

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 604 OF 2018

1. Sarubai wd/o Bhika Jadhav
age 56 years, occ. Agriculturist
2. Bhaskar s/o Bhika Jadhav
age 33 years, occ. Agriculturist
3. Shantaram s/o Bhika Jadhav
age 30 years, occ. agriculturist

All r/o Talegaon Male,
Tq. Kopargaon.
Dist. Ahmednagar.

Appellants

Versus

1. Kisan s/o Sukhdeo Jagtap
age 42 years, occ. Agriculture
r/o Bhaggaon, Tq. Vaijapur
Dist. Aurangabad.
2. Ashabai w/o Barku Kakad
age 35 years, occ. Household
Presently Ashabai @ Vaishali w/o Somnath Ugale
r/o Songaon, Tq. Niphad,
Dist. Nashik.

Respondents

Mr. Milind Patil, Advocate for the appellants.
Mr. A. S. Bajaj, Advocate for Respondent No. 1.

CORAM : R. M. JOSHI, J.
RESERVED ON : 5th APRIL, 2023.
PRONOUNCED ON : 20th APRIL, 2023.

JUDGMENT :

1. This appeal is filed under Section 100 of the Code of Civil Procedure taking exception to the judgment and decree passed by First Appellate Court in Regular Civil Appeal No. 62/2014, whereby the judgment and decree dated 30th June 2014, passed by Civil Judge, Senior Division, Kopergaon in Regular Civil Suit No. 145/2012 is set aside. The appellants are original defendants in the suit. The parties are referred to by their nomenclature in the suit.

2. In brief, the case of plaintiff and defendants can be narrated as under :-

It is the case of plaintiff that he purchased land admeasuring 1 H 65 R from Gat No. 12/1 from defendant No. 1 who is owner on consideration of Rs.2,65,000/-. It is further contended that at the time of executing sale deed defendant No. 1 received entire consideration and handed over possession of the said land to plaintiff. It is alleged that thereafter the defendants have started obstructing his possession over the suit land and hence suit for injunction is filed against them.

3. Defendants filed a written statement and denied execution of sale deed in question by defendant No. 1 and handing over of possession of the suit land to the plaintiff. It is further denied that defendants have caused any obstruction to the possession of plaintiff over the said land. Defendants No. 2 to 4 filed counter claim stating that Gat No. 12/1 is ancestral joint family property of defendants. It is claimed that there is no partition effected between the coparceners. It is stated that defendant No. 2 is illiterate and a simpleton person in nature. It is their case that he is addicted to liquor and on 14th July, 2009, making him to consume liquor and without paying any consideration, plaintiff has obtained sale deed by playing fraud. It is also averred that the said sale is not for the benefit of the family, without their consent and legal necessity. According to these defendants the said sale deed is not binding upon them and declaration is sought to that effect.

4. Learned Trial Court by framing issues, put initial burden on plaintiff to prove execution of sale deed by defendant No. 1 for legal necessity. Defendants No. 2 to 4 were called upon to establish that the sale deed is obtained by plaintiff without paying consideration. They were also asked to prove the entitlement of declaration in respect of the said sale deed. Parties led evidence before Trial Court. The suit was dismissed and the said judgment was challenged successfully before First Appellate Court.

5. Learned counsel for the defendants submitted that First Appellate Court has committed serious error of law and facts while reversing the judgment and decree passed by the Trial Court. It is his contention that the First Appellate Court has failed to take into consideration evidence on record which, according to him, indicates that the plaintiff has failed to prove legal necessity for the sale of suit property which is joint family coparcenary property. He referred to the evidence of plaintiff as well as defendant No. 4 Shantaram in order to argue that

defendants No. 2 to 4 have never recorded their consent for execution of sale deed by defendant No. 1 in favour of plaintiff. It is further pointed out that plaintiff's cross examination indicates that there were no liabilities to be discharged by defendant No.1, such as marriage of daughter or discharge of any debt, and therefore, for want of proof of legal necessity the transaction of sale between plaintiff and defendant No.1 is not binding on other defendants. Thus, according to him, it is a fit case for causing interference in the impugned judgment and decree passed by the First Appellate Court and to restore the judgment of the Trial Court. To support his contentions, he relied upon following judgments :-

- i) Santosh Hazari vs. Purushottam Tiwari,
2001 AIR (SC) 965 (Power of Appellate Court to
cause interference in findings of fact)
- ii) Indian Bank vs. S. N. Enginees and Suppliers and
another, 2018(4) SCC 606 (Order XII Rule 6 CPC)
- iii) Anathula Sudhakar vs. P. Buchi Reddy,
2008(4) SCC 594 (where a cloud is raised over title of
plaintiff a suit for simplicitor injunction is not tenable.)

6. Learned counsel for the plaintiff, on the other hand, submitted that the plaintiff has discharged the initial burden of proving existence of legal necessity for the sale of suit land and also proved execution of sale deed by defendant No. 1 on recovering consideration. In support of this, he placed reliance on evidence of plaintiff Bajirao (Exhibit 12) and Prakash (Exhibit 17). He further drew attention of this Court to cross examination of defendant No. 4 which according to him, conclusively proves case of plaintiff on both counts. In particular, reference is made to fact that no objection was given by defendants to mutate name of plaintiff in revenue record on the strength of sale deed. On these amongst other submissions it is stated that it is not a fit case wherein this Court can exercise jurisdiction under Section 100 of the Code of Civil Procedure to disturb the judgment of Appellate Court.

7. Before considering the factual matrix of the case, it is necessary to take into consideration the jurisdiction of this court under Section 100 of the Code of Civil Procedure to cause

interference in the impugned judgment and decree. As per the provisions of the Code of Civil Procedure, second appeal can be entertained only if there exists a substantial question of law. No doubt, where the Trial Court or First Appellate Court have misread the evidence or have not considered the evidence or have ignored the evidence on record, in that case the findings of the Court below can be termed as perverse and in such situation, it is open for the Court to cause interference in the said finding. In this regard reference can be made to the judgment in the case of Ramathal v/s. Marutathal, **AIR 2018 SC 340** wherein the Hon'ble Apex Court has observed thus :-

" 15. A clear reading of section 100 and 103 of the CPC envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the high court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a Second appeal is a substantial question of law involved in the case which has to be adjudicated by the high court. It

is the intention of the Legislature to limit the scope of second appeal only when a substantial question of law is involved and the amendment made to section 100 makes the legislative intent more clear that it never wanted the High Court to be a fact finding court. However it is not an absolute rule that high court cannot interfere in a second appeal on a question of fact, Section 103 of the CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, court is empowered to interfere on a question of fact as well. Unless and until there is absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact just because two views are possible, in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact.”

8. Reverting back to the facts of the case it is pertinent to note that the plaintiff has specifically pleaded about the sale of the suit land A measuring 1 H 65 R from Gat No. 12/1 which

is purchased by him from defendant No. 1 for the consideration of Rs.2,65,000/-. In this regard plaintiff has examined himself at Exhibit 47 and deposed accordingly. In the cross-examination defendants have not disputed the fact that defendant No. 1 is Karta of the joint family of the defendants. No dispute is made about the fact that the defendant No. 1 has executed the said sale deed. His cross examination further confirms the case that prior to the transaction of sale there was discussion between parties. So also that at the time of execution of sale deed, defendants No. 2 to 4 were present at Sub-Registrar's office. In support of his contention, plaintiff has examined Bajirao at Exhibit 52 who has categorically stated about execution of sale deed (Exhibit 43) by defendant No. 1 and that he received consideration of Rs.2,65,000/- at that time. He also stated that plaintiff is in possession of suit land. From the cross-examination, it is apparent that this witness is nephew of defendant No. 1. There is nothing on record to show that he had any reason to falsely depose against defendants. It was suggested to him that he did not personally count the currency

notes which were given towards consideration. This suggestion implies that consideration was paid in his presence but he did not count the said notes. There is no suggestion made to this witness that no consideration was ever handed over by the plaintiff to defendant No. 1. There is further corroboration in respect of the execution of sale deed in the form of testimony of Prakash, scribe (Exhibit 57). This witness has candidly stated about he typing the said document at the instruction of plaintiff as well as defendant No 1 and they executing the document. Plaintiff therefore, by leading cogent evidence, has proved execution of sale deed by defendant No. 1 after accepting the agreed consideration and handing over of the possession of the suit land to plaintiff.

9. While deciding issue of legal necessity, a fruitful reference can be made to the judgment of Hon'ble Apex Court in case of Smt. Rani and another vs. Smt. Santa Bala Debnath and others, AIR 1971 Supreme Court 1028 wherein it is held thus :-

“10. Legal necessity to support the sale must however be established by the alienees. Sarala owned the land in dispute as a limited owner. She was competent to dispose of the whole estate in the property for legal necessity or benefit to the estate. In adjudging whether the sale conveys the whole estate, the actual pressure on the estate, the danger to be averted, and the benefit to be conferred upon the estate in the particular insistence must be considered. Legal necessity does not mean actual compulsion : it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of proving legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and bona fide enquiries about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity.

10. Thus, initial burden is on plaintiff to show that suit property was sold by defendant No. 1 for legal necessity of family. This can be done either by proof of actual necessity or by proof that he made boanfide enquiries about existence of necessities. It is sought to be contended by relying upon

admission of plaintiff that he did not go to the Bank or made enquiry about private loan, that plaintiff has failed to prove existence of legal necessity. This argument is wholly misconceived as it is based on premise that only by evidence regarding enquiry conducted, legal necessity can be proved. Here in this case, the plaintiff has brought evidence on record to show that about a year back daughter of defendant No. 1 was married and that he had loan of credit society.

11. Plaintiff in his evidence has stated that defendant has sold the suit land for the benefit of family. He further relied upon the recitals of the sale deed to prove the legal necessity of defendant No. 1 to sell suit land. In the cross examination it is suggested to him that marriage of son and daughter of defendant No. 1 was performed prior to sale. Evidence of defendant No. 4, Shantaram, however, shows that there was charge over suit land of credit society. He admits that his sister was married in 2008 i.e. about a year prior to execution of sale deed. He also admitted that there is entry in 7/12 extract

about loan of credit society. Though he denied that loan was obtained but accepted that no complaint is made with regard to the said entry.

12. Apart from this, the recitals of sale deed shows tht the legal necessity for sale is specifically spelt out therein. In case of Smt. Rani (supra) the Hon'ble Apex Court has held thus :-

11. Recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in evidence, their value varying according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of legal necessity. The weight to be attached to the recitals varies according to the circumstances. Where the evidence which could b brought before the Court and is within the special knowledge of the person who seeks to set aside the sale is withheld, such evidence being normally not available to the alienee, the recitals go to his aid with greater force and the Court may be justified in appropriate cases in raising an inference against

the party seeking to set aside the sale on the ground of absence of legal necessity wholly or partially, when he withholds evidence in his possession.

The case of plaintiff with regard to sell of suit land for legal necessity stands proved by oral evidence corroborated by recitals of sale deed.

13. About defendant No. 1 being Karta of family, it is contended that Appellate Court erred in not accepting the wife of defendant No. 1 as Karta. The said submissions however are not supported by evidence on record. Sarubai, wife of defendant No. 1 has accepted that all lands stand in the name of her husband i.e. defendant No. 1. He was looking after work related to credit society. Though she claims that she used to enter into transaction on behalf of family, no evidence to that effect is placed on record. Shantaram, defendant No. 4, also gave admission about properties in name of defendant No. 1. He further agreed that neither he, nor his mother and brother

had occasion to go to the credit society. Apart from this, he admits that on 16th January, 2013, his father, defendant No. 1 has sold land from Gat No. 12/1 to Ushabai Pawar and said document does not bear his or mother's signature. All these admissions are more than sufficient to show that there is no truth in denial of defendants that defendant No. 1 was not Karta. On the basis of evidence on record, the only inference which can be drawn is that defendant No. 1 is Karta of family and executed sale deed in that capacity.

14. Aforesaid evidence also falsifies claim of defendants that defendant No. 1 is simpleton person. Moreover, there is absolutely no evidence on record to show that he was addicted to liquor and that for any reason was incapacitated to execute valid sale deed in any manner whatsoever. Contentions of defendants that on the date of execution of sale deed defendant No. 1 was made to consume liquor and under the said influence his signature is obtained, is falsified with admitted fact that these defendants were very well present at the Sub-Registrar

Office. If it was so, they would have certainly stopped defendant No. 1 executing document. More over, inspite of the knowledge of these defendants about execution of sale deed by defendant No. 1 on 14th July 2009, no prompt action is taken challenging said sale deed. This conduct of these defendants casts doubt over their claim. Apart from this, though initially defendants No. 2 to 4 objected for the mutation of the name of plaintiff over the suit land, but subsequently they recorded no objection for the same. This conduct of the defendants speaks volume. It is sought to be argued on behalf of defendants that the defendant No. 4 has explained as to the reason for which the said no objection was given. According to him, since the plaintiff had agreed to return the suit land, no objection was recorded. This explanation however, is not acceptable for the simple reason that no prudent man will consent for mutation of record on such assurance. Similarly, further cross-examination of defendant No. 4 indicates that there was no such agreement entered into between the parties and therefore, in absence of any material on record to indicate so, the statement volunteered

by this witness in the cross-examination cannot be considered as an explanation to the factum of giving no objection to mutation entry in favour of plaintiff.

15. From perusal of pleadings and material evidence on record, it is clear that the plaintiff has proved that suit land was sold by defendant No. 1 being Karta of the joint family and for legal necessity. The handing over of possession of suit land to the plaintiff is also established by examination of the witness to the sale document. Apart from this, there is mutation entry in the name of plaintiff showing his possession over the same. No doubt the mutation entry neither creates nor extinguishes right, title or interest in the property. However, for the purpose of considering the possession of the plaintiff over the suit land, presumptive value can be attached to it. This evidence is in corroboration to the other evidence on record from which it can be held that the plaintiff is in possession of the suit land since the time of execution of sale deed.

16. It is also necessary to record that defendant No. 1 has not entered into witness box to deny execution of sale deed or receipt of consideration and to state that the recitals of the document are not as per his instructions. Subsequent transaction of sale effected by him solely further indicates his capacity of understanding. Considering entire facts on record, inference can be drawn that defendants have colluded to defeat right of plaintiff.

17. As regards maintainability of suit filed by plaintiff, the same is filed on title document of registered sale deed executed by owner. It is only by filing the counter claim said sale deed was asked to be declared not binding on defendants. Here in this case, execution of sale deed by defendant No. 1 is not in dispute. Parties being fully conscious of the issue to be met in trial, led evidence and plaintiff succeeded to prove that sale of suit property is for legal necessity of family. Hence judgment in case of Anathula Sudhakar (supra) won't help defendants in any manner.

18. Perusal of the judgment of the First Appellate Court indicates that after taking into consideration pleadings, evidence and relevant law on the points involved in the case, it has rightly reversed the findings and judgment of the Trial Court. The learned Trial Court has clearly committed error in ignoring the evidence on record with regard to the legal necessity and possession of plaintiff over the suit land. Appellants/ defendants have failed to show any error committed by the First Appellate Court in declaring the suit and dismissing counter claim. This Court finds involvement of no substantial question of law in this appeal to cause interference in the impugned judgment and decree of the First Appellate Court. The present appeal, therefore must fail. In the result, appeal stand dismissed with cost.

19. Pending civil application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

LATER ON :

Learned counsel for the appellants states that interim relief running in his favour during the pendency of this appeal may be extended for a period of four weeks.

Learned counsel for the respondents opposes the said contention in view of the fact that the second appeal is dismissed.

Since interim relief was in existence during the pendency of this appeal, this Court finds no reason for not extending the same for further period of four weeks. Hence, interim relief to remain in force for four weeks.

(R. M. JOSHI)
Judge

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