

(1930) 07 BOM CK 0020
In the Bombay High Court

Pandharinath Govind Vani and Another	APPELLANT
Vs	
Ramchandra Bandu Vani and Others	RESPONDENT

Date of Decision : 30-07-1930

Acts Referred:

Citation : AIR 1931 Bom 157

Hon'ble Judges : Baker, J

Bench : Division Bench

Judgement

Baker, J.—In these appeals, which are cross appeals, the facts are as follows: The plaintiffs, who are minors, sued the defendants for a declaration that the sale deed dated 11th August 1921, passed by their mother to defendant 1's father, was null and void as against them, and that the defendants be ordered to give up actual possession of the suit house and to recover Rs. 5 per month as future mesne profits. The facts are that the plaintiffs were minors under the guardianship of their mother Sitabai, who was a widow, and their mother had to maintain them by labor, and she also borrowed small amounts from one Lotu who was occupying the house in suit which belonged to the plaintiffs' father. In November 1920 she passed a mortgage deed for Rs. 200 in favour of Lotu, and also passed a promissory note for Rs. 100 on 2nd December 1920, on which date the mortgage was registered. The property was thus in mortgage with Lotu, the amount due to him being Rs. 300, Rs. 200 on a mortgage and Rs. 100 on a promissory note. Subsequently Govind, the brother of the present defendant 2 and the father of the present defendant 1, seems to have desired to get this house, and within about nine months of the mortgage Sitabai sold the house to Govind for Rs. 500, out of which he paid Rs. 330 to Lotu, and the balance was paid to Sitabai. The present suit is brought by the plaintiff's, of whom plaintiff 2 is still a minor after the death of their mother, to set aside the sale on the ground that there was no legal necessity for the mother to alienate this ancestral property. The first Court held that the sale deed was null and void as against the plaintiff Section and ordered them to recover possession of the house on paying the defendants Rs. 100. On appeal by the defendants the District Judge of East

Khandesh upheld the cancellation of the sale, but raised the amount payable to the defendants from Rs. 100 to Rs. 300. Against this decree the defendants have made S.A. No. 301 of 1928, and the plaintiffs have made S.A. No. 425 of 1928 as regards the amount directed to be paid by them to the defendants, and also raised a question of mesne profits.

2. The appeals have been heard together. The facts are fully set out in the judgment of the lower appellate Court. It would be seen that the plaintiffs' mother Sitabai owed Rs. 300 to Lotu, Rs. 200 on the mortgage and Rs. 100 on the promissory note. It was all really one transaction, as is shown by the District Judge; and then subsequently in August 1921 there was a sale of the house by Sitabai to the father of defendant 1 for Rs. 500, out of which Rs. 330 were paid to Lotu and Rs. 170 to Sitabai. Lotu being in possession he was not entitled to any interest, yet he was paid Rs. 30 nominally by way of interest, but really for damages, as he was deprived of the house before the stipulated period of five years of the mortgage, of which only nine months had run. Now the view taken by the learned District Judge is this: After referring to certain evidence as to communications between Sitabai and the father of defendant 1, Govind with regard to negotiations for the sale of the house, the Judge holds that there was no necessity for the sale. Sitabai was not in need of money as she had received Rs. 136-8-0 out of the consideration of the mortgage amount only nine months before, and she entered into the bargain with Govind either because she thought it profitable or Govind prevailed upon her by charging her with a breach of promise in mortgaging the house to Lotu for the same amount which he had offered. Whatever be the motive there can be no doubt that the sale was without any justification and there was no need to raise any further sum on the house. But he held the amount of Rs. 300, which the minors were bound to pay should be paid by the plaintiffs to the defendants. The learned advocate for the appellants has referred to a number of cases decided by the Privy Council, all I think in appeals from the High Court at Allahabad, in which they reprobate the practice adopted by that Court of making arithmetical calculations in cases in which necessity is proved for the major portion of the purchase money in cases of alienations by widows.

3. The first of these cases to which he has referred is AIR 1927 37 (Privy Council) , in which it was held that where it was proved that the purchaser gave adequate consideration and acted in good faith and ascertained that the bulk of the proceeds was to discharge family debts the question is not a matter of arithmetical calculation, but whether the sale was one which was justified by legal necessity; and a decree setting aside a sale on condition of refund to the purchaser of the amount shown to have been required for necessity is contrary to authority. There is a similar judgment of the Privy Council in the same volume AIR 1927 244 (Privy Council) , and the same principle has been followed by the Privy Council, in AIR 1927 246 (Privy Council) and Ram Sundar Lal v. Lachmi Narain AIR 1929 P.C. 143. The learned advocate has further referred to a case in Chimnaji Govind v. Dinkar Dhondev [1886] 11 Bom 320, showing that the

position of a widow is different from that of a manager of a joint family and she can do what the body of coparceners can do, subject always to the condition that she acts fairly to the expectant heirs. The same principle has been followed in the case of Venkaii Shridhar v. Vishnu Babaji Beri [1893] 18 Bom. 534 and in AIR 1927 37 (Privy Council) . And the contention is that in the present case out of the total consideration of Rs. 500 for the sale, Rs. 300 are proved to have been for legal necessity, and the Court should not therefore, in the face of these rulings of the Privy Council pass a decree for the setting aside of the sale on the stipulation that the owners minors should repay to the purchaser that portion of the amount which is proved to be for legal necessity.

4. It has been argued by the learned advocate for the respondents that these considerations will apply if we had only to deal with the mortgage in this case. It has been held by the Courts below that the mortgage and the promissory note, which may be considered as one transaction, constituted a debt of Rs. 300 which it is agreed was binding on the minors; but we have in the present case to consider also the question of the sale. And it has been found by both the Courts below that there was no necessity whatever for the sale itself. The reasons which led the lower Court to come to this conclusion are that in the first place the mortgage had five years to run of which only a short period had elapsed, apart from the fact that it would have been open to the minors to redeem the mortgage, subsequently. There was therefore no pressure on the widow to sell the house to redeem the mortgage nor is there any evidence in this case that Lotu, who was in possession of the house, was pressing for the repayment of the Rs. 100 due under the promissory note; and if the widow had again mortgaged the house to somebody else in order to pay off Lotu it would have been very difficult to set aside the transaction on the ground that there was no necessity for it; but so far as the sale itself is concerned it is the deliberate finding of the lower appellate Court that there was no necessity whatever for it. It is not shown that she was in need of money. There was no pressure on the part of the creditor Lotu to repay the amount of Rs. 300, nor is it shown why Rs. 200 further were required. The result of the sale was to deprive the minors in perpetuity of property which they possibly would have been in a position to redeem if the mortgage had continued to subsist. The learned advocate has pointed out that none of the cases which have been quoted on behalf of the appellant will strictly apply to the facts of this case. In each of them, to begin with, the alienation was one by a widow in possession of her husband's property, and moreover in nearly all of them there was a definite finding that there was necessity for at any rate the greater portion of the consideration of the sale. In AIR 1927 37 (Privy Council) it was held that the bulk of the proceeds was required to discharge family debts. In AIR 1927 244 (Privy Council) the sale was proved to be for legal necessity for the amount of Rs. 17,000 odd out of Rs. 19,000; but in the present case we have a finding of the Court below that there was no legal necessity for the sale at all.

5. So also in AIR 1927 246 (Privy Council) , it was held that the real question

that has to be considered is this: whether the sale itself was justified by necessity. In *Ram Sunder v. Lachmi Narain* AIR 1929 P.C. 143 the same point was laid down. The material question that has to be considered in such cases is whether the sale itself was justified by legal necessity, whereas in the present case no such necessity is proved. The distinction between the cases which have been quoted and the present case seems to be this: All the cases from the Privy Council which have been quoted are cases in which the transaction itself was impugned, the transaction in which the question of legal necessity arose. The present case stands on a somewhat different footing, because we are dealing here with two transactions. So far as the first transaction is concerned, there was legal necessity as has been held by the Courts below, but we are now dealing with the subsequent transaction arising out of the first transaction, and as regards the second transaction no legal necessity is shown, as has been found by the Courts below, and that is what I meant when I stated in an earlier portion of this judgment that if this case was one to set aside the alienation to Lotu, the matter would stand on a different footing.

6. Assuming that it was necessary for the widow to borrow these amounts from Lotu and to alienate the property by way of mortgage to him, what we have to consider in the present case is whether within the short period of nine months it was necessary for her to further encumber the property and to alienate it altogether so that it passed out of the possession of the minor heirs completely. Another distinction is that in the cases which have been quoted, the widow herself was in possession of the family property as her husband's heir, although of course taking a limited estate, whereas in the present case the widow was not the owner of the property, but was acting as the guardian of her minor sons, who were the owners. In these circumstances I am not prepared to hold that this case falls strictly within the rulings of the Privy Council. I am bound to hold that it is not necessary that a purchaser in good faith should have to prove that the whole consideration was devoted to purposes of family necessity. It is sufficient if he shows that he acted in good faith and that the consideration was needed for the purposes of the family but in the present case, as appears from the judgment of the District Judge, the transaction between Govind and the widow is one rather of a different character. There was no necessity even to pay off Lotu at that particular time and it is not shown that the widow required the balance of the consideration of Rs. 500 over and above the amount of Rs. 300 which was due to Lotu. And from the references in the judgment of the learned District Judge to the correspondence between the widow and Govind, it would appear that she was trying to get rid of the property and to get as much as she possibly could for it irrespective of any question of necessity, legal or otherwise. The case which has been quoted by the learned advocate for the respondents, *Ragho v. Zaga* AIR 1929 Bom. 251, is not very similar on the facts. That lays down that to support an alienation of joint family property by its manager, it must be shown that the benefit to the estate should be of a protective character, and the benefit does not include an alienation of the property for the purpose of investing the

proceeds so as to yield a better return, and the term "necessity" involves some notion of pressure from without. That case may be made use of to show that in the present case there was as a matter of fact no pressure from without on Sitabai to sell the property to Govind, and even if she got a favorable bargain by selling it, which does not seem to me in the case to be proved, still that would not justify the alienation on the ground of benefit. In these circumstances it seems to me that the view which has been taken by the learned Judge of the lower appellate Court is right, and that his judgment should be affirmed.

7. As regards the appeal of the minors, the plaintiffs, as to the amount to be paid to the defendants, the learned advocate for the appellants, viz., the original plaintiffs, has to admit that he cannot press the case as regards the payment of Rs. 300, which must be regarded as the payment to the extent to which the minor is benefited, and which the alienee is therefore entitled to recover, as laid in *Someshvar v. Someshvar* AIR 1923 Bom. 16. He further contends that he is entitled to mesne profits from the date of suit to the date of possession which he claimed in the first Court, but that is a point to which neither of the Courts below have devoted any attention. On the other side it is argued possession has already been taken immediately after the decree and though no objection can be taken to the claim for mesne profits from the date of the suit till the date when possession was taken, the defendants are entitled to claim interest on the amount awarded by the lower appellate Court. There is no evidence as a matter of fact on the record as to when possession was taken or when the amount was paid. Presumably the amount was paid before the defendants gave up possession. The amount of mesne profits also is not admitted. The plaintiff's claim more than the defendants admit.

8. The result will be that in appeal No. 301 of 1928, which is the appeal by the defendants, the appeal must be dismissed with costs.

9. In appeal No. 425 the decree of the lower appellate Court will be varied by stating that the plaintiffs will be entitled to mesne profits from the date of their taking possession of the property, the mesne profits to be determined in execution, and the defendants will be entitled to interest at 6 per cent per annum on the amount of Rs. 300 directed to be paid by the plaintiffs to them from the date of suit up to the date of payment whenever that might be. That also will be determined in execution, and set off against the mesne profits in Appeal No. 425. I think I should make no order as to costs as both parties have made some concession, and the appeal has not been contested. In appeal No. 325 of 1928 the parties will therefore bear their own costs.