

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.451 OF 2019
WITH CA/8804/2021 IN SA/451/2019

SUNIL S/O KALYAN BHALE AND OTHERS
VERSUS
KAMANABAI ALIAS KAMALABAI KALYAN BHALE (DIED) AND OTHERS

...
Mr. V. V. Jahagirdar h/f Mr. N. K. Tungar for appellants.

...
CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 07.10.2021

ORDER :-

. Present appeal has been filed by the original plaintiffs challenging the concurrent judgment and decree passed by the Courts below. Present plaintiffs had filed Regular Civil Suit No.60 of 2002 before the learned Civil Judge Junior Division, Kannad, Dist. Aurangabad for partition and separate possession. The said suit came to be partly decreed on 18.10.2010. It was held by the learned Trial Court that the plaintiffs are having 4/5th share in suit property old Municipal House No.408 now converted to Municipal House No.3/455. However, their claim in respect of old Municipal House No.408 converted into Municipal House No.408/A now converted into Municipal House No.3/455/A was dismissed. The original plaintiffs challenged the said judgment and decree by filing Regular Civil Appeal No.226 of 2011

before the learned Principal District Judge, Aurangabad. By judgment and order dated 16.09.2018, the said Regular Civil Appeal as well as Regular Civil Appeal No.227 of 2011 filed by original defendant No.3, came to be partly allowed. The judgment and decree passed by the learned Trial Judge was set aside and modified. The suit for partition was partly decreed. It was declared that plaintiff Nos.1 to 4 and defendant No.1 are entitled to get 1/5th share each in the suit property area 1376 sq. feet excluding the area of 784 sq. feet i.e. 28 x 28 feet purchased by defendant No.2. Plaintiff Nos.1 to 4 and defendant No.1 held to get 275 sq. feet each out of area 1376 sq. feet and defendant No.3 would retain 275 sq. feet area in equitable partition out of the area purchased under registered sale-deed dated 21.07.2004. The claim for partition in respect of another property which was rejected by the learned Trial Court was also rejected by the first Appellate Court. Hence, this second appeal.

2. Heard learned Advocate Mr. V. V. Jahagirdar holding for learned Advocate Mr. N. K. Tungar for appellants.

3. It has been vehemently submitted on behalf of the original plaintiffs that both the Courts below have failed to consider that both the suit properties were the ancestral properties left by the father of plaintiffs and now by the deceased mother (original defendant No.1),

who expired during the pendency of the appeal. They had no right to alienate the property to respondent Nos.2 and 3, which came to be sold by two different sale-deeds. The provisions of Hindu Succession Act were not considered properly. It is then contended that respondent No.2, after the alleged sale-deed by deceased father – Kalyan, had entered his name and succeeded in getting entries and separate number 408-A without giving notice to the plaintiffs. Even respondent No.2 had filed suit for injunction against deceased father and mother of the plaintiffs during their lifetime, which came to be decreed against them. But, it was failed to consider that when they had no right to sell the suit property, such injunction could not have been clamped and the rights of the plaintiffs in the suit property could not have been prejudiced. Both the respondents i.e. respondent Nos.2 and 3 failed to prove the legal necessity and, therefore, those sale-deeds in their favour ought to have been set aside.

4. Reliance has been placed on the decision in ***Suresh @ Suryakant Shamsundar Darandale and anr. Vs. Praveen Balasaheb Darandale and ors.,[2014 (7) LJSOFT 59]***, wherein it has been held that “Hindu coparcener has right to sell at least his own share from joint family property and for that purchaser is not expected to prove that the transaction was made for legal necessity, however, as the legal necessity

is not proved the sale in respect of interests of plaintiffs in the joint family property cannot be recognised.” Further, in this case, though in the sale-deeds it was mentioned that the seller was in need of money for medical expenses, but when no particulars of the medical expenses were given either in the sale-deed or in the evidence, then such legal necessity cannot be presumed. Further, reliance has been placed on the decision in ***Rameshwar s/o Babasaheb Paul Vs. Shivaji s/o Eknathrao Paul and others, [2019 (4) ALL M R 803]***, wherein it has been held that, “Evidence on record shows that the plaintiff, minor was exclusive owner of the suit land and no evidence was adduced that father was neglecting the child and child was in care, custody and maintenance of the mother, then the sale cannot be said to be for legal necessity or benefit of minor.” Further, reliance has been placed on the decision in ***The Designers Co.-Op. Hsg. Soc. Vs. Udhav s/o Murlidhar Rasne and ors.,[2011 (1) ALL MR 346]***, wherein the duties of purchaser were highlighted and he was held that, “the burden would lie on purchaser to prove either that there was legal necessity in fact or that he made proper and *bona fide* inquiries as to existence of such appalling and pressing needs of the family.” Further, reliance has been placed on the decision in ***Mohd. Osman s/o Pir Sab Vs. Dr. Devid s/o Premkumar D. F. Sundersingh, [2011 (2) ALL MR 315]***, wherein it was held by this Court that the first

Appellate Court is a last fact finding Court and is duty bound to deal with the total factual matrix. Further, reliance has been placed on the decision in *Mallaya Bapenna Mekkalwar Vs. Rajboina Bhemmaka w/o Hanamantoo & ors.*, [2008 (2) ALL MR 21], wherein it has been held that though the defendants contended that the transaction was for legal necessity, but the evidence on record was not supporting the said case, the order of passing decree for partition and separate possession was proper. Further, reliance has been placed on the decision in *NagubaiAmmal and others Vs. B. Shama Rao and others*, [AIR 1956 SC 593], wherein it has been held that, “when the parties went to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon and adduced evidence relating to the same, then absence of a specific pleading on the question was mere irregularity, which resulted in no prejudice to them.”

5. On the basis of these submissions, learned Advocate for the appellants prayed for admission of the second appeal stating that substantial questions of law are arising in this case.

6. At the outset, it is to be noted that both the Courts below, taking into consideration the evidence, held that the plaintiffs have partly proved that the suit property is undivided joint Hindu family property of plaintiffs and defendant No.1. In order to arrive at this conclusion, the

first and the foremost fact that is required to be considered is that the plaintiffs contended that it was an ancestral property, but then who was the original person has not been stated. If that was the ancestral property, it could not have started from their father. Account of three generations including their father should be accounted and then their has to be pleading as to how the suit property devolved on their deceased father. There is lack of clarity in this connection. However, the evidence that was available would show that the father, their mother i.e. defendant No.1 and plaintiffs were residing together forming a joint Hindu family. Their father Kalyan had sold the second property i.e. 28 x 28 ft. Municipal House bearing No.408-A to original defendant No.2 on 19.08.1981. If that sell was of the year 1981, then the suit that was filed on 19.04.2002 will not be within limitation. Further, it can be seen that if the property was ancestral, then Kalyan was the *Karta* of the family. It had come on record that he was suffering from T.B. and the family was in need of money. Plaintiffs have not adduced evidence that Kalyan had sufficient amount with him to bear the medical expenses upon himself. Further, he could have disposed off the property which would have fallen to his share and, therefore, the first Appellate Court has rightly held that, that property which was purchased by defendant No.2 will have to be excluded. One more fact that is required to be

considered is that defendant No.2 had filed Regular Civil Appeal No.111 of 1988 for perpetual injunction. That suit was against the plaintiffs and defendant No.1. If that is so, then the plaintiffs had the knowledge about the sell transaction. Why in that suit itself, they had not prayed for partition and separate possession is a question, which has been left unanswered. Further, when that suit was filed in the year 1988, then why it took plaintiffs so much of time to approach the Trial Court i.e. till 2002 to file a suit for partition and separate possession. Under such circumstance, as against defendant No.2 both the Courts below have rightly rejected the relief.

7. Now, turning towards the point of legal necessity in respect of transaction, which defendant No.3 has purchased, it has come on record that after death of Kalyan, the mother defendant No.1 was the *Karta* or manager of the joint family. It can be seen that, at that time, the plaintiffs were very young and, therefore, the affairs of the family property would have been definitely dealt with by defendant No.1. Strictly she may not be *Karta*, but since she would have been managing the affairs of the joint family property, she could receive every right to collect the amount to run the house. After excluding the property, which was sold to defendant Nos.2 and 3, the remaining area of the suit property is in possession of the plaintiffs and defendant No.1. Now,

defendant No.1 had expired during the pendency of the appeal. As regards defendant No.3 is concerned, though he had purchased the property during the pendency of the litigation, yet, it was sold by defendant No.1. So defendant No.1's share can be carved out and given to defendant No.3. When the property was sold to defendant No.3 by defendant No.1, definitely, she had the power to dispose off her share. Therefore, whatever division has been made by the learned Principal District Judge while deciding the first appeal is correct, legal and justified.

8. The ratio laid down in catena of judgments relied by the learned Advocate for the appellants cannot be denied, however, taking into consideration the facts of the present case and the evidence that has come on record, the said ratio cannot be made applicable here. Whether there is legal necessity or not would depend on the evidence that had been adduced by the parties.

9. No substantial questions of law are arising in this case requiring admission of the second appeal. Hence, second appeal stands dismissed.

10. In view of dismissal of the second appeal, Civil Application No.8804 of 2021 stands disposed of.

[SMT. VIBHA KANKANWADI, J.]

scm