

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.58 OF 1995

- 1) Sangnath s/o Mahalingappa Ambulge,
Age 61 years, Occupation Agriculture,
R/o Almala Tq. Ausa Dist. Latur.
- 2) Jayshankar s/o Chanappa Ambulge,
Age 26 years, Occupation Agriculture,
R/o As above.
- 3) Umakant s/o Sangnath Ambulge,
Age 28 years, Occupation Agriculture,
R/o As above.

..Appellants.

VERSUS

- 1) Babu s/o Sidling Ambulge,
Age 22 years, Occup. Agri.& Labour,
R/o Almala Tq Ausa Dist. Latur.
- 2) Rajendra s/o Sidling Ambulge
(Deceased) Through His L.Rs.
- 2-A) Mayabai w/o Rajendra Ambulge,
Age 28 years, Occupation Household,
R/o Almala Tq. Ausa Dist.Latur.
- 2-B) Deepali d/o Rajendra Ambulge,
Age 5 years, Occupation Nil,
R/o As above.
- 2-C) Ganesh s/o Rajendra Ambulge,
Age 4 years, Occupation Nil,
R/o As above.
U/G of R-A i.e. Mayabai w/o
Rajendra Ambulge, Age 28
years, Occup. Household,
R/o As above.
- 3) Sidling s/o Basling Ambulge,
Age 66 years, Occupation Agriculture,
R/o As above.
(Deceased) Through L.Rs.

- 3-A) Babu @ Ramkant s/o Sidling Ambulge,
Age 48 years, Occupation Agriculture,
R/o Almala Tq. Ausa Dist. Latur.
(Already on record as respondent No.1)
- 3-B) Shivmala Bhagwan Birajdar,
Age 40 years, Occupation Household,
R/o Hingnemala Mahada Colony,
Vaidwadi, Hadapsar, Pune – 28.
- 3-C) Sangita Madhukar Wagh,
Age 32 years, Occupation Household,
R/o Almala Tq. Ausa Dist. Latur.
- 3-D) Bebi Shivling Yevlage,
Age 36 years, Occupation Household,
R/o Almala Tq. Ausa Dist. Latur.
- 4) Ram s/o Basling Ambulge,
Age 66 years, Occupation Agriculture,
R/o As above.
(Deceased) Through L.Rs.
- 4-A) Smt. Shanubai Ram Ambulge,
Age 85 years, Occupation Household,
- 4-B) Gurwasbai Gurappa Kharade,
Age 67 years, Occupation Household,

Both R/o Almala Tq.Ausa Dist.Latur.
- 4-C) Shankar s/o Ram Ambulge,
Age 65 years, Occupation Business,
R/o Market Yard, Almalekar
Tq. Dist. Latur.
- 4-D) Shivdas s/o Ram Ambulge,
Age 63 years, Occupation Private
Service,
- 4-E) Baswaraj s/o Ram Ambulge,
Age 61 years, occupation Business,
- 4-F) Dnyaneshwar s/o Ram Ambulge,
Age 53 years, Occupation Ex-Servicemen,

4-G) Mukteshwar s/o Ram Ambulge,
Age 48 years, Occupation Labour,

All R/o Almala Tq. Ausa Dist. Latur.

4-H) Nanda w/o Suresh Upase,
Age 45 years, Occupation Household,
R/o Ausa Swami Galli, Near Nandi
Math, Tq. Dist. Latur.

4-I) Somnath s/o Ram Ambulge,
Age 43 years, Occupation Business,

4-J) Balaji @ Balu s/o Ram Ambulge,
Age 40 years, Occupation Service,

Both R/o Almala Tq. Ausa Dist. Latur. **...Respondents.**

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Mr. S. B. Talekar, Advocate for Appellants.

Mr. B. R. Waramaa, Advocate for Respondents No.1 and
2A.

Mr. M. V. Dhongade, Advocate for Respondents No.3B
to 3D.

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Judgment :
18-03-2019.**

**Date of Pronouncing The Judgment :
13-06-2019.**

JUDGMENT :

1. Present appeal has been filed by original defendants No.2 to 4. Present respondents No.1 and 2 are the original plaintiffs who had filed Regular Civil Suit No.284 of 1982 for partition and separate possession. They were minors at that time and therefore the suit was filed through their cousin brother as next friend. Original

defendant No.1 is the father of plaintiffs. Their mother had expired about eight to nine years prior to the suit. It was contended that, plaintiffs and defendant No.1 are the members of joint Hindu family. However after the wife expired, defendant No.1 did not pay attention to the family. He got addicted to liquor and Ganja and in order to fulfill his vices, he started selling the joint Hindu family properties. It is stated that, there was absolutely no necessity for defendant No.1 to sell the lands. Agricultural land bearing Survey No.91/A admeasuring 5 Acres 20 Gunthas from East-North side situated at village Almala Tq. Ausa Dist. Latur was owned and possessed by defendant No.1 as well as plaintiffs. Out of the said survey number he sold 2 Acres 5 Gunthas land from North-East corner to defendant No.2. It was transferred by defendants No.1 and 5. Defendant No.5 is the brother of defendant No.1. The land which went to the share of defendant No.5 out of Survey No.92 was adjacent to the said 2 Acres 13 Gunthas land and on that count defendant No.5 has been made as party to the proceeding. It is stated that, thereafter in the year 1976, defendant No.1 sold Eastern side 2 Acres 12 Gunthas land adjacent to the rivulet (Nala) to defendant No.3 and further 1 Acre 3 Gunthas land from North side was sold to defendant No.2 in 1977. Both these transactions are not for legal necessity and they are not binding on the share of the plaintiffs. Defendant No.2 has further given the said land to his son defendant No.4, and therefore

he has been made party to the proceeding. Since the plaintiffs have birth right in the suit properties, they have filed suit for partition and separate possession to the extent of their share i.e. $2/3^{\text{rd}}$.

2. Defendants No.2 to 4 have filed written statement and denied the contents of the plaint. It is stated that, the suit could not have been brought through 'next friend', when the guardian of the minor plaintiffs is alive and he is defendant No.1. They denied that, defendant No.1 is addicted to liquor and in order to satisfy his vices, he has sold out the lands. It is stated that, out of Survey No.91/A/1 and 91/A/8 admeasuring 3 Acres 15 Gunthas came to the share of defendant No.1. It is denied that, in 1972 defendants No.1 and 5 have sold the North-East 2 Acres 5 Gunthas land out of Survey No.91/A to defendant No.2 without any legal necessity. It is stated that, at that time defendants No.1 and 5 were residing jointly and they had taken decision to sell out the said portion. That sale deed is binding on the plaintiffs. Defendants No.1 and 5 were joint till 1974 and thereafter they partitioned the lands as it appears from the 7/12 extracts. It is stated that, the land which was near to the rivulet (Nala) was barren and was not giving any income to defendant No.1 therefore he sold it in 1977 to defendant No.2. It was for the necessity of the family. So also on 20-05-1976 the portion of the land was sold to defendant No.3, as defendant No.1 was not having bullocks and other agricultural implements to

cultivate the land. Therefore according to the defendants No.2 to 4, the lands have been sold for legal necessity, and therefore, those transactions are binding on the plaintiffs.

3. Taking into consideration the evidence on record and hearing both sides, the learned Civil Judge, Junior Division, Ausa Dist. Latur partly decreed the suit on 06-09-1988. Plaintiffs were held entitled to get $2/3^{\text{rd}}$ share from land Survey No.91/A to the extent of 1 Acre 3 Gunthas and 2 Acres 12 Gunthas which were sold in the year 1976 and 1977.

4. Original defendants No.2, 3 and 4 filed Regular Civil Appeal No.160 of 1988 before the learned Joint District Judge, Latur. After hearing both sides, the appeal came to be dismissed on 11-11-1994, hence they have filed present second appeal. It will not be out of place to mention here that, the original defendants No.1 and 5 remained absent and the suit had proceeded ex-parte against them. So also they were absent in appeal also before the First Appellate Court.

5. When the matter came up for admission, this Court on 23-02-1995 has passed following order ;

“There involves substantial question of law in regard to the alienation effected by the Karta of the joint family for legal necessity.

2. Admit.

3. Notice."

Therefore, it is taken as substantial question of law.

6. Heard Mr. S. B. Talekar, Advocate for appellants, Mr. B. R. Waramaa, Advocate for respondents No.1 and 2A, and Mr. M. V. Dhongade, Advocate for respondents No.3B to 3D.

7. It has been vehemently submitted on behalf of the appellant that the present appellants are the purchasers. Since the suit was partly decreed and the sale transaction that was executed in 1972 was held to be binding on the plaintiffs and plaintiffs did not file any counter claim or cross appeal, that part of the decree has become final. The subject matter, now restricted to the appeal, is the sale deeds those were executed in the year 1976 and 1977. It was stated that, the plaintiffs who were minors filed the suit through next friend but he was not a relative. In fact the burden was wrongly thrown on the defendants to prove that there was a legal necessity. The learned Trial Court framed issue No.1 as,

"Do the plaintiffs prove that the transfer effected by defendant No.1, of the suit land, was without any legal necessity ?"

Whereas the First Appellate Court while framing points for determination framed point No.1 as,

"Do the defendants No.2 to 4 prove that, defendant No.1 sold the suit lands to them for legal necessity ?"

Plaintiffs did not adduce any evidence showing that, there was no legal necessity. Whereas the defendants have examined four witnesses to prove that, there was a legal necessity for defendant No.1. The First Appellate Court did not consider the admission given by the witness examined by the plaintiff. Further it was also not seen by both the Courts that, other lands belonging to the joint Hindu family were not brought in the hotch pot. The sale deeds were produced by the defendants at Exhibits 30 and 38. There was specific recital in both the sale deeds that, the transaction is done for the necessity of the family. Plaintiffs did not challenge the sale deeds which they have bought. Under such circumstance the valuation of the suit would have increased. Therefore, the finding arrived at and decree that has been passed by both the Courts is perverse and therefore the substantial question of law deserves to be answered in favour of the appellants by setting aside both the impugned decrees.

8. The learned advocate appearing for the appellant has relied on many cases. In *Kehar Singh (Dead) Through Legal Representatives and Others Versus Nachittar Kaur and Others*, reported in (2018) 14 Supreme Court Cases 445, wherein it was held that,

“Once the factum of existence of legal necessity stood proved, then, no co-parcener (son) has a right to challenge the sale made by the Karta of his family. The

plaintiff being a son was one of the co-parceners along with his father P. He had no right to challenge such sale in the light of the findings of legal necessity being recorded against him. It was more so when the plaintiff failed to prove by any evidence that there was no legal necessity for sale of the suit land or that the evidence adduced by the defendants to prove the factum of existence of legal necessity was either insufficient or irrelevant or no evidence at all."

In *Sakharam Mahadji Rajegore and others Versus Datta Vithalrao Rajegore and others*, reported in 2010 (6) Mh.L.J.225, wherein it was held that,

"Karta of the family can sell the property for legal necessity."

Similar view was taken in *Prasad and Others Versus V. Govindaswami Mudaliar and Others And K.P.Ramamurthi and Others Versus V. Govindaswami Mudaliar and Others*, reported in (1982) 1 Supreme Court 185, *Sunder Das and Others Versus Gajananrao and Others*, reported in (1997) 9 Supreme Court Cases 701, and *Shridhar s/o Bajirao Pawar and others Versus Bajirao s/o Dhondiba Pawar and other*, reported in (2016) 5 AIR Bom R 243.

Further submission has been made on the basis of decision in *E. Ramendra Rao Versus Dinesh Chand Verma and Others*, reported in 2010 (2) CGLJ 281 that, expenses incurred for medical treatment is a necessity for purposes of which a Karta can alienate

the joint family properties. It was on the basis of the fact that the defendants have proved that, defendant No.1's wife was suffering from Tuberculosis (TB) and was hospitalized. Huge expenses have been incurred on her treatment, and therefore, defendant No.1 had taken step to sell out the land.

Further reliance has been placed on the decision in *Kakumanu Pedasubhayya and Another Versus Kakumanu Akkamma and Another*, reported in *AIR 1958 SC 1042*, wherein it has been held that,

"A minor has no volition on his own in law and therefore cannot ask for partition of family property."

Further in *Nagaiah and another Versus Smt. Chowdamma (dead) By Lrs. And another*, reported in 2018 SCC OnLine SC 32, wherein it has been held that,

"A minor cannot file a suit through the next friend unless the guardian representing the minor has an interest adverse to the interest of the minor."

9. Per contra the learned advocate appearing for the respondent submitted that, the evidence led by the defendants to show the alleged legal necessity was in variance to their own pleading. There is absolutely no whisper in the written statement about defendant No.1 indebted due to medical expenses of his wife. Further in the written statement also no stand is taken that unless declaration in

respect of sale deeds has been sought, the suit is not maintainable. This argument has been advanced for the first time in second appeal which cannot be considered. Though the burden of proof initially was on the plaintiff to show that, there was no reason for the defendant No.1 to sell the land but then onus would certainly shift, as and when the suit proceeds. He relied on *Kalwa Devadattam Versus Union of India: Kamaji Saremal, Firm*, reported in 1964 AIR (SC) 880, wherein it was held that,

“The question of onus probandi is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the onus lies to prove a certain fact must fail. Where however evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties.”

As per the defence subsequently developed by defendants No.2 to 4 that defendant No.1 was indebted due to the hospitalization of wife of defendant No.1, can be seen to be a false defence that has been taken in view of the fact that in his testimony D.W.1 Sangnath has admitted that, wife of defendant No.1 Sidhling Basling Ambulge expired in the year 1974. Thus if she had expired in the year 1974 itself, where is the question of her hospitalization and incurring debt

for her treatment in 1976 and 1977. When the minor co-parceners have interest and share in the property, then definitely they have every right to file the suit. Definitely the interest of the minors was contrary to the defendant No.1 in this case. The point as regards not framing of proper issue as well as putting burden on defendant were never raised before the Trial Court or First Appellate Court. Therefore, they cannot be raised here in this appeal. In fact there is no substantial question of law arising in this case and at the time of admission it was not happily worded also. He relied on the decision in *Gurnam Singh (D) By Lrs. And Others Versus Lehna Singh (D) By Lrs., Civil Appeal No. 6567 of 2014*, wherein it has been reiterated that the second appellate Court cannot take cognizance of the case unless substantial questions of law have been made out. Similar view was also taken in, *Basheer Amir Patel Versus Dnyaneshwar Bhikarchand through its L.Rs. Dattu Dnyaneshwar Sonwane and others*, reported in 2015 (5) Mh.L.J. 853 and *Rajaram Vithu Shinde and Others Versus Bhagirathibai Kesu Jadhav and Others*, reported in 2205 (4) Mh.L.J. 1198. In respect of proving or onus of a fact to be proved he relied on the decision in *Rangammal Versus Kuppuswami & Anr.*, reported in 2011 AIR (SC) 2344.

10. As aforesaid the subject matter of this appeal is restricted to the sale deeds those were the executed in the year 1976-1977 only. Plaintiffs have come with a case that, there was no legal necessity

for defendant No.1 to sell those lands. In order to prove the same the plaintiff No. 1 has examined himself. It will not be out of place to mention here that at the time when the suit was filed P.W.1 Babu was minor, however during the pendency of the suit he attained majority and on the date his evidence was recorded, he was 20 years old. Therefore, the appellants cannot make use of the ratio in *Kakumanu Pedasubhayya and Another Versus Kakumanu Akkamma and Another*, reported in *AIR 1958 SC 1042 (Supra)*. Further as regards the suit that was instituted by them was through a next friend though defendant No.1 can be said to be their guardian. Definitely the interest of defendant No.1 was against the interest of plaintiffs because he was selling the properties in which the plaintiffs had interest or share. Therefore, no fault can be found in the format of the suit which was filed by minors through their next friend who was not a legal guardian in strict sense.

11. P.W.1 Babu has categorically stated that, there was no necessity for his father to sell the lands. In his cross-examination it was tried to be brought on record that, his father had no bullocks and agricultural implements to cultivate the land but that does not support the contention of the defendants that in absence of bullocks and agricultural implements, defendant No.1 was not able to cultivate and therefore he had kept lands barren. He could have got the land cultivated by hiring the bullocks as well as agricultural

implements. One of ground on which the defendants are contending that since the lands were remaining hollow or barren, defendant No.1 had decided to sell it. Their contention does not find any support in the 7/12 extract.

12. Another ground that was canvassed and evidence was tried to be led by the defendants is that, defendant No.1 was heavily indebted due to the medical expenses incurred on the treatment of his wife. In fact no such specific contention has been raised in the written statement therefore whatever evidence has been led will have to be held beyond the pleadings. Even if for the sake of arguments we consider that ground, it can be seen from the evidence that has been led by the defendant, D.W.1 Sangnath has stated that, Sidling sold the lands as it was hollow, to bring the land under cultivation he had to expend more. So in this reason he did not say that, defendant No.1's wife was ill. In fact in his entire examination in chief he is silent on that point. He has only stated that, Sidling's wife expired about ten years back. The reason for her death was not disclosed by him in his examination in chief. In his cross-examination he says that, defendant No.1's wife died in 1974. If that is so, then why the lands were sold in the year 1976-1977 is a question. If defendant No.1 was heavily indebted, he would have immediately, either just prior to or after the death of his wife would have sold the lands. D.W.2 Kashinath has also stated that, Sidling

and his brother are residing separately since 1974 and defendant No.1's wife expired about ten to twelve years ago. On the contrary in his cross-examination he has admitted that, after selling the land, Sidling had no source of income to maintain his family. If this was the fact then it is hard to believe that, the only source of income would have been sold by defendant No.1. If this situation was prevalent then they ought to have shown that except selling the lands, defendant No.1 had no alternative option for raising funds for the family. The evidence led by the defendants does not throw any such kind of light.

13. Though there was difference between the issue and point framed by the Trial Court and the First Appellate Court as regards legal necessity is concerned, it can be seen that both the Courts have considered the evidence led by both the parties from all the angles. Merely because the burden has been wrongly thrown on the defendants, it cannot be said that the learned First Appellate Court has committed any mistake in law because it has appreciated evidence from both the angles. Plaintiff could not have been asked to place any negative evidence on record to show that, there was no legal necessity. Parties are required to adduce positive evidence and therefore the statement on oath by the plaintiff that defendant No.1 had no legal necessity to sell the lands was sufficient to hold it accordingly. Per contra, the evidence adduced by the defendant on

the two aforesaid grounds, one is very much short of proving it and another is beyond the pleadings. Mere statements by the witnesses that, defendant No.1 was heavily indebted due to the medical expenses incurred on the treatment of his wife was not sufficient for the defendants to support their contention. The ratio laid down in *Kehar Singh (Dead) Through Legal Representatives and Others Versus Nachittar Kaur and Others*, reported in (2018) 14 Supreme Court Cases 445 (Supra) and *Sakharam Mahadji Rajegore and others Versus Datta Vithalrao Rajegore and others*, reported in 2010 (6) Mh.L.J.225 cannot be disputed. However, mere principle of law is not sufficient here to support the facts giving rise to the dispute. It was for the defendants then to prove that the 'Karta' of the family was required to sell the property and had no alternative left to raise funds for the family. The other authorities on the same line will have to be considered accordingly and no benefit of the said ratios can be given to the appellants.

14. As regards other lands which have not been brought in the hotch pot, the point raised in this appeal it can be seen that it was not raised specifically before the Trial Court. So also there was no attempt on the part of the defendants to get issue framed in respect of non inclusion of any other family of the joint family in the hotch pot, therefore the said point cannot be raised for the first time in second appeal. The details of those lands which have been left out,

has not been given.

15. A casual statements made in sale deed Exhibits 30 and 38 regarding sale of the land for necessary is not the sufficient evidence for the simple reason that, the details of the said necessity were not given in the recital of the sale deeds. Further there was also no need to challenge the sale deeds for the simple reason that, though the sale deeds were executed by the defendant No.1 without any legal necessity, those sale deeds cannot be said to be binding on the share of plaintiffs.

16. There is substance in the submissions on behalf of the respondents No.1 and 2, in fact no substantial question of law is arising in this case and therefore the second appeal deserves to be dismissed. Since the matter was admitted long back, the other authorities on the point of maintainability of the second appeal cannot be considered at this stage. With these observations following order is passed.

ORDER

- 1) The second appeal is hereby dismissed with costs.
- 2) Decree be drawn accordingly.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.