

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

**SECOND APPEAL NO. 325 OF 2018
WITH
CIVIL APPLICATION NO. 728 OF 2018**

Sau. Sunanda Babanrao Awtade	]	
Age 53 yrs., Occu. Agriculturist,	]	
R/o.Khandoba Galli, Mangalwedha,	]	
Taluka - Mangalwedha,	]	
District - Solapur.	]	<u>... Appellant.</u>

- : Versus : -

- | | | |
|--------------------------------------|---|--------------------------------|
| 1. Sau. Urmila Dnyaneshwar Bhosale |] | |
| Age 40 yrs., Occu. Household/ Agri., |] | |
| R/o.Sarkoli, Taluka - Pandharpur, |] | |
| District - Solapur. |] | |
| 2. Pandurang Tulshiram Bendre |] | |
| Age 68 yrs., Occu. Retired, |] | |
| R/o. Bathan, Taluka - Mangalwedha, |] | |
| District - Solapur. |] | |
| Currently at : House No.516, |] | |
| Near Indira Vasahat Vridhashram, |] | |
| Gopalpur, Taluka - Pandharpur, |] | |
| District - Solapur. |] | |
| 3. Sau.Gokulabai Pandurang Bendre |] | |
| Age 60 yrs., Occu. Household, |] | |
| 4. Sau.Nirmala Pampushet More |] | |
| Age 37 yrs., Occu. Household, |] | |
| 5. Seema Pandurang Bendre |] | |
| Age 31 yrs., Occu. Household, |] | |
| 6. Dnyaneshwar Pandurang Bendre |] | |
| Age 31 yrs., Occu. Education, |] | |
| Respondent Nos.3 to 6 R/o. House |] | |
| No.516, Indira Colony, Near |] | |
| Vridhshram, Gopalpur, Taluka - |] | |
| Pandharpur, District - Solapur. |] | <u>... Respondents.</u> |

- Mr.Suhas S. Inamdar for the Appellant.
- Mr.Ajay A. Joshi for Respondent No.1.
- Mr.Sarang Satish Aradhye for Respondent Nos.2 to 6.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 28th JUNE, 2018.

ORAL JUDGMENT :

1] Heard Mr.Inamdar, learned counsel for the Appellant, Mr.Joshi, learned counsel for Respondent No.1 and Mr.Aradhye, learned counsels for Respondent Nos.2 to 6.

2] Admit. With the consent of learned counsel for the parties, the Appeal is taken up for final hearing at the stage of admission itself.

3] This Second Appeal is directed against the judgment and decree dated 27th December, 2017 passed by the District Judge-3, Pandharpur, thereby dismissing Civil Appeal No.174 of 2011 and confirming the judgment and decree dated 17th August, 2011 passed by the Court of Civil Judge, Junior Division, Mangalwedha in Regular Civil Suit No.9 of 2008.

4] The said suit was filed by Respondent No.1 herein for partition of her 1/6 share in the suit property. Respondent No.1 is the

daughter of Respondent Nos.2 and 3. It is her case that the suit properties are the ancestral joint family properties. Her father Respondent No.2-Pandurang was looking after the same and managing the said properties. He was working as "Talathi" in Revenue Department and having sufficient income from agricultural land also. Therefore, there was no legal necessity for him to transfer the suit property to anyone. However, due to mental disease and addiction to liquor, he has incurred loan from various persons and towards security of that loan, the present Appellant had got executed the sale-deed dated 28th August, 1995 of the suit land from him. According to the Respondent No.1-org. Plaintiff, the said sale-deed is not at all binding on her share or the share of other legal heirs of Respondent No.2. It was purely a money lending transaction, which is found reflected in the said sale-deed and hence, she is entitled to get her 1/6 share in the property. Accordingly, she demanded the partition of her share, which was denied and hence, she was constrained to file this suit.

5] This suit was resisted by the present Appellant, the purchaser, contending *inter-alia* that the suit property was sold by the Respondent No.2-Pandurang for legal necessity and the amount of consideration was applied for the benefit of joint family. Therefore, the

said sale-deed dated 28th August, 1995 is binding on the share of Respondent No.1 also and she cannot be entitled to get partition of her 1/6 share in the suit property.

6] On these respective pleadings of the parties, the trial Court framed necessary issues at Exhibit-27.

7] In support of the case, Respondent No.1-Plaintiff examined herself and also the attesting witness to the sale-deed. As against it, the Appellant did not enter into the witness box but led the evidence of her husband Babanrao Avtade.

8] On appreciation of this evidence, the trial Court was pleased to hold that as it is not disputed that the suit property was the ancestral joint family property of the family, the Respondent No.1-Plaintiff is having her 1/6 share therein and she is entitled to get partition of her share. As regards the sale-deed, it was held by the trial Court, on the basis of the several documentary evidence adduced before it, that the sale-deed was not actually a transaction of sale but it was a document obtained from the father of the Respondent No.1-Plaintiff towards security of loan. It was also found by the trial Court that the Appellant has failed to prove that the sale-deed was executed

for legal necessity or for the benefit of joint family. Hence, the trial Court held that the sale-deed was not binding on the share of the Respondent No.1-Plaintiff.

9] When this judgment of the trial Court was challenged before the First Appellate Court, the Appellate Court again on re-appreciation of the evidence on record, was pleased to confirm the finding of the trial Court. This concurrent finding of the fact arrived by both the Courts below is challenged in this Second Appeal.

10] The First question of law raised by learned counsel for the Appellant is that, though in the written statement the Appellant has raised the contention that the suit is barred by limitation, the trial Court has not framed issue to that effect. However, it can be seen that though the trial Court has not specifically framed the issue, the trial Court has considered this aspect and found that as from the date of demand of partition, the suit is filed within time, it is not barred by limitation. In answer to Issue No.5, the trial Court has further held that, as, in the year 2007 the Respondent No.1-Plaintiff firstly demanded her share in the suit property, which was refused, hence the cause of action arose in the year 2007 and from that day the suit filed in the year 2008 is definitely in limitation.

11] Not only that, the First Appellate Court has specifically framed the Issue No.3, as to, “whether the suit filed by Respondent No.1-Plaintiff is barred by limitation?” and in answer to the said issue categorically held that, the suit is within limitation, as the suit is filed immediately after the refusal of the demand for partition. As rightly held by the First Appellate Court in respect of the suit for partition technically speaking the provisions of Limitation Act are not applicable in the sense that when the demand is made for partition and it is not complied with, then the cause of action arises and here, in the case, the cause of action arose in the year 2007 and hence, the suit filed in the year 2008 is within limitation. No other view of the matter can be taken so as to reconsider the submission advanced on the same issue.

12] The second question of law, which according to learned counsel for the Appellant, arises in this appeal is, whether without seeking the relief of declaration relating to the sale-deed being not binding on her share, the trial Court could not have granted to the Respondent No.1-Plaintiff, share in the property, which was already sold by her father to the Appellant. In this respect also, the law is fairly well settled that in a suit for partition filed by the coparcener, it

is not necessary for the coparcener or the legal heir to seek any such relief of declaration of the sale-deed. The Court has only to consider whether it is a joint family property and whether she is entitled for separation of her share, and if yes, then it is for the purchaser to prove how that sale-deed is binding on the plaintiff.

13] The third submission advanced by learned counsel for the Appellant is pertaining to the appreciation of evidence of the Respondent No.1-Plaintiff. It is submitted that neither the trial Court nor the Appellate Court has considered the various admissions given by the Respondent No.1 in her cross-examination. It is urged that, not only the Respondent No.1 but even the attesting witness examined by the Plaintiff, has also given some admissions to which the trial Court and the Appellate Court has not given due weightage. In this respect, learned counsel for the Appellant has pointed out that the Respondent-Plaintiff has admitted in her cross-examination that her family consists of her parents and they were four siblings. The income from the agricultural land was not sufficient and hence, her father was taking private loans. Further, it is submitted that the attesting witness Shivaji Bhosale has also admitted that the Plaintiff's father Pandurang was having some private loans and for satisfying the family needs, he has sold his land. Thereafter, he has corrected himself and stated that

this sale-deed was executed as security towards the loan.

14] As regards the alleged admission given by the Respondent No.1-Plaintiff that the income from the agricultural land was not sufficient, her own evidence shows that her father was also working as Talathi. Apart from that, he was addicted to alcohol and suffering from mental illness. That evidence is not disturbed. Moreover, merely because in the sale-deed there is recital that it was executed for the family requirement, is not sufficient to hold that it is a bonafide transaction; especially in the absence of specific pleadings relating to the legal necessity and the execution of the sale-deed for benefit of the joint family. Both the trial Court and the Appellate Court have considered the pleadings and found that there was no specific pleadings to that effect.

15] The trial Court and the Appellate Court also found that the husband of the Appellant is a very powerful political person and in addition to this transaction, there were several other transactions in which it was found that the money was advanced under the guise of sale-deed. The Revenue Entries of the year 1995 are produced to that effect in addition to the copy of the FIR in Criminal Case No.34 of 2008 filed against him for illegal money lending business. In the light of this

evidence, coupled with other evidence, like, Mutation Entries Exhibit Nos. 76 to 95, both the trial Court and the Appellate Court had arrived at concurrent finding that this transaction was not out and out sale, but it was a transaction of security towards the loan. In Second Appeal, this Court therefore cannot convert itself to the “third Court of fact finding” and disturb that finding; especially when it is based on evidence on record.

16] The last submission advanced by learned counsel for the Appellant is that, as regards the said sale-deed, assuming that it is not binding on the Respondent No.1-Plaintiff, it is required to be held binding so far as the share of the vendor of the sale-deed that is the father of the Plaintiff, viz. Respondent No.2, who has executed it. In this respect also, both the trial Court and the Appellate Court have already observed that, at the most, it can be binding on the share of the Plaintiff's father but so far as the Respondent No.1-Plaintiff is concerned, on her share it cannot be binding and therefore, her suit for partition of her 1/6 share needs to be decreed.

17] To sum up therefore, no fault can be found in the impugned judgment and decree passed by the trial Court and confirmed by the Appellate Court. No substantial question of law as such is raised and

therefore, the Second Appeal stands dismissed.

18] In view of dismissal of the Second Appeal, nothing survives in the Civil Application and hence, it also stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]