

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

WRIT PETITION NO.3415 OF 2017

PARVATI LAXMAN GADIKAR AND OTHERS
VERSUS
VENKAT LAXMAN GADIKAR AND ANOTHER

...

Advocate for the Petitioners : Smt.M.D.Thube-Mhase

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 12th December, 2018

Per Court:

1 Despite service of court notice, the Respondents have not caused an appearance in this matter. This matter was adjourned on two occasions on 26.11.2018 and 11.12.2018. Yet, there is no appearance on behalf of the Respondents.

2 The Petitioners, original Plaintiffs in RCS No.229/2013, had moved an application Exhibit 72/3 pointing out to the Trial Court that as the suit is for partition and separate possession and the sale deed in favour of Defendant No.2 was without any legal necessity or for any justifiable cause, an issue in accordance with the Hindu Law has to be framed so as to find out whether, Defendant No.2 has purchased the suit property by indulging in necessary enquiry and as to whether, the seller has a legal necessity. It was, therefore, prayed that Issue No.3 as was framed on

03.03.2014, be deleted.

3 I have considered the submissions of the learned Advocate for the Petitioners/ Plaintiffs and have gone through the grounds. The grievance of the Plaintiffs is that the Trial Court has rejected Exhibit 72/3 on the ground that as Defendant No.2 is not contesting the suit and it has proceeded ex-parte against her, no purpose would be served by recasting Issue No.3.

4 Issue No.3 reads thus :- "Whether, the Plaintiffs prove that, the sale deed executed by Defendant No.1 of Survey No.127/A admeasuring 0H.81 R is not binding on the Plaintiffs?"

5 The Plaintiffs have prayed that this issue be deleted and be replaced by an issue so as to cast the onus and burden on Defendant No.2 to prove that she purchased the suit property after a proper enquiry as regards the legal necessity.

6 The Petitioners rely upon the judgment of the learned Division Bench of this Court in the matter of *Shrikant s/o Trimbakrao Begade and others vs. Natthu Maroti Shivarkar and others, 2017 (4) Mh.L.J. 590*. The learned Division Bench, after placing reliance upon 21 reported judgments, has concluded in paragraphs 48, 49, 52 and 53, which read as under :-

"48. Thus, the Trial Court attempts to find out legal necessity to support the impugned sale-deed and answers it in negative. As the transactions

were independent, it has delivered separate judgments. This need of transaction specific approach was perhaps not urged before the Learned Single judge and hence, evidence of the witnesses speaking generally though irrelevant, came to be accepted. It can not help the purchasers in establishing the legal necessity or family benefit to validate the sale-deed in their favour. No particular legal necessity or any specific family benefit has been pleaded in written statement by the present defendant respondents. We have already noticed above that no special occasion in the family of Trimbakrao necessitating such a sale has been brought on record. Thus, the general “non need-specific” evidence, that too in the absence of pleading of any incident or accident in the family, does not help the defendants in discharging the burden cast upon them by law.

49. In contrast, the impugned judgment in first appeal adopts all together different perspective. It finds that there is no evidence of vices indulged into by Trimbakrao. It notes that numerous suits filed by the plaintiffs for setting aside alienations against several alienees, were consolidated and plaintiffs led common evidence. It, in few earlier paragraphs of the judgment, mentions arguments of the plaintiffs and precedents relied upon by them. However, because of its earlier judgment in First Appeal No. 99 of 1976, it points out that Trimbakrao had adopted urbanized life style; was living at Nagpur since 1940; in 1949, malgujari rights were abolished; in 1949 only Trimbakrao got married with Shalinibai, agricultural operations were carried through employees, substantial lands were fallow, he suffered losses and his income was less than expenditure. Financial condition was precarious and holding non profitable lands was adverse to the interest of the joint family. Hence, as a prudent manager and to save the property from being wasted, Trimbakrao sold the lands. Failure of the plaintiffs to show gambling habits of Trimbakrao recorded in earlier First Appeal No. 99 of 1976 is also reiterated here. It observes that learned Counsel for the

plaintiffs failed to persuade it to take a different view. It, therefore, goes by its earlier judgment and holds the sale valid. In other words, sale transaction is accepted as one to meet the legal necessity of family's routine expenses. In view of Order XII Rule 4 Civil Procedure Code, it finds no substance in objection to non-joinder of Trimbakrao and Shalini in First Appeal before it. Need to implead Shalinibai w/o Trimbakrao is also negated by not relying upon the judgment in case of Parappa Hingappa Khaded vs. Mallappa Kallappa—(AIR 1954 Bombay 332), because she did not assail the adverse trial Court verdict. Thus, this narrow and limited scrutiny in impugned appellate judgment is due to its earlier judgment dated 20.11.1987 delivered in First Appeal No. 99 of 1976. Perusal of earlier judgment shows that the evidence of yield annually of paddy, other grains, of sugar cane etc., income generated therefrom is discarded as account books are not produced by Trimbakrao. Obviously plaintiffs could not have been penalized for such a failure on part of their father. In any case, the burden to prove legal necessity was always on the purchaser defendants and first appellate Court ignores their omission to plead any definite case in this connection. It does not see that the defendants do not plead any inquiry by them with Trimbakrao to warrant the sale, do not plead any particular event like marriage etc. which needed such a huge expenditure. Finding of Trial Court on size of family of Trimbakrao, annual amount needed by family and no apparent reason to support such huge sales also stand discarded because of this erroneous approach. These findings of Trial Court militate with the effort of the purchasers to substantiate alleged legal necessity. As the basic burden was/is on the defendants to bring on record that need of family. Trial Court has given these reasons as additional grounds to discredit them. Material on record shows that at Nagpur yearly expenses incurred by Trimbakrao were between Rs.500/ to 700/-. In 1943, Trimbakrao possessed more than 600 acres of land and in 1948 after various sales, Trimbakrao still had more than 335 acres of land. Thus when he was not married, he had already sold about 265 acres of lands. However, the appellate

Court examines the controversy by putting the burden on the plaintiffs. When there were 25 sale transactions by Trimbakrao, why such a huge amount disproportionate to the size and exceeding the need of his family, was being arranged by him, that too for a long period, does not appear to have been entered the consideration by the First Appellate Court. What we find is that a well reasoned judgment of the Trial Court has been set aside by approaching it from a wrong perspective. We find that the First Appellate Court has failed in its duty to come to the close quarter of the reasoning employed by the trial Court while reversing the judgment of Trial Court.

52. Discussion by us above shows the general approach adopted by the First Appellate Court leading to a an error of not examining the “legal necessity” qua the sale-deed in dispute. This error goes to the root of the matter.
53. Accordingly, we record our findings on the points for determination framed supra. The material on record does not show any inquiry conducted by the respondents before us about the legal necessity felt by Trimbakrao for the sale of kh. no. 10 ad-measuring 20.69 acres of mouza Kheda, Tah. Warora Distr. Chandrapur on 20.10.1951 vide sale-deed at Ex. 44. Such an inquiry into alleged legal necessity should have been prior to the obtaining the sale-deed Ex. 44 and evidence about it can not be adduced for the first time in a suit filed by the appellants’ vide Special Civil Suit No.33 of 1971. It also follows that here the sale of kh. no.10 is not proved to be of an agricultural land which could not have been cultivated profitably or then to avoid any legislation. In any case, such a sale in present facts can not be construed as one for legal necessity. The burden to prove the existence of the legal necessity always continued on the purchaser respondents, and even at this point of time, this factor is very material. We also hold that the earlier judgment dated 20.11.1987 delivered in First Appeal No. 99 of 1976 was not decisive in First Appeal No. 133 of 1976. It is unnecessary to find out whether it

operates in rem or in personam. Lastly as the shares of defendant no. 5 Trimbakrao or defendant no.6 Shalinibai were being dealt with, we find that they were necessary parties in First Appeal No. 133 of 1976."

7 Considering the above, this Writ Petition is partly allowed. Exhibit 72/3 is also partly allowed by maintaining Issue No.3 since it pertains to the contention of the Plaintiffs that the sale deed is not binding on them. I am directing the Trial Court to frame the following issue :-

"Does Defendant No.2 prove that she had purchased the suit property by causing an enquiry to assess the legal necessity for the sale?"

8 As such, the Trial Court shall frame the above stated issue forthwith and permit the litigating sides to lead evidence on the said issue, if not already adduced.