IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

927 SECOND APPEAL NO.135 OF 2020
WITH CA/3931/2020 IN SA/135/2020

ASHOK DADA AHER AND ANOTHER

VERSUS

KARBHARI MAHADU AMBARE AND OTHERS

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Mr. A.N. Nagargoje, Advocate for appellants

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 01st OCTOBER, 2021

ORDER :

1 Present appeal has been filed by the original plaintiffs challenging the Judgment and Decree passed in Regular Civil Appeal No.99/2012 by learned District Judge-2, Samgamner, Dist. Ahmednagar on 07.01.2019, whereby the appeal filed by the present respondent No.1-original defendant No.1 came to be allowed and the suit filed by the present appellants came to be dismissed. Present appellants had filed Regular Civil Suit No.121/1985 for declaration and injunction. The said suit came to be decreed on 05.05.2012 by learned Civil Judge Junior Division, Akole, Dist. Ahmednagar. The defendants were directed to hand over the suit property to

the plaintiffs to the extent of 1/4th share in the suit property and it was held that the sale deed dated 22.02.1979 was not binding on the plaintiffs as it was *void ab initio*.

2 Heard learned Advocate Mr. A.N. Nagargoje for the appellants.

3 It has been vehemently submitted on behalf of the appellants-plaintiffs that the learned Trial Judge had taken a proper appreciation of evidence and arrived at correct and legal conclusion. There was no necessity for the First Appellate Court to disturb those findings. The First Appellate Court failed to consider that the suit property was the joint family property of the plaintiffs and defendant Nos.3 and 4. Plaintiff Nos.1, 2 and defendant No.3 are the sons of one Dada and defendant No.4. After the demise of Dada the suit land came to be mutated in the name of defendant No.4 in her individual capacity as well as the guardian of plaintiff Nos.1, 2 and defendant No.3, who were at that time minors. There was loan taken from Co-operative Society over the suit land. Defendant No.4 executed sale deed in respect of the suit land in favour of defendant No.1 for a consideration of Rs.3,000/- on 22.02.1979. Thereby the sale deed was hit by Section 47 and 48 of the Maharashtra Co-operative Societies Act. Since the alienation becomes void in view of Section 48-E of the Maharashtra Co-operative Societies Act, the defendant No.1 could not have acquired any kind of right or title. The said

sale deed was not binding on the plaintiffs and it was not even executed for the legal necessity.

4 The defendant Nos.1 and 2 appeared in the matter. Later on, the legal representatives of defendant No.2 appeared, after they were brought on record, in view of demise of defendant No.2. They had submitted that the said sale deed was legal. It was executed for the legal necessity of the joint family. Defendant No.4 wanted to repay the loan of the society and, therefore, she executed the said sale deed. By that time the defendant No.3 was major and he was also the signatory to the sale deed. Out of the total area of Sy.No.91/2 to the extent of 98 R, they have sold land admeasuring 20 R. The entire property was not sold. It was further submitted on behalf of the appellants that the Trial Court considered that the loan that was taken was only to the extent of Rs.600/- and for that purpose they could not have sold 20 R land for an amount of Rs.3,000/-. DW 1 in his cross-examination clearly admitted that he had not made any inquiry with the defendant No.4 regarding the necessity to sell the land. Further, when the Law under Section 47(2) and (3) as well as Section 48 of the Maharashtra Co-operative Societies Act prohibits such alienation, the transaction itself was void and it was not binding on the plaintiffs. The learned First Appellate Court took a wrong view that recitals in the sale deed were sufficient to indicate that there was

legal necessity for the family to raise amount. It was wrongly observed by the First Appellate Court that there was no suggestion given to the plaintiff that there was no legal necessity to the family for selling the suit property and, therefore, whatever was stated by DW 1 in his examination-in-chief as reason to sell the suit property had gone unchallenged. Mother cannot become Manager or Karta of the family and, therefore, she had no authority to sell the suit land, in which the minor had right and title. Even as regards the bar under the Maharashtra Co-operative Societies Act, a wrong view has been taken and, therefore, substantial questions of law are arising in this case.

5 At the outset, it is to be noted that unless the appellants in the Second Appeal make out substantial questions of law, as contemplated under Section 100 of the Code of Civil Procedure, there is no necessity to even issue notice to the respondents. Reliance can be placed on **Ashok Rangnath Magar vs. Shrikant Govindrao Sangvikar, (2015) 16 SCC 763** to support this contention.

6 The plaintiffs were challenging the suit transaction, which had taken place on 22.02.1979 in the suit filed on 24.07.1985 on two grounds; firstly, there was no legal necessity and another the transaction was hit by the prohibition under Section 47 and 48 of the Maharashtra Co-operative

Societies Act. Before turning to the same it is to be noted that when the suit was filed plaintiff No.1 was stated to be 22 years old young person and plaintiff No.2 was shown as aged 16, that means, minor and he was stated to be under the guardianship of plaintiff No.1. In fact, when a suit is filed by the minor the appropriate person through whom such suit can be filed by the minor is next friend, who need not be the legal guardian in all legal parlance. However, here the defendant No.4, who is the mother can be said to be the legal guardian of plaintiff No.2, however, without her consent how plaintiff No.1 can file suit in the capacity as next friend of the minor, is a question. Therefore, the possibility of the suit being the collusive suit between the plaintiffs and defendant Nos.3 and 4 cannot be ruled out.

7 The Judgment of the Trial Court appears to be too cryptic and all the evidence together with the legal interpretations appears to have been not properly done. The suit property had devolved on the plaintiffs and defendant Nos.3 and 4 after the demise of their predecessor Dada. Another fact will have to be considered is that the entire area of the property was admeasuring 98 R, out of which only 20 R was sold to defendant Nos.1 and 2. Even if for the sake of some reason we keep the rights of plaintiffs aside; yet, defendant Nos.3 and 4 being the co-sharers/members would have been justified in selling their share from the suit property and there would not

have been any legal hurdle for them. Definitely, the area which was sold was sufficient to include the area/share which would have come to the share of defendant Nos.3 and 4. The plaintiffs, in fact, had equal efficacious remedy only by way of filing a suit for partition and thereby getting their share separate did not do so, but filed the suit for declaration and injunction. Now, in the suit for declaration and injunction surprisingly the Trial Court had directed the defendants to hand over the possession of suit property to the plaintiffs to the extent of $1/4^{th}$ share, that means, in a way decree for partition was given by the learned Trial Judge, which was, in fact, illegal.

8 The First Appellate Court, after taking into consideration the documentary evidence on record, noted that the loan amount was taken in the year 1979 or prior to that. The recitals in the sale deed show that the land under the sale deed was sold by defendant Nos.3 and 4 for repayment of that loan. We can understand the fact that though the mother may not be strictly the Manager or the Karta of the family, but at the same time, when the children were minor or of young age and not earning at all, then definitely, she was required to run the house. She would have justified in raising the loan, but then at the same time she had the liability to repay the loan. She was then justified in entering into such transaction. The learned First Appellate Court has correctly observed that defendant No.3 being the

elder brother of the plaintiffs could have been taken as Karta or Manager of the joint family in absence of father. He is the signatory to the sale deed. Even he could have had authority to sell the said land for the benefit of the family. Therefore, from that angle the transaction cannot be said to be hit by any provisions of law.

9 As regards the provisions of Section 47 and 48 of the Maharashtra Co-operative Societies Act is concerned, the First Appellate Court has rightly relied on the decision in **Malhari Gangaram Kale, deceased, through L.Rs. Babu Malhari Kale vs. Shenfad Namdeo Tayade, (2004) 4 Mh.L.J., 577**. This Court had observed that the provisions of Act of 1960 will have to be interpreted for advancement of the object and the scheme of the statute. Though the law prohibits transaction/alienation without the approval of the co-operative society and makes it void; yet, only the society, whose interest is to be protected can avoid such transaction. In other words, if the society takes objection then only the transaction can be avoided or declared as void. The protection is unavailable to those who want to use the provisions in disguise. The plaintiffs never, in this case, brought on record that the society, at any point of time, had ever objected to the transaction. Therefore, even on that point also the sale deed cannot be said to be *void ab initio*.

10 The appeal was correctly allowed by the First Appellate Court and thereby the Judgment and Decree passed by the Trial Court was reversed. Now, no substantial questions of law, as contemplated under Section 100 of the Code of Civil Procedure, requiring admission, are arising, in this case. The Second Appeal stands dismissed at the threshold. Civil Application stands disposed of.

(Smt. Vibha Kankanwadi, J.)

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