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

SECOND APPEAL NO. 826 OF 2009

- 1) Devidas Jotiba Dalwe,
age 51 years,
- 2) Kumar Jotiba Dalwe,
age 49 years,
- 3) Shivanand alias Nandan Jotiba Dalwe,
age 45 years

All Barber by occupation and R/o Deokurli
Taluka Tuljapur Dist. Osmanabad,
at present Papnas Tirth, Tuljapur
Taluka Tuljapur Dist. Osmanabd.

... APPELLANTS
(Original plaintiffs)

VERSUS

- 1) Nivrutti Tatya Surde (DIED)
Through: legal representatives:
- 2) Shamrao Nivrutti Surde, age 52 years,
- 3) Raghu Nivrutti Surde, age 50 years
- 4) Duryodhan Nivrutti Surde, age 47 years
- 5) Nivrutti Rangnath Jadhav, (DIED)
Through legal representatives:
- 5A) Dattu Nivrutti Jadhav, (DIED)
Through legal representatives:
- 5A-I) Shivaji Dattu Jadhav, age 45 years
- 5A-II) Vilas Dattu Jadhav, age 50 years,
- 5A-III) Ganesh Dattu Jadhav, age 42 years,

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All agriculturists by occupation and
R/o Deokurli Taluka Tuljapur Dist. Osmanabad.

5A-IV) Ranjana Pandurang Chivare, age 32 years

5A-V) Sushilabai Babu @ Pandurang Bhore, age 30 years

Both household by occupation and
R/o Wadje Taluka North Solapur Dist. Solapur.

5B) Digambar Nivrutti Jadhav,
age 60 years occupation agriculture
R/o Deokurli Taluka Tuljapur Dist. Osmanabad.

5C) Rajendra Nivrutti Jadhav (DIED)
Through : legal representatives:

5C-I) Sunita Arjun Gaikwad, age 35 years,

5C-II) Vanita Yuvraj Gaikwad, age 33 years

Both household by occupation and
R/o Mohol Taluka Mohol Dist. Solapur,
at present Deokurli Tal. Tuljapur Dist. Osmanabad.

5C-III) Santosh Rajendra Jadhav,
age 25 years occupation agriculture
R/o Deokurli Tal. Tuljapur Dist. Osmanabad.

5C-IV) Savita Sanjay Tambe,
age 27 years occupation household
R/o Kumbhari Tal. Tuljapur Dist. Osmanabad.

5C-V) Nita Rajendra Jadhav,
age 25 years occupation household
R/o Deokurli Taluka Tuljapur Dist. Osmanabad.

6. Godabai Jotiba Dalwi,
age 60 years occu. household (DIED)
Legal representatives are already on record
as appellants No. 1, 2, 3 & respondents No. 7A, 7B, 7C.

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7. Prakash Jotiba Dalvi,
age 39 years occupation agriculture (DIED)
Through legal representatives:

7A. Nilavatibai Prakash Dalvi,
age 35 years occup. Household

7B. Ranjana Prakash Dalvi,
age 40 years occupation education

7C. Ganesh Prakash Dalvi,
age 20 years occupation education

Nos. 7A to 7C R/o Papnas Galli,
Tuljapur Dist. Osmanabad.

...RESPONDENTS
(Original defendants)

Mr S.P. Shah, Advocate, for appellants.

Mr P.K. Deshmukh, Advocate for respondents No. 2 to 4

Mr S.Y. Patil, Advocate, holding for Mr V.B. Deshmukh, Advocate for
respondents No. 5a-I to 5A-V, 5B, 5C-I to 5C(V)

Mr A.N. Sikchi, Advocate for respondent No. 7-B.

CORAM : N.W. SAMBRE, J.

DATE : 12th July, 2017

ORAL ORDER

One Jotiba died on January 4, 1970, who was blessed with four sons, namely, Prakash i.e. defendant No.7 and plaintiffs Devidas, Kumar and Shivanand, his other sons, and his wife Godabai/defendant No.6.

2. It is claimed that properties of Jotiba were transferred by

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Godabai and Prakash, resulting into filing a suit by other three brothers for partition and separate possession being Regular Civil Suit No. 72 of 1990, in the Court of Civil Judge (Junior Division), Osmanabad. The said suit came to be dismissed by Judgment and decree dated July 15, 1995, which confirmed in Regular Civil Appeal No. 188 of 1995, decided on August 5, 2009 by the learned District Judge, Osmanabad. As such, this Second Appeal.

3. The learned Counsel for the appellant while questioning the findings recorded by both the courts below would urge that the sale of ancestral property was not out of necessity. According to him, since the burden to prove that sale was for necessity rests on the purchaser defendants, the same was not proved by leading adequate evidence. They would seek support from the judgment of this Court in the matter of **Shankarlal Ramprasad Laddha** died L.Rs. **Chandrabhaga Shankarlal Laddha and others Vs. Vasant Chandidasrao Deshmukh and others**, reported in **2009(3) Mh.L.J. 959**.

4. In addition, he would urge that the lower Appellate Court has not considered and re-appreciated the entire matter while delivering the judgment and submitted that the matter needs reconsideration by the lower Appellate Court.

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5. With the assistance of the respective Counsel, I have perused Judgments delivered by the Trial Court and lower Appellate Court. The Trial Court framed issues at Exh. 40, which are as under; and answered the same accordingly:

<u>"Issues.</u>	<u>Findings.</u>
1) Whether the defendant No.5 proves that the suit house is sold for legal necessity:	Yes, proved.
1A) Whether the defendant No. 1 to 4 proves that the defendant No.6 and 7 sold the suit land for legal necessity ?	Yes
2) Whether the plaintiffs prove that defendant No.7 is addicted to vices and he sold the suit house to deft.no.5 for immoral purpose by compelling deft. No.6 ?	Not proved.
2A) Whether the defendant no. 1 to 4 proves that at the time of sale deed dated 26-11-1979 the plaintiffs were major ?	Only pltf.no.1 proved to be major
3) Whether the plaintiffs prove that they are dispossessed from the suit house in the year 1978 ?	Not proved ?
3A) Whether the plaintiffs prove that sale deeds dated 25-11-1979 and 24-3-1975 are not binding upon them ?	Not proved.
4) Whether the suit is bad for mis-joinder of causes of action and mis-joinder of party ?	Yes
5) Whether suit is within limitation ?	Barred by limitation against deft.no.5.
6) Whether plaintiffs are entitled for partition and separate possession ?	Not entitled.
7) What order and decree ?	As per final order below."

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6. The Trial Court while dealing with the claim of partition and separate possession, noticed that the property of which partition was sought, was transferred to defendant/respondent No.5, vide sale deed dated 24th March 1975, and in view of the provision of Article 65 of the Limitation Act, 1963, the suit against defendant No.5 i.e. respondent No.5 herein, was held to be time barred.

7. So far as the aforesaid issue is concerned, I hardly see any material to infer that such finding recorded by the Court below, particularly, when defendants admitted the position on record that sale deed in favour of respondent No.5 was executed on 24th March 1975, and the suit could have been brought against him within a period of twelve years i.e. in fact, by 24th March 1987, whereas, the suit came to be filed on 25th April 1990.

8. Thereafter, the Trial Court proceeded to consider the claim of the present appellants/plaintiffs on the issue, whether the sale was for necessity or not ?

9. It has come on record that the sale deed in question was executed by respondent/defendant No.7 Prakash in favour of defendant No.1 to which the respondent No.6 Godabai remained a witness. Apart

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from above, it is also brought on record that the suit land, which was subject matter of the proceedings, is a dry crop land and the owners i.e. appellants or respondents No. 6 and 7 were not cultivating the same on their own but had given on *Batai* basis to one Sadashiv. It has also been brought on record that the family members of the plaintiffs and respondents No. 6 and 7 have decided to migrate to Tuljapur and had also entered into the business.

10. The aforesaid issues are met by the both the Courts below in favour of respondents No. 1 to 4 who were purchasers of the land in question. In the aforesaid backdrop, the inference drawn by the Courts below that the sale in question was of legal necessity, has been rightly proved by discharging burden by defendants No.1 to 4.

11. In the aforesaid backdrop, in my opinion, the question of law as it sought to be raised by the appellants, relying upon the judgment of **Shankarlal**, cited supra, in paragraphs 15 and 16, will be of hardly any assistance. Both the Courts below have concurrently held upon appreciation of pleadings and evidence brought on record that the appellants are not entitled for the prayer of partition and separate possession, as it was held that the sale was of necessity.

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12. No illegality could be noticed, which prompts for interference in Second Appellate jurisdiction. As such, the appeal stands dismissed.

(N.W. SAMBRE, J.)

pjm