

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

949 SECOND APPEAL NO. 341 OF 1992

1. Narayan S/o. Bhaurao Kados, ...**APPELLANTS**
Age-15 years, a Minor,
Under Guardianship of real
mother Kantabai W/o. Bhaurao,
Aged-36 years, Occu-Household work,
R/o. Malewadi, Tq. Jalna,
At present Residing at Gadhe-Jalgaon
Tq. & Dist. Aurangabad
2. Kantabai W/o. Bhaurao Kados,
Age-36 years, Occu-Household work,
R/o. Gadhe-Jalgaon,
Tq. & Dist. Aurangabad

VERSUS

1. Gangadhar S/o. Dhuraji Kados, ...**RESPONDENTS**
Since Deceased, by his heirs,
and Legal representatives
- 1-A] Digambar S/o. Gangadhar Kados,
Age-33 years, Occu- Agriculturists,
- 1-B] Ashok S/o. Gangadhar Kados,
Age-30 years, Occu- Agriculturists,

All R/o. Maewadi, Tq. & Dist. Jalna.

Mrs. Pooja V. Langhe, Advocate for the appellants

CORAM : MANGESH S. PATIL, J.

RESERVED ON : 12 April 2022

PRONOUNCED ON : 19 April 2022

JUDGMENT :-

I have heard Mrs. Langhe, learned Advocate for the appellant. None is present for the respondents.

1. The second appeal has been admitted by the order dated 29-07-1992 with following substantial question of law:

“i. Non consideration of all the issues arising out of plaintiff’s pleading as taken into account by the trial court, while reversing the decision by the lower Appellate Court raises a substantial question of law. Leave was also granted to add substantial questions of law, perhaps as contemplated under Section 100 (5). However, none have been furnished thereafter.”

2. Shorn of details, the facts leading to the second appeal are as under:-

a] Appellant No. 1-Narayan while he was barely couple years of age filed the suit through his natural guardian and mother who is arrayed herein as appellant No.2-Kantabai against one Gangadhar, the predecessor of respondent No.1 and his own father Bhaurao who is respondent No.2 interalia averring that the suit property agriculture land Gut No. 42, adm. 13-Acres 5-Gunthas of village Malewadi, Tq. Jalna was the ancestral and joint family property. Bhaurao was congenital idiot. He was suffering from fits of insanity. Taking advantage of his such condition Gangadhar-the original defendant got executed a sale deed of the suit property on 04-09-1981 without there

being any legal necessity. It was not even for the benefit of minor son Narayan. No consideration was paid. Whatever was mentioned as consideration was meagre. The market price was more than Rs. 20,000/-. Gangadhar played mischief by pretending that his land Gut No. 14, admeasuring 3-Acres 16-Gunthe was sold to Bhaurao by a separate sale deed on the same date for Rs.7,000/- when in fact the property was worth barely Rs.1,000/-. The suit property was superior than the property of Gangadhar Gut No. 14. By questioning the legality of the sale deed on all these grounds, Narayan claimed possession of the entire suit property and perpetual injunction restraining Gangadhar from alienating it.

b] Gangadhar contested the suit by his written statement. He admitted the relation between

Narayan, Kantabai and Bhaurao. He also admitted about having purchased the suit property for consideration mentioned in the sale deed and sold his own land Gut No. 14 to Bhaurao on the same date. He, however, denied rest of the contentions. He contended that Bhaurao was not idiot or lunatic. He was shrewd and a person who could manage to file a collusive suit. He was indebted to a bank as also individuals and was in need of money. To pay them off he had to sell the suit property. Even Bhaurao wanted to purchase land of superior quality. While disposing of the suit property on the very same day, he purchased his (Gangadhar's) land for valuable consideration. His land is superior to that of Bhaurao. Therefore, he contended that Bhaurao had sold the suit property to meet legal necessity of the joint family and besides the transaction was for the benefit of the family.

c] Bhaurao filed written statement admitting the claim.

d] With such pleadings the parties went to trial. The trial court concluded that there was neither any legal necessity nor was sale for the benefit of the family. However, it also held that Bhaurao was not idiot or lunatic and was not incapable of selling suit property. In view of such conclusion the trial court decreed the suit and holding that sale was not binding on Narayan, directed possession of 2/3rd share of the suit property to be delivered to him and also granted perpetual injunction as prayed for.

e] Being aggrieved by the judgment and decree of the trial court, Gangadhar preferred an appeal before the District Court by arraying

Narayan, Kantabai and Bhaurao as respondents. By the judgment and order under challenge the appeal has been allowed, the judgment and order of the trial court has been quashed and set aside and the suit has been dismissed.

f. The lower appellate court has concurred with the conclusion of the trial court in observing that Bhaurao was not lunatic or idiot and was capable of defending his cause was capable of and taking conscious decisions. However, it concluded that the suit was collusive one. Bhaurao was acting behind the curtains. There was evidence to demonstrate that he was in need of money to pay off debts, beside purchasing a superior quality land. The transaction was beneficial to the family. It was also noticed that Kantabai was not a party to the suit albeit she was arrayed as respondent

No. 2 in the appeal before the lower appellate court. It was also noticed that another child was born to her from Bhaurao during pendency of the litigation. The decree was inexecutable in as much as no prayer for partition was there and that Narayan was held entitled to only $2/3^{\text{rd}}$ share.

3. The learned Advocate Mrs. Langhe would submit that being a purchaser burden was on Gangadhar to prove that the property was sold by Bhaurao to him for legal necessity and that it was for the benefit of the family. However, no sufficient, cogent and convincing evidence was led before the trial court which had necessitated it to pass the decree. There was no perversity or illegality. The trial court had appreciated the evidence in the proper perspective and the lower appellate court without considering the material

evidence has unnecessarily caused interference while reversing the judgment. Points considered by the trial court have been overlooked and the judgment and decree under challenge be quashed and set aside and one passed by the trial court be restored.

4. She would place reliance in the decision of Shrikant Trimbakrao Begade Vs Natthu Maroti Shivarkar through LRs Jyoti Wd/o. Natthu Shivarkar and others reported in 2017(4) Mh.LJ 590.

5. I have carefully considered the submissions of the learned advocate and perused the record and proceeding. It is necessary to observe at the out set that the learned advocate Mrs. Langhe tried to assail the judgment and order of the lower appellate court on the ground that the appeal was not maintainable in as much as Bhaurao being a lunatic was incapable of defending himself. It could not

have been filed without appointment of his guardian as is required by order 32 of the Code of Civil Procedure. She was even bold enough to refer to a decision in the matter on Ram Chandra Arya Vs Man Sing and another reported in AIR 1968 SC 954.

6. I have intentionally used the word 'bold' for the simple reason that in fact, the appellant-Narayan is the original plaintiff who had filed the suit through his mother-Kantabai who is arrayed as the appellant No.2 in the second appeal, arraying Gangadhar the purchaser as defendant No.1 and his father Bhaurao as defendant No.2. Though a stand was taken since inception that Bhaurao was idiot and may be lunatic at times, the suit itself would have been defective, if this stand was to be taken about his lunacy. At no point of time procedure under order 32 was followed during pendency of the suit before the trial court and Bhaurao was sued without seeking any

appointment of guardian to defend him. On the contrary, admittedly, he appeared through a lawyer and even filed a consenting written statement. If such is the state of affairs, particularly when both the courts below have recorded a concurrent finding that he was capable to defend himself and was not idiot, the submission of the learned advocate Mrs. Langhe to reck up this issue at this stage, is highly objectionable and not legally and factually tenable at all.

7. Be that as it may, there cannot be any dispute about the fact that going by the principles of Hindu Law, burden was on the purchaser to prove existence of legal necessity for the Karta or Manager of the joint family to sell the joint family property. Similarly, even the burden to prove that such a sale was for the benefit of family would also be on the purchaser, as has been laid down in

the matter of *Shrikant Begade (supra)*.

8. The courts below have recorded contradictory findings in this regard. The trial Court has concluded that there was no legal necessity and the transaction was not for the benefit of the family. Whereas the lower appellate court has concluded that there was a legal necessity and even the transaction was for the benefit of the family.

9. As far as necessity is concerned, the lower appellate court has pointed out that simultaneously when sale deed in respect of suit property was executed by Bhaurao in favour of Gangadhar, latter also executed another sale deed in favour of the former of another land for consideration of Rs.7,000/-. The suit property was sold for Rs.10,000/- and Bhaurao purchased Gangadhar's land

for Rs. 7,000/-. It also pointed out that subsequently Bhaurao sold the land Gut No. 14 purchased from Gangadhar for a total consideration of Rs. 20,000/- by two different sale deeds barely within 1 and half year. It also noticed that revenue record of the suit property disclosed an entry in respect of an encumbrances of a credit society. It also noticed that Kantabai was feigning ignorance. Her father Shamrao who was examined as a witness had also expressed ignorance about such purchase of land Gut No.14 and existence of encumbrance. It also compared the crops grown in the suit property and harvested from Gut No.14. It was also pointed out that information was elicited from Gangadhar during his cross examination on behalf of plaintiff-Narayan as to whom and how much money Bhaurao was to pay apart from his liability to the credit society. The lower appellate pointedly remarked that encumbrance as was appearing in the

revenue record of the suit property was ignored by the trial court in spite of it being a certified copy of a public document and it was not even exhibited or read in evidence.

10. True it is that some observations of the lower appellate court like usual practise of mentioning lesser amount of consideration in the sale deed to avoid the stamp duty are based on surmises and conjunctures. However, pertinently, conclusion is not solely dependent on such observations. It has referred to all the aforementioned circumstances, which are clearly borne out from the evidence, to demonstrate as to how there was evidence to show that in all probability the suit property was sold for legal necessity and also for the benefit of the family and indeed such benefit was subsequently derived by selling it with appreciation within a short span.

All these factors noted by the lower appellate court were clearly available for the trial court to look into, but were not considered.

11. In addition to aforementioned circumstances, the lower appellate court, for the valid reasons, has also remarked that it was a collusive suit. Indeed, the suit was collusive one. Even Bhaurao was bold enough to file a consenting written statement, admitting the claim. The suit was filed barely within nine months of execution of the sale deed. There was no prayer for partition and none was granted by the trial court. It was indeed impossible to execute the decree in as much as only 2/3rd portion was directed to be delivered without any further direction, to effect partition by metes and bounds. Importantly, Kantabai was not made a party to the suit. When admittedly, even Bhaurao and Kantabai begot another child during pendency of the

suit, when suit property is stated to be ancestral and joint family property, even that child was, thereafter, not impleaded. Even after Narayan having attained majority during pendency of the second appeal, he has not come forward to take any other stand than what has been taken since inception and has continued with the litigation and the second appeal. These are all the circumstances which clearly justify and corroborate the conclusion drawn by the lower appellate court holding that the suit was collusive one. It also pointed out that going by number of sharers even Narayan would not be entitled to $2/3^{\text{rd}}$ share.

12. Going by the reasoning assigned by the lower appellate court, I am satisfied that it has considered the pleadings and the evidence and the grounds assigned by the trial court in arriving at a conclusion that the suit must fail. Hence, I answer

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aforementioned question accordingly. The appeal is dismissed with costs.

13. In view of the dismissal of the second appeal, pending civil applications, if any, stand disposed of.

[MANGESH S. PATIL, J.]

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