

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

SECOND APPEAL NO. 281 OF 2012

Jankabai w/o Vyankappa Shete,
Age : 75 years, occup. Agriculture,
R/o Hiwara (Bk.), Tq. Majalgaon, .. Appellant/original
District : Beed Plaintiff

versus

- 1) Ashok s/o Vyankappa Shete,
Age : 55 years, occup. Agriculture:
R/o Hiwara (Bk.), Tq. Maalgaon,
District : Beed
- 2) Bhanudas s/o Bhimrao Kachare,
Age : 50 years, occup. Moneylender,
R/o Mangrool, Tq. Majalgaon,
District : Beed
- 3) Ashok s/o Bhimrao Kachare,
Age : 27 years, occup. Agriculture,
- 4) Kushawartabai w/o Bhimrao Kachare,
Age : 50 years, occu. Household,
R/o Rajegaon, Tq. Majalgaon,
District : Beed
- 5) Bhimrao s/o Bhanudas Kachare,
Age : 60 years, occup. Moneylender,
R/o as above
- 6) Kalabai w/o Bhanudas Ghatul,
Age : 70 years, occup. Moneylender, .. Respondents/
R/o as above Ori.Defendants

Mr. Krushna S. Solanke, Advocate h/f Mr. S. J. Salunke,
Advocate for appellants

Mr. B. S. Kudale, Advocate for respondents no. 2 to 6

CORAM : SUNIL P. DESHMUKH, J.
DATE : 5th January, 2017

ORAL JUDGMENT :

1. Heard learned counsel for the appearing parties.
2. Second appeal is preferred against judgment and order passed by the appellate court [District Judge-1, Beed] in regular civil appeal no. 69 of 2006 on 24-08-2011 confirming the judgment and decree passed by the trial court [2nd Joint Civil Judge, Junior Division, Majalgaon] on 31-07-2006 in regular civil suit no. 313 of 1997 whereunder all through aforesaid suit instituted by present appellant-plaintiff for partition, separate possession and injunction in respect of properties referred to in the plaint against respondent no. 1-her son and other defendants who happen to be purchasers in the alienations which had taken place from 1981 to 1987, has been dismissed.
3. After hearing learned counsel, it appears that there is no dispute about that suit properties being ancestral properties inherited by Vyankappa s/o Kondiba Shete who was husband of plaintiff-present appellant and father of defendant no.1-present respondent no. 1. Vyankappa is stated to have died in 1985.

4. It is plaintiff's case that partition had taken place between Vyankappa and defendant no. 1 in 1980 under which defendant no. 1 received 6 acre and 32 guntha area of land and Vyankappa received 3 acre. In 1981, Vyankappa had to sell by way of security a portion of property in order to enable him to purchase house no. 145. The property had been dealt with by Vyankappa in favour of defendant no. 2 who then had been minor under guardianship of defendant no.6.

5. According to the plaintiff, defendant no.1 had been addicted to bad vices and despite death of Vyankappa, property admeasuring about 2 acres was shown to have been dealt with by defendant no. 1 along with Vyankappa under a transaction dated 20-04-1985. The transaction had been entered into by defendant no. 1 to meet expenses incurred for his bad vices.

6. On 31-07-1986, defendant no. 1 had alienated an area of 1 acre and 15 guntha and thereafter had sold 3 acre and 25 guntha on 10-09-1987. The plaintiff claims all these transactions by defendant no. 1 to be illegal and that she has been in possession and cultivating the lands. It has been contended that the prices of the lands were more than shown in the sale deeds. There was huge income from the suit lands

and there had been no necessity at all to enter into any transaction. The cause of action for suit had arisen since defendant no. 1 in 1997 had denied partition.

7. Defendant no. 1 did not appear in the suit. Defendants no. 2 to 6 had on appearance filed written statement at Exhibit 19. Defendants do not dispute, defendant no. 1 being member of joint family as claimed by plaintiff and defendant no. 1 to be manager of the joint family. The contention about partition between Vyankappa and defendant no. 1 had been denied by the defendants. It is further denied that the transaction of 02-02-1981 under which Vyankappa sold 3 acre land in favour defendant no. 5 was by way of security. Defendants had contended that the sale deed had been effected by Vyankappa for legal necessity and for benefit of the family. Defendants denied that defendant no. 1 had been addicted to bad vices and kept on selling the lands to satisfy the same. Defendants had referred to that the joint family was having one more land gut no. 59 admeasuring 4 acres and 4 guntha and the same had been mutated in the name of wife and son of defendant no. 1.

8. With reference to aforesaid pleadings, the trial court considered the issues arising, viz; whether the sale deed

executed by Vyankappa in 1981 had been by way of security, whether the lands sold by defendant no. 1 were in his capacity as *Karta* of the joint family and were sold for legal necessity and whether the sale deeds were binding on the plaintiff.

9. Upon appreciation of the evidence, the trial court considered that it could not be said that sale deed by Vyankappa had been by way of security and further found that the sale deeds executed by defendant no. 1 were in his capacity as *Karta* of the family and were for legal necessity and as such found the same to be binding on the plaintiff and as such dismissed the suit.

10. The plaintiff had carried the proceeding against dismissal of suit, in regular civil appeal no. 69 of 2006 whereunder the appellate court had framed points for determination, viz; whether the trial court had properly appreciated the evidence, whether the findings recorded by the trial court were erroneous and whether the decree passed by trial court is liable to be set aside.

11. The appellate court considered that the sale deed of 1981 executed by Vyankappa could not be said to be a nominal sale deed or for that matter had been executed by way security. The appellate court has discussed evidence

available on record elaborately, including citation in the case of *Chunchun Jha vs. Ebadat Ali and another*, reported in *AIR 1954 SC 345* and appreciated that the evidence does not show in any way the transaction can be said to have been entered with a view to offer security to defendant no.2. It has been appreciated by the court that the sale deed does not at all disclose that the transaction was a loan transaction or for that matter property had been dealt with with condition to repurchase it. The court had adverted to section 58-C of the Transfer of Property Act, 1882 and found that appreciation by trial court about the transaction being not by way of security is not exposed to any interference by the appellate court.

12. The contention with regard to sale deed dated 20-04-1985 executed by Vyankappa had also been dealt with, finding that the plaintiff could not show that Vyankappa died in January, 1985 since no credible material in support of such a contention had been placed on record. The appellate court gave reasons as to why the death certificate in respect of Vyankappa issued by P.W. 4 - the Gramsevak at the say of Sarpanch and Upa-Sarpanch could not be placed reliance on and had found that the certificate had been issued without reference to the record and it was merely on say of some persons. The appellate court found, the sale deed had been

signed by Vyankappa. In such a case, death certificate of Vyankappa was not relied on by the appellate court.

13. The appellate court further appreciated that Vyankappa had absolute right to deal with properties which had come to his share in the partition referring to a decision in the case of *Subhadrbai Kachari Khandagale vs. Balwanta Narayan Jadhav and others*, reported in 2005 (1) Bom.C.R. 875 and further appears to have quoted in paragraph no. 30, the observations of the apex court. The appellate court has considered that after death of Vyankappa, defendant no. 1 had been *Karta* of the family and had dealt with lands inherited by him, under sale deeds Exhibits – 48 and 54 and those were for legal necessity.

14. The appellate court appreciated that the sale deeds were executed in order to purchase another land which had been convenient for cultivation and said fact had been proved by defendant no. 2 and other defendants producing mutation entry bearing no. 735 at Exhibit-38 showing about four acres of land had been purchased in the name of wife of defendant no. 1 for consideration of ₹ 30,000/- soon after sale deeds Exhibits – 48 and 54 were executed i.e. around October, 1987 and further the appellate court has referred to that defendant no. 1 had not been before the court to deny aforesaid. The

appellate court as such appreciated that the sale deeds were executed in order to purchase another property.

15. The appellate court has further appreciated that the plaintiff herself had never entered into witness box, in stead, Munjaba Shete-brother of deceased Vyankappa had come in as her power of attorney and further that he had no personal knowledge regarding the transactions in respect of any of the alienations. The appellate court further found that neither he had proved the document of power of attorney nor the same had been exhibited.

16. With reference to decision in the case of *Janki Vashdeo Bhojwani vs. Indusind Bank*, reported in *AIR 2005 SC 439*, the appellate court found that the power of attorney holder can give deposition on behalf of the principal about which he has personal knowledge, whereas the power of attorney in the present case had no personal knowledge about the transactions and the purpose for which the properties were dealt with. In the circumstances, appellate court has concurred with the decision of the trial court and dismissed the appeal.

17. Having regard to aforesaid, the contention by learned counsel for the appellant that the appellant being the member

of joint family was entitled to share in the properties left behind by Vyankappa particularly the properties which were sold between 1981 to 1987, appears to have a fragile foundation. It further emerges that other properties purchased have not been included in the suit for partition by the plaintiff.

18. In the first place, it is apparent that the action under the suit had been belated action. While the alienations had taken place in 1981 and 1987 and continuously possession had been of the alienees since the date of transactions. The plaintiff has failed to produce any evidence worth credence to show her possession over the suit lands. Secondly, the plaintiff does not appear to have included other properties which are claimed to have been purchased from the proceeds of the transactions entered into by defendant no.1.

19. In the circumstances, for the reasons as have been given by the courts hitherto and aforesaid, the second appeal does not appear to give rise to any substantial question of law.

20. Second appeal as such stands dismissed.

SUNIL P. DESHMUKH,
JUDGE

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