

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

SECOND APPEAL NO. 372 OF 2012

1. Balakrao S/o Sahebrao Bachate,
age 32 years occupation agriculture
R/o Takli Siradhon Tal. & Dist. Latur.
2. Kalyan S/o Sahebrao Bachate,
age 28 years occup. & R/o as above. ...Appellants

VERSUS

1. Arjun S/o Tukaram Savant,
age 52 years occup. agriculture
R/o Takli Siradhon Tal. & Dist. Latur.
2. Sahebrao S/o Pundlikrao Bachate,
age 59 years occup. & R/o as above ...Respondents

Mr. B.N. Patil, Advocate for appellants.

CORAM : AVINASH G. GHAROTE, J.

DATE : 30th September, 2019

ORAL JUDGMENT:

1. Heard Mr. B.N. Patil, learned Counsel for the appellants.
2. None appears for the respondents though served.
3. For the sake of convenience, the parties are being referred to as they were before the Trial Court.

4. The plaintiffs/appellants had filed a suit claiming the possession of $\frac{2}{3}^{\text{rd}}$ share in the land of Gat No. 209 admeasuring 0.83R situated at Takali Shiradhon Taluka and Dist. Latur and for cancellation of sale deed dated 08/01/1996, which was executed by defendant No.2 in favour of defendant No.1 in respect thereof. Plaintiffs Bakakrama and Kalyan are real brothers interse and defendant No.2 Sahebrao is their father. It was contended by the plaintiffs in the suit that Gat No. 209 was ancestral joint family property and the plaintiffs had $\frac{1}{3}^{\text{rd}}$ share, each, in the said land and, therefore, the sale by defendant No.2, their father, by the sale deed dated 08/01/1996 to defendant No.1 was without consent of the plaintiffs and, therefore, the same was liable to be set aside. It was also contended that defendant No.2, their father, had filed Reg. civil suit No. 665/2003 in respect of the suit property against defendant No.1, which was pending before the 5th Joint Civil Judge (Junior Division), Latur, wherein an application filed by present plaintiffs/appellants for adding them as parties, was rejected on 31/10/2006, consequent to which, they were constrained to file the suit before the Trial Court. It is contended that the sale deed dated 08/01/1996 being without their consent, was not binding upon the plaintiffs/appellants. Defendant No.2 supported the claim of the plaintiffs.

5. Defendant No.1 in his written statement contended that the suit was collusive between the plaintiffs and defendant No.2. He also raised a plea that sale dated 08/01/1996 in his favour was for legal necessity.

6. After framing the issues and recording evidence, the learned Trial Court came to the conclusion that as per the agreed position between the plaintiffs and defendant No.2, the property was ancestral joint family property and was purchased from the joint family income out of the agricultural lands being held and cultivated by defendant No.2 Sahebrao and therefore, the plaintiffs would have share therein. It, however, on appraisal of the pleadings, found that the plea of absence of legal necessity was not stated at all by the plaintiffs in the plaint, while admitting that defendant No.2 was the 'Karta' of the joint family comprising the plaintiffs and defendant No.2. He, thus, found that in absence of plea of legal necessity being put-forth by the plaintiffs in the plaint, while challenging the sale deed dated 08/01/1996, it was not necessary for defendant No.1/alienor to tender proof of legal necessity. Reliance was placed upon *Pandurang Mahadeo Kavade Vs. Annaji Balwant Bokil* reported in *AIR 1971 Supreme Court 2228*; and *Anita Rege Vs. Guruprasad M. Raje and others*, reported in *2004 (3) All M.R. 271 (Panji Bench)*. The learned Trial Court, thus, held that in absence of the pleadings as to legal necessity, defendant No.1

was not put on notice and, such a plea having not been raised by the plaintiffs themselves, defendant No.1 was not required to tender proof of legal necessity. He further held that the sale by defendant No.2 in his capacity as a '*Karta*', was binding upon the plaintiffs. On a further plea raised by defendant No.2 that there was an agreement of reconveyance dated 29/12/1995 executed by defendant No.1 in his favour, the learned Trial Court held that no counter claim was filed by defendant No.2 in this regard. That apart, Reg. civil suit No. 665/2003 filed by defendant No.2 Sahebrao against defendant No.1 for reconveyance of the suit land on the basis of agreement dated 29/12/1995 came to be dismissed in default, as defendant No.2 remained absent. No proceedings were filed by defendant No.2 to get the suit restored. He, thus, held that it was not open for defendant No.2 to now raise the plea regarding the alleged agreement of reconveyance. Thus, based upon the evidence led, the learned Trial Court rendered the finding that defendant No.2 had sold the suit land as a '*Karta*' of the joint family and the transaction was binding on the plaintiffs. It was further found by the learned Trial Court that the total area of Gat No. 209 was 2H. 69R, in which admittedly considering that defendant No.2 would be having 1/3rd share, same would come to 2 acres 9R, as against which, what was transferred under the sale deed dated 08/01/1996 in favour of defendant No.1, was an area admeasuring only 0.83R, leaving balance of 0.6R with defendant No.2 in so far as his share was

concerned. It was, thus, found that area sold by defendant No.2 to defendant No.1 under the sale deed dated 08/01/1996, in fact, was less than what would have come to his share in a partition between plaintiffs and defendant No.2. Considering the matter in this light also, the learned Trial Court found no favour with the plaintiffs.

7. On the issue of limitation, the learned Trial Court found that when the sale deed dated 08/01/1996 was executed and registered, plaintiffs were minor. The suit challenging the sale deed dated 08/01/1996 was filed on 05/01/2008, on which date, the plaint showed the ages of plaintiff No.1 Balakrao Sahebrao Bachate as 28 years and that of plaintiff No.2 Kalyan Sahebrao Bachate as 24 years and thus, concluded that the suit ought to have been filed within three years from the date of attaining majority, which having not been so filed, the suit was also barred by limitation. Considering this, the learned Trial Court was pleased to dismiss the suit by its judgment and decree dated 04/11/2009.

8. The appeal at the behest of the original plaintiffs before the first Appellate Court did not lay any challenge to the findings as to issues No. 1 & 2, as rendered by the Trial Court that the property was joint family property and defendant No.2 was a '*Karta*' of the same. This is so reflected from para 8 of the judgment of the Appellate Court. The Appellate Court found that so also the plea of

absence of legal necessity too was not pleaded by the plaintiffs, however, there is material on record to show that in the year 1996-97 there was loan of Rs. 25000/- on the family of the plaintiffs incurred by defendant No.2 Sahebrao from Janata Urban Sahakari Bank Ltd., Usmanabad. It further found that, that in fact was the purpose for sale of the suit property. The first Appellate Court reiterated the factual possession of absence of pleadings as to legal necessity in the plaint and after considering the well reasoned judgment of the Trial Court, found that the sale in favour of defendant No.1 by defendant No.2 as '*Karta*' of the joint family property, was legal and binding upon the plaintiffs. The learned Appellate Court further found that there was no counter claim raised by defendant No.2 against defendant No.1 even presuming agreement of reconveyance dated 29/12/1995 to be in existence, in spite of the dismissal of Reg. civil suit No. 665/2003. The learned Appellate Court further found that the plaintiffs had knowledge regarding the execution and registration of the sale deed dated 08/01/1996 and ought to have filed the suit within limitation, which knowledge is reflected from the application filed by them in Reg. civil suit No. 665/2003 to get themselves impleaded as party defendants therein and the suit having been filed on 05/01/2008, beyond the period of three years after attaining majority, was also barred by limitation.

9. The learned Counsel for the appellants submits that the grounds as raised in the memo of appeal, are containing substantial questions of law. He further submits that even if there was no pleading in the plaint regarding absence of legal necessity , it was incumbent upon defendant No.1 to demonstrate legal necessity on record.

10. Though the law is clear on the point that in case of transfer by Karta, being challenged on the point of absence of legal necessity, it is for the transferee to prove the legal necessity, the question which arises in the present matter is whether the obligation by a transferee to prove legal necessity, continues to exist, even when the person challenging the transfer, does not come up with a plea in the plaint, of absence of legal necessity in effecting the transaction. The answer to this in my opinion, has to be found in the provisions of the Code of Civil Procedure and specifically Order 6, Order 8 and Order 14 which relate to pleadings, written statement and framing of issues. The law enjoins a party who approaches the Court to come with a pleading, which as defined in Order 6 Rule 2 of the C.P.C. is to contain, and contain only, a statement in a concise form of the material facts on which a party pleading relies for his claim. Order 6 Rule 4, then requires a party in all cases in which

particulars may be necessary, beyond such as are exemplified in the forms, to be stated in the pleadings. The subsequent provisions of Order 6 Rule 6 to 12 then dilate upon the nature of the pleadings which are required to be made if there is a condition precedent or a departure from the pleadings, the effect of a document, the nature of denial required to be made in respect of a contract and other things as stated therein. The reason for this, is the corresponding obligation cast upon the defendant by virtue of the provisions of Order 8 Rule 1A to Rule 5, to meet the allegations in the plaint and in a given case, if there are no pleadings vis-a-vis a particular transaction or a document contained in the plaint, there would be no corresponding obligation upon the defendant, to traverse the same. In light of an absence of pleading and non traverse as a result of the same, the Court under the provisions of Order 14 Rule 1 is not bound to frame any issues in that regard. The further position is that no evidence in absence of pleadings, is permissible to be led. This being the position, the pleadings in the plaint, assume exemplary importance. The plaintiff coming to the Court, challenging a transfer made by his Karta, as not being binding upon him, necessarily has to raise a plea, that such a transfer, was not for legal necessity, only in which case the corresponding obligation to deny the same or for that matter to prove the existence of legal necessity would transfer to the defendant. The very purpose of

raising a plea in the plaint, is to put the defendant on notice, as to the case, which the defendant has to meet in his defence. If such a plea is not raised in the pleadings at all, the defendant, is not put on notice and thereafter it would not be permissible to expect from the defendant, that he ought to have proved a case, which he was not called upon to defend at all. It is a settled position of law that the substance and not form is material. The substance of the plea ought to be spelt out by the pleadings, form being non-essential. The only exception is a case where the parties go to trial being fully aware of the obligation to meet the case put up by the otherside and, in fact, consciously lead evidence on the point, even in absence of pleadings and issues being framed on the plea, that the rigor of absence of pleadings can be relaxed and the plea even though not specifically raised can be entertained and decided, but not otherwise. The position in this regard is spelt out in the case of ***Bhagwati Prasad Vs. Chandramauli, AIR 1966 Supreme Court 735***, in paragraphs 9 & 10 in the following words:

" 9. There can be no doubt that if a party asks for a relief on a clear and specific ground, and in the issues or at the trial, no other ground is covered either directly or by necessary implication, it would not be open to the said party to attempt to sustain the same claim on a ground which is entirely new. The same principle was laid

down by this Court in Sheodhari Rai & Others v. Suraj Prasad Singh, AIR 1954, SC 758. In that case, it was held that where the defendant in his written statement sets up a title to the disputed lands as the nearest reversioner, the Court cannot, on his failure to prove the said case, permit him to make out a new case which is not only made in the written statement, but which is wholly inconsistent with the title set up by the defendant in the written statement. The new plea on which the defendant sought to rely in that case was that he was holding the suit property under a shikmi settlement from the nearest reversioner. It would be noticed that this new plea was in fact not made in the written statement, had not been included in any issue and, therefore, no evidence was or could have been led about it. In such a case clearly a party cannot be permitted to justify its claim on a ground which is entirely new and which is inconsistent with the ground made by in its pleadings.

10. But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in

the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issue, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it ? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another. "

This has been followed in **Ram Sarup Gupta Vs. Bishun Narain Inter College, AIR 1987 SC 1242.** **Anita Rege Vs. Guruprasad M. Raje and others,** (supra), relied upon by the Courts below, also enunciates the same proposition.

11. Applying the above principles, to the facts of the present case, I find that the matter in hand is squarely covered by the judgment in the case of ***Pandurang Mahadeo Kavade*** (supra), wherein the Hon'ble Apex Court has held that, in the case of alienation by '*Karta*', the proof of legal necessity by alienee is not necessary when specific plea as to want of necessity is not raised.

12. In the instant case, the learned Counsel for the plaintiffs/appellants candidly admitted that the plaint does not contain any averment that the sale in favour of defendant No.1 by defendant No.2/Sahebrao, was not for legal necessity. The only contention raised was that there was no consent of the plaintiffs to the sale, which even otherwise could not have been there as admittedly the plaintiffs were minor on the date of the sale, apart from the fact that defendant No.2 admittedly being the '*Karta*', did not require any consent of the plaintiffs.

13. In-spite of the absence of a plea, the learned Trial Court in paragraph 24 of the judgment has considered the factual position as brought on record that in the year 1996, defendant No.2/Sahebrao was indebted to the Janata Sahakari Bank, Osmanabad, in the sum of Rs. 25,000/-. The 7/12 extract of the suit property at Exh. 36 contained an entry recording the loan from the Janata Sahakari Bank, Osmanabad, which was obviously a debt

on the joint family, headed by defendant No.2/Sahebrao and it was for reason of repayment of the same that the sale deed was executed. This position has been correctly appreciated by the learned Appellate Court in paragraph 9 of the judgment. Thus, there are concurrent findings of fact on this point and there is nothing contrary to this position on record, which would enable me to take a different view of the matter.

14. That apart, in so far as the issue of limitation is concerned, the sale was attempted to be challenged by the plaintiffs by attempting to get themselves impleaded in Reg. civil suit No. 665/2003 filed by their father Sahebrao/defendant No.2 against defendant No.1, challenging the sale deed dated 08/01/1996, which application came to be rejected. Such rejection was not challenged by the plaintiffs before the Higher Forum. Thus, the plaintiffs were fully aware as to the existence of the sale deed dated 08/01/1996. As rightly held by the Courts below, considering the age of the plaintiffs, as shown in the cause title of the plaint, plaintiff No.1 became major some time in 1998-99 and plaintiff No.2 sometime in 2001-2002, whereas, the suit has been filed on 05/01/2008, considering which the same was clearly barred by limitation as Article 60 of the Limitation Act, 1963, applies.

15. Not only this, as reflected from the impugned judgments, the challenge to the sale deed dated 08/01/1996 by defendant No.2/ Sahebrao, was posed in the year 2003 i.e. nearly eight years after he executed the sale deed dated 08/01/1996. If at all there was any infirmity or challenge open, nothing prevented defendant No.2/Sahebrao from raising such a challenge immediately after or within three years of the date of execution of the sale deed dated 08/01/1996. The same was done only in 2003. Defendant No.2/Sahebrao cannot plead ignorance as to the sale deed dated 08/01/1996 as he himself was its executor. The silence on behalf of defendant No.2/Sahebrao for nearly eight years, is telling and unexplained. Over and above that, he let the suit filed by him to be dismissed-in-default and did not make any attempt to get it restored. It is, thus, apparent that having failed in his attempt to get the sale set aside, he saw to it that his sons challenged the transaction, that too, after a long period of time, in as much as, though the plaintiffs had attained majority, as observed earlier sometime in 1998-99 and 2001-2002, the suit came to be filed on 05/01/2008, wherein their father Sahebrao was made a party defendant No.2.

16. The plaintiffs, who are the residents of the same village, in which the suit property is situate, namely, Takali Shiradhon Taluka

& Dist. Latur, cannot claim to be oblivious to the transaction of sale dated 08/01/1996, as they must have seen that their father/defendant No.2, who was earlier cultivating it, had, in fact, not being doing so since 08/01/1996. It is nobody's case that the plaintiffs and defendant No.2 are residing separately. In fact, the address, as given in the cause title of the plaint, shows the same place of residence, and the plaint reflects their joint status. Thus, any plea of absence of knowledge, is also not available to the plaintiffs.

17. In fact the above position, coupled with the action of the defendant No.2 / Sahebrao in supporting the claim of the plaintiffs, clearly fell within the meaning of the word "collusion". The Hon'ble Apex Court, in the case of **Nagubai Ammal Vs B. Shamarao**, AIR 1956 SC 953, has held collusion to mean as under :

"collusion, in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of judicial tribunal for some sinister purpose. In such a proceeding, the claim would forward is fictitious, the context over it is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties".

Considering the fact that the plaintiffs were aware of the

proceedings filed by the defendant No. 2 / Sahebrao, their father, their attempt at getting themselves impleaded in that suit being rejected on 31/10/2006 and in absence of any challenge thereof having become final, the suit as filed by defendant No.2 / Sahebrao having been dismissed in default, and with no application for restoration having been filed, stood finally terminated, the filing of the present suit by the plaintiffs against their father the defendant No. 2/ Sahebrao and he supporting the claim of the plaintiffs, could only be said to be in collusion with each other, to obviate the rights of the defendant No.1 as obtained by him under the sale deed dated 08.01.1996, which is further affirmed from the admission of plaintiff No.1 Balakrao Sahebrao Bachate, in his cross-examination, as recorded by the learned Trial Court in paragraph 22 of the judgment, which is to the effect "P.W.1 Balakrao has also admitted in his cross that they and defendant No.2 Sahebrao have filed this suit by joining hands with each other." An admission elicited by skillful cross-examination is the most telling piece of evidence in a civil proceeding and the one, as recorded by the learned Trial Court, as enumerated above, is certainly one, which sounds the death knell for the case of the plaintiffs. The law abhors collusive proceedings and no Court can permit them to continue. Collusion is further writ on the face of record, in as much as, the total area of Gat No. 209 was 2H.69R, in which admittedly considering that there were three

claimants i.e. the two plaintiffs and defendant No.2, each would be having 1/3rd share. Thus, calculated the 1/3rd share of plaintiffs would be 0H.89.6R, each and defendant No.2 would be having 0H.89R. As against this, what was sold by defendant No.2/Sahebrao under the sale deed dated 08/01/1996, was only an area of 0H.83R, leaving an area of 0H.06R balance to his share. Thus, the plaintiffs even in case a partition was demanded, by them, which was not, would have been entitled to 1/3rd share, each, which came to 0H.89R, each, which area was already balance and available with defendant No.2/Sahebrao. This leads one to an irresistible conclusion that defendant No.2/Sahebrao had set up the plaintiffs to challenge the transfer dated 08/01/1996 and the suit as instituted by the plaintiffs was clearly collusive in nature. Thus, in light of the admission of plaintiff No.1 Balakrao, as recorded by the learned Trial Court and the position as discussed above, the collusive nature of the proceedings is clearly established.

18. The theory of an agreement of reconveyance by defendant No.1 in favour of defendant No.2 has also been rejected by the learned Trial Court as the agreement itself has been held to be not proved. Both the judgments, as such, do not suffer from any infirmity in applying and appreciating the law as applicable.

19. In light of the above, I do not see any substantial

question of law arising in the second appeal, at the behest of the original plaintiffs. The appeal is, therefore, without any merit and is liable to be dismissed. The second appeal is accordingly dismissed, with no order as to costs.

(AVINASH G. GHAROTE)
JUDGE

Madkar