

(2004) 09 BOM CK 0126

In the Bombay High Court

Case No : Second Appeal No. 176 of 1985

Chandrakant and Others

APPELLANT

Vs

Shrinivasrao died, LRs. Mainabai and Others

RESPONDENT

Date of Decision : 08-09-2004

Acts Referred:

Bombay Prohibition Act, 1949 — Section 66
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4(4), Order 41 Rule 22, Order 41 Rule 22(1), Order 41 Rule 33
Evidence Act, 1872 — Section 90
Limitation Act, 1963 — Article 109, 6, 7, 8

Citation : (2005) 2 CivCC 716 : (2005) 3 MhLj 82

Hon'ble Judges : N.V. Dabholkar, J

Bench : Single Bench

Advocate : D.K. Kulkarni, for the Appellant; A.G. Mukhedkar, for the Respondent

Final Decision : Dismissed

Judgement

N.V. Dabholkar, J.—Original plaintiffs have approached this Court against the concurrent dismissal of their suit, which was filed seeking partition and separate possession of 1/6th share of each of the plaintiffs in the suit property (renumbered four pieces of land Survey No. 131 and a house of village Tembhurni, Taluka Biloli, District Nanded) from defendant Nos. 4 to 9, and a declaration that the sale deed dated 13-9-1956 executed by defendant No. 1 in favour of defendant No. 4 to be not binding upon the interest of the plaintiffs. Regular Civil Suit No. 107 of 1977 was dismissed by the learned Civil Judge, Junior Division, Biloli, vide his judgment and order dated 10-3-1981. Feeling aggrieved, the original plaintiffs approached the District Court, vide Regular Civil Appeal No. 129 of 1981, which was also dismissed by District Judge, Nanded, by his judgment and order dated 31-12-1984.

2. Plaintiffs have approached the trial Court with the following contentions:

The deceased defendant No. 1 Shrinivasrao was the father of plaintiff Nos. 1 to 3

and defendant Nos. 2 and 3. (Due to death of Shrinivasrao during the pendency of the suit, widow Mainabai and daughters Vijayanti, Vijaya and Shantabai are brought on record as co-defendants). Defendant Nos. 4 to 9 are not concerned with the family of plaintiffs and defendant Nos. 1 to 3. The suit property is the ancestral property of plaintiffs and defendant Nos. 1 to 3. Deceased Shrinivasrao was addicted to bad habits of consuming Ganja and gambling and to meet his illegal desires, he used to borrow loans from defendant No. 4 Madhavrao and father of defendant No. 8 namely Hanmanta. Taking undue advantage of this weakness of defendant No. 1, defendant No. 4 got executed a registered sale deed in his favour in respect of suit land Survey No. 131/A, admeasuring 10 Acres 7 Gunthas without paying adequate consideration, on 10-9-1956. The transaction was not for legal necessity. When this sale deed was executed, plaintiff No. 3 Uttam and defendant Nos. 2 and 3 Panditrao and Subhash were living. (Plaintiff Nos. 1, 2 and defendants Nos. 1/2 and 1/3 were then not born). According to the plaintiff, even plaintiff Nos. 1 and 2, who are born after plaintiff No. 3, have a right to agitate under the doctrine of "overlapping", because the claim of plaintiff No. 3 is not time barred. It is contended by the plaintiffs that this sale deed is not binding upon them.

It is further added that, defendant No. 4 Madhavrao has illegally occupied over portion admeasuring 5 Acres 3 Gunthas i.e. Survey No. 131/C/1 and defendant Nos. 5 to 7 are illegally occupying portions of the suit land. Defendant No. 4 has got his name mutated illegally.

Father of defendant No. 8 namely Hanmanta was occupying Survey No. 131/B admeasuring 5 Acres 3 Gunthas on lease. He got his name mutated as purchasers without any legal document.

On the basis of above averments, the plaintiffs claimed that the transactions of the suit land are not binding upon them and they have prayed for partition and separate possession of 176th share of each of the plaintiffs, by eviction of the defendants and by declaration regarding sale deed dated 13-9-1956 not being binding upon them.

3. Defendant Nos. 1 to 6 and 8 preferred to remain ex parte and suit was contested only by defendant Nos. 7 and 9. According to them, the suit property was the self acquired property of defendant No. 1 and, therefore, he was exclusive owner and possessor of the same. He had no other occupation except agriculture and the suit land being Kharab land was not yielding sufficient income. His house had suffered extensive damages due to rainfall. His family was running into debts and, therefore, defendant No. 1 sold away part of Survey No, 131 admeasuring 10 Acres 6 Gunthas in favour of Hanmanta and Madhavrao for consideration of Rs. 4,000/-. Thereafter, defendant No. 1 sold further land in favour of Madhavrao by a sale deed dated 10-9-1956 for a consideration of Rs. 2,000/-. When the transactions were carried out, the plaintiffs were not born at all. It is the claim of the defendants that defendant No. 4 Madhavrao and father of defendant No. 8 namely Hanmanta, became owners of the suit lands under

these two transactions.

4. The details of the transactions referred to by defendant Nos. 7 and 9 in their written statement can be tabulated as follows:

	Sale Deed	Area	Vendor	Vendee	Consideration	No. and date
_____	112/	10A.	Shrinivas Hanmanta s/o Gopal	Rs. 2,142/-	5-5-1955	06 G. Madhavrao s/o Narayan Rs. 1,714/- (Deft. No. 4) 935/- 10 A. Shrinivas Madhavrao Rs. 1,714/- 13-9-1956 07 G. (Deft. No. 4) 1929/ 02 A. Madhavrao Sambha Bhavrao Rs. 5,000/- 17-12-1968 (Deft. No. 4) (Deft. No. 7) (Exh. 77) Tukaram Nivrati s/o Santuka 35/ 05 A. Hanmanta Srirang Rs. 15,000/- 5-1-1970 06 G. (father of Deft. (Deft. No. 9) (Exh.69) No. 8) 1244/ 01 A. Bashumiya Narayan Bhavrao Rs. 3,000/- 26-5-1971 (Deft. No. 6) (Deft. No. 7) (Exh. 78) 2331 40 R. Bashumiya Pundlik Santuka Rs. 1,000/- 7-6-1974 (Deft. No. 6) 1296 02 A. Madhav Srirang Rs. 7,000/- 28-5-1975 (81 R) (Deft. No. 4) (Deft. No. 9) (Exh.70) Govind Narayan _____

It is also contended by defendants that after purchasing the suit land under valid transactions, they have also spent considerable amount towards improvement of the land. Thus, it is the claim of defendant Nos. 7 and 9 that they are the bona fide purchasers for value; that they have also spent amount on improvement of land and that the suit land is also barred by law of limitation and the same is prayed to be dismissed.

5. Defendant No. 1 - Mainabai has filed written statement at Exhibit 43 after being brought on record as legal heir on behalf of herself and defendant Nos. 1/2 and 1/3, by which she has fully supported the case of the plaintiffs.

6. After considering the evidence that was led before him, which includes depositions of Mainabai on behalf of plaintiffs, Srirang (defendant No. 9), Ganpati and Bhavrao (defendant No. 7) on behalf of the defendants, as also certain documents, learned Civil Judge arrived at a conclusion that, contesting defendants have failed to show that the sale was for legal necessity or that, the suit land was self acquired property (independent estate) of deceased Shrinivasrao or that, they had spent large amounts on improvement of the lands after purchase. The trial Court dismissed the suit by holding that the same was barred by Law of Limitation.

Learned District Judge, in view of the fact that all sale deeds were the documents duly registered, rejected the contention of the plaintiffs that the transactions were without consideration. He, however, did not find any reason to differ with the trial Judge on other issues. Learned trial Judge has held the suit barred by limitation, by relying upon observations of Privy Council in the matter of Rano Dip Singh v. Parameshwar Prasad, ILR 47 AH 165, AIR 1925 PC 33, wherein, it is held that extension of three years given by Section 6 of the Limitation Act cannot

be availed of by the sons not in existence at the time of alienation. The learned District Judge rejected the contention of the plaintiffs/appellants that even plaintiff Nos. 1 and 2 were within limitation in challenging the alienation by deceased father, by doctrine of "overlapping", because plaintiff No. 3 was already born when the transaction took place. Observing that the suit was governed by Article 109 of the Limitation Act, 1963, which prescribes the period of limitation for 12 years for setting aside alienation made by father and that period of limitation begins to run when the alienee takes possession of the property, he has held that the period of limitation expired in 1968 as the possession was transferred on 13-9-1956. Observing that, extension permissible by Section 6 of the Limitation Act, not being for the sons who, were not born on the date of alienation, it is held that plaintiff Nos. 1 and 2 have no right to challenge the sale deeds and according to the learned District Judge, plaintiff No. 3 could have challenged the sale deeds within three years from the date of attaining majority. Since appellant No. 3 was born sometime in the year 1955, he attained majority in the year 1973 and, therefore, learned District Judge felt that the suit filed in the year 1977, which was beyond period of three years after the plaintiff attained majority, was barred by limitation. The District Judge has dismissed the suit on the sole ground of limitation.

7. The second appeal was admitted vide order dated 9-9-1985, which reads as follows :

"Admit.

1. Whether plaintiffs have title to sue for partition in regard to lands not included in sale deed?
2. Whether plaintiff proves his joint title in regard to house?
3. Whether the suit is within time?

All these questions are framed and arise for decision."

8. Heard Advocates S/Shri D. K. Kulkarni for appellants and Shri A. G. Mukhedkar for respondent No. 9.

At the beginning, Advocate Shri D. K. Kulkarni for appellants states that the co-shares have settled the matter outside the Court, so far as house property is concerned and, therefore, the appellants/plaintiffs do not pray for any finding on point No. 2. Advocate Shri Mukhedkar, being a lawyer representing the respondents, who has purchased the agricultural land, has not resisted the proposition of Advocate Shri D. K. Kulkarni.

Hence, now dispute remains confined to agricultural land only.

9. Sale deeds dated 5-5-1955 by defendants Nos. 7 and 9, as also sale-deed dated 13-9-1956, Urdu documents with English translation, are on record, but in file "D" and unexhibited.

Sale deed dated 13-9-1956 ought to have been exhibited and admitted in evidence without any formal proof. This is because existence of this sale deed is admitted by both parties and what is produced is certified copy of the same obtained from office of Sub-Registrar, Biloli (pages 3 to 5 of "D" file of trial Court) with Marathi translation of the same.

Similarly, certified copy of the sale deed dated 5-5-1955 is at pages 60/61 in "D" file, Urdu certified copy from office of Sub Registrar, Biloli, and English translation at pages 76 to 78. This document also needs to be admitted in evidence and exhibited for more than one reasons. Even ignoring the deposition of DW Ganpat, examined as attesting witness, who ex-facie, appears to be a got-up witness, on reference to deposition of defendant No. 9 - Srirang (Exhibit 65), it is evident that he was permitted to lead secondary evidence of this sale deed, because vendor Madhavrao did not produce the same in spite of summons for such production. Madhavrao being the person in whose favour the document is executed, is the custodian of the same. Madhavrao is ex parte before trial Court and also absent before District Court and this Court.

If defendant No. 9 had produced an extract of index register from the office of Sub Registrar, Biloli, which contains details as to names of vendor and purchaser, consideration, description of property sold and the registration number of the conveyance, the same would be admissible in evidence as certified copy of public document. And, therefore, there is no reason why certified copy of the sale deed may not be admitted on record, which is issued by public servant, who keeps the account of all conveyances of immovable property.

Otherwise also, by now, the document is "ancient document" and had the original been produced, would have been strengthened by all presumptions regarding genuineness of execution, handwriting and signatures, by virtue of Section 90 of the Indian Evidence Act.

On reference to deposition of Mainabai, who is examined as a witness for plaintiffs, in her cross-examination, she has said :

^lu 1955 e/s ek{k uo;kuh 10 ,dj xqBs tehu lOgsZ ua- 131 iSdh ek/kojko o
guear ;k nks?kkauk jftLV?h c;kukek }kjs fodys vkgs-**

Eventually, the same sentence in English deposition has come as, "I do not know".

(Translation: In the year 1955, my husband has sold, by registered sale deed, land 10 Acres 8 Gunthas from Survey No. 131 to Madhavrao and Hanmant.)

When the English and vernacular recordings are at variance, vernacular has to be accepted. But, even if we are to take English recording as correct, "I do not know" is certainly not a denial of existence of such conveyance deed, which is asserted by Srirang.

About other lands, plaintiffs came with a case in paragraph 9 that Hanmanta was

leaseholder (tenant) in 5 Acres 3 Gunthas and he got his name mutated as owner. For obtaining possession from tenant, declaration against sale deed dated 13-9-1956 is not sufficient. In her chief examination, Mainabai deposed that 5 Acres 3 Gunthas south-west corner is mortgaged to Hanmanta and remaining land (south-east) was mortgaged to Madhavrao and these mortgages were created 2 years after impugned sale. Even these contentions make southern half unamenable to adjudication in present suit, because there is no prayer for redemption of mortgage.

10. Taking into consideration the details of seven sale transactions, produced in paragraph 4 ante, available from record, either through pleadings/depositions or from the contents of the documents, following position emerges.

Deceased defendant No. 1 - Shrinivasrao seems to have sold southern half of Survey No. 131, admeasuring 10 Acres 6 Gunthas to Hanmanta (father of defendant No. 8) south-west quarter and Madhavrao (defendant No. 4) south-east quarter. Although Madhavrao has kept away from the Court, defendant No. 9 -Srirang has deposed about the same. Plaintiffs, not having challenged this sale deed, nor having produced any evidence to establish lease or mortgage as pleaded or contended, southern half 10 Acres 6 Gunthas, is not amenable to present adjudication. Defendant No. 9 - Srirang seems to be in possession of south-west corner, on the strength of sale deed (Exhibit 69) dated 5-1-1970 in his favour by Hanmanta (father of defendant No. 8) and Madhavrao over southeast quarter, on the strength of sale dated 5-5-1955.

Northern half 10 Acres, 7 Gunthas is sold to Madhavrao by sale-deed dated 13-9-1956, which is under challenge. But total northern half is now not in possession of Madhavrao.

It appears that Madhavrao sold under sale deed Exhibit 77 dated 17-12-1968, 2 Acres land from the northern half to defendant No. 7 - Bhavrao as his brother. This land being part and parcel of northern half purchased by Madhavrao, was amenable to adjudication in the present suit, but plaintiff has not impleaded 4 others, who are co-purchasers with defendant No. 7 - Bhavrao. And so far as Bhavrao is concerned, appeal is dismissed by order dated 1-7-1986. The judgments of lower Courts, therefore, have become final qua Bhavrao (defendant No. 7) and 2 Acres land purchased by him under sale deed dated 17-12-1968 cannot be subjected to any orders at the conclusion of present appeal.

It appears that, defendant No. 6 - Bashumiya has purchased 2 Acres portion from Madhavrao. And Bashumiya has sold western 1 Acre from those to defendant No. 7 - Bhavrao and one Narayan by sale deed (Exhibit 78) dated 26-5-1971. This land also cannot be affected by decision of present appeal because of Narayan not being a party to the suit and dismissal of appeal against defendant No. 7 Bhavrao.

Eastern half admeasuring 1 Acre is sold by Bashumiya to one Kundalik Santuk, who is also not impleaded in the suit. Hence, this piece of 1 Acre also will have to

be kept untouched.

One piece of 81 R (about 2 Acres) from this northern half is sold by Madhavrao and his sons to defendant No. 9 - Srirang by sale deed (Exhibit 70) dated 28-5-1975. This land being part and parcel of northern half, which is subject matter of sale deed dated 13-9-1956 (under challenge) and occupant Srirang being impleaded in the suit, is amenable to present adjudication.

Thus, even if plaintiffs succeed, except portion of 81 R (2 Acres) purchased by defendant No. 9 under Exhibit 70 and balance land in the possession of Madhavrao, about 4 Acres, is the only land amenable to the orders at the conclusion of appeal.

11. Advocate Shri D. K. Kulkarni informs that as per Bailiff's report, defendant Nos. 4, 5 and 6 namely Madhavrao, Shrinivas and Bashumiya have expired on 22-1-1985; 9-10-1991 and 3-10-2002. Advocate Shri Mukhedkar also states that defendant No. 7 - Bhavrao has expired about two years ago.

Death of Shrinivasrao and Bashumiya and abatement of appeal as against them does not frustrate the appeal. Because they are not in possession of any land. Appeal against Bhavrao is dismissed and, therefore, land in his possession, and now may be in possession of his legal representatives, cannot be touched.

Advocate Shri Kulkarni for appellants faintly expressed desire to adjourn the matter, so that legal representatives of defendant No. 4 Madhavrao can be brought on record. But such a course of action is not necessary, in view of Order 22, Rule 4(4) read with Rule 11 of the Code of Civil Procedure, which reads :--

"The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to contest the suit at the hearing and, judgment may, in such case be pronounced against the said defendant, notwithstanding the death of such defendant and shall have the same force and effect it has been pronounced before death took place."

As can be seen from the record of trial Court, defendant No. 4 Madhavrao was ex parte before it (order dated 23-6-1977). From the impugned judgment in District Court Regular Civil Appeal No. 129 of 1981, it can be seen that, he was absent before District Court. In the present appeal, he is absent in spite of service. The plaintiffs/appellants, therefore, are entitled to be exempted from necessity of bringing the legal representatives of defendant No. 4 Madhavrao on record.

12. Limitation:-- At the time of filing the suit, ages of 3 plaintiffs are stated to be 17, 19 and 21. Mainabai in her deposition has admitted that, she had only two issues namely Shantabai (defendant No. 1/4) and Uttam (plaintiff No. 3) at the time of sale deed dated 13-9-1956 was executed. S.S.C. certificate of Uttam filed before the District Court shows his birth date to be 17-1-1953.

Trial Court has ignored the deposition as above of Mainabai and taking her

admission that he might be 23 years old (in 1981), has inferred that he being eldest, neither of the plaintiffs was born (not even in the womb), when sale deeds dated 5-5-1955 and 13-9-1956 were executed. Observing that defendant Nos. 2 and 3, who were then in existence (they are aged 28 and 25 in the year 1977 and hence aged 7 and 4 years in 1956.), could have challenged the alienation within 12 years, which they did not and relying upon observations in *Rano Dip Singh v. Parameshwar Prasad*, ILR 47 AH 165, AIR 1925 PC 33 that extension of 3 years given by Section 6 of Limitation Act is not available to non-existent (unborn) sons, held that, suit is barred by limitation.

Learned District Judge also observing that Article 109 of the Limitation Act, 1963, is the appropriate provision applicable, which prescribes a period of 12 years and that the time begins to run from the date of transfer of possession, held that, prescribed period of limitation in fact expired in the year 1968. According to him, the suit filed in the year 1977 was, therefore, clearly barred by Law of Limitation. The District Judge also accepted that plaintiff Nos. 1 and 2 were unborn when the transaction took place and, therefore, they cannot challenge the sale-deed. So far as appellant No. 3 is concerned, he could have challenged it within three years from attaining majority. The District Judge has taken birth year of the appellant No. 3 to be 1955 and observing that he attained majority in the year 1973, held that, giving relaxation of 3 years as per Section 8 of the Limitation Act, he could have filed the suit latest in the year 1976, and therefore, the suit filed in the year 1977 was barred by limitation so far as appellant No. 3 is concerned. Thus, the District Judge has dismissed the appeal and suit, by holding that appellant Nos. 1 and 2 have no right to challenge the alienation, being sons born to Shrinivasrao after the impugned transaction and the suit being barred by limitation so far as appellant No. 3 is concerned.

It must be noted here that, statement of Mainabai of having only two issues on the date of transaction namely Shantabai and Uttam is incorrect. It is evident that, defendant Nos. 2 and 3-Panditrao and Subhash are shown aged 28 and 25 years respectively. Thus, they are elder than Uttam, who is shown 21 years old in the plaint. Hence, it can safely be inferred that at the time of transaction, Mainabai must be having four issues-Shantabai, Panditrao, Subhash and Uttam in that order.

Observation of the district Judge that there is no evidence of birth date of appellant No. 3 on record is also erroneous. Along with Exhibit 6 in the record of District Court, SSC Certificate of Uttam is filed, which shows his birth date to be 17-1-1953. Thus, he was son born prior to impugned transaction is a correct position. He attained majority on 17-1-1971 and suit filed by him in the year 1977 must be said to be barred by limitation. During the course of arguments, Advocate for the appellants, on instructions, has provided birth dates of plaintiffs Nos. 1 and 2, although without any documentary evidence about the same.

According to him, they were born on 8-5-1959 and 20-6-1956 respectively. Thus, they attained age of 18 years on 8-5-1977 and 20-6-1974 respectively. Suit filed

on 21-4-1977 is, therefore, within less than 3 years from the date of their attaining majority and suit filed by them cannot be said to be barred by limitation.

13. In AIR 1986 Bom 122, Narayan Katkar v. Arjun Gore, it was observed :

"Each of the sons who is coparcener of a joint family is entitled to question alienations made by the father, has an independent right of his own; it is not a joint right of all the sons which cannot be enforced unless all of them join so that the minority of one son could enlarge the period of limitation. The major sons being entitled to question alienations not having filed the suit within 3 years of the alienations, their claim was barred by limitation."

In AIR 1938 Bom 39, Bhikarchand v. Lachmandas, alienation by mother of two sons during their minority was under consideration. The brothers were maintained by aunt. They had no other property except which was alienated by mother. It was observed :

"It is also correct to say that the presumption under Hindu law is that ordinarily the eldest brother would be the manager of the joint family; but, where the evidence shows that excepting the property sold by mother there was no other property as such which belonged to the two brothers as members of the joint family and the two brothers were actually thrown on the street on the death of their father, and for a long time they were being maintained by their aunt, the ordinary presumption, which arises in the case of joint Hindu family, possessed of ancestral property, that the eldest brother must be deemed to be the manager of the family and its property, cannot apply and this being so, the suit is barred only against the elder brother and not as against the other younger brother."

In the light of this view, because the suit by Uttam is barred by limitation, the same cannot be said about plaintiffs-Chandrakant and Shankar.

Both lower Courts, relying upon Rano Dip Singh v. Parameshwar Prasad, ILR 47 AH 165, AIR 1925 PC 33 , have held that plaintiff Nos. 1 and 2, being unborn sons as on 13-9-1956, are not competent to challenge the alienation. On this aspect, Privy Council in its judgment in the matter of Shri 108 Puja Pad Udit Panch Parmeshwar Pancchaiti Akhara Udasi Nirwani v. Surajpal Singh alias Chhedi Singh and Ors., has observed as follows :

"Two defences, however, are set up firstly, that the infant sons of Surajpal Singh are not entitled to contest the liability of the family estate as security for the mortgage debt and, secondly, that in any case the liability was incurred in order to repay their father's antecedent debt. In support of the former proposition, it is asserted that a member of a joint family must be content with the family estate as he finds it at his birth or at any rate he cannot complain of anything done before the period of gestation. Upon this rule, it is admitted, there is engrafted an exception to the effect that if the child who objects to the alienation of the property comes into existence or is conceived after the alienation, but

during the life of a child born or conceived before the alienation, then that overlapping of the two dives enables the later-born child to contest the validity of the father's act. Their Lordships do not think it necessary to determine whether this limitation upon the right of an after-born child to resist the claim of an encumbrance upon the family estate correctly expresses the law in all respects. They are content to assume its accuracy since they agree with the High Court in thinking it sufficiently established by the evidence that there was overlapping of lives in the present case."

14. Both these cases were considered by a Full Bench of this Court in the matter of Shivaji Ganpati Muthal and Others Vs. Murlidhar Daji Muthal and Others, and conclusion regarding the legal position was recorded as follows :

"If a Hindu father alienates joint family property without necessity, the alienation is voidable if there is a son born or conceived at the date of the alienation. This son has a right to challenge the alienation. This right may be lost if the son consents to the alienation. It may be lost if the son dies or is given in adoption. It may be lost by lapse of time. But if before the right is lost another son is born, this after-born son can avail himself of the right to challenge the alienation as effectively as his elder brother could have done."

In the matter, Ganpati had a son named Maruti when he disposed of certain family properties in the year 1936. Plaintiffs were three sons born between 1936 to 1942. Maruti was given in adoption in the year 1942. In the suit filed by subsequent born sons claiming that alienation effected by their father so far as their interest in the property was concerned, was liable to be set aside, it was held that the plaintiffs to the suit were born while the right to challenge the alienation still subsisted in Maruti. Therefore, the right which Maruti could have availed was available to the plaintiffs. Applying this ratio coupled with observations in AIR 1945 1 (Privy Council) , it must be said that the finding of the District Court that plaintiff Nos. 1 and 2 cannot challenge the alienation being sons unborn on the date of alienation, is not sustainable.

15. Advocate Shri Mukhedkar placed reliance on the observations of the Supreme Court in the matter of Sarda Prasad and Others Vs. Lala Jumna Prasad and Others, . In this matter, question of limitation in execution proceeding was under consideration. Suit for partition filed by brothers Devi Prasad and Jumna Prasad as also two minor sons of Jumna Prasad against Gajjulal, his son Jwala Prasad and four minor sons of Jwala Prasad was decreed by Civil Judge, Kanpur. Application for execution was filed by four minor sons of Jwala Prasad on 23-11-1949. It was claimed that all the applicants were minor till the time of filing execution proceedings and one of them was still minor and, therefore, there was no question of limitation. The principal objection to the execution was about bar of limitation. The decision on that question depended on the answer to the question raised on behalf of opposite party that Jwala Prasad (father), one of the persons entitled jointly with these applicants to make an application for the execution of the decree, could have given a discharge of the liability under the

decree without the concurrence of the minor sons and so time ran u/s 7 of the Limitation Act against them also, from the date of the decree. The trial Court held that Jwala Prasad could not give a valid discharge and held that the application was within time. High Court held that Jwala Prasad as the Karta of Hindu joint family could act on behalf of the entire joint family in taking possession of the house allotted to defendants and delivery of such possession could discharge the liability qua the entire joint family and hence held that application was barred by limitation. The Supreme Court upheld the view of the High Court.

Advocate Shri Mukhedkar tried to argue that plaintiffs had two elder brothers Panditrao and Subhash. They have not challenged the alienation. Even amongst three plaintiffs, Uttam, being the eldest, could have challenged the alienation on behalf of plaintiffs and since he has not done so, time has run out for plaintiff Nos. 1 and 2 along with plaintiff No. 3.

In this context, it must be remembered that father Shrinivasrao/original defendant No. 1 was alive when the suit was filed. Even if we presume that the family comprising of parents, five brothers and three sisters was a joint family, during the life time of father Shrinivasrao, there cannot arise presumption of any of the brothers assuming the role of Karta or manager of the joint family. The argument of Advocate Shri Mukhedkar that any of the three elder brothers could have given a discharge without concurrence of minor plaintiffs is, therefore, not sustainable. The suit, therefore, cannot be said to be barred by limitation so far as plaintiff Nos. 1 and 2 are concerned. There is also no evidence regarding separation of any of the sons from father and one of them assuming the role of Karta/Manager, who could have been capable of giving discharge on behalf of all separated brothers.

16. At this stage attention of Advocate Shri Kulkarni for appellants was drawn to Order 41, Rule 22 as also Rule 33 of the CPC :

"22. Upon hearing, respondent may object to decree as if he has preferred separate appeals. -- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree, but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; (and may also) take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate Court within one month from the date of service on him, or his pleader of notice of the day fixed for hearing the appeal....."

From the bracketed conjunction (and may also) it is evident that, finding against him in the Court below in respect of any issue can be challenged by appellant, while supporting the impugned decree, without filing cross objection. Filing of cross-objection containing all grounds which could have been taken by way of an appeal, is another right conferred upon respondent in an appeal. By this door, his appeal may get entertained, even if otherwise barred by limitation, because and

if cross objection is filed within one month from the date of service. In the matter at hands, there was no part of decree which respondents could have challenged by way of appeal or cross-objection. There are only findings on issue of "legal necessity" and "bona-fide purchasers" which are recorded against defendants/respondents. They could not have appealed against the dismissal of suit on the ground of limitation. They are also not in a position to prefer any cross-objection, which is also available only against a decree and not against a finding on particular issue. Cross-objection is to be only on those grounds which could have been available by way of an appeal. And by virtue of Section 96 of Civil Procedure Code, appeal as of right is a remedy available against a decree and not against adverse finding.

Even after taking into consideration explanation to Rule 22, such right to file cross-objection would not be available to defendants, so far as adverse findings in the present case are concerned, decree (of dismissal) of suit is not based on such adverse findings. Opening part of explanation reads :--

"Explanation. -- A respondent aggrieved by a finding of the Court on which the decree appealed against is based may, under this rule file cross-objection."

Present suit will have to be distinguished from suits wherein only partial decree is in favour of appellant, based upon adverse findings by original Court on certain issues, against the defendants, (e.g. suit for specific performance decreed only for refund of consideration). Thus, on reading Order 41, Rule 22(1) and explanation below the same, it is optional to respondent, if to challenge adverse finding by filing a cross-objection or without doing so. In the matter at hands, defendant could not have filed an appeal or cross-objection against the findings adverse to them, because no part of decree is based upon those and therefore right to challenge the adverse findings conferred by Rule 22 of Order 41 cannot be taken away. *Shri Ravinder Kumar Sharma Vs. The State of Assam and Others*, , can be relied upon to support such a view.

Rule 33 of Order 41 also arms the Court with powers to pass any decree or make any order, which ought to have been passed or made, in favour of all or any of the respondents or parties, although such respondent or party may not have filed any appeal or objection.

17. Intentions of this Court to reconsider the findings on issues of "legal necessity" and "bona fide purchaser", which are certainly substantial questions of law in this case, were resisted by Advocate Shri D. K. Kulkarni by placing reliance upon the decision of the Supreme Court in the matter of *Choudhary Sahu (Dead) by Lrs Vs. State of Bihar*, . In this matter, under Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, after notices to landowner, Collector had allotted 12 units to him, against his claim for 15 units. Landowner went up in appeal before the Commissioner. The State of Bihar submitted to the order and did not go in appeal, not only that it failed to appear, in spite of notice, in the appeal by landowner. Appellant had challenged the order

of Collector on various grounds, but without challenging the finding recorded by Collector, regarding the number of units allotted. The Commissioner, yet, set aside the order of Collector regarding allotment of units, while remanding the matter to Collector, High Court upheld the order of Commissioner. It was in this set of facts. Hon"ble Apex Court, set aside the order of the High Court and Commissioner insofar it related to finding of Collector in favour of landowners.

On facts, our case stands quite on different footing. In the reported case, respondent-State had not only failed to file an appeal (although it could have) but it had also shown indication that, it did not dispute even the findings in favour of landowner, by remaining absent before the Commissioner in spite of service of notice. In our case, respondents had no right to prefer appeal/cross objection and they (at least contesting respondents) have not shown inclination to accept the findings against them.

In paragraphs 9 and 10, the Supreme Court has referred to ratio laid down in earlier judicial pronouncements in *Nirmala Bala Ghose and Another Vs. Balai Chand Ghose and Others*, and *Giasi Ram and Others Vs. Ramjilal and Others*, as follows :--

"Ordinarily, the power conferred by this rule will be confined to those cases where as a result of interference in favour of the appellant, further interference in the decree of the lower Court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience."

The case at hands, I am of the view, fits in these parameters. The respondents in this case, in the light of dismissal of the suit on the ground of limitation, had no right to file an appeal or cross-objection. They have not indicated surrender to the adverse findings and, therefore, as soon as the dismissal of suit is required to be set aside, by interference in the finding that suit is barred by limitation, the respondents get a right to challenge the adverse finding and Court has a duty to examine those findings which are likely to convert dismissal of suit into a decree in favour of plaintiff, as soon as suit is held not barred by limitation. No adverse view can be taken against contesting respondents, because they did not file any appeal or cross-objection.

Because of subsequent events, there is also a possibility of inconsistent decisions on the same question, in this matter. Appeal against Bhavrao (respondent No. 7) is dismissed for failure on the part of appellants to take steps to serve him and this was in the year 1986. Dismissal of suit on the ground of limitation once set aside, enable plaintiffs No. 1 and 2 to obtain a decree for declaration that alienation by father is not binding upon them, but only against others. That makes the land in possession of defendant No. 7-Bhavrao and one Kundalik s/o Santuk amenable to partition, although suit against Bhavrao is dismissed and Kundalik is no party, since they derive title to (3 + 1 = 4 Acres) through said sale deed. And hence, principles of justice, equity and good conscience also require consideration of other issues.

18. In *Banarsi and Others Vs. Ram Phal*, , relied upon by Advocate for appellants, suit for specific performance was decreed for refund of consideration within two months from the date of decree and for specific performance in case default on the part of defendants so to deposit, which was only a direction in terrorem. It was held that in an appeal filed by the defendant challenging the relief of compensation or refund, the plaintiff, as respondent, cannot seek the relief of specific performance or modification of decree without filing an appeal of his own or taking cross-objection.

At the cost of repetition, it must be said that, our contesting respondents had no right to file an appeal or cross-objection and hence, their right to challenge adverse findings without filing appeal or cross-objection cannot be taken away.

Even in this matter, relied upon by learned Counsel for the appellants, three limitations on the powers of the Court under Order 41 Rule 33 are laid down.

1) Power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court.

2) Claim given up or lost cannot be revised and,

3) Such part of decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party.

On facts, case at hands does not come within the clutches of either of the restrictions.

In *K. Muthuswami Gounder Vs. N. Palaniappa Gounder*, , the Supreme Court observed :--

"The necessary condition for exercising the power under the Rule is that the parties to the proceeding are before the Court and the question raised properly arises out of the lower Court and in that event the appellate Court could consider any objection to any part of the order or decree of the Court and set it right. No hard and fast rule can be laid down as to the circumstances under which power can be exercised under Order 41, Rule 33 and each case must depend upon its own facts."

It was also added :--

"The power though discretionary should not be declined to be exercised merely on the ground that the party has not filed any appeals."

19. This brings us to consider the findings in the negative, on the issues, whether transaction dated 13-9-1956 was for legal necessity and whether defendants are bona fide purchasers for value. Reconsideration of these issues is also necessary, because apparently, both lower Courts have considered these issues in casual and slipshod manner, once they arrived at a conclusion that the suit was barred by law of limitation.

Finding on issue about legal necessity is dealt by trial Court in paragraph 8, which comprises of 5 lines and two sentences:--

"There is no evidence showing that the sale-deed of 1955 and of 1956 by Shrinivasrao was for any legal necessity. The defendants did not utter a word about such necessity and therefore the issues are found against the defendants."

Lower Appellate Court which did not even frame points for consideration has confirmed the said finding by equally cryptic reasons in para 7 as follows:--

"In these circumstances (that original purchasers are ex parte/dead), these contesting respondents have not evidence to show that the original sales were for legal necessity. They have also not said anything about the legal necessity in support of these sales. In the circumstances, the learned trial judge was perfectly justified....."

About issue of "bona fide purchaser", same is answered against defendants because, Shrirang said that he had seen 7/12 extract before purchase, but he had not inspected record with the office of sub-registrar and he did not talk about enquiries with vendor or his existing sons. The appeal Court has not touched this aspect at all.

About issue of legal necessity, both lower Courts lost the sight of two facts, one, contesting defendants. No. 7 and 9 were not parties to transactions dated 5-5-1955 and 13-9-1956. Purchaser Madhavrao was ex parte and Hanmanta was dead (father of defendant No. 8). Vendor defendant No. 1 was ex parte. Thus, there was none before the Court, who had knowledge about the purpose of the sale. Secondly, plaintiffs had come with a specific case that, vendor was addicted to vices and hence he sold the land.

The trial Court ought to have considered this positive plea first and even upon their failure, issue of legal necessity was required to be considered in the light of available evidence and facts and circumstances. Subtlety of onus of proof and its shifting is totally lost sight of by both lower Courts.

It is pleaded in paragraph 4 of the plaint that, defendant No. 1 -Shrinivasrao was addicted to bad habits of consuming, Ganja and gambling etc. and loans were being borrowed for the purpose. But in the deposition, Mainabai (widow) came with a case that husband was addicted to drinking (liquor-and not Ganja) and playing cards. He was convicted under Prohibition Act. A certified copy of judgment in Summary Case No. 161 of 1965 is produced (which is also left unexhibited by trial Court) showing that on 21-7-1965, he was convicted for incident dated 18-7-1965 u/s 66(b) of Bombay Prohibition Act and sentenced to simple imprisonment till rising and fine of Rs. 25/-. Details of the offence are not available but from the quantum of sentence, it can be inferred to be not a very serious offence, may be of consumption of liquor. It must be noted that, this incident is 9 to 10 years after the impugned sale-deed and it is difficult to swallow that by the time of sale deed, deceased defendant No. 1 was so deep in

his addiction and debts that, land was required to be sold for the purpose. It must be said that, plaintiffs do not have evidence strong enough to hold that land was sold for vices or debts incurred due to those.

Both the sale deeds on reference contain recitals that lands are being sold due to "private necessity" and "necessary work" respectively.

Although suit may not be barred by limitation as against minor plaintiffs, because others did not challenge the alienation. But others did not challenge it, is a circumstance weighing against them. From the ages stated in the plaint, Panditrao and Subhashrao, attained majority 10 and 7 years prior to filing of the suit. Neither mother Mainabai for her minor sons, nor first two sons, for 7 to 10 years after attaining majority, felt the transaction to be worthy of challenge and consequently, challenge came from a son, who was aged 2 to 3 years and two sons, who were not born, at the time of transaction. Except mother and two elder brothers, there could not have been any other source for plaintiffs to know that the transactions were not for legal necessity and the sources had not challenged the same, is a circumstance raising strong adverse inference against the plea that that transaction was not for legal necessity.

Lands were further sold in the years 1968, 1970, 1971, 1974 and 1975 to various persons. Mainabai admitted in the deposition in 1981 that for last 7 to 8 years she did not visit the lands. Thus, she had visited the lands upto 1973-74. Yet, she did not take any legal steps when the lands were further transferred. Panditrao and Subhash had attained majority in 1967 and 1970 respectively and were available to mother to support and prosecute.

In the absence of active participation by Madhavrao, and litigation having been initiated 4 years after death of other purchasers Hanmantrao, and on the face of recitals in the sale-deed. Plaintiffs, who examined mother Mainabai, were obliged to explain why no legal action was taken by mother and two brothers for nearly 20, 10 and 7 years respectively against the alienation.

Evidence of Shrirang, which is mainly on the point of being bona fide purchaser, is required to be taken into consideration on both points. He has said that he referred to 7/12 record of the land. He was knowing that Madhavrao and Hanmantrao were in possession as purchasers. He had also known that, Madhavrao had sold some land to Bhavrao (defendant No. 7), I do not think it was correct on the part of trial Court to blame him, because he did not refer to Sub-Registrar's record or did not make further enquiries. In any case, he was purchasing the land in 1970 and 1975 i.e. 15 and 20 years after those were purchased by his vendors.

In the light of scanty evidence on record, I feel, trial Court ought to have recorded a finding that, plaintiffs have failed to prove that transaction was not for legal necessity and mere absence of Madhavrao (ex parte, defendant No. 4) was not sufficient to record a finding that, it was not for legal necessity. Evidence of Shrirang is also sufficient to demonstrate that, he was bona fide purchaser for

value, without notice.

Suit, though not barred by limitation, so far as plaintiff Nos. 1 and 2 are concerned, deserves to be dismissed by upsetting the findings of lower courts, on the issues of "legal necessity" and "bona fide purchaser" as above.

20. Apart from declaration against sale-deed dated 13-9-1956. Plaintiffs have prayed for partition and separate possession of their share of entire land. Having sought a declaration that transaction dated 13-9-1956 is not binding. Plaintiffs have, either feigned ignorance about how other defendants are in possession of other pieces of the same land, or made vague contentions that Hanmanta (deceased father of defendant No. 8) was leaseholder of 5 acres 3 gunthas, Hanmanta and Madhavrao are in possession because lands are mortgaged to them. In paragraphs 10 and 11, I have discussed at length as to which land is/is not amenable to partition and it is evident that even 4 acres portion from the land which is subject matter of impugned sale-deed is also not available for partition due to default on the part of plaintiffs. And hence, in the absence of any specific details about character of possession of other defendants to other pieces of lands and in the absence of prayer for appropriate relief against them, first issue framed while admitting the appeal will stand answered in the negative. Consequently, although plaintiffs have referred all pieces of survey No. 131 as subject property for partition suit, all family property cannot be said to have been brought into hotchpot for effecting partition, due to unavailability of other lands for partition. In a suit filed by one coparcener for partition, against the other coparceners, whole family property must be embraced by partition suit, which cannot be the case in the present matter and suit for partition must fail even on this count.

21. For the reasons discussed hereinabove, suit for a declaration against alienation by deceased Shrinivasrao dated 13-9-1956 and also partition and separate possession of their shares ought to fail and the appeal of plaintiffs is required to be dismissed.

The Appeal is dismissed with costs i.e. plaintiffs shall bear their own and pay the costs of contesting defendants, at all stages of this litigation to them.