

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.524 OF 2016
WITH
CIVIL APPLICATION NO.1068 OF 2016
IN
SECOND APPEAL NO.524 OF 2016

Dinkar Balu Kharoshe

...Appellant.

Versus

Deepali Dinkar Kharoshe & Ors.

...Respondents.

Adv. Gajanan M. Savagave for the Appellant.

Coram : Sharmila U. Deshmukh, J.

Date : April 30, 2024.

P. C. :

1. Being dissatisfied by the judgment dated 30th December, 2013 passed by the Appellate Court dismissing the appeal and modifying the decree of the Trial Court to the extent of the share in the suit properties thereby confirming the partition, the original Defendant No. 1 is before this Court.

2. The facts of the case are that the Plaintiff who is the daughter of Defendant No. 1 filed a suit seeking partition and separate possession of the suit properties described in paragraph No. 1a and 1b of the suit. Properties described in paragraph 1A are three landed

properties and 1B are two house properties. It was contended that the land Gat No. 653 and House property are ancestral properties and Gat No. 194 was purchased out of the income generated from the ancestral properties. It was further contended that the land Gat No. 788 to the extent of 3Anna 2 paise was in joint possession by Defendants being the legal heirs of Balu Krishna who was tenant in the said property. Defendant No. 1 was serving with the State Transport Corporation earning salary of Rs. 8,000/- and due to the dispute between the family, the Plaintiff and the Defendant No. 2 i.e. the mother was driven out of the house. The Defendant No. 1 had established the relations with one other lady named Mangla. In order to deprive the Plaintiff of her right in the property 1/3rd share in Gat No. 653 has been sold by Defendant No. 1 in favour of Defendant No. 3 who is the close relative of said lady Mangla. There was no legal necessity to sell the land as the Defendant No. 1 was earning a monthly salary of Rs. 8,000/-.

3. Defendant No. 1 resisted the suit by filing written statement denying the contentions. It was pleaded that there was no partition between his brother and the widow of another brother Dinkar. It was contended that as far as the sale-deed in favour of the Defendant No. 3 is concerned, he has availed the loan to the extent of Rs. 1,25,000/-

from Vadgaon Urban Co-Op. Bank as well as loan of Rs. 50,000/- from Vikas Nagari Sahakari Pat Sanstha and has taken hand loans of Rs. 1,00,000/- from his friends to meet the educational expenses of the Plaintiff and for her sustenance. It was contended that the Plaintiff got married during the pendency of the suit and she has received the amount of maintenance along with her mother. Defendant Nos.3 and 4 more or less raised the same contentions as that of Defendant No. 1. By way of an additional written statement, it was contended that the lady Mangla in respect of which allegations are made and the children if any, are also necessary parties to the suit without whom the suit is not maintainable.

4. The parties went to trial. The Trial Court by judgment dated 30th October, 2010 decreed the suit and determined the shares of the parties. The trial Court further directed that the sale-deed which was executed in favour of the Defendant No. 3 is not binding upon the share of the Plaintiff. As against this the Defendant No. 1 preferred an Appeal before the Appellate Court being Regular Civil Appeal No. 23 of 2011. The Appellate Court upon re-appreciation of evidence dismissed the Appeal and redetermined the shares of the parties and passed an order of injunction restraining the Defendant Nos. 1 and 3 from dealing with the suit properties until partition by metes and

bounds.

5. This Court is informed that caveat was filed on behalf of the Respondent and the copy was served and notice was given of today's hearing. However, none appears for the Respondent despite service.

6. Heard Mr. Savagave for the Appellant.

7. Learned counsel for the Appellant would submit that two substantial questions of law which would arise in the present case is the non joinder of the necessary parties i.e. lady named Mangla and their children if any, as has been specifically contended in the additional written statement filed by Defendant No. 1 on 11th June, 2007. He would further submit that as far as sale-deed of 2nd June, 2003, executed in favour of the Defendant No. 3 is concerned, the specific case is that the alienation was for legal necessity and the findings of the Trial Court and the Appellate Court are based on misappreciation of evidence on record. He has taken this Court through the judgment of the Trial Court and the Appellate Court minutely in support of his contentions.

8. Considered the submissions and perused the record.

9. As far as the first submission of non joinder of necessary party is

concerned, the settled position of law is that in case of void marriage the wife is not entitled to any share in the ancestral property and it is only the children who are born from the void marriage and whose legitimacy is protected under Section 16 of the Hindu Succession Act would be entitled to share in the property of their father. In the present case, the allegations in the plaint is that the Defendant No. 1 was having an illicit relationship with the lady named Mangla. It is not the case of the Plaintiff that there are any children which are born from the said relationship. If the written statement of Defendant No. 1 is perused, it is not the case of the Defendant No. 1 that from the said relationship with Mangla there are any children who are born. There are absolutely no details, no names given of the children, if any, begotten from the said lady Mangla. Very vague pleading finds place in the written statement that Mangla and their children, if any, are also necessary parties to the present suit. If an issue as regards the non maintainability of the suit for non joinder of necessary parties is raised, the burden is upon the party raising the said issue to give the necessary details of the parties who are required to be joined to the suit being necessary parties. In the present case, apart from contending that the Mangla and their children, if any, are necessary parties to the suit, no details are given, and as such the suit was perfectly maintainable as Mangla not being legally wedded wife did

not have any right in the suit property and thus was not necessary party.

10. The next contention which has been raised is that the allegation in favour of the Defendant No. 3 was for legal necessity. If the evidence of Defendant No. 1 is perused, in paragraph No. 7 of the Affidavit of evidence the Defendant No. 1 has deposed that he has obtained loan of Rs. 1,25,000/- from Vadgaon Urban Co-Op. Bank, Rs. 50,000/- from Vikas Nagari Sahakari Pat Sanstha and hand loans from various friends of Rs. 1,00,000/-. He has further deposed that the Defendant No. 3 has from time to time advanced monetary help and for repayment of the loan, it was necessary to alienate same part of the property in favour of Defendant No. 3 and by reason of the said transaction, the right of the Plaintiff is not affected and that the said property has been alienated for the benefit of the house and for satisfying the family needs. It is settled position that a coparcener is entitled to alienate his undivided share in the property. However, if he seeks to alienate in excess of his share, then the same can be only for the purpose of legal necessity. The burden is upon the purchaser to show that the undivided share in the coparcenary property has been alienated for legal necessity. In the present case, the evidence has been led by the Defendant no. 1 and as noted above apart from saying

that loans are obtained, there are no details given as to how the amounts were spent for the benefit of family and towards satisfying the family needs. On the contrary, specific deposition is that the right of the Plaintiff is not affected by virtue of the said transaction. Apart from a bald statement that the property has been alienated for the purpose of benefit of the family, there is no evidence brought on record to substantiate the same.

11. The situation is sought to be salvaged by learned counsel for the Appellant by submitting that it is an admitted position that the educational and other needs of the Plaintiff were met by the Defendant No. 1 and thus it is evident that, loans were obtained for the said purpose. Apart from the fact, that the deposition does not set out any such case, considering that the Defendant No. 1 was employed with the State Transport Corporation and was earning a salary of Rs. 11,000/-. If the alienation was for legal necessity, it was necessary to demonstrate that the educational and the other family expenses could not be met about the sum of Rs. 11,000/- and that the loan was taken for the benefit of the family. There is no such evidence on record. The Trial Court while considering the evidence has noted that the loan of Rs. 1,25,000/- from Vadgaon Urban Co-Op. Bank was obtained by the Defendant No. 1 and Defendant Nos. 4 and 6 i.e. his

brothers who were carrying out only agricultural work had repaid their share of the loan in the year 2005 itself. The Trial Court noted that despite the loan period not having expired and considering that the Defendant No. 1 was employed and was having an additional source of income apart from agricultural income, and, the admission that there was no recovery instituted by the bank, the Trial Court held that the alienation of the property in favour of the Defendant No. 3 was not for legal necessity. The Trial Court further noted the recitals in the sale-deed wherein it was only mentioned that from time to time sum Rs. 3,70,000/- was given by the Defendant No. 3 to Defendant No. 1 and held that the document itself is suspicious document.

12. As regards the submission that the property was alienated for the purpose of marriage of the daughter the same does not find place in the evidence of Defendant No. 1. Even otherwise, the daughter was married on 10th May, 2005 and the property has been alienated on 2nd June, 2003. The evidence on record does not establish alienation for legal necessity and the Trial Court and the Appellate Court has rightly appreciated the evidence on record.

13. It is well settled that in exercise of power under Section 100 of CPC, this Court will not re-appreciate the evidence and substitute its own view unless it is demonstrated that the findings suffer from

perversity. On perusal of the material on record no perversity is demonstrated. As such, no substantial question of law arises. Appeal stands dismissed.

14. In view of dismissal of Second Appeal, Civil/Interim Applications, if any, taken out therein does not survive for consideration and the same are disposed of.

[Sharmila U. Deshmukh, J.]