IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.284 OF 1994

Vithal Bapu Mane … Appellant
Versus
Balasaheb Sidhu Masal And Others ... Respondents
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Ms. A.R.S. Baxi a/w Mr. Nitesh Zimur for the Appellant.
Mr.T.S. Ingale a/w Mr. Nikhil Pawar for Respondent Nos.1 to 4.
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CORAM : S.C.GUPTE, J.

DATE : 19 JANUARY 2017

ORAL JUDGMENT :

. Heard learned Counsel for the parties.

2 This second appeal was admitted on a substantial question of law relating to the character of joint family property in the hands of a sole surviving coparcener and the legal effect of adoption by such sole surviving coparcener.

3 The Appellant is the original Defendant No.2 in a suit for partition filed by Respondent Nos.1 to 3 (original Plaintiffs). The suit was for partition and separate possession of the property described in the plaint, being agricultural land Gat No.157 situated in Village Kognoli, Taluka Kavathe Mahankal, District Sangli and Gat No.22 situated in Village Sarati, Talukar Kavathe Mahankal, District Sangli together with a house (“the suit property”). The Appellant claimed this property through a sale deed

executed in his favour by Respondent No.4 (original Defendant No.1). Respondent No.4 is the father of Respondent Nos.1 and 2 herein and the husband of Respondent No.3. It was the case of Respondent No.1 to 3 before the Trial Court that the suit property was a joint family property of Respondent Nos.1 to 4; that the sale deed executed by Respondent No.4 in favour of the Appellant was not binding on Respondent Nos.1 to 3; and that Respondent Nos. 1 to 3 were entitled to their separate shares on partition of the suit property. The suit was contested by the Appellant on the ground that he had purchased the suit property from Respondent No.4 as a bonafide purchaser for value without notice. The Trial Court decreed the suit for partition. By concurrent findings of the facts, the First Appellate Court, i.e. the Court of 2nd Additional District Judge, Sangli, confirmed the judgment and decree of the Trial Court.

4 The controversy in the present matter pertains to the nature and character of the suit property - whether it is to be treated as self acquired property of Respondent No.4, Sidhu Rajaram Masal ("Sidhu"), or whether it is a joint family property of Respondent Nos.1 to 4 which includes the Plaintiffs and Sidhu. If the property is a joint family property, then the second question is whether the sale by Sidhu in favour of the Appellant was valid and binding on the other coparceners, namely, Respondent Nos.1 and 2. Then, there is a third question, namely, whether or not the Appellant is a bonafide purchaser of the suit property for value without notice. Both the Courts below found against the Appellant on all these questions.

5 Learned Counsel for the Appellant submits that Sidhu was the adoptive son of one Rajaram. Rajaram, on his part, was a sole surviving

coparcener of a joint Hindu family at the time of the adoption of Sidhu and accordingly, the property in the hands of Rajaram would devolve upon Sidhu, the adoptive son, by way of succession and not by way of survivorship as in the case of a Hindu caparcenery. In other words, the submission is that the property coming to the hands of a sole surviving coparcener is no longer a joint family property, but should be treated on par with self acquired property of the sole surviving coparcener. There is no principle of Hindu Mitakshara Law, by which the parties are admittedly governed in the present case, that joint family property going into the hands of a sole surviving member of a coparcenery looses its character as a joint family property. It is only if the deceased was at the time of his death a sole surviving coparcener that the whole of his property including the coparcenery property would pass to his heirs by succession. In other words, the sole survivorship of the coparcener must subsist at the date of his death, when the succession opens for it to devolve upon his heirs by succession. A necessary corollary is that if a son is born to the sole surviving coparcener during his lifetime, the son will get a right in the property by birth. In such case, there is no question of the property or the share of the original sole surviving coparcener going by succession. As much as a natural born son, even an adoptive son gets a right into the coparcenery property by virtue of his adoption. The adopted son takes a legal birth in the adoptive family at the time of his adoption and accordingly gets a right in the property of his adoptive father as much as a natural born son would. On this principle, upon his adoption by late Rajaram, Sidhu got a right in the property of Rajaram, which came to the latter as the sole surviving coparcener of the original joint Hindu family. The property, in other words, in the hands of Sidhu is a joint family property and Respondent Nos.1 and 2 upon their birth acquired rights in the property as Hindu coparceners. It, thus, cannot be possibly disputed that the property, at the time Sidhu purported to transfer the same to the Appellant, was a joint family property.

6 The next question is whether there was any legal necessity for Sidhu to have transferred the suit property to the Appellant. Legal necessity is a mixed question of law and facts, and burden of proving such legal necessity is upon the purchaser and his predecessor, namely, in this case the Appellant and Sidhu. The Respondents in their evidence made out a case that there were no reasons for the family to sell the suit property. The loan of the family was waived by the Government and Sidhu was not indebted to others. The suggestion that Sidhu had to sell the suit property for repayment of a hand loan or a loan of a bank, was denied by the Respondents in their evidence. The evidence, on the other hand, produced by the Appellant and his predecessor was disbelieved by the Court. Sidhu's deposition in this behalf, according to the Court, was falsified by his further statements. The Court came to the conclusion that there was no reason to believe that there was any loan outstanding against the family or in respect of the property and that there was no reason for sale of the property for any legal necessity. The appreciation of evidence in this behalf by the Courts below cannot be faulted in any way on a question of law. The Courts below have not considered any irrelevant or non-germane material or disregarded any relevant or germane material. The conclusions are supported by evidence. No substantial question of law arises in this behalf for the consideration of this Court.

7 So also, as far as the Appellant's case of being a bonafide purchaser for value and without notice is concerned, it was not believed by the Court. The Appellant is the maternal uncle of Respondent-Sidhu. He admitted in his statement that he knew the Respondents and their relations with Sidhu at the time of execution of the sale deed. Secondly, the Court also found that the possession of Respondent No.3, Bhagubai Sidhu Masal, of the suit premises was proved and such possession amounted to a constructive notice of the rights of Respondent Nos. 1 to 3 under the Transfer of Property Act. Moreover, as noted by the First Appellate Court, the Appellant had admitted before the Court that the plaintiffs had given a public notice in local newspapers of their rights in the property, cautioning public against any unauthorised dealing with it contrary to their rights. In the premises, the Appellant could not be held to be a bonafide purchaser for value without notice. Besides, even the consideration paid by the Appellant to Respondent No.4 towards the sale of the suit property was held to be inadequate by the Court. None of these conclusions can be faulted on any matter of law.

8 Learned Counsel for the Appellant submits that the suit ought to have been dismissed, since there ware no prayers in the suit for setting aside the alienation made by Sidhu in favour of the Appellant. It is pertinent to note that there was no such defence raised before either of the Courts below. Even the memo of the present second appeal does not contain any ground in this respect. In any event, there is no merit in it. The original plaintiffs came to the Court with a specific case that the property was a joint family property; that there was no legal necessity for sale of the property by one of the coparceners, namely, Sidhu; and that the

alienation in favour of the Appellant was not binding on the plaintiffs as coparceners. Besides, the plaintiffs claimed to be in possession of the property and there was no need to claim a decree of possession. In a suit for partition by a Hindu coparcener, in these facts, it is not necessary to seek a specific declaration for setting aside the alienation in favour of the purchaser. I am fortified in this view by a decision of Karnataka High Court in the case of **Ganpati Santaram Bhosale Vs. Ramchandra Subbarao Kulkarni**[1] where the Court has held that it is now well settled that in a suit for partition by a Hindu coparcener it is not necessary for him to seek setting aside of a sale affected by another coparcener in favour of a third party. It is sufficient if he asks for his share in the joint family properties and for separate possession thereof on the basis that he is not bound by any alienation or interest of others created in such properties which fall to his share.

9 In the premises, there is no merit in the second appeal and the same is dismissed. No order as to costs.

10 The interim order granted by this Court in favour of the Appellant at the time of admission of the appeal, in so far as the possession of separate shares of the property is concerned, is continued for a period of four weeks from today.

(S.C. GUPTE, J.)

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1 ILR 1985 Kar. 1115