

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APEPAL NO.383 O 1994
WITH
CIVIL APPLICATION NO.1693 OF 2006**

Shankar Kondiba Lohar ... Appellant
Versus

Jagannath Sopan Zinje ... Respondent

.....
Mr. Sanjay D. Thokade for the Appellant.
Mr. Uday Warunjikar for the Respondent.

CORAM : S.C.GUPTE, J.

DATE : 6 FEBRUARY 2017

P.C. :

Heard learned Counsel for the parties.

2 The second appeal challenges the judgment and order of the District Court at Pandharpur passed in Civil Appeal No. 137 of 1985. By the impugned judgment and order, learned District Judge dismissed the appeal filed by the Appellant herein and confirmed the judgment and decree passed by the Civil Judge, Junior Division, Malshiras in Regular Civil Original Suit No.137 of 1985. This suit was filed by the Respondent (original Plaintiff) against the Appellant (original Defendant) for specific performance of an agreement for sale executed by the Appellant in favour of the Respondent.

3 The suit was filed by the Respondent on the footing that the property was owned by the Appellant; that this property was agreed to be sold by the Appellant to the Respondent for a total consideration of Rs.10,000/- under a registered agreement for sale dated 17 October 1984; that the Respondent paid the sum of Rs.7,000/- as earnest on the date of the agreement, balance amount of Rs.3,000/- being payable at the time of execution of the sale deed and handing over of the possession of the suit property; that the Respondent was ready and willing to pay a balance amount of Rs.3,000/- as agreed; and that the Appellant was not willing to perform the suit agreement by executing the sale deed in favour of the Respondent.

4 The Appellant, in his written statement, contested the suit *inter alia* on the ground that the suit land was an ancestral property; that he was not entitled in his own right to sell the suit land; that the suit property was the only source of livelihood of the Appellant's family; and that there was no legal necessity for sale of the suit land. It was also pleaded that suit agreement was in fact not an agreement for sale of the suit land, but was a mere money lending transaction. The Appellant, being in need of money, had approached the Respondent for a loan, which the latter agreed to give on condition of execution of the suit agreement as a security. The alleged need of the Appellant was said to be for making over the sum to his son-in-law.

5 Both the Courts below concurrently held that the suit agreement was an agreement for sale of the suit land and not a loan transaction or security for any loan extended by the Respondent to the Appellant. Both the

Courts, however, came to the conclusion that the suit land was an ancestral property and was dealt with by the Appellant as Karta of a joint family. Both the Courts below accepted the Appellant's case that there were other coparceners forming part of the family property, who had not consented to the suit agreement for sale. It was, therefore, incumbent on the Courts below to enquire into the legal necessity enabling the Appellant as a Karta to enter into the suit agreement for sale. The First Appellate court in the impugned judgment and order in fact observed that whenever there was any family necessity, the karta was entitled to alienate the joint family property. The First Appellate Court also held that in the present case, the Appellant, being the father and Karta of the joint family, had the right to alienate the property and such transaction would bind his son, if the same was for legal necessity. The First Appellate Court observed that the plea of the Appellant in his written statement that the loan was needed for a family necessity inasmuch as he was in need to pay to his son-in-law, was not proved as a matter of fact. In other words, the only family necessity urged by the Appellant for approaching the Respondent for a loan, as the Appellant put forth in his written statement, was not found to be correct by the First Appellate Court. There is nothing else on record considered by the First Appellate Court to arrive at a finding of legal necessity. The property, being a joint family property and admittedly dealt with by the Karta without the consent of the other coparceners without any proof of legal necessity, could not have been alienated in favour of the Respondent purchaser. The suit agreement for sale, in the premises, could only have been specifically enforced in respect of one third share of the Appellant in the suit property and not the balance two third share held by his two sons, who were coparceners of the joint family alongwith the Appellant. The

impugned judgment and order of the District Court, accordingly, suffers from a substantial error of law inasmuch as despite holding the property to be a joint family property (owned by the coparcenery of the Appellant and his two sons), specific performance of the agreement of sale executed by the father as a karta without consent of his sons was granted in the absence of any proof of legal necessity. The impugned judgment and order of the District Court is, accordingly, set aside and the decree passed by the Civil Judge, Junior Division, Malshiras in Regular Civil Suit No.137 of 1985, is modified to the extent of restricting the same only to one third share in the suit land held by the Appellant herein (original Defendant). The Appellant is directed to execute a sale deed in respect of this one third share in the suit land in favour of the Plaintiff in accordance with the judgment and decree passed by the Civil Judge, Junior Division, Malshiras. Save and except as modified by this order, the decree shall stand and be executed.

6 In view of the disposal of the second appeal, the civil application does not survive and the same is also disposed of.

(S.C.GUPTE, J.)