



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

907 SECOND APPEAL NO. 350 OF 1994

Vithoba Deoka Khandekar

....Appellant

VERSUS

Kailash Chima Jorawekar & others

.....Respondents

.....

Mr. R. N. Dhorde, Senior Counsel along with Mr. S. S. Dudhane,
instructed by Mr. V. R. , Advocate for the appellant.

Mr. S. K. Shinde, Advocate for Respondent Nos. 1 to 3.

CORAM : R. M. JOSHI, J.

DATE : 5th FEBRUARY, 2025.

PER COURT :

1. This appeal under Section 100 of Code of Civil Procedure takes exception to the judgment and decree passed by the Trial Court in Regular Civil Suit No. 291/1977 which is practically confirmed but with modification by the First Appellate Court in Regular Civil Appeal No 69/1984.

2. Following substantial question of law arises in this appeal :

Whether Courts below have erred in not considering evidence of sale-deed (Exhibit 35) executed between

Defendant Nos. 1 and 2, while deciding the issue of legal necessity of the said sale ?

Learned counsels for both sides were confirmed with this issue and heard thereon.

3. Learned Senior counsel for appellant has drawn attention of the Court to the pleadings of the parties and evidence led before the Trial Court. It is his contention that Defendant No. 3 who is the subsequent purchaser of the suit property from Defendant No. 2 has been able to prove the sale-deed Exhibit 35 executed between original owners Defendant Nos. 1 and 2. He drew attention of the Court to the recitals of the said sale-deed which specifically mentions about Defendant No. 1's need of money for medical expenses. He further points out that even details are provided therein as to how the monetary help was given by Defendant No. 2 to Defendant No. 1 for the said medical purpose. It is his submission that though it was not necessary for Defendant No. 3 to prove the legal necessity of the transaction between Defendant Nos. 1 and 2, and in any case, there is evidence in the form of sale-deed Exhibit 35 with recitals as stated hereinabove. He has drawn attention of the Court to the judgments of the Trial Court so also First Appellate Court wherein the said

evidence of sale-deed and recitals therein are not at all considered by the Courts below. To support his submission that the recitals are required to be given due weightage for deciding the issue of legal necessity, he has placed reliance on judgment of Hon'ble Supreme Court in case of Sundar Das and others vs. Gajananrao and others, **AIR 1997 Supreme Court 1686** and judgment of this Court in case of Kisan Ramchandra Kokane and others vs. Anjani Kaxman Kapase and others, **2016(4) ABR 565**. He, therefore, contends that since this evidence was not considered by both the Courts below, it would be in the fitness of justice that the impugned judgments and decrees are set aside and the matter is relegated back to the Trial Court for decision afresh.

4. Learned counsel for Respondent has supported the impugned judgments and decrees. However, he was unable to point out anything from those judgments to indicate that the Courts below have considered the evidence in the form of sale-deed and recitals thereto for the purpose of deciding the issue of legal necessity.

5. Record indicates that evidence in form of sale-deed (Exhibit 35) is not taken into consideration by both Courts below

while deciding issue of legal necessity for said sale transaction. Ignorance of relevant/material evidence on record leads to the perversity of findings on the issue. Thus, substantial question of law framed above deserves to be answered in affirmative.

6. In the second appeal, it is inappropriate for this Court to record finding of fact for the first time as the same will amount to denying opportunity to the parties to challenge the same in the appeal. Thus, inspite of the fact that appeal is of year 1994 and suit is filed in 1977, the only course available for this Court is to set aside the impugned order to the extent of finding of legal necessity and relegate the matter back to the Trial Court for deciding the said issue on the basis of evidence on record more particularly sale-deed Exhibit 35. It is specifically clarified that no other issue except the issue of legal necessity i.e. issue No. 16 shall be allowed to be canvassed and entertained before the Trial Court.

7. In view of above, appeal stands disposed of. Impugned order is set aside. Regular Civil Suit No. 291/1977 is relegated back to the Trial Court for decision afresh on the aforestated issue. Since

the suit is filed in the year 1977, Trial Court to decide the said issue within a period of six months from today.

8. In view of the peculiar facts and as sale-deed in question i.e. Exhibit 35 is already proved, Trial Court not to permit any additional evidence to be led. The issue be decided on considering evidence already placed on record and the sale-deed Exhibit 35. Needless to say that any findings recorded on the issue and consequential order/judgment would be subjected to the challenge as per law.

9. Appeal stands disposed of in above terms.

(R. M. JOSHI)
Judge

dyb