



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.209 OF 2017
WITH
CIVIL APPLICATION NO.484 OF 2017

Sou.Laxmibai Ashok Sutar and Ors. ... Appellants.

Versus

Ashook Vithoba Sutar (since deceased),
through LR's and Ors. ... Respondents.

Mr. Chintan Shah, Mr. Shubhankar Kulkarni i/by Triyama Legal for
the Appellants.

Mr. Umesh Mankapure, for the Respondent nos.2 and 3.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : MARCH 05, 2024

P. C.:

1. Being dissatisfied by the judgment dated 5th August, 2016 passed in Regular Civil Appeal No.348 of 2008 dismissing the Appeal confirming the judgment and decree dated 10th September, 2008 passed in Regular Civil Suit No.92 of 2000 by the trial Court, the original-plaintiffs are before this Court. For the sake of convenience, the parties are referred to by their original status before the trial Court.

2. Regular Civil Suit No.92 of 2000 was instituted by the plaintiffs seeking partition and separate possession of the suit

properties and for perpetual injunction. The plaintiff No.1 is the wife of Defendant no.1, and plaintiff Nos.2 to 4 are the sons of the defendant no.1.

3. The case of the plaintiffs is that the suit properties are ancestral properties of Defendant No.1 and after the death of father of the Defendant No.1, there was no partition of the ancestral properties. The Defendant no.1 was not mentally sound person and suffers from schizophrenia. It was pleaded that the brother of the defendant no.1's mother and his son compelled the Defendant no.1 to execute the sale-deed in respect of Gat No.192 in favour of the Defendant Nos.2 and 3 without there being any legal necessity. The Defendant No.1 filed his written statement and supported the case of the plaintiffs.

4. The Defendant Nos.2 and 3 have resisted the suit contending that the Defendant no.1 and his mother have sold the property for payment of bank loan and for other family debts and the family needs. It was contended that out of land bearing Gat No.192 the Defendant No.1 and his mother have sold 3 Hectors 25 Are for total consideration of Rs.1,60,000/- on 20th January, 1988 and have handed over the possession of the said property.

5. The parties went to trial. The trial Court declared that the plaintiffs and the Defendant No.1 have $1/5^{\text{th}}$ share in house property and that the Defendant nos.2 and 3 have joint shares to the extent of land admeasuring 3 H 25 Are out of land Gat No.192 and the plaintiffs and the Defendant No.1 have $1/5^{\text{th}}$ share each in remaining property. The Appellate Court in an Appeal filed by the plaintiffs upheld the findings of the trial Court and dismissed the Appeal.

6. Heard Mr. Chintan Shah, learned counsel appearing for the Appellants and Mr. Umesh Mankapure, learned counsel for the Respondent nos.2 and 3.

7. Mr. Shah, learned counsel appearing for the Appellants would submit that the admitted position is that the suit properties were ancestral properties and in respect of which there was no partition effected and as such, the burden was upon the defendant Nos.2 and 3 to prove the legal necessity for sale of portion of Gat No.912. He submits that the trial Court has wrongly cast the burden upon the plaintiffs to prove the legal necessity. Pointing out to the findings of the trial Court, he would submit that only certain amounts have been shown as against the entire consideration of

Rs,1,60,000/-, and there is no material to show that any amount was paid to the Defendant no.1. He would further submit that the findings of the Courts as regards the mental illness of the Defendant no.1 is perverse in view of the medical evidence which has come on record.

8. *Per contra*, Mr. Mankapure, learned counsel appearing for the defendant Nos.2 and 3 would submit that the burden was not cast upon the plaintiffs but upon the defendants, who have discharged the burden by producing the receipts at Exhibit 294 as well as by examining the witnesses to show the amount deposited in the post office. He submits that the case of the plaintiffs is that fraud has been committed upon the Defendant no.1, which case has been rejected by the trial Court on the basis of the evidence. He would further submit that although the Defendant no.1 is stated to be suffering from schizophrenia, he has filed the written statement supporting the case of the plaintiffs and as such, the suit was clearly a collusive suit.

9. Considered the submissions and perused the record.

10. The nature of the suit property being ancestral property is not disputed. The issue raised for consideration is whether the

Defendants have proved the legal necessity for sale of portion of ancestral properties. The judgment of the trial Court indicates that the Plaintiffs had produced receipts to show that the parents of the defendant no.1 had taken bank loans and gold loan for the purpose of cultivation of lands. The Defendants have produced receipt at Exhibit 294 dated 19th January, 1988 which shows the name of the defendant No.3, depositing the amount of loan on behalf of the father of the defendant no.1 thereby discharging the entire debt a day prior to execution of sale-deed on 20th January, 1988. The said fact is stated in the sale-deed that amount of Rs.60,000/- is paid to vendor for discharging debts. On the basis of receipt at Exhibit 294, the trial Court has come to a finding that there has been discharge of the debt on behalf of the father of the Defendant No.1. Although the receipt is not for the payment of loan of Rs.60,000/-, the trial Court has rightly held that there is no explanation forthcoming as to who has discharged the debt of the bank loan and as to why the name of the defendant no.3 is mentioned in the said receipt. The burden was cast upon the defendants to prove the legal necessity, which is evident from the fact that the defendant had examined DW2-Laxmikant

Deshpande, who was serving in the post-office. The witness for the defendants has produced the document at Exhibits 301 and 302 which shows that the amount of Rs.40,000/- was deposited in the name of Defendant no.1 which amount was discharged on 21st January, 1988, after the sale-deed dated 20th January, 1988.

11. Considering the evidence which has come on record as regards the discharge of the debt as well as the deposit of the money in the bank account which was received by the defendant no.1, there is no merit in the contention of the learned counsel for the Appellants that the property was not sold for legal necessity. The evidence on record would demonstrate that the defendants had examined the necessary witness in support of their case of the ancestral property being sold for legal necessity. If the burden was cast upon the plaintiffs there was no necessity for the defendants to examine the witnesses and produce the documentary evidence to show the payments made towards discharge of the debt as well as the amounts deposited in the name of the Defendant no.1.

12. The trial Court has further considered that in the sale-deed itself it is mentioned that the amount is required for treatment of the mother of the Defendant No.1 and that on 23rd

January, 1988, amount of Rs.3,000/- was deposited in the bank account of the Defendant No.1.

13. Having regard to the evidence on record the trial Court and the Appellate Court has rightly answered the issue as regards the sale of the ancestral property on account of the legal necessity in favour of the Defendant Nos.2 and 3. As regards the contention that there is perversity in the findings inasmuch as the medical record produced would show the mental illness of the Defendant no.1, the evidence indicates that the treatment of the defendant no.1 was started on 3rd April, 1978 and the medical records produced were only in respect of the period from 3rd April, 1978 to 15th May, 1978. In the cross-examination, the witness has admitted that he is not in a position to state about the fitness of the defendant no.1 for the period from 10th June, 1978 to 30th June, 1989. The sale-deed had been executed on 20th January, 1988 and no medical records have been produced that the Defendant No.1 was suffering from any mental illness at the time of execution of the sale-deed. Coupled with the fact that the written statement has been filed by the defendant no.1 in the proceedings and no application was made for appointment of any next friend of the

Defendant no.1 as according to the plaintiffs, he was suffering from any mental illness shows that the trial Court and the Appellate Court has rightly appreciated the evidence as regards the mental illness of the Defendant no.1 on record.

14. Having regard to the discussion above, no substantial question of law arises in the present case. In exercise of powers under Section 100 of the Code of Civil Procedure, 1908, this Court is not expected to re-appreciate the evidence which has come on record unless perversity is demonstrated. Second Appeal stands dismissed.

15. In view of the disposal of Second Appeal, Civil/Interim Application(s) taken out in this Appeal, if any, does not survive and the same is disposed of.

(Sharmila U. Deshmukh, J.)