

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO.108 OF 1995**

Shri. Suresh Dalpatrai Shah & Ors.

...Appellants

vs.

Shri. Dnyanu Maruti Jadhav & Ors.

...Respondents

....

Mr. Ashutosh Gole, for the Appellants.

Mr. S.G. Deshmukh, for Respondent No.1(c).

Mr. Ashok Dhabugade, for Respondent No.1(a), 1(b) and 1(d).

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CORAM : S.C. GUPTE, J.

**DATED : 20/22 FEBRUARY &
23 MARCH 2017**

ORAL JUDGEMENT :

. Heard learned Counsel for the parties. After this matter was heard at length on 20th and 22nd February 2017 and reserved for orders (argued at that time by Mr. Deshmukh, who appeared for Respondent No.1), the Court was informed subsequently that Respondent No.1 had expired sometime before the hearing and that Mr. Deshmukh had now been representing his legal heir, brought on record as Respondent No.1(c), whilst his other legal heirs (Respondent Nos. 1(a), 1(b) and 1(d)) were being represented by another advocate. Accordingly, submissions of Mr. Dhabugade were heard today on behalf of these latter Respondents.

2. This second appeal challenges a judgment and order passed

by the District Court at Sangli in Regular Civil Appeal No.150/1989. By this impugned judgment and order, the learned District Judge dismissed the appeal filed by Respondent No.2 herein (original Defendant No.1, since deceased and represented through his legal heirs, who are joined as Respondent Nos.2(a) to 2(h) to the second appeal). By the impugned judgment and order, the learned District Judge also allowed the cross objections filed by Respondent No.1 herein (original Plaintiff) and modified the decree passed by the trial court.

3. The decree of the trial court had declared one-half share each of the Plaintiff and Defendant No.1 in the suit properties, including Plot bearing CTS No.1710 at Sangli, which belonged to their joint family, and passed a preliminary decree of partition. The Plaintiff was held to be entitled to initiate proceedings for a final decree. At the same time, in the body of the judgment, the learned District Judge held that as far as the plot bearing CTS No.1710 is concerned, which plot was sold by Defendant No.1 to the Appellants herein (original Defendant Nos. 2 to 5), the Plaintiff was entitled to one-half share in the price paid by Defendant Nos. 2 to 5, i.e. Rs.11,250/-. (The plot bearing CTS No.1710 is hereinafter referred to as "suit land". The Second Appeal concerns only this plot of land.) This decree was challenged by Defendant No.1 on the ground that the suit land was purchased by him from his personal earnings and not from the income of the joint Hindu family and that he was accordingly entitled to sell the same to Defendant Nos.2 to 5 (Appellants herein). The original Plaintiff, on his part, filed cross objections before the first appellate court. One of the cross objections was that the trial court had erred in allowing only one-half of the sale

proceeds, i.e. Rs.11,250/-, to the Plaintiff instead of allowing possession of the suit property based on partition. The learned District Judge dismissed the appeal filed by original Defendant No.1 and allowed the Plaintiff's cross objection. The present Second Appeal is pressed by Defendant Nos. 2 to 5, only to the extent the impugned order of the first appellate court allows the Plaintiff's cross-objection.

4. The learned District Judge held that in the present case, all immovable properties forming the subject matter of the suit were joint family properties and as such, the Plaintiff and Defendant No.1 each had one-half share in them. The learned District Judge noted that the original contention of Defendant No.1 that there was already a partition of the properties during the life time of their father, Maruti Santu Jadhav, was given up by him during the course of the trial. The learned Judge held that the agricultural lands originally forming part of the joint family property proved the existence of a nucleus in the hands of the joint family, and having regard to the nature of these lands and the consideration received towards them, there existed a sufficient nucleus out of which the suit land and other properties could have been purchased. It was, accordingly, held that the properties, including the suit land, were joint family properties; that Defendant No.1 was the manager of the joint family; that the transaction of sale (registered sale deed dated 15 February 1979 in favour of Defendant Nos.2 to 5 for a consideration of Rs.22,500/-) was without the Plaintiff's consent or knowledge; and that this transaction, being without any legal necessity of the joint family, was not binding on the Plaintiff and he was entitled to get his one-half share separated on partition in all properties, including

the property at CTS No.1710, namely, the suit land.

5. The findings of the first appellate court regarding (a) the suit land being a joint family property, and (b) the suit transaction of sale being (i) without the consent of the other coparcener, namely, the Plaintiff and (ii) without any legal necessity of the joint Hindu family, are not contested by Defendant No.1. Defendant Nos. 2 to 5 (the Appellants herein) also do not contest these findings at the hearing, though the memo of the second appeal contains grounds in this behalf. Their case is that the first appellate court ought not to have disturbed the finding of the trial court that the Plaintiff was entitled to share one-half price of the suit land paid by them to Defendant No.1. They submit that the first appellate court erred in including the suit land in the division by metes and bounds to be made towards the partition. This is the only controversy for which submissions have been made by learned Counsel for the parties in the present Second Appeal. Accordingly, the substantial question of law in this second appeal is reframed as follows :

“Whether the lower appellate court was right in law in setting aside the direction of the trial court to grant as part of a decree of partition one-half of the price received for the suit land to the Plaintiff instead of ordering division of the suit land?”

6. The trial court held that the Plaintiff was entitled to receive one-half share of the sale proceeds received from Defendant Nos.2 to 5 on the footing that the Plaintiff himself had claimed that the price of Rs.22,500/- received by Defendant No.1 from Defendant Nos. 2 to 5 for sale of the suit land should be taken as available for partition and that it

was this amount which was liable to be divided between the legal heirs of the deceased Maruti, that is to say, the Plaintiff and Defendant No.1. The trial court noted that whilst the Plaintiff's case was that the suit land was a joint family property and Defendant No.1 had no authority, as manager of the joint family, to sell it away except for a legal necessity, it was not his case that the property was not sold for a proper price. The trial court noted that Defendant Nos. 2 to 5 had purchased the land by paying full amount, that is to say, a competent price, to Defendant No.1. It was in these circumstances that the trial court held the price of Rs.22,500/- received by Defendant No.1 as being available for partition and in which the Plaintiff had one-half share. This conclusion of the trial court is unexceptionable. It is pertinent to note that the Plaintiff in his cross-objections did not question the competence of the price received by Defendant No.1 towards the sale of the suit land. The case of the Plaintiff in his cross-objections was that the trial court ought to have given the option of receiving the prevailing market value of the property to the Plaintiff and that the decree to the extent that it allowed only a share in the price, i.e. Rs.11,225/-, to the Plaintiff without his opting for it, was against law, justice and equity. If one proceeds on the footing that the price paid by Defendant Nos. 2 to 5 to Defendant No.1 towards the suit land was a competent price, the decree of the trial court in this behalf is not only in keeping with the cases respectively urged by the parties before it, but also in accordance with principles of justice, equity and good conscience. It is always the attempt of courts in matters of partition that if a property to be partitioned is sold by one of the co-owners and it is possible to make an equitable partition without disturbing such sale, the court could rather make such equitable partition

and not disturb the sale. That is a legitimate way of balancing equities between the parties. In case, for example, there are more than one properties, the court in an appropriate case would see that the property sold by one co-owner is allotted to the share of that co-owner and not divided physically between all co-owners or allotted to the other co-owner/s. Similarly, the court may in an appropriate case resort to the other option available to it in the matter of division of properties, which is reflected in Section 2 of the Partition Act, 1893, namely, to rather go for sale of the suit property and distribute the proceeds between the shareholders as a more beneficial option than to physically divide the property. As provided in Section 2 read with Section 3(1) of the Partition Act, 1893, whenever in any suit for partition, it appears to the court that, either by reason of the nature of the property to which the suit relates, or of the number of shareholders, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that the sale of the property and distribution of the proceeds would be more beneficial to all the shareholders, the court may, within its discretion, on the request of any of the shareholders, direct the sale of the property and distribute the sale proceeds. So also, it is legitimate to allow one shareholder to buy the moiety of the other/s.

7. No doubt, in the present case, there is no formal request on the part of any shareholder for sale of the suit land and distribution of its proceeds *pro rata* between the parties within the meaning of Section 2 of the Partition Act. Such request being a condition precedent for invoking Section 3(1) of that Act, there is no warrant for ordering a sale strictly

within the framework of the Partition Act. But then, as held by the Supreme Court in the case of **Badri Narain Prasad Choudhary vs. Nil Ratan Sarkar**¹, affirming the dicta of Subba Rao, C.J. of Andhra Pradesh High Court (as the learned Judge then was) in **R. Ramaprasada Rao v. Subbaramaiah**², in cases not covered by Sections 2 and 3 of the Partition Act, the power of the Court to partition property by any equitable method is not affected by the said Act.

8. In the impugned judgment and order, this aspect of the matter appears to have been lost on the first appellate court. The court appears to have simply proceeded on the footing that the sale deed executed by Defendant No.1 in favour of Defendant Nos. 2 to 5 was not binding on the Plaintiff. That may certainly be so and it is not really the subject matter of the present controversy that it is not so. The point is that even if the sale were not binding on the Plaintiff, the court had still to consider, firstly, whether Defendant Nos. 2 to 5 were bonafide purchasers for value without notice and secondly, and even otherwise, whether it was more equitable in the facts of the case to order distribution of the sale proceeds as between the co-owners rather than physical partition of the suit land as an equitable method, even if the case was not strictly covered by Sections 2 and 3 of the Partition Act.

9. On the question of Defendant Nos. 2 to 5 being bonafide purchasers for value without notice, the first appellate court noted that there was nothing in the written statement of Defendant Nos. 2 to 5 to indicate that they were such bonafide purchasers. The court noted that

¹ AIR 1978 SC 845

² AIR 1958 Andhra Pradesh 647

the evidence of Defendant No.3 showed that the suit land was purchased after verifying only the entries in 7/12 extracts and that there was nothing to show that Defendant Nos. 2 to 5 acted in good faith or entered into the subject transaction by exercising reasonable care to ascertain the exclusive ownership of Defendant No.1 of the suit land. It is difficult to see what more, in the facts of the case, should Defendant Nos. 2 to 5 have done to exercise such reasonable care. There was a registered sale deed in favour of their vendor, namely, Defendant No.1 executed by his vendor. The sale deed mentioned the consideration as flowing from Defendant No.1 without reference to his alleged capacity as the manager of a joint Hindu family. It is the Plaintiff's own case that Defendant No.1 was in possession of the suit land and on top of it, there was revenue record to support exclusive ownership of Defendant No.1 of the suit land. In the face of the original sale deed, the Plaintiff's own case that Defendant No.1 was in physical possession of the suit land and the supporting revenue entries, there is nothing for Defendant Nos. 2 to 5 to enquire into any further. Besides, the price paid by Defendant Nos. 2 to 5, as we have noted above, is wholly competent and not even disputed by the Plaintiff. It is true that Defendant Nos. 2 to 5 did not cause a public notice to be issued before purchasing the suit land but that, in my opinion, is not solely determinative of their bonafides in purchasing the suit land one way or the other. In the facts of the case, there was no reason for Defendant Nos. 2 to 5 to suspect that the suit land might be a joint family property and their mere failure to cause a public notice to be issued before purchasing the property would not undermine their bonafides as purchasers for value and without notice.

10. But even if I am wrong in this conclusion regarding the Defendants' position as bonafide purchasers for value without notice, it was, as I have noted above, necessary for the first appellate court to have considered the question of distribution of sale proceeds between the co-owners as a more equitable and beneficial option than division of the property by metes and bounds in the present case. There are at least three circumstances, which would have made it incumbent on the court to do so. The first circumstance is the Plaintiff's own case in the plaint that the suit land was valued at Rs.22,500/- and the Plaintiff's one-half share therein was Rs.11,250/-. (The Plaintiff had on that basis valued the suit and paid court fees.) The second circumstance is the Plaintiff's own deposition before the trial court which was to the following effect:-

“Deft No.2 sold this plot to deft Nos.2 to 5 on 15-2-1979 for Rs.22500/-. There was no family necessity or any legal necessity to sell this plot. Deft No.1 sold it as the Manager of the Joint Family property. I have ½ share thus comes to Rs.11225/-. Deft No.1 is liable to pay this amount to me.”

The third circumstance is that this deposition, or the competence of the price paid by Defendant Nos. 2 to 5, was not *per se* disputed by the Plaintiff before the first appellate court. If that was so, even leaving aside the question of bona fides of the purchase for value without notice, it was necessary for the first appellate court to have balanced the equities by ordering distribution of sale proceeds of the suit land as an appropriate and adequate relief in the matter of division of properties in the partition suit.

11. In the premises, the judgment of the First Appellate Court

cannot be sustained. The impugned judgment, to the extent it allows the Plaintiff's cross objection, is, accordingly, set aside and the judgment and decree of the Trial Court is restored in its entirety. No order as to costs.

12. Learned Counsel for Respondent Nos.1(a), 1(b) and 1(d) submits that as far as the balance properties are concerned, there is a settlement between the co-sharers and that partition of the properties in accordance with that settlement, need not to be held up. In any event, this order pertains only to the suit land, i.e. plot bearing CTS No.1710 at Sangli. The partition of the properties is the subject matter of a final decree to be passed in the suit, subject to the directions contained in the judgment and decree of the Trial Court, which is restored by this judgment. The settlement, if any, between the co-sharers can be taken note of by the Trial Court whilst passing the final decree and also whilst executing mutation of properties. The subject of any compensation having to be made by Defendant No.1 to the Plaintiff/his legal heirs for not having paid the one-half share of the price, i.e. Rs.11,250/-, at the relevant time, is also kept open, to be determined whilst passing the final decree. All rights and contentions of the parties in this behalf are kept open.

(S.C. GUPTE, J.)