versus

1. Diwakarrao s/o Ramrao Bhoyar,
Aged about 54 years,
Occupation – Cultivator,
R/o Shelu Natwa,
Tq. Nandgaon Khandeshwar,
Distt. Amravati.
2. Rameshchandra Rajmalji Runwal (Jain),
Aged about 51 years,
Occupation – Cultivator & Business,
R/o Budhwara Chowk,
Nandgaon Khandeshwar,
Distt. Amravati.

...Respondents
Ori. Defendants

Shri M.G. Bhangde, Senior Advocate, assisted by Shri Sourabh Tapadia, Advocate for Appellants.

Shri A.G. Gharote, Advocate for Respondent No.1.

Along with

SECOND APPEAL NO.137 OF 2003

Rameshchandrajji s/o Rajmalji
Runwal (Jain),
Aged about 50 years,
Occupation – Cultivator and business,
R/o Budhwara Chowk,
Nandgaon Khandeshwar,
Tq. Nandgaon Khandeshwar,
Dist. Amravati.

... Appellant/
Ori. Deft. No.2

Versus

1. Diwakarrao s/o Ramrao Bhoyar,
Aged about 53 years,
Occupation – Cultivator,
R/o Shelu Natwa, Tq. Nandgaon
Khandeshwar, Dist. Amravati.
2. Pawan alias Vishal s/o Rameshchandrajji
Runwal (Jain),
Aged 24 years,
Occupation – Cultivator.
3. Ku. Sweta d/o Rameshchandrajji
Runwal (Jain),
Aged 22 years,
Occupation – Student.
4. Ku. Basanti d/o Rameshchandrajji
Runwal (Jain),

Aged 20 years,
Occupation – Student.

5. Sou. Chandrakanta w/o
Rameshchandraji Runwal (Jain),
Aged 44 years,
Occupation – Household.

Nos.2 to 5, residents of Budhwara
Chowk, Nandgaon Khandeshwar,
Tq. Nandgaon Khandeshwar,
Dist. Amravati.

... Respondents
Respondent
No.1-Ori.Deft.
No.1, and
Respondent
Nos.2 to 5-
Ori.Plaintiffs.

Shri S.R. Deshpande, Advocate for Appellant.

Shri A.G. Gharote, Advocate for Respondent No.1.

Shri M.G. Bhangde, Senior Advocate, assisted by Shri Sourabh
Tapadia, Advocate for Respondent Nos.2 to 5.

CORAM : R.K. DESHPANDE, J.

DATE : 26TH OCTOBER, 2016

ORAL JUDGMENT :

Second Appeal No.84 of 2003 :

1. The dispute in this appeal pertains to 1.08 HR of land out of Survey No.11, situated at Mouza Mundnishankrao, Taluka Nandgaon Khandeshwar, District Amravati, which was sold by the defendant No.2 to the defendant No.1 for a total consideration of Rs.1,25,000/- by executing the registered sale-deed dated 7-4-1994. In Regular Civil Suit No.42 of 1997, the Trial Court passed a decree for partition and separate possession in respect of the suit property on 21-8-1999, and it is held that the plaintiffs are entitled to 4/5th share in the suit property. Regular Civil Appeal No.189 of 1999 preferred by the defendant No.1 has been allowed by the lower Appellate Court on 28-1-2003 by setting aside the decree passed by the Trial Court and dismissing the suit filed by the plaintiffs. Hence, the plaintiffs are before this Court in this second appeal.

2. The brief facts of the case are as under :

The suit property was undisputedly an ancestral property in the hands of the defendant No.2-Rameshchandji Rajmalji Runwal, who sold it to the defendant No.1-Diwakarrao Ramrao Bhoyar by executing the registered sale-deed dated 7-4-1994. Regular Civil Suit No.42 of 1997 was filed by the son Pawan, the daughters Kumari Shweta and Kumari Basanti, and the wife Sou. Chandrakanta of the defendant No.2 on 31-10-1995 for a decree of possession of the suit property from the defendant No.1 for the reasons stated in para 6 of the plaint. In the alternative, a relief of partition and separate possession was claimed for the reasons stated in para 7 of the plaint. In para 6 of the plaint, the averments were that the sale-deed dated 7-4-1994 is illegal, as it was hit by Section 8 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. The averments in para 7 of the plaint were that in terms of the amendment to Hindu Succession Act, 1956, brought into force on 22-6-1994, all the plaintiffs become owners of 4/5th share in the suit property, and hence they are entitled to a

decree for partition and separate possession.

3. The reading of the plaint as a whole also disclose the claim of the plaintiff No.1 is that being the son of the defendant No.2, born on 15-2-1979, he acquired interest in the suit property, which was coparcenary property in the hands of the defendant No.2. The plaintiff Nos.2 and 3 being the daughters of the defendant No.2, born on 4-2-1981 and 16-2-1983 respectively, acquired the interest in the suit property by virtue of Section 29-A of the Hindu Succession Act on 12-6-1994. The defendant No.2, the father of the plaintiff Nos.1 to 3, for his personal need of money, executed nominal sale-deed dated 7-4-1994 in respect of the suit property, which was by way of security for the loan transaction and the possession was also delivered to the defendant No.1. According to the plaintiffs, the sale-deed was bogus, nominal, illegal and unauthorized and it was not for the benefit of the family. It is further the case of the plaintiffs that even if the

sale-deed is found to be legal and valid, it will operate only to the extent of $1/5^{\text{th}}$ share of the defendant No.2 and shall not bind the plaintiffs and hence the suit for partition and separate possession in respect of $4/5^{\text{th}}$ share of the suit property was filed.

4. None of the plaintiffs entered the witness-box, but examined only one witness, viz. Suresh Jain, the real brother of the defendant No.2, on the aspect of legal necessity. The defendant No.2, the father of the plaintiffs, filed the written statement, supporting the case of the plaintiffs, but he did not enter the witness-box. The defendant No.1, who is the purchaser of the property, has opposed the claim of the plaintiffs by filing the written statement and taking the stand that it was an out-sale for valuable consideration. The defendant No.1 entered the witness-box and examined three witnesses in support of his case that the sale by the defendant No.2 was for legal necessity.

5. The Trial Court records the finding that the plaintiffs have proved their right and interest in the suit property on the date of execution of the registered sale-deed and that the said transaction was effected without their knowledge and consent. It holds that the plaintiff No.4, the wife of the defendant No.2, got the knowledge of the suit transaction after execution of the sale-deed, when she received the notice dated 16-8-1994 from the Talathi and Revenue Inspector in respect of mutation. It further holds that the plaintiffs have established their 1/5th share in the suit property and the defendant No.1 has failed to establish that the sale was for legal necessity. The Trial Court passes a decree for partition and separate possession.

6. The lower Appellate Court records the finding that the plaintiffs have failed to prove that the suit transaction was a money lending transaction and the sale-deed in question was nominal, executed by the defendant No.2 in favour of the defendant No.1. It

further holds that the plaintiffs have failed to plead and establish that the transaction was not for legal necessity and, therefore, it was not binding upon them. It holds that the Trial Court could not have even touched the aspect of legal necessity. It further holds that the defendant No.1 has brought evidence to prove legal necessity, which has to be accepted as proof. It also holds that the plaintiffs have failed to establish that they are entitled to possession of the suit property or in the alternative for a decree of partition and separate possession.

7. On 9-9-2005, this second appeal was admitted on the substantial questions of law raised in ground Nos.2 and 3 of the memo of appeal, which are reproduced below :

“2. Whether the Lower Appellate Court is right in holding that in a suit for setting aside alienation filed by members of joint family who are not parties to the said alienation, the plaintiffs are required to plead want of legal necessity and in

absence of such pleading the point of legal necessity is inconsequential?

3. *Whether the Lower Appellate Court is right in not holding that it was absolutely necessary on the part of the defendant No.1 to plead legal necessity for the transaction in question?"*

8. After hearing the learned counsels appearing for the parties, this Court passed an order on 6-10-2016 framing another substantial question of law, which is reproduced below :

“ After hearing the learned Senior Advocate Shri M.G. Bhangde, assisted by Shri Sourabh Tapadia, for appellant, the following additional substantial question of law arises in the present matter.

Whether the findings recorded by the lower appellate Court are based upon conjectures and surmises and in ignorance of the findings recorded by the trial Court upon

appreciation of evidence of each of the witnesses examined?

Put up on Monday, 10.10.2016 as part heard.”

9. On 19-10-2016, the learned counsels appearing for the parties were heard at length and were granted time to address this Court on the question whether the sale for want of legal necessity is void or voidable, and also on the question whether the suit without the relief of declaration in case of voidable sale would be maintainable for possession of the suit property. On 24-10-2016, this Court passed an order as under :

“ On 19-10-2016, this Court asked the learned counsels for the parties to address this Court on the question whether the sale for want of legal necessity is void or voidable. They are heard on this aspect of the matter. They are also heard on the question whether the suit without the relief of declaration in case of voidable sale would be maintainable for possession of

the suit property.

Put up this matter again on 26-10-2016, so as to enable the learned counsels for the parties to advance further arguments and cite case laws, if any.”

Accordingly, the parties are heard on all these aforesaid questions.

10. Though the prayer of the plaintiffs was for a decree of possession of the entire suit property from the defendant No.1 on the ground mentioned in para 6 of the plaint that the sale-deed dated 7-4-1994 was legal, as it was hit by Section 8 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, neither the Trial Court did frame any issue or rendered any finding on it, nor the lower Appellate Court has applied its mind to this aspect of the matter. Even if any such issue was required to be framed, the Civil

Court had no jurisdiction to record any finding on such issue in view of the bar created under Section 36A(1) of the said Act and the matter was required to be referred for decision by the competent authority under the said Act. In the absence of any such finding, the plaintiffs are not entitled to a declaration of the sale-deed in question being void on that ground and consequently for possession of the entire suit property. In such event, the question of passing a decree in such suit for partition and separate possession also did not arise.

11. Though the case of the plaintiff was also that the sale-deed in question was a nominal transaction for security of the loan advanced to the defendant No.2, the Trial Court neither did frame any issue on this aspect of the matter nor recorded any finding. Obviously, the burden of proof in respect of such an issue was upon the plaintiffs. The plaintiffs did not enter the witness-box nor examined any witness on this issue. The lower Appellate Court records the finding that the

plaintiffs have failed to establish such a plea. Neither the learned Senior Advocate has pointed out any evidence on record to establish such case, nor I could notice any such evidence available on record. Hence, no fault can be found with such finding recorded by the lower Appellate Court. Even if such a plea was established, the plaintiffs would have been entitled to a decree for possession of the entire suit property, and the decree for partition and separate possession passed by the Trial Court cannot be maintained.

12. The Trial Court records a finding that the burden of proof to establish a plea of legal necessity was upon the defendant No.1, who has failed to discharge it. The lower Appellate Court holds that it was for the plaintiffs to have pleaded and established that the sale in question was not for legal necessity and, therefore, it was not binding upon them and thus the Trial Court has committed an error in touching the aspect of legal necessity. Normally, such a view would be contrary

to well-settled principle of law that the party is neither expected to plead or prove a negative plea that the transaction was not for legal necessity and the burden of proof lies upon the purchaser to prove such fact to save the transaction in his favour. However, in the facts and circumstances of this case, the question of perversity of the findings of the lower Appellate Court will have to be dealt with.

13. Shri Bhangde, the learned Senior Advocate appearing for the appellant-plaintiffs, concedes to the position that if the sale is to be treated as voidable, a declaration to that effect is required to be necessarily asked for in the plaint. He, however, relies upon the finding recorded by the Trial Court that the defendant No.1 has failed to establish that the sale was for legal necessity. It is his submission that the transaction of sale without legal necessity by a Karta of the joint family shall have the same effect of making the transaction void as in the case of the alienation of the ancestral property by a Karta

without legal necessity. He takes support of the Division bench decision of this Court in the case of *Patilbua Pandu Landge v. Sadashiv Vithoba Kamble and others*, reported in 1976 *Mh.L.J.* 158, wherein it is held that if the non-alienating coparceners bring a suit for partition of their undivided interest in that specific property on the ground that the alienation does not bind their interest, if the alienation is held to be not binding on the non-alienating coparceners, a suit by them for partition of the specific property alone would be maintainable. He further submits that the reversal of the finding recorded by the Trial Court on legal necessity by the lower Appellate Court suffers from perversity, as it is based upon conjectures and surmises and in ignorance of the findings recorded by the Trial Court.

14. Now coming to the question of perversity in the findings recorded by the lower Appellate Court on the question of legal necessity, the pleadings in the plaint as well as in the written statement

filed by the defendant No.2 clearly indicate the stand that the defendant No.2 needed an amount of Rs.1,00,000/-, and for that purpose, he approached the defendant No.1 to advance him the said amount, which was required to be returned to him after two years along with the additional amount of Rs.25,000/- and the property was required to be reconveyed. The lower Appellate Court has considered the fact that the sale-deed does not contain any recital for reconveyance of the property by the defendant No.1 in favour of the defendant No.2 after repayment of an amount of Rs.1,25,000/-. There is absolutely no evidence brought on record either by the plaintiffs or by the defendant No.2 to establish that the sale-deed was nominal and that in fact it was a money lending transaction. The plaintiffs have also failed to establish a plea that the transaction of sale was without consent and knowledge of the plaintiff No.4, who was the natural guardian of the plaintiff Nos.1 to 3.

15. The witness Suresh Jain examined by the plaintiffs deposes that

the defendant No.2 was in need of money. He further deposes that the business of coparcenary of the defendant No.2 was of agriculture, the shop and the family owned 37 acres of land. He states that it was for the personal need of the defendant No.2 that the transaction of sale was effected. The witness pleads ignorance about the debts of the family of the defendant No.2. The need for executing the sale-deed has thus been established and the only question is whether the need was by way of legal necessity and benefit of the joint family.

16. The only stand taken by the defendant No.1 is that the sale in question was an out and out sale of the property belonging to the joint family of the plaintiffs and the defendant No.2 for legal necessity and there was no question of reconveying the property in favour of the defendant No.1 by accepting an amount of Rs.1,25,000/-. The defendant No.1 himself has entered the witness-box and examined DW 2, the mediator Nandkishor Dhage; DW 3 Anil Padole, the Clerk

from the office of MSEB; and DW 4 Ambadas Bhoke, the Clerk in Credit Co-operative Society from which the defendant No.2 had obtained the loan and he was indebted to it. The defendant No.1 states in his examination-in-chief as well as in cross-examination that he made enquiries regarding legal necessity and collected the information about mortgage of the field of the defendant No.2 at Rohana and the defendant No.2 told him that he wanted money to store the goods in shop. There is also an evidence brought on record to suggest that the agriculture and hardware shop was the business of joint family. The defendant No.1 has also deposed that he had seen the stock of goods purchased after the sale-deed. Obviously, except to clear family debts and purchases and expenses for family business, no other purpose can be seen in sale of the suit property.

17. Though the Trial Court also considered the evidence of all the witnesses to hold that the legal necessity has not been established, the

lower Appellate Court has considered the evidence available on record in the light of the facts that - (i) the suit was collusive, (ii) the plaintiffs and the defendant No.2 have failed to establish that the sale-deed was nominal and it was actually a money lending transaction, (iii) it was an out and out sale, (iv) the plaintiffs have failed to establish that the transaction was without knowledge and consent of the plaintiff No.4, (v) the joint family possessed other properties also, and (vi) the need of money by the defendant No.2 is established. The Trial Court records the finding that no enquiry was made by the defendant No.1 in respect of legal necessity, but from the oral evidence of the defendant No.1, I find that he made certain enquiries before entering into the transaction of purchase of the suit property, which was finalized after 8 to 10 days of discussion between the parties. On the aspect of lack of pleadings, the plaintiffs have themselves come forward with the case of need to obtain loan, and the only question was whether it was a personal need or family necessity. The plaintiffs have failed to establish personal

need of the defendant No.2. I have gone through the evidence of all the witnesses, and I find that the findings recorded by the lower Appellate Court are based upon the evidence available on record, and, at any rate, it is a possible view of the matter based on relevant considerations. There is no perversity in recording the findings by the lower Appellate Court, which has come close to the four corners of the findings recorded by the Trial Court. The additional substantial question of law is answered accordingly.

18. In the result, the second appeal is dismissed. No order as to costs.

Second Appeal No.137 of 2003 :

19. This second appeal is preferred by the original defendant No.2, who is the father of the plaintiff Nos.1 to 3, and the husband of the plaintiff No.4. The defendant No.2 has supported the case of the

plaintiffs. Second Appeal No.84 of 2003 preferred by the plaintiffs has been dismissed by this Court. In view of this, nothing survives in this second appeal also. The same is, therefore, dismissed with no order as to costs.

.....

20. At this stage, Shri Tapadia, the learned counsel appearing for the original plaintiffs, submits that this Court had granted interim protection to the plaintiffs on 3-3-2003, which was confirmed on 9-3-2005, restraining the defendant No.1 from creating any third-party interest in respect of the suit pending the decision of these second appeals. He submits that the protection be continued for a further period of six weeks so as to enable the plaintiffs to adopt further appropriate remedies available in law.

21. Shri Gharote, the learned counsel appearing for the original defendant No.1, opposes the prayer and submits that in view of the

dismissal of these second appeals, the plaintiffs are not entitled to continuation of such protection.

22. In view of the fact that the interim protection is operating since 2003, the same shall continue to operate for a further period of six weeks from today; at the end of which, the interim protection granted shall stand vacated without reference to the Court.

JUDGE

LANJEWAR