

(2007) 12 BOM CK 0077
In the Bombay High Court
Case No : Second Appeal No. 289 of 1997

Mallaya Bapenna Mekkalwar	Vs	APPELLANT
Rajboina Bhemmaka and Others		RESPONDENT

Date of Decision : 20-12-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 391
Hindu Succession Act, 1956 — Section 8

Citation : (2008) 2 ALLMR 21 : (2008) 2 BomCR 151 : (2008) 3 MhLj 886

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : A.V. Deshmukh, for the Appellant; M.B. Badiye, for the Respondent

Final Decision : Dismissed

Judgement

C.L. Pangarkar, J.—Both these appeals are preferred by the original defendant No. 2, who lost in both the courts below.

2. The facts giving rise to the appeal are as under Plaintiff No. 1 is the wife of defendant No. 1 while defendants No. 2 to 4 are the sons and daughters of defendant No. 1. The marriage between plaintiff No. 1 and defendant No. 1 took place 25 years ago. Since 10 years prior to institution of the suit the plaintiffs have been residing with the father of plaintiff No. 1. The defendant No. 1 has not been providing anything to them for their maintenance. Plaintiff No. 1 is, however, maintaining plaintiff nos.2 to 4. Defendant No. 1 has totally neglected the plaintiffs. Plaintiff No. 1, therefore, had instituted a Criminal case u/s 125 of the Cr.P. Code against defendant No. 1 and the court was pleased to grant maintenance of Rs. 50/-per month to plaintiff No. 1. Defendant No. 1 has not even paid this maintenance to the plaintiffs. Defendant No. 1 owned Survey No. 291/2 admeasuring 1 hectare 84 Ares and survey No. 292/2 admeasuring 58 Ares of village Panchgaon, Distt.Chandrapur. He also owned two houses. It is the contention of the Plaintiffs that since the defendant deserted the plaintiffs he has been leading a life of a vagabond and has been wasting the ancestral property. It

is alleged that he has illegally sold the two fields to defendant No. 2 for consideration of Rs. 7000/- by a sale-deed dated 23/1/1979. It is alleged that since the suit property is ancestral the defendant No. 1 had no authority to sell the same to defendant No. 2. They submit that each of the plaintiffs is entitled to 1/4th share in the suit property. The Plaintiff, therefore, pray for cancellation of the sale-deed and partition and separate possession of their 3/4th share.

3. Defendant nos.1 and 2 filed their joint written statement. The defendants do not dispute the relationship between the Plaintiffs and defendant No. 1. They also do not dispute that defendant No. 1 owned the property as mentioned in the plaint. The defendant's contention is that the defendant had become indebted to several societies since he was required to take loan for improvement of the property and for meeting the family expenses. The property was sold for improvement of the rest of the property and for meeting the expenses of the family. He does not dispute that the suit property is an ancestral joint family property. It is his contention that after sale of the property he has liquidated the loan outstanding against him and property has been sold for legal necessity. It is also their contention that the plaintiff unnecessarily instituted proceedings against the defendant No. 1 in the court of law and made him to incur unnecessary expenditure. It is on account of that he became indebted. The plaintiffs have no right for cancellation of the sale-deed.

4. The learned judge of the trial court found that plaintiffs have 3/4th share in the suit property. The property was sold without any legal necessity and holding so he decreed the suit and directed the plaintiffs to be put in joint possession with defendant No. 2. Being aggrieved by the decree passed, defendant No. 1 and 2 preferred a separate appeal before the District Judge while plaintiffs also preferred a separate appeal because the court did not pass a decree for separate possession and partition. The learned judge of the appellate court dismissed the appeal filed by the defendants while allowed the appeal filed by the plaintiffs and directed that partition be effected and plaintiffs be put in separate possession of 3/4th share. Being aggrieved by dismissal of appeal preferred by defendants and the plaintiff's appeal having been allowed, defendant No. 2 has preferred both these second appeals.

5. This Court has admitted the appeals on the five substantial question of law as were mentioned in the memo of appeal. They are as follows

- i) Whether the respondents 1 to 3 were entitled to claim invalidation of sale in favour of the appellant, when they had failed to plead that they belonged to Mitakshara school of Hindu Law and had existing share in the property in dispute during the life time of the respondent No. 5 ?
- ii) Whether the respondents 1 to 4 were entitled to claim partition and separate possession of the property when they had failed to prove their existing share, even assuming that they had the right of maintenance against respondent No. 5 ?
- iii) Whether the respondents 1 to 4 could claim invalidation of sale in favour of

the appellant and separate possession of their alleged share when they could at the most have the charge against the property.

iv) Whether the courts below had the jurisdiction to hold that the sale of entire property was not necessary especially when the courts below had found that part of consideration was utilized for repaying the lawful debts of the family ?

v) Whether the respondent No. 1 who is the wife of respondent No. 5 could claim one third share in the property, assuming that the property was coparcenary property during the life time of the respondent No. 5, when even under the provisions of Section 8 of the Hindu Succession Act she could have one third share in the share of the respondent No. 5 ?

However, the learned Counsel for the appellant restricted his argument as to the question No. 4 alone. I shall, however, deal with the other controversy also. It may be, however, observed that as far as question No. 1 is concerned, the learned Judge of the First Appellate Court found that this ground was not at all raised in the pleading and in the grounds of appeal before the appellate court. It was, in fact, therefore not necessary to consider that aspect for the learned Judge of the first appellate court. If such ground is not raised, it could be said that there is no dispute amongst parties to that effect and the appellant does not want to agitate that. Even otherwise he rightly observed that every person who is not a Christian, Parsi, Muslim or Jew is a Hindu. It is neither parties case that they belong to any other religion than Hindu. Parties residing in Maharashtra and they do not have a dispute that they are governed by the Mitaksharas school of law. It is not pleaded by either of the parties that they are governed by any other school of law. They have to be, therefore, held to be governed by the Mitakashara school of law. The plaintiffs are wife and sons of defendant No. 1. Since the defendant No. 1 has two sons, it must be presumed that he and two sons formed a coparcenery. There is, therefore, no difficulty in concurring with the findings of the learned judge of the first appellate court that defendant No. 1 and the plaintiff nos.2 and 3 formed coparcenery.

6. The question as to whether the property could be said to be ancestral or not , I may say that the question does not at all arise in view of the admission of the defendants in paragraph nos.3 and 4 of the written statement. The plaintiffs in paragraph No. 3 of the plaint specifically averred that the property mentioned in it was an ancestral in the hands of defendant No. 1. The defendant No. 1 admits the contents of paragraph No. 3 to that extent and nowhere denies that it was an ancestral property. In fact, in paragraph No. 4 of the written statement, there is a clear averment on behalf of the defendants that the suit property was ancestral joint family property. Hence, this fact could be said to be admitted one and in fact there was no controversy to that effect and there could be none.

7. Once the property is held to be ancestral one and there is a coparcenery, the plaintiffs No. 2 and 3 get a right or a share in it by birth. Plaintiffs No. 2 and 3 are the sons of defendant No. 1. I need not dilate more on this proposition at all.

8. Since plaintiffs No. 2 and 3 had a right by birth, they certainly had a right to challenge the alienation made by their father if same was not for legal necessity. They, therefore, have a right to avoid the sale on that count.

9. The burden, in fact, therefore, is on defendant No. 2 to establish that the sale was for legal necessity in his favour. Much ado seems to have been made before the appellate court about there being no issue on this. The learned appellate judge has rightly found that defendants were aware that they cannot avoid the sale unless they plead and establish this fact. They have at two places in their joint written statement pleaded that the property was sold to repay the loan of various societies and for improvement of the remaining property and for the family expenses. Now, this pleading clearly shows that the plea was raised. The parties led evidence on this point and went to trial with this fact in mind. The courts below have concurrently found that the fields were sold for Rs. 7000/- and a very meager sum of Rs. 2100/- was spent for repayment of the loan. Since this is a finding of fact which is borne out by record, I need not reconsider it at all. Shri Deshmukh, learned Counsel for the appellant, submits that once it is established that some amount was spent for liquidation of the loan, the alienation cannot at all be set aside. There is no doubt that the courts below have held that the part of this sum was spent for repayment of loan of societies. In fact, there is an evidence available that this loan may not have been incurred by defendant No. 1 for any improvement of property or the family need. First; it is not in dispute that since 10 years prior to suit, the plaintiffs have not been living with defendant No. 1. There was, therefore, no question of defendant No. 1's spending anything for the family. Secondly, it appears from the evidence of DW 2 Mallaya that he has been cultivating the suit fields on contract (lease) since 10 years prior to the sale in his favour. If he was cultivating as a leasee, and the fields were exclusively in his possession and he himself was appropriating the entire usufruct of the said field, it could be said that he was only paying lease money to defendant No. 1. Further, if defendant No. 2 was cultivating field and taking the crops, there was no question of defendant No. 1's incurring any money for improvement of the field for he could have no interest in improvement of the field since the field was in exclusive possession of defendant No. 2. There was, therefore, no question of defendant No. 1 incurring any loan for that purpose. He could not be said to have spent the money obtained by incurring loan for cultivation of the field or for improvement of the same or for any other purpose related to agriculture. DW 1 Hanamantoo admits in cross-examination that he had taken loan for the purpose of constructing a .bodi. (probably an embankment in the field) but he spent the amount for family. Obviously, the loan was not taken for being spent for improvement of the field but for some other purpose. The family was not living with him and, therefore, there was no question of spending the amount of loan on the family. That means, he neither spent that amount of loan for the family expenses or for the improvement of the field i.e. construction of "Bodi". Obviously, the debts were not incurred for legal necessity.

10. Mr. Deshmukh, learned Counsel, contended that once part of the amount is shown to be spent for repayment of loan, court should infer that the fields were sold for legal necessity. In this regard, first from the above discussion it is clear that the money obtained by incurring loan was not utilized for legal necessity and even if they are repaid, such payment could not be for discharge of loan incurred for legal necessity. Shri Deshmukh, learned Counsel, relied on a Commentary of Mayne's Hindu Law and Usage at page No. 647 of Section 391 which reads as follows

391. Partial necessity.-Where the necessity for a particular sale or mortgage is only partial, in other words, where the money required to meet the necessary purposes is less than the amount sought to be raised by the sale or mortgage, the true question is whether the sale itself is one which would be justified by legal necessity. The reason for this is that it is not always possible for the managing member to sell just that share of the family property which will bring in the precise sum which is wanted to clear the debts which are binding.

It is observed that it is not possible for the member or Karta to sell the exact extent of property to discharge that loan only. True, and this cannot be disputed. But then there are two things why argument cannot be accepted. First, a very paltry amount of Rs. 2100/- is spent for discharge of the loan and secondly; defendant No. 1 in fact had a choice to sell only one property separately. There are two separate properties (1) Survey No. 291/2, admeasuring 1 hectare 84 Ares and (2) Survey No. 292/2, admeasuring 58 Ares. Thus, the defendant No. 1 had a choice to sell only field survey No. 292/2 which was smaller in extent and which could have, in fact, liquidated the loan (though not obtained for legal necessity). Yet, defendant No. 1 chose to sell the entire property unnecessarily including the houses. The fact that defendant No. 1 sold both the fields and even both the houses clearly indicates that he never considered the necessity of the family to have some source of income. The act of selling both the fields as well as houses was most improper and imprudent. Hence, the sale could not be justified at all. In each property the plaintiffs have an undivided share. The share was rightly determined by the first appellate court and the first appellate court rightly passed a decree for partition and separate possession. The substantial questions of law as raised are answered accordingly and the appeals are dismissed with costs.