

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

SECOND APPEAL NO.1767 OF 2005

1. Dattatraya Jaysing Walke,
Age: 27 Years, Occu.: Service,
R/o.: Jakhangaon, Taluka: Nagar,
District: Ahmednagar
 2. Dipak Jaysing Walke,
Age: 25 Years, Occu.: Education,
R/o.: Jakhangaon, Taluka: Nagar,
District: Ahmednagar
 3. Amol Jaysing Walke,
Age: 23 Years, Occu.: Education,
R/o.: Jakhangaon, Taluka: Nagar,
District: Ahmednagar
 4. Mirabai Jaysing Walke,
Age: 50 Years, Occu.: Household,
R/o.: Jakhangaon, Taluka: Nagar,
District: Ahmednagar
- .. Appellants
(Ori. Plaintiffs)**

Versus

1. Jaysing Dhondiba alias Baba Walke,
Since deceased survived by L.Rs.
Appellant Nos.1 to 4 above.
R/o.:Jakhangaon, Taluka: Nagar,
District: Ahmednagar
 2. Lankabai Macchindra Sonawane,
Age:65 Years, Occu.: Agril.,
R/o.:Hingangaon, Taluka: Nagar,
District: Ahmednagar
- .. Respondents
(Ori.Defendants)**

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Advocate for Appellants: Mr. Shailesh P. Brahme
Advocate for Respondent No.2:
Ms. Madhaveswari Mhase

...

AND

...

SECOND APPEAL NO.142 OF 2006

- . Sau. Lankabai Machindra Sonawane
 Age:35 Years, Occu.: Agriculture,
 R/o.: Hingaon, Tq.: Ahmednagar,
 Dist.: Ahmednagar .. Appellant
 (Ori. Defendant)

Versus

1. Dattatraya Jaysing Walke,
 Age: 23 Years, Occu.: Service,
2. Deepak Jaysing Walke,
 Age: 20 Years, Occu.; Nil (Education),
3. Amol Jaysing Walke,
 Age: 19 Years, Occu.:Nil (Education)
4. Meerabai Jaysing Walke,
 Age: Major, Occu.: Household,

Respondents 1 to 4 all R/o. Jakhangaon,
 Tq.Ahmednagar, Dist. Ahmednagar

5. Jaysing Dhondiba @ Baba Walke
 (Deceased) survived by LRs.
 Respondent No.1 to 4 .. Respondents
 (Ori. Plaintiffs)

...

Advocate for Appellant: Ms. Madhaveswari Mhase
 Advocate for Respondent Nos.1 to 4:
 Mr. Shailesh P. Brahme

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CORAM:	ARUN R. PEDNEKER, J.
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Reserved on:	19.10.2022
Pronounced on:	07.12.2022

JUDGMENT:

1. The parties are referred to as per their original status before the Trial Court. The appellants in Second Appeal No.1767 of 2005 are the original plaintiffs and the appellant in Second Appeal No.142 of 2006 is the original defendant no.2. The parties would be referred as plaintiffs, defendant no.2 and defendant no.1.

2. Heard Mr. S. P. Brahme, learned counsel for the plaintiffs and Ms. Madhaveshwari S. Mhase, learned counsel for defendant no.2.

3. The brief facts leading to the filing of the present second appeals can be summarized as under:-

[a] Defendant No.1 - Jaysing sold the suit land admeasuring 40 Are in favour of defendant no.2 by sale deed dated 08.09.1997 and the sale deed records the transaction for a consideration of Rs.32,000/-. The plaintiffs are sons and wife of defendant no.1 Jaysing. The suit is filed by wife

and sons of Jaysing for declaration that the above sale deed executed by defendant no.1 in favour of defendant no.2 is void and not binding on the plaintiffs as the sale is not for legal necessity of the family. They also prayed for partition and separate possession of their share.

[b] Defendant no.1 did not appear and contest the suit. The suit was contested by defendant no.2 (alienee). The trial Court after examination of the evidence on record held that the sale transaction was not for legal necessity of the joint family and thus the sale was held not binding on the plaintiffs. The trial Court granted declaration that the above sale deed was not binding on the plaintiffs and the plaintiffs are entitled to partition and separate possession of the 4/5th share of the suit land.

[c] Aggrieved thereto the defendant no.2 filed appeal before the appellate court. The appellate Court concluded that the sale was for legal necessity and as such held that the sale deed was binding on the plaintiffs. However the appellate court held that the sale was void under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (*hereinafter referred to as Fragmentation Act of 1947*). Having held so it has set aside the trial Courts judgment but has not granted possession of the suit land to the plaintiffs.

[d] Aggrieved thereby the Plaintiffs and defendant no.2 have both preferred the second appeals before this court.

4. It is the contention of the plaintiffs that the courts below have allowed defendant no.2 to plead and lead evidence as to the actual consideration paid for the sale transaction as Rs.1,15,000/- as against Rs.32,000/- mentioned in

the sale deed and such pleading and evidence is barred by Section 92 of the Indian Evidence Act.

5. It is further the case of the plaintiffs that the defendant no.2 in the written statement has not given any details / particulars of the legal necessity and correspondingly there can be no evidence lead for the legal necessity in absence of proper pleadings in support of the same.

6. The learned counsel for the plaintiffs also submits that the sale deed does not mention that the sale is for legal necessity of the joint family and no corroboration can be found in the sale deed for legal necessity.

Per contra, defendant no.2 has challenged the finding of the appellate Court that the sale transaction is in violation of the Fragmentation Act of 1947. The defendant no.2 also contends that the appellate Court's Judgment is not perverse as regards the findings of legal necessity.

7. By order dated 25.06.2007, the Second Appeals were admitted on the following two questions of law:-

"(i) Whether in the facts and circumstances of the present case, the consideration being Rs.1.15 lacs, which is contradict by or which is deviation of the terms of the sale deed and hence, it was violative of provisions of Section 91 of the Evidence Act and that the issue of legal necessity was thereby wrongly decided and finding in this behalf is otherwise perverse having regard to the nature of evidence adduced by the parties ?

(ii) Whether in the facts and circumstances of the present case, when the first appellate Court came to the conclusion the suit transaction is violative of the provisions of the Bombay Prevention and Fragmentation and consolidation of Holdings Act, 1947 and is void, then was it legal and proper to uphold the same and denying the decree sought by the plaintiffs ?"

8. The learned Counsel appearing for the plaintiffs and appellants in Second Appeal 1767 of 2005, submits that the following additional

substantial question of law arises for consideration regarding legal necessity and discharge of burden of proving legal necessity and accordingly following question of law is formulated at the instance of the plaintiffs i.e.

"(iii) Whether the finding of the appellate Court that the sale of the suit property was for legal necessity is perverse on account of non pleading of legal necessity with particulars, in pleadings and there being no corroboration of the same in the sale deed and the evidence in respect of legal necessity is based on conjunctior and surmises?"

The appellate Court has reversed the finding of legal necessity given by the Trial Court. The above three substantial questions of law arises in the present Second Appeal are answered in this Judgment.

9. To consider the question of law referred at Paragraph No.7(i), it is necessary to reproduce Sections 91 and 92 of the Indian Evidence Act, 1872, which reads as under:-

"91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.—

When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—...

Exception 2.—...

92. Exclusion of evidence of oral agreement.—

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1) to (6)...."

10. Section 91 deals with a situation where contract is in writing or is required to be in writing and if such a document is made then there can be no evidence given in proof of the terms of such contract, grant or disposition except by

producing the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of the Evidence Act.

11. In the instant case the sale transaction is recorded in the sale deed dated 08.09.1997 and the sale deed is produced on record and defendant no.2 relies upon the sale deed to assert its title to the suit property. The sale deed mentions consideration of amount of Rs.32,000/- paid towards the sale of the suit property. However, oral evidence is led to show that the consideration paid was actually Rs.1,15,000/- and not Rs.32,000/- as stated in the sale deed.

12. Section 92 of the Indian Evidence Act stipulates that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a documents have been proved according to the last section i.e. Section 91, no evidence of any oral agreements or statements shall be admitted, as between the parties to any such instrument or

their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.

13. Relying upon Section 92 of the Indian Evidence Act the learned Counsel for the plaintiffs submits that it was not available for the defendant no.2 to lead oral evidence to demonstrate that the actual consideration was Rs.1,15,000/- and not Rs.32,000/- as mentioned in the sale deed, as it is barred under Section 92 of the Indian Evidence Act. There can be no variance as to what is stated in the contract itself and since defendant no.2 is a party to the document and also relies on the said document to assert its title cannot then lead oral evidence to show that the the terms of written document are altered by oral contract and part of the document stood altered to the extent of the consideration amount. Defendant no.2 is barred from leading oral evidence to the extent of stating that the actual consideration was far more than as stipulated in the sale deed. The learned Counsel for the

plaintiffs relies upon the case of **Bhandari Construction Co. Vs. Narayan Gopal Upadhye, 2007 (3) Mh. L. J. 837**. The Hon'ble Supreme Court at Paragraph No.15 has held as under:-

"15. When the terms of the transaction are reduced to writing, it is impossible to lead evidence to contradict its terms in view of section 91 of the Evidence Act. There is no case that any of the provisos to section 92 of the Act are attracted in this case...."

14. The learned Counsel also relies upon the Judgment of the Hon'ble Supreme Court in the case of **S. Saktivel Vs. M. Venugopal Pillai, 2000 (7) SCC 104**, at Paragraph No.6 has observed as under:-

"6. ...Where under law a contract or disposition is required to be in writing and the same has been reduced to writing, its terms cannot be modified or altered or substituted by oral contract or disposition. No parol evidence will be admissible to substantiate such an oral contract or disposition. A document for its validity or effectiveness is required by law to be in writing and, therefore, no modification or alteration or substitution of such written document is permissible by parol evidence and it is only by another written document the terms of earlier written document can be altered, rescinded or substituted. There is another reason why the defendant-appellant cannot be permitted to let in parol evidence to substantiate the subsequent oral arrangement. The reason being that the settlement deed is a

registered document. The second part of proviso (4) to Section 92 does not permit leading of parol evidence for proving a subsequent oral agreement modifying or rescinding the registered instrument. The terms of registered document can be altered, rescinded or varied only by subsequent registered document and not otherwise. If the oral arrangement as pleaded by the appellant, is allowed to be substantiated by parol evidence, it would mean rewriting of Ext. A-1 and, therefore, no parol evidence is permissible."

The learned Counsel for the plaintiffs submits that there can be no parol oral evidence to vary the terms of the document produced in writing and relied upon the party to the document. Thus, the learned Advocate submits that the bar under Section 92 is applicable and the proof of Rs.1,15,000/- being paid as a sale consideration has to be set aside. Consequently the consideration of Rs.32,000/- mentioned in sale deed is a marginal consideration for sale transaction of 40 Are of land and that it would not be sufficient to establish legal necessity.

15. Per contra the learned counsel for the respondents relies upon the Judgment of the **Ganu Ramji Patil Vs. Bhau Bapuji Patil** of this Court

decided on 21.01.1918, whereby it is held that Section 92 has no application or Section 92 applies only to the parties to the written document or their representatives in interest.

Based on this, she contends that if the suit was between the vendor and the buyer then either of them could have been prohibited from leading oral evidence to vary the terms of the written instrument in a suit between them. However the present suit is not between the parties to the agreement and therefore the bar under Section 92 is not applicable. The learned Counsel further relies upon the Judgment of **Pandit Ramjilal Tiwari Vs. Shir Vijai Kumar and others, of the Madhya Pradesh High Court, decided on 10.10.1969,** wherein it has been held that third party can always establish that the agreement between the parties to the sale deed was a nominal one and that there is variance to the actual agreement and that it is not hit by Sections 91 and 92 of the Indian Evidence Act. The learned Counsel for the defendant no.2 submits that since the suit is not between the vendor and the vendee, she is entitled

to lead oral evidence as to the actual consideration paid and that the bar under Section 92 is not applicable.

16. Section 92 speaks about no evidence of any oral agreement or statements shall be admitted as between the parties to any instrument for the purpose of contradicting, varying, adding to subtracting from its terms. In the instant case, the suit is between one of the parties to the sale deed and the third parties.

17. However, in a suit between the stranger and a party to the sale deed a question arises as to whether the party to the sale deed which relies upon the sale deed to assert its title to the suit land and when the consideration mentioned in the sale deed is Rs.32,000/- whether the party relying upon the sale deed can lead oral evidence to show that the actual consideration paid is Rs.1,15,000/-? This issue is answered by the Hon'ble Supreme Court in the case of **Bai Hira Devi and others Vs. Official Assignee of Bombay, 1958**

SCR 1384 : AIR 1958 SC 448, wherein at Paragraph

No.9 it has held as under:-

"9. ...In our opinion, the true position is that, if the terms of any transfer reduced to writing are in dispute between a stranger to a document and a party to it or his representative in interest, the restriction imposed by Section 92 in regard to the exclusion of evidence of oral agreement is inapplicable; and both the stranger to the document and the party to the document or his representative in interest are at liberty to lead evidence of oral agreement notwithstanding the fact that such evidence, if believed, may contradict, vary, add to or subtract from its terms. The rule of exclusion enunciated by Section 92 applies to both parties to the document and is based on the doctrine of mutuality. It would be inequitable and unfair to enforce that rule against a party to a document or his representative in interest in the case of a dispute between the said party or his representative in interest on the one hand and the stranger on the other. In dealing with this point we may incidentally refer to the relevant statement of the law by Phipson in his treatise on Evidence:

"Where the transaction has been reduced into writing merely by agreement of the parties", it is observed, "extrinsic evidence to contradict or vary the writing is excluded only in proceedings between such parties or their privies, and not in those between strangers, or a party and a stranger; since strangers cannot be precluded from proving the truth by the ignorance, carelessness, or fraud of the parties (R. v. Cheadle, 3 B.

& Ad. 833); nor, in proceedings between a party and a stranger, will the former be estopped, since there would be no mutuality [Phipson on Evidence – 9th Edn., p. 602] .”

18. In view of the law laid down by the 3 Judges bench of the Hon'ble Supreme Court in the case of **Bai Hira Devi (supra)**, I hold that the bar under Section 92 to lead oral evidence in variance of terms of any written instrument, required by law to be in writing is not applicable to a proceedings between a party to the document and a stranger on the principle of mutuality. Thus it is permissible for a party to the document required by law to be in writing, in a suit filed by a stranger, to lead oral evidence to prove variance in the terms of contract of the written document. In the instant case it is permissible for defendant no.2 to show that the consideration paid is different than what is shown in the sale deed. The question of law is answered accordingly.

19. The next question I am considering is at No.(iii) at para 8. To decide the third question of law and to ascertain whether the

finding of the Appellate Court is perverse on the aspect of legal necessity, it is necessary to go into the pleadings and the evidence on record. The case put up in the plaint is that the defendant no.1 was habituated to liquor and that the defendant no.2 has taken advantage of the vice of the defendant no.1 and without paying any consideration has fraudulently made the defendant no.1 to sign the sale deed and has accordingly transferred the suit property to defendant no.2.

20. However, irrespective of the stand of the plaintiffs and that a specific case of fraud is put up, heavy burden rest on the karta and also the alienee to demonstrate that the purchase of the joint family property was for legal necessity of the family and therefore the initial burden has to be discharged by the karta or the alienee that the sale is for legal necessity.

21. In the instant case, defendant no.1 karta has not filed written statement and has not contested the proceedings. The plaintiffs have put up a case that they were not looked after by the

defendant no.1 and that they are living separately from defendant no.1.

22. The learned Counsel for the plaintiffs Mr. Brahme has taken me through the plaint and specifically Exhibit-54 i.e. the sale deed which does not mention anything about legal necessity for sale of the suit land. On the aspect of legal necessity the learned counsel for the plaintiffs submits that, [1] The sale deed does not mention the aspect of legal necessity. [2] The plaint does not enumerate the aspects of legal necessity as it does not refers to what is the legal necessity for which the suit land was sold. [3] Inquiry is required to be done by the alienee to satisfy itself that there existed a legal necessity and the alienee has to establish by stepping into the witness box that she had satisfied herself that there was legal necessity for sale of the joint family property. In the instant case the defendant no.2 alienee has not stepped into the witness box rather her power of attorney has deposed about the legal necessity and as such there is no evidence

of the inquiry of legal necessity by the alienee and the power of attorney of the alienee cannot dispose as to the facts in personal knowledge of the alienee.

23. The plaintiffs further contend that from all the above 3 factors it could only be demonstrated that there was no legal necessity and the same has also not been established by defendant no.2 by stepping into the witness box and as such the finding of the appellate court that the sale is for legal necessity is perverse and is not based on the pleadings, evidence or any material on record.

24. Mr. Brahme, learned counsel for the plaintiffs has relied upon the judgment of the **Shankarlal Prasad Ladha died L.Rs. & others Vs. Vasant Chandidasrao Deshmukh and others, 2009 (1) Bom.C.R. 488**, at paragraph nos.16, 19 and 20 to contend that the recitals in the sale deed must indicate as to the legal necessity for which the sale transaction has taken place. It is also relevant to show that the sale transaction was

expected to confer benefit on the family of the vendors at the relevant time. Mere vague recitals in the sale deed is not sufficient enough. The learned Counsel relies on the Judgment of the **Man Kaur (D) by Lrs. Vs. Hartar Singh Sangha, 2010 (10) SCC 512**, specifically upon paragraph no.12(c) and (g), wherein it is observed that the attorney holder cannot depose or give evidence in case of principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge and relies upon at para 12(g) of the judgment wherein it is observed that where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his state of mind or conduct, normally the person concerned alone has to give evidence and not an attorney holder.

25. The learned Counsel for the plaintiffs submits that in the instant case the evidence was not adduced by the alienee by stepping into the witness box and therefore it was not open to the

alienee to establish her state of mind through her power of attorney. Thus he contends that the alienee has completely failed to discharge the burden of proving that the sale was for legal necessity and therefore he further contends that finding of the Appellate Court to the extent that the sale deed was for legal necessity is perverse and needs to be set aside and the finding of the Trial Court in this regard be maintained.

26. Per contra the learned Advocate for defendant no.2 - Ms. Mhase has taken me through paragraph No.17 of the written statement, where it is stated that the sale has taken place for the legal necessity of the plaintiffs joint family and although there is no mention of what the legal necessities are but the written statement indicates that the sale was for legal necessity.

27. The learned Advocate for the defendant no.2 contends that non appearance of defendant no.1 in the instant case is to support the case of the plaintiffs. The cause title and address memo the address of the defendant no.1 and that of the

plaintiffs is the same. The suit summon are served on the same address and they are still residing together. PW-1 has not mentioned any address of Ahmendagar of her separate residence. PW-1 admits that in her ration card, the address is still mentioned that of defendant no.1. No evidence is laid of staying separately. The learned Advocate for defendant no.2 submits that the suit is collusive to the extent between the plaintiffs and the defendant no.1. Defendant no.1 has colluded with the plaintiffs to defeat the rights of the alienee.

28. The case put-forth by the plaintiffs that the alienation was done because the defendant no.1 was habituated to the vice of liquor on the face of it is false and no evidence is put-forth by the plaintiffs to show that defendant no.1 was habituated to liquor. Rather there is evidence contra on record of the Bond-writer of the sale deed stating that he had inscribed the sale deed on the basis of instructions given by defendant no.1 and there are other witnesses who has clearly

mentioned that there was no vice of liquor as far as defendant no.1 is concerned.

29. Ms. Mhase, learned counsel further submits that although legal necessity was pleaded no sufficient particulars were given. The witness DW-1 was specifically asked this question in cross-examination and DW-1 has stated that he had mentioned the particulars of legal necessity to his Advocate, however it was not enumerated in the written statement. She relies on the Judgment of the Bombay High court in the case of **Meenakshi Ashokbhai Doshi Vs. Ashok Dhirajlal Doshi, 1989 (1) Bom.C.R. 156**, wherein it is observed that the Lawyer who has been already mentioned all the facts, fails to put all particulars in the pleadings then the party to it should not be made to suffer.

30. The learned Counsel for defendant no.2 Ms. Mhase further submits that the defence had entered the witness box first to discharge the burden of legal necessity and that the plaintiffs

were not taken by surprise as to the nature of legal necessity.

31. The learned Counsel further submits that the power of attorney is the father-in-law of the defendant no.2 and his evidence clearly indicates that he was involved in the entire transaction of sale and he was knowing the plaintiffs for a long time as the wife and sons of defendant no.1 and there was long association with the family of the plaintiffs.

32. Ms. Mhase, further submits that the evidence on record shows that the sale is for legal necessity for education of children, for constructions of house and purchase of motorcycle and there is evidence that the construction of the house was done at approximate time.

33. Ms. Mhase, learned counsel for defendant no.2 further submits that once the burden of proof is discharged by the alienee the plaintiffs then have to prove their case on its own facts i.e. the case put by the plaintiffs was of a fraud and that

it was necessary for the plaintiffs to lead evidence to prove fraud and there was no evidence to that extent.

34. Ms. Mhase, learned counsel for defendant no.2 further submits that although the sale is of 1997, the plaintiffs have challenged the sale deed in the year 2006 although they were residing together. The plaintiffs and defendant no.1 has filed a collusive suit for the purpose of defeating the rights of defendant no.2.

35. She relies upon the case of Hanoomanpersaud Panday Vs. Babooee Munraj Koonweree, decided on 08.07.1856, before the Privy Council, to contend that the alienee must either prove that the legal necessity or benefit of the estate in fact existed or that he had made proper or reasonable and bonafide inquiry as to the existence of such legal necessity and alienation is uphold even if there should be no proof of actual necessity or benefit of the estate provided it proves there was on his part a bonafide inquiry to its existence.

36. She further submits that although if an alienation may fail in absence of actual necessity in practice it is not allowed to fail for the courts taken to consideration the equities in favour of the bonafide purchasers of the value. This is also a principle of general law as embodies in Section 38 of the Transfer of Property Act, 1982, which has now been made applicable to the Hindus. She further submits that when a suit is by a son to set aside the father's alienation on the ground that there was no legal necessity and the father was joined as the defendant it was held that failure of the father to come and give evidence to the state of real facts raises a presumption that the money must have been for legal necessity and that the suit is collusive.

37. The learned Counsel for the defendant no.2 has relied upon the Judgment of the Andhra Pradesh High Court in case of **B. Ranga Rao (died) and Others Vs. G. Venkata Krishna Rao and others, 1996 AIR(A.P.) 5**, at paras 8, 9 to 15 where the law on alienation by karta of joint family is

summarized at para 29, wherein the principles are laid down after the discussing the law on the subject are quoted as under:-

"29. All the above cited judgments laid down the following principles:

(1) The Kartha of Hindu joint family has got the power to alienate the joint family property only for legal necessity or for the benefit of the family.

(2) Where the joint family property is sold for legal necessity or for the benefit of the family, the degree of prudence which is required for the Kartha of the joint family, who is not the sole owner of the property is greater than that of the owner, and like a trustee.

(3) When the sale is only for legal necessity, the burden on the alienee is to show that the sale itself was justified by legal necessity and he is under no obligation to enquire into application of sale amount in detail by the Kartha as alienee has no control over him.

(4) Where the sale of joint family property is for the benefit of the family, the alienee has to take reasonable care to find out whether the sale, in fact, was for the benefit of the family on the date of transaction, which includes to find out that the sale was for the purchase of other property or better investment; that the sale consideration was actually utilised for the purpose of purchasing in other lands for the benefit of the family."

38. On the aspect of the sale deed not containing recitals she cited judgment in the case of **Ramaji Batanji Vs. Manohar Chintaman and others, 1961 AIR(Bom.) 169**, at para 19 wherein it has been held that non mention of the legal necessity in the sale deed may not alter the burden of proof nor is the evidence dispensed with.

39. Ms.Mhase, learned Counsel has relied upon the judgment in case of **Man Kaur (dead) by Lrs. Vs. Hartar Singh Sangha, 2010 (10) SCC 512**, which is also relied upon by the plaintiffs, at para 12 to contend that where entire transaction has been entered by the power of attorney and he has personal knowledge of the transaction that he can depose as to the enquiry of legal necessity. The learned counsel further submits that defendant no.2 was unwell and confined to her residence on account of giddiness and as such her power of attorney DW-1 had deposed about the existence of legal necessity for sale transaction.

40. Having considered the rival submissions, the law on sale of joint family property for legal necessity has been discussed by the Hon'ble Supreme Court in it's recent Judgment in the case of Beereddy Dasaratharami Reddy Vs. V. Manjunath and others, reported in AIR 2022 SC 65, at paragraph nos.6 and 7 reads as under:-

"6. Right of the Karta to execute agreement to sell or sale deed of a joint Hindu family property is settled and is beyond cavil vide several judgments of this Court including Sri Narayan Bal v. Sridhar Sutar,² wherein it has been held that a joint Hindu family is capable of acting through its Karta or adult member of the family in management of the joint Hindu family property. A coparcener who has right to claim a share in the joint Hindu family estate cannot seek injunction against the Karta restraining him from dealing with or entering into a transaction from sale of the joint Hindu family property, albeit post alienation has a right to challenge the alienation if the same is not for legal necessity or for betterment of the estate. Where a Karta has alienated a joint Hindu family property for value either for legal necessity or benefit of the estate it would bind the interest of all undivided members of the family even when they are minors or widows. There are no specific grounds that establish the existence of legal necessity and the existence of legal necessity depends upon facts of each case. The Karta enjoys wide discretion in his decision over existence of legal necessity and as to in what way

such necessity can be fulfilled. The exercise of powers given the rights of the Karta on fulfilling the requirement of legal necessity or betterment of the estate is valid and binding on other coparceners.

7. Elucidating the position in Hindu law, this Court in *Kehar Singh (D) through Legal Representatives v. Nachittar Kaur*³ has referred to Mulla on Hindu Law and the concept of legal necessity to observe thus:

"20. Mulla in his classic work *Hindu Law* while dealing with the right of a father to alienate any ancestral property said in Article 254, which reads as under:

"Article 254

254. Alienation by father.— A Hindu father as such has special powers of alienating coparcenary property, which no other coparcener has. In the exercise of these powers he may:

(1) make a gift of ancestral movable property to the extent mentioned in Article 223, and even of ancestral immovable property to the extent mentioned in Article 224;

(2) sell or mortgage ancestral property, whether movable or immovable, including the interest of his sons, grandsons and great-grandsons therein, for the payment of his own debt, provided the debt was an antecedent debt, and was not incurred for immoral or illegal purposes (Article 294)."

21. What is legal necessity was also succinctly said by Mulla in Article 241, which reads as under:

"Article 241

241. What is legal necessity.—The following have been held to be family necessities within the meaning of Article 240:

(a) payment of government revenue and of debts which are payable out of the family property;

(b) maintenance of coparceners and of the members of their families;

(c) marriage expenses of male coparceners, and of the daughters of coparceners;

(d) performance of the necessary funeral or family ceremonies;

(e) costs of necessary litigation in recovering or preserving the estate;

(f) costs of defending the head of the joint family or any other member against a serious criminal charge;

(g) payment of debts incurred for family business or other necessary purpose. In the case of a manager other than a father, it is not enough to show merely that the debt is a pre-existing debt;

The above are not the only indices for concluding as to whether the alienation was indeed for legal necessity, nor can the enumeration of criterion for establishing legal necessity be copious or even predictable. It must therefore depend on the facts of each case. When, therefore, property is sold in order to fulfil tax obligations incurred by a family business, such alienation can be

classified as constituting legal necessity."

41. Article 56 and 57 of the Mulla's The Hindu Law, Volume 1, 3rd Edition, are also relevant in this aspect and reads as under:-

"56. In case of need or for the benefit of the estate.- The expression 'in case of need or for the benefit of the estate' is a rendering by the Privy Council of the expression 'during a season of distress (*apatkale*) and for the sake or benefit of the family (*Kutumbarthe*), in the relevant text. In current law language the expression 'legal necessity' is generally used in place of 'in case of need' and sometimes in place of both 'in case of need' and 'for the benefit of the estate'. We have however confined it here to correspond to the expression 'in case of need' only.

Necessity and benefit of the estate are two separate and independent tests. The doctrine of benefit of the estate is essentially independent and may save transactions which cannot be justified by reference to principle of legal necessity alone.

57. In case of need or legal necessity.- What is a legal necessity is a question of fact in each case; speaking generally, family purposes including the purposes of business are a legal necessity. An alienation for pious purposes (*dharmarthe*) is one in case of need or for legal necessity as pious purposes (*dharmarthe*) are expressly mentioned in the relevant text."

Maintenance, education and marriage expenses of the family are held to be for legal necessity and for expenses of necessary repairs to the family properties and for protection of the fields and lands belonging to the family is also held to be legal necessity. What is for the benefit of the estate is the question of fact in each case but some general cases are available. Each case must be satisfied from a material before it that it was a fact such has conferred or reasonably expected to confer benefit on the family at the time it was entered.

42. In the instant case, the karta has not defended the sale. Only the alienee has defended the sale. The law on the burden of proof of legal necessity on the alienee is laid down in the case of Hanoomanpersaud Panday Vs. Babooee Munraj Koonweree, decided on 08.07.1856, before the Privy Council, at paragraph no.26 reads as under:-

"26. The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where,

in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bond fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be -regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted mala fide, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual

application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

The karta in the instant case has stayed away from the defence and the alienee in terms of *Hanoomanpersaud Panday* case (*supra*), has to only establish as under:

"The alienee must either prove that the legal necessity or benefit of the estate in fact existed or that he had made proper or reasonable and bonafide inquiry as to the existence of such legal necessity and alienation is uphold even if there should be no proof of actual necessity of benefit of the estate provided it proves there was on his part a bonafide inquiry to its existence."

The alienee in this case therefore has to establish one of the following two things:-

[1] The Transaction in fact justified by legal necessity or for the benefit of the estate; or

[2] The alienee has to establish that he had made reasonable and bonafide inquiries as to the existence of legal

necessity and satisfy themselves that the manager was acting for the benefit of that estate.

43. Evidence on record in this case is summarized as under:-

(I) DW-1 is the father in law of defendant no.2. He deposes that defendant no.2 is confined to home on account of sickness / giddiness and, therefore, she has given power of attorney to DW-1. He submits that the actual consideration paid in the sale deed is 1,15,000/- and to avoid additional payment of stamp duty the same is transcribed as 32,000/-. He stated that the defendant no.1 had no drinking vices and that defendant no.1 had sold the property for education of children, construction of house and for purchase of motorcycle. DW-1 further states that he had informed his lawyer that the sale was for the reason of education of children, purchase of

motorcycle and construction of house and he had also instructed that the said amount is utilized for the same purpose. However, the details were not transcribed in the written statement by the Advocate.

(II) The evidence of plaintiff — Meerabai, in her evidence states that from four to five years she is staying away from her husband on account of the alcoholism. However, she states that they have a ration card at one place. She has no proof of they being staying separately. She admits that her husband and the DW-1 use to work at same place. She has not filed any maintenance case against the husband. She states that her address mentioned in the plaint is the same as that of defendant no.1.

(III) Thereafter, the evidence of DW-4 — Bhimashankar, Occupation — Bond writer, he states that he has written the bond on the instructions of defendant no.1 and

that mental and physical state of defendant no.1 was good at the time of giving instructions.

(IV) The DW-3 Shaikh Ahmed Ismile, he says that, defendant no.1's family had a house with wooden roof and that later on defendant no.1 constructed the house with RCC slab and put tiles in the house and made many improvements. He says that he was witness to the sale transaction and that he is not aware that defendant no.1 drinks although he is very familiar with defendant no.1 as they share farm equipments. He says that he is not aware that defendant no.1 ill treats his wife and children on account of drinking problem.

44. Based on the evidence, discussed above, following inference can be made:-

[a] That the plaintiffs and defendants are staying together and that

there is no evidence of their separate stay.

[b] There is no evidence that defendant no.1 was alcoholic and was not maintaining the family and there is positive evidence on record indicating that he was not drinking from DW-3 – Shaikh and DW-4 – Bond Writer has stated that he has made the sale deed on the instructions of the defendant no.1 and that defendant no.1 was in a proper state of mind to give instructions.

[c] Defendant No.1 has not filed written statement and has supported the plaintiffs. Thus, it can be inferred that the suit is collusive in nature.

[d] From the evidence of DW-1 who is the father-in-law of defendant no.2, he was given power of attorney on behalf of defendant no.2 on account of her ill health. DW-1 and defendant no.1 were

working at the same place and that they were well acquainted with one another and their family members. DW-1 was entirely aware of the sale transaction and thus he was in a position to depose about legal necessity of the joint family for the sale of the joint family property.

[e] Sale was for educating the children, construction of house and purchase of motorcycle.

[f] The money received from sale was utilized for the purpose of construction of house.

45. The judgments of the courts cited above specially in the case of Beereddy Dasaratharami Reddy Vs. V. Manjunath and others (*supra*), that the legal necessity would depend upon the facts of each case. In the instant case, there is evidence to show that the sale was for education of children and construction of house and purchase of motorcycle for the children and the above can be

said to be a sale for legal necessity of the joint family.

46. Thus, in this case, on the basis of evidence discussed above, I hold the suit to be collusive and the inquiry as contemplated by the alienee has to be limited to the extent of a bonafide inquiry as to the existence of legal necessity. In the instant case, the family were known to one another. It was made known by defendant no.1 to the defendant no.2 that the sale is for legal necessity for education of children, construction of house and purchase of motorcycle and that defendant no.2 being aware of the requirements of the family was under the bonafide belief that the sale is for legal necessity and thus the transaction of sale is to be held for legal necessity. In the instant case there is further evidence that the money received is utilized for legal necessity.

47. Since I hold that the sale is for legal necessity, the finding of the appellate court in this regard cannot be said to be perverse and

therefore, I answer the question of law accordingly.

48. As regards the 3rd question of law raised at paragraph no.7(ii) i.e. the applicability of the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (*hereinafter referred to as 'Fragmentation Act of 1947'*), the learned Counsel for the defendant no.2 submits that the act is not applicable to the present sale transaction and that such an issue was never before the trial court and the appellate court in the first instance has considered the same on the oral submissions by the plaintiffs.

49. The learned appellate court has held the sale to be violative of Section 31 of the Fragmentation Act of 1947. The learned Counsel for the defendant no.2 has taken me through the Fragmentation Act of 1947 to point out that Section 31 of the Fragmentation Act of 1947 would only be applicable when there is consolidation as contemplated under the Fragmentation Act of 1947

and the land is allotted under the scheme of consolidation of the Fragmentation Act of 1947.

50. The learned counsel further submits that in the instant transfer the entire land has been transferred and as such there is no fragment created and bar under Section 7(1) of the Fragmentation Act of 1947 would also not be applicable. The learned counsel has relied upon the judgment of this court in the case of **Putalabai Lakhu Pawar and others Vs. Shiva Dhondi Pawar and others, 1981 AIR(Bom.) 9**, at the para 7 which lays down that in order to attract the bar under Section 31 of the Fragmentation Act, the holding must have been allotted under the Fragmentation Act of 1947. The learned counsel has also relied upon the judgment of **Ranga Bapuji Shinde, since deceased, by his heirs Pandurang Rangnath Shinde and others Vs. Nivrutti Bapurao Pande and others, 1978 U.C.R. (Bom.) 213**, at para 7 to contend that when the land is sold in entirety the Fragmentation Act would not be applicable. She also relies upon the judgment of

Jangllu Pandurang Mali Vs. Shahaji Narayanrao Mali and another, 2009 (1) Bom.C.R. 166, at para 10 which states that in order to attract the bar under Section 31 the holdings must be allotted under the Act. Where the consolidation scheme has been made applicable and the land which was previously owned by a person and was bearing a survey number and is given a new gat number under the consolidation scheme, and remained with the same owner, it cannot be said that the holding is allotted under the Consolidation Act. That land which was not previously owned by a person is allotted to him in lieu of his some other land held by him under the consolidation scheme, the new land which is allotted to the person will be holding allotted under the Act.

51. The learned counsel for the plaintiffs submits that the Fragmentation Act of 1947 would be applicable. He further contends that although the appellate court held that the sale is in violation of the Fragmentation Act of 1947, the

appellate court has not directed reversion of the land to the plaintiffs.

52 I have considered the submission of the learned counsel for the parties and more particularly the judgment passed by this court in the case of **Putalabai Lakhu Pawar and others Vs. Shiva Dhondi Pawar and others**, 1981 AIR(Bom.) 9, it has held at **paras 7, 8 and 9** as under:-

"7. In order to attract the bar of section 31 of the Fragmentation Act, the holding must have been allotted under the Fragmentation Act. The relevant provisions of section 31(1) of the Fragmentation Act run as follows:

"31. (1) Notwithstanding anything contained in any law for the time being in force, no holding allotted under this Act, nor any part thereof, shall save as otherwise provided in this section-

(a) be transferred, whether by way of sale (including sale in execution of a decree of a civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue) or by way of gift, exchange, lease, or otherwise; or

(b) be sub-divided, whether under a decree or order of a Civil Court or any other competent authority, or otherwise, so as to create a fragment,

without the previous sanction of the Collector. Such sanction shall be given by the Collector in such circumstances

and subject to such conditions, as may be prescribed."

8. It will, therefore, be seen that in order to attract the bar of this section, the holding must have been allotted under this Act. There is nothing in the instant case to show that the suit land was a holding allotted to the defendants under this Act. On the admitted facts the suit land cannot be a holding allotted under the Fragmentation Act to the defendants because Lakhu executed a sale deed of the suit land to the defendants privately. The provision of allotment is laid down in rule 11 of the Rules framed under the Fragmentation Act. So all these provisions clearly go to show that the suit land is not a holding allotted under this Act and, therefore, the bar under section 31 of the Fragmentation Act cannot be attracted. Both the Courts below have proceeded on the assumption that this section is applicable and both of them have not taken into consideration the wording used in the section and that is why both of them have fallen in error.

9. The only other section which prohibits transfer is section 7(1) of the Fragmentation Act and it runs as follows:

—

"7(1) No person shall transfer any fragment in respect of which a notice has been given under sub-section (2) of section 6, except to the owner of a contiguous survey number or recognised sub-division of a survey number."

This provision clearly goes to show that this bar is attracted only if a notice is given under sub-section (2) of section 6 of the Fragmentation Act. It is not the contention in this case that any such notice given under sub-section (2) of

section 6 of the Fragmentation Act. The mere fact that this land is entered as a Fragment in 7-12-extract does not prohibit the transfer of the land under the Fragmentation Act. I have so far pointed out that there are only two provisions in the Act inhibiting transfers of the fragments and I have so far pointed out that none of these two provisions are applicable in the instant case and so there can be no bar under the Fragmentation Act for enforcing the agreement of re conveyance."

53. Under the Fragmentation Act of 1947, there are only 2 provisions inhabiting the transfer of lands i.e. under Section 31(1) and Section 7(1) and both the provisions are not applicable to the instant case as the sale in the instant case does not create fragmentation as the entire land is sold and second that the land was not allotted to the vendor under the consolidation scheme formulated under the Fragmentation Act of 1947. Finding of the appellate court in this regard that the sale was violative of Section 31 of the Fragmentation Act is set aside.

54. Having answered the questions of law raised in these Second Appeals, I proceed to pass following order:

ORDER

[I] The Regular Civil Suit No.106 of 2000, filed in the court of 2nd Joint Civil Judge, Junior Division, Ahmednagar is dismissed.

[II] I declare that the Sale Deed dated 08.09.1997 does not violate provisions of the Maharashtra Prevention of Fragmentation and Consolidation of holdings Act, 1947 and the sale of 40 Are of land situated at village Jakhangaon, Taluka and District – Ahmednagar is valid.

[III] Second Appeal No.1767 of 2005 is dismissed.

[IV] Second Appeal No.142 of 2006 is allowed.

[ARUN R. PEDNEKER, J.]