(2009) 01 BOM CK 0036

Bombay High Court (Aurangabad Bench)

Case No: Second Appeal No. 220 of 1988

Shankarlal Ramprasad Ladha died L.Rs. (Chandrabhaga Shankarlal Laddha and Others)		APPELLANT
	Vs	
Vasant Chandidasrao Deshmukh, Renukadas Chandidasrao Deshmukh, Sulochanabai Deshmukh and Laxmikant Chandidasrao Deshmukh		RESPONDENT

Date of Decision: Jan. 7, 2009

Acts Referred:

- Hindu Succession Act, 1956 - Section 6
- Transfer of Property Act, 1882 - Section 58

Citation: (2009) 1 BomCR 488 : (2009) 111 BOMLR 393 : (2010) 7 RCR(Civil) 1669

Hon'ble Judges: V.R. Kingaonkar, J

Bench: Single Bench

Advocate: A.H. Kasliwal, for N.A. Jain, for the Appellant; D.B. Bhadekar, for the Respondent

Judgement

V.R. Kingaonkar, J.

Challenge in this appeal is to judgment rendered by learned District Judge, Parbhani, in an appeal (RCA No. 104/1980), whereby and whereunder judgment of learned Civil Judge (J.D.), Basmath, in a suit (RCS No. 28/1977), dismissing the same, came to be reversed.

2. Original defendant No. 2 preferred this appeal which is continued by his legal representatives after his death. He was purchaser of suit house properties bearing House Nos. G-91 and H-207 situated at Basmathnagar which is a Taluka place.

3. Respondent Nos. 1 to 3 are the original plaintiffs and Respondent No. 4 is the original defendant No. 1. Admittedly, the suit house properties were in the hands of deceased Chandidasrao Deshmukh. He died somewhere in the year 1962, leaving behind him the Respondents as his legal heirs. There is no dispute about the fact that the Respondent Nos. l and 2 are the sons of Respondent No. 3 and the Respondent No. 4 is their step brother. At the time of death of Chandidasrao Deshmukh, the Respondent No. 4 was his eldest son. He use to look after the agricultural and house properties of the family. The Respondent Nos. l and 2 were school going boys when their father - Chandidasrao Deshmukh - died. The family of the Respondents were having certain agricultural lands and a house property at village Kurta, besides the two suit houses. Out of the suit houses, house property No. G-91 was a constructed house whereas house No. H-207 was only an open space. The deceased appellant/defendant No. 2 use to reside in the proximity of the suit houses.

4. Briefly stated, the case of the Respondent Nos. 1 to 3/plaintiffs was that they and the Respondent No. 4 became owners of the suit house after death of Chandidasrao Deshmukh, being his legal heirs. They went to Nanded for educational purpose of the Respondent Nos. l and 2. The Respondent No. 4 alone use to manage the agricultural lands and the house properties. The ancestral properties were partitioned in or about 1971-72. The suit houses were, however, kept undivided. The Respondent No. 4 agreed to distribute the rent of the houses and give them due share. It was subsequently learnt that he alienated the suit houses by virtue of sale deeds dated 25.2.1963 and 14.8.1963, respectively, without any reason. The sale transactions are not binding on their rights. The sale deeds are null and void. The Respondent No. 4 had no legal necessity to alienate the suit houses nor he was authorised to execute the sale deeds in question. Consequently, they urged to set aside both the sale deeds and give them 3/4th share by way of partition.

5. By filing their written statement, (Exh.21) the Respondent No. 4/defendant No. 1 resisted the suit. He contended that he never sold the suit houses to the deceased appellant/defendant No. 2. He asserted that he mortgaged only one of the suit house i.e. house No. G-91 for Rs. 1,000/- (Rupees one thousand) which he had borrowed for meeting out expenditure required for his own marriage. It was agreed between them that on his repayment of the said amount, that house would be redeemed by him. It was only a mortgage by conditional sale. He denied that the suit house No. H-207 was sold by him. He asserted that his signature was forged on the second sale deed dated 14.8.1963 and the document is falsely prepared.

6. According to the deceased appellant/defendant No. 2, the Respondent No. 4 became Karta of the joint Hindu family of the Respondents after death of Chandidasrao Deshmukh. He purchased the suit house properties from the Respondent No. 4 by virtue of the two sale deeds (Exh.49 and Exh.50). Both the sale transactions were done by the Respondent No. 4 on account of legal necessity of the

joint Hindu family of the Respondents. He asserted further that the suit was barred by limitation. He contended that he acquired title by prescription, alternatively, since the suit was filed more than 12 (twelve) years after the sale transactions. He contended that the suit was collusive civil action filed by the Respondent Nos. l to 3 in collusion with the Respondent No. 4. Hence, he urged to dismiss the suit.

7. The parties went to trial over issues settled below Exh.22. The learned Civil Judge (J.D.) held that the suit house properties were sold by the Respondent No. 4 as the Karta of the joint Hindu family and on account of the legal necessity which then existed. The learned Civil Judge held that the suit was not barred by limitation. He also held that the mortgage transaction pleaded by the Respondent No. 4 was not proved. Considering these findings, the suit came to be dismissed.

8. The learned District Judge was pleased to set aside the judgment of the trial Court, mainly on the ground that the deceased appellant/defendant No. 2 failed to prove that the suit properties were sold by the Respondent No. 4 in his capacity as Karta of the joint Hindu family.

9. This appeal was admitted treating ground Nos. (I) and (II) shown in the appeal memo as the substantial questions of law. Instead of reproducing these grounds, I deem it proper to formulate the substantial questions of law as follows :

(i) Whether in the facts and circumstances of the present case, the first appellate Court committed patent error while holding that due to introduction of Section 6 of the Hindu Succession Act, 1956, the family of the Respondents did not remain to be joint Hindu family and the properties held by them could not be treated as coparcenary properties.?

(ii) Whether in the facts and circumstances of the present case, the first appellate Court committed patent error while decreeing the suit without addressing itself to the issue of legal necessity.? If yes, whether the deceased appellant/defendant No. 2 proved existence of legal necessity for both the alienations or for either of them and what is its legal effect.?

10. Heard learned advocates for the parties. I have gone through the record and proceedings.

11. At the outset, it may be stated that the pleadings of the Respondent Nos. 1 to 3/plaintiffs purport to show that both the suit house properties were ancestral properties in the hands of deceased Chandidasrao Deshmukh. It was not the case of the Respondent Nos. l to 3 that the suit house properties were self-acquired properties of deceased Chandidasrao Deshmukh. It is an admitted fact that the Respondent Nos. 1 to 4 were members of the joint Hindu family until alleged partition was effected between themselves in or about 1971/1972. It has come on record that the first sale deed (Exh.49) was executed by the Respondent No. 4 in respect of house property bearing No. G-91 on 25.2.1963, whereas second sale deed

in respect of house property No. H-207 was executed by him on 14.8.1963. The first sale deed is said to have been executed for consideration of Rs. 1,000/- (Rupees one thousand), whereas the second sale deed is said to have been executed for consideration of Rs. 200/- (Rupees two hundred). Both the Courts below did not find any substance in the defence raised by the Respondent No. 4 as regards nature of the sale transactions. There is no reliable evidence to support the theory of alleged mortgage transactions nor such plea is tenable in view of Section 58(c) of the Transfer of Properties Act. For, neither of the sale deed shows any term so as to indicate that the transaction/s was/were of mortgage by conditional sale. It is not necessary, therefore, to consider such defence of the Respondent No. 4.

12. Now, it is worthwhile to see as to why the first appellate Court decreed the suit. According to the learned District Judge, the original concept of "coparcenary" underwent change after introduction of the Hindu Succession Act, 1956. He held that after death of Chandidasrao Deshmukh, all the legal heirs were entitled to inherit the suit properties and other properties and, therefore, the Respondent No. 4, "though he was the elder son of Chandidasrao Deshmukh, did not become the Manager of the joint Hindu family". The learned District Judge, further held that the Respondent No. 4 was not the Karta of the joint Hindu family as the nature of the property was changed. It is the finding of the learned District Judge that the family of the Respondents did not remain a joint Hindu family as such and the properties held by them could not be termed as coparcenary properties. The basic error seems to have crept in due to improper interpretation of Section 6 of the Hindu Succession Act, 1956. It is true, no doubt, that the succession had opened in the year 1962 i.e. after the commencement of the Hindu Succession Act. The concept of notional partition is a legal device used for purpose of demarcating interest of the deceased when the explanation (I) of Section 6 is attracted. Like any other legal fiction, the fiction of notional partition is meant for a specific purpose. It is not a real partition by metes and bounds. It neither effects a severance of status nor does it demarcate the interest of the surviving coparceners or of any females who are entitled to a share on a partition. It is well settled that the share of the deceased coparcener is required to be determined by notionally making allotment of his share which he was entitled to at the partition, on assumption that he was alive on that day and thereafter to divide his share amongst the legal heirs. The joint status of the Respondents was not impaired due to the introduction of Section 6 of the Hindu Succession Act. There is no reason to hold that the joint Hindu family was disrupted.

13. In State of Maharashtra Vs. Narayan Rao Sham Rao Deshmukh and Others, , the Supreme Court took survey of the earlier decisions including that of Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum and Others, . The Supreme Court held that Gurupad''s case has to be treated as authority only for the position that when a female member who inherits an interest in the joint family property u/s 6 of the Hindu Succession Act, files a suit for partition expressing her willingness to go out of the family would be entitled to both the interest she has inherited and the

share which would have been notionally allotted to her as stated in Explanation (I) appended to Section 6 of the Hindu Succession Act. The applicability of Section 6 does not per se bring about severance of status among the surviving coparceners. The legal fiction can not be carried beyond the purpose for which it is enacted. Considering this legal position, the view taken by the learned District Judge appears to be incorrect and improper. It must be held, therefore, that the Respondents Nos. l to 4 continued to remain members of the joint Hindu family and the suit houses were part of the coparcenary properties held by them.

14. Once it is held that the suit houses were properties of the joint Hindu family, then it goes without saying that the Respondent No. 4 was the Karta of the family. For, he was the eldest male member amongst them. The pleadings of the Respondent Nos. l to 3 would show that he use to manage affairs of the joint family, including cultivation of the family lands situated at village Kurta. The evidence on record shows that the Respondent No. 3 took the Respondent Nos. l and 2 to Nanded for their educational purpose. The Respondent No. 4 was required to maintain himself and the other members of the joint Hindu family after the death of Chandidasrao Deshmukh.

15. The core issue involved in this appeal is whether the deceased appellant/defendant No. 2 proved existence of legal necessity for alienation of the suit houses. The burden of proof was on his shoulders.

16. Before I embark upon scrutiny of the evidence tendered by the parties, let it be noted that the concept of legal necessity is illustrated under Article 243 of the Hindu Law (By Mulla - 20th Edition [Vol.I] page 371). It is well settled that "legal necessity" does imply pressure on the resources of the joint Hindu family. So, if it is proved that there was considerable strain on financial resources of the joint Hindu family at the relevant time, then the sale transaction may be justified. The alienation by Manager of the joint Hindu family may be permissible if it is for the benefit of the estate. Article 244 of the Hindu Law (By Mulla) would make it manifest that purchaser of the joint Hindu family property is under obligation to discharge burden of proof to prove existence of the legal necessity or that his having made proper and bonafide inquiry as to the existence of such necessity.

17. The deceased appellant examined himself at Exh.48. The version of deceased appellant (DW 1 - Shankarlal) purports to show that the Respondent No. 4 alienated the suit properties to him for improvement of the lands, for maintenance of himself and education of the minors and for meeting out his own marriage expenditure. His version reveals that he paid consideration of Rs. 1,000/- (Rupees one thousand) when he purchased suit house property No. G-91. He deposed further that he purchased the suit house property No. H-207 for consideration of Rs. 200/- (Rupees two hundred). His version reveals further that his family residential house is situated leaving two houses in the midway of house No. G-91 in the same lane. His version reveals that he did not inquire where the Respondent Nos. 1 and 2 were taking

education. He also did not know whether any debt was left by deceased Chandidasrao Deshmukh. The sale deeds (Exh.49 and Exh.50) are duly proved by attesting witnesses, namely, DW 2 - Ismail and DW 3 - Ramvallabh. However, they are not the witnesses on question of legal necessity.

18. It is most pertinent to notice that there is no cross-examination directed against DW - Shankarlal about period of marriage of the Respondent No. 4 and need for his marriage expenses. It was only suggested that there was no pressing need for the Respondent No. 4 to sell the suit houses. The recitals of the sale deed (Exh.49) would show that the transaction of sale in respect of house property No. G-91 was effected for meeting out marriage expenditure of the Respondent No. 4. It has come on record that in the proximity of time of the sale deed, the Respondent No. 4 got married. The version of PW 1 Sulochanabai reveals that the Respondent No. 4 was married in the year 1963. She deposed that expenditure of the said marriage was incurred by his father-in-law. She states that her family members were not required to incur any expenditure for the said marriage. It may be mentioned here that DW - Laxmikant (Respondent No. 4) did not state anything about the marriage expenditure required for his marriage. There is no whisper in his evidence to show that his father-in-law incurred the entire marriage expenditure. His version shows that in the year 1963 he was in need of money. Though he did not explain nature of the need, yet, having regard to attending circumstances, it can be gathered that the amount was needed to meet out his marriage expenditure.

19. It is explicit in view of Article 243(c) of the Hindu Law (By Mulla) that marriage expenses of male coparceners can be regarded as incidents of legal necessity. The marriage expenditure required for the purpose of marriage of the Respondent No. 4 appears to be the reason for which the house property bearing No. G-91 was alienated by him. The recitals of the sale deed (Exh.49) in this behalf are duly corroborated by version of DW - Shankarlal and the fact that said marriage was performed in the proximity of the time of such sale transaction. Obviously, it will have to be said that the suit house property bearing No. G-91 was alienated by the Respondent No. 4 as Karta of the joint Hindu family and on account of legal necessity which then existed.

20. So far as recitals of the next sale deed (Exh.50) are concerned, it is vaguely scribed therein that the sale transaction was entered into for purpose of improvement of the agricultural lands. The versions of DW - Shankarlal and his witnesses do not show, even remotely, as to which kind of improvements were to be effected in respect of the agricultural lands of the Respondents. There is hardly any evidence to show that, in fact, the consideration amount was utilised for any improvement of the family lands. As stated before, DW - Shankarlal did not inquire where the Respondent Nos. 1 and 2 were taking education. There was no proper inquiry made by him as regards nature of benefit which the family could have derived due to the sale of the house No. H-207. There is no material on record to

show that the sale transaction was expected to confer benefit on the family of the respondents at the relevant time. Mere vague recitals in the sale deed (Exh.50) that it was for the purpose of improvement of agricultural lands would not suffice the purpose. The deceased appellant (DW - Shankarlal) failed to prove that the sale deed dated 14.8.1963 (Exh.50) was executed by the Respondent No. 4 for any benefit to the joint family estate. Under these circumstances, it will have to be held that the second sale deed dated 14.8.1963 (Exh.50) is not binding on the rights of the Respondent Nos. 1 to 3.

21. In view of foregoing discussion, I have no hesitation in holding that the first appellate Court committed patent error while interpreting Section 6 of the Hindu Succession Act and treating the Respondent Nos. l to 4 as tenants in common immediately after the death of Chandidasrao Deshmukh. I further hold that the house property bearing No. G-91 was sold by the Respondent No. 4 on account of legal necessity, namely, to meet out expenditure of his own marriage. However, the sale transaction of the house property No. H-207 is not proved to be for the purpose of legal necessity nor it could be for the benefit of the estate of the joint family. Hence, part of the impugned decree granted by the first appellate Court is improper and incorrect.

22. In the result, the appeal is partly allowed. The impugned judgment is set aside to the extent of the declaratory relief and partition decree in respect of the house property No. G-91 and the suit be deemed as dismissed to the extent thereof.

23. The remaining part of the declaratory and the partition decree in respect of house property No. H-207 is maintained. The Respondent Nos. 1 to 3 will be entitled to 3/4th share by way of partition of the house property No. H-207 and the 1/4th share to be allotted to Respondent No. 4 shall be allotted to the appellants during course of the partition. The parties to bear their own costs throughout.