

(2018) 12 BOM CK 0090
In the Bombay High Court
Case No : Second Appeal No. 493 Of 2018

Pundlik S/O Sadashiv Gujarkar And Others	APPELLANT
Vs	
Kiran S/O Rameshwar Avachat And Others	RESPONDENT

Date of Decision : 22-12-2018

Acts Referred:

Code of the Civil Procedure, 1908 — Section 100
Hindu Minority and Guardianship Act, 1956 — Section 8, 8(2)
Evidence Act, 1872 — Section 101

Citation : (2018) 12 BOM CK 0090

Hon'ble Judges : Rohit B. Deo, J

Bench : Single Bench

Advocate : K.R. Lule, Anand S. Joshi

Final Decision : Allowed

Judgement

Manish Pitale, J

[1] Heard Shri K.R. Lule, the learned Counsel for the appellants and Shri Anand S. Joshi, the learned Counsel for respondent 1.

[2] The appellants are arrayed as defendants 1 to 5 in Special Civil Suit 78/2006 for specific performance of contract which is instituted by respondent 1 herein against the appellants and respondent 2 herein. By judgment and decree dated 30.08.2010 the Joint Civil Judge, Senior Division, Wardha decreed the suit partly. The claim for specific performance was rejected and the appellants 1 and 2 herein were directed to refund the earnest amount of Rs.3,00,000/- with interest at the rate of 18% per annum. This judgment and decree is reversed by the District Judge, Wardha, who allowed Regular Civil Appeal 222/2015 and allowed the claim for specific performance of the suit agreement.

Being aggrieved by the judgment and decree in First Appeal the original defendants 1 to 5 have preferred this appeal under section 100 of the Code of the Civil Procedure.

[3] This appeal is finally heard on the following substantial questions of law:

(1) Whether the appellate Court has rightly held that the agreement dated 30-6-2005 that was entered into by the defendant No.1 was binding on the defendant Nos.3 to 5 who were minors?

(2) In absence of any issue as to plaintiff's readiness and willingness having been framed by the trial Court, whether the same could have been considered for the first time in appeal?

(3) Whether the appellate Court has rightly exercised discretion in granting relief of specific performance?

[4] Respondent 1 - plaintiff claims to be an agriculturist whose ancestral agricultural land situated in Mouza Chikhali (Deosthan) was acquired by the Nagpur Improvement Trust (NIT) and in the litigation which followed the dispute was compromised and the plaintiff was allotted developed plots by the NIT. The plaintiff contends that like other members of the family he too sold the developed plots and was interested in purchasing agricultural land. The plaintiff claims that he came to know that the defendants 1 to 5 are interested in selling the suit property which is agricultural land admeasuring 1.48 HR approximately, from his father-in-law one Suresh Irutkar.

The plaintiff contends that the name of defendant 1 is recorded in the revenue record as owner since he is the karta of the family. The plaintiff avers in the suit plaint that since the suit property is situated near the City of Nagpur, the defendants 1 to 5 were facing difficulty in cultivating the same and therefore, converted the user of portion admeasuring 1755.23 square meters from agricultural to non-agricultural and carved out plots and by under the suit agreement dated 30.06.2005 agreed to sell the remaining portion admeasuring 1.48 HR to the plaintiff for valuable consideration of Rs.3,00,000/- (per acre).

[5] The plaintiff further avers that since defendants 3 to 5 were minors, the defendant 1 agreed to obtain the permission under section 8(2) of the Hindu Minority and Guardianship Act ('Act' for short) from the District Judge. The plaintiff further avers that the said agreement is also signed by the defendant 6, who is the owner of a well situated on the boundary of the suit property, which the defendant 6 agreed to sell for consideration included in the consideration of Rs.3,00,000/- per acre. The plaintiff avers that on 30.06.2005 contemporaneous with the execution of the suit agreement defendants were paid Rs.2,00,000/- as earnest and further amount of Rs.1,00,000/- was paid on 14.11.2005 since the defendants 1 to 5 needed the money to purchase other agricultural land. The plaintiff then contends that although he was ready and willing to perform his part of the contract and indeed made several efforts to persuade the defendant 1 to execute the sale-deed as early as possible, the defendant 1 avoided to carry out the measurement of the suit field and ultimately the plaintiff was constrained to issue notice dated 17.04.2006 through counsel to the defendants 1 to 5 to carry out the measurement of the suit field and to obtain the necessary permission

from the District Judge. According to the plaintiff in response to the said notice, the defendants 1 to 5 out rightly denied the suit agreement and took a false plea that the suit agreement was executed as a nominal document and as security for loan advanced.

[6] The defendants 1 to 5 filed written statement which is signed by defendant 1 for himself and on behalf of his minor children as natural guardian. The defendants 1 to 5 pleaded that there was no intention whatsoever to sell the suit field, which is the only agricultural field owned by them and the only source of livelihood. The defendants 1 to 5 pleaded that in view of the medical condition of defendant 2, the defendant 1 was in debt and to clear the debt he sought loan of Rs.1,00,000/- from the father-in-law of the plaintiff and executed the suit agreement as nominal security document. The defendants 1 to 5 denied the receipt of earnest amount of Rs.2,00,000/- on the date of the agreement of the suit and claimed to have received only Rs.1,00,000/-. The defendants 1 to 5 further denied having received Rs.1,00,000/- on 14.11.2005 and claimed that the endorsement made was to adjust the future interest on the loan of Rs.1,00,000/- advanced by the father-in-law of the plaintiff. A specific defence was taken that the suit agreement is not binding on the minors defendants 3, 4 and 5, who are coparceners. Every other material averment in the suit plaint is denied.

[7] The plaintiff entered the witness box and examined his father-in-law Suresh Irutkar as P.W.2 and one Dinkar Nakhate as P.W.3 while the defendant 1 examined himself. The Trial Court framed the following issues:

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fu.kZ;

1- izfroknh ;kauh fn- 30-6-2005 yk nkok feGdr gh jDde #i;s 3]00]000@& izfr ,dj
izek.ks fod.;kpk djkj dsyk gksrk vls oknh 'kkchr djrkr dk; ? ----- gks;

2- izfroknh dz-6 ;kaph foghj lq/nk oknh fod.;kpk djkj dsyk gksrk vls oknh 'kkchr
djrkr dk; ? ----- ukgh

3- oknkrhy djki= gs ukeek= vkgs o rs dtkZl rkj.k Eg.kwu dj.;kr vkys vls izfroknh
'kkchr djrkr dk; ? ----- ukgh

4- oknh ;kauh izfroknh dz-1 rs 5 ;kauk jDde #i;s 3]00]000@& fodzhP;k
djkkjiksVh fnys vls oknh 'kkchr djrkr dk; ? ----- gks;

5- oknh gs djkiwrhZP;k ekx.khl ik= vkgsr dk; ? -----
ukgh

6- oknh gs i;kZ;h dsysY;k ekx.khizek.ks jDde #i;s 3]00]000@& O;ktklghr ijr
feG.;kl ik= vkgsr dk; ? ----- gks;

7- vafre vkns'k o gqdweukek dk; vkgs ?

nkok va'kr% eatwj

The reasons which are recorded by the Trial Court for refusing the relief of specific performance of the suit agreement may now be noted. The first reason which is recorded is that the defendants 3 to 5, who irrefutably have undivided share and interest in the ancestral property, are not bound by the suit agreement. The Trial Court was of the view that the suit agreement is not executed by the defendant 1 father as karta and that defendant 1 has acted in the capacity of natural guardian and therefore, he ought to have obtained permission under section 8(2) of the Act. The other reason recorded is that it has come in evidence that the house of the defendants 1 to 5 is situated in the suit field which is not even referred to in the suit agreement. The Trial Court was of the view that it is not clear whether the said house was agreed to be sold and that if the relief of specific performance is granted there would be difficulty in the execution of the decree of specific performance.

[8] The first Appellate Court framed the following points for determination and recorded findings:

Points :

- (1) Whether plaintiff is ready and willing to perform his part of contract ?
- (2) Whether defendant no.6 has agreed to sell the well ?
- (3) Is plaintiff is entitled to get decree for specific performance of contract ?

Findings :

- (1) In the affirmative.
- (2) In the affirmative.
- (3) In the affirmative.

The first Appellate Court referred to the enunciation of law by the Apex Court in *Sri Narayanbal & others vs. Sridhar Sutar & others* reported in (1996) 8 SCC 54 and held that since the minor children have only undivided share in the suit field, the defendant 1 is entitled to dispose of the suit field as karta and that permission under section 8 of the Act would not be necessary. The first Appellate Court that went to observe that even if it is assumed *arguendo* that the permission of the District Judge is required even then such permission could have been obtained and specific performance cannot be refused only for the reason that permission under section 8(2) of the Act is necessary. The first Appellate Court then held that the Trial Court erred in refusing specific performance on the ground that the house of the defendant 1 is situated in the suit field. The first Appellate Court noted that such plea was not taken in the written statement and that it was only in response to a question in the cross-examination that the defendant 1 accepted that his house was situated in the suit field. The first Appellate Court further noted that there is no material to show the nature of construction of the house, whether the construction was temporary or permanent.

The first Appellate Court then observes that the age of the children was 14, 12 and 10 when the suit agreement was executed in the year 2005 and they would have attained majority during the pendency of the suit and the appeal. The first Appellate Court observes that although the minors have the option to challenge the suit agreement on attaining majority such option is not exercised and the minors are therefore, bound by the suit agreement. The first Appellate Court ultimately granted the relief of specific performance.

[9] The plea that the suit agreement was a nominal security document is negated by both the courts below and I do not see any reason to disagree. The Trial Court has held that the defendant 1 has not executed the agreement as karta and has acted in the capacity of natural guardian and therefore, the permission under section 8(2) of the Act is mandatory. The finding that the suit agreement is not binding on the minor children is predicated on the said reasoning. The Trial Court clearly erred in holding that permission under section 8(2) of the Act is a prerequisite. It is common ground that the suit property is joint family property and that the minors children have only undivided share and interest and not a definite share in the suit property. The fact that the agreement is signed as natural guardian does not take away from the fact that the defendant 1 was the karta of the family and purported to execute the suit agreement acting as the karta. The Trial Court further erred in observing that the existence of residential house on the suit land would render decree of specific performance difficult to execute. The first Appellate Court rightly held that it was not the case either of the plaintiff or the defendants that there was a residential house on the suit property and that the nature of the construction is not brought on record. While the Appellate Court correctly held that since the minor had only undivided share in the suit land permission under section 8(2) of the Act is not prerequisite, the Appellate Court clearly erred in recording a finding that the suit agreement is binding on the minor children since the suit agreement is signed by defendant 1 and the minor children who attained majority during the pendency of the suit and the first appeal had not exercised the option of challenging the suit transaction within the period of limitation. The first Appellate Court failed to appreciate that the defendant 1 filed written statement for himself and on behalf of the minor children resisting the suit claim and inter alia asserting that the suit agreement is not binding on the minor children. The minor children on attaining majority have not taken a contrarian stand. In view of the fact that the karta - defendant 1 himself disputed the validity of the suit agreement and its binding force qua the minors, it was not necessary for the minor children to initiate independent proceedings to assail the suit transaction. The first Appellate Court failed to address the crucial and seminal issues which fail for consideration and which are (i) whether the defendant 1 has executed the suit agreement qua the shares of the minor children for legal necessity or for the benefit of the family or estate and (ii) on whom the burden of proof lies to prove that the transaction is for either legal necessity or the benefit of the family or estate. The answer to substantial questions (1) and (3) would lie in the answer to the aforesaid two

questions which the first Appellate Court failed to consider. In so far as the substantial question (2) which is formulated, in my opinion the fact that specific issue as regards readiness and willingness is not framed by the Trial Court pales into insignificance since no prejudice is caused to the parties who have adduced evidence on readiness and willingness and in rebuttal.

[10] It is well settled that the alienation of joint family property by the father - karta would bind the minor sons provided that the transaction is effected for legal necessity or for the benefit of the family or estate. It would be apposite to consider the decisions which enunciate the law applicable to the two questions which would determine the fate of this litigation, which I have already formulated supra.

[11] In *K. P. L. S. Palaniappa Chetty and another v. Sreenath Devasikamony Pandara Sannadhi* reported in AIR 1917 Privy Council 33. Lord Atkinson quoted with approval the following observations of Lord Justice L.J. Knight Bruce in *Hunooman Persaud v. Babooee Munraj*.

"The power of the manager for an infant heir to charge an estate not his own, is under the Hindu Law a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate the bona fide lender is not affected by the precedent mismanagement of the estate. The actual presence on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded."

"Their Lordship think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom his dealing, that the manager, is acting in the particular instance for the benefit of the estate. But they think that, if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity, is not a condition precedent to the validity of his charge, and they do not think that under such circumstances, he is bound to see the application of the money."

In *Ganpat Rao and others v. Ishwar Sing and another* reported in A.I.R. 1938 Nagpur 476 the Division Bench of the Nagpur High Court observes thus:

This has been the most criticized part of the judgment. It was rightly urged that a mortgage and a sale transaction stand on a different footing. A sale is either wholly good or bad; a mortgage can be good in parts, or capable of being supported as to part and if it should appear that part of the consideration is for necessity, that part would be binding. It was accordingly said that if the payment of land revenue amounts to necessity, this mortgage is binding to that extent. We are of the opinion however that what has to be shown is that the loan is for legal necessity, not that the money is wanted, or is stated to be wanted, and inquiries confirm that want, for a necessary purpose. The difference is

improvement. The manager may have, to the knowledge of the lender large available resources, he may have actual cash at hand. Can he still bind the estate if he borrows ostensibly to pay land revenue ? Clearly not. The purpose is necessity, but there is no necessity for the loan, where, as here, there are apparently large resources, a large income and an unencumbered estate (to be with). The lender must show not merely a necessary purpose but a necessity for the loan. If, after reasonable inquiries, he, as a reasonable man, is satisfied of that necessity, that is sufficient; he is not concerned with a misapplication of the money lent, but it must be the necessity for the loan that he must satisfy himself about were it otherwise, minors (whose power to claim partition is limited) would be at the mercy of spendthrifts who spent the family income on themselves and borrowed money for necessary family expenses.

In *Koutarapu Venkata Chenchayya v. Koutarapu Ramalingam and others* reported in AIR 1957 Andhra Pradesh 744 the Division Bench of the Andhra Pradesh Court articulates thus:

(10) We now proceed to the main question whether the alienation under Exhibits B-24 and B- 34 are binding on the plaintiff. It is well settled that a father's alienations of joint family property are binding on the sons, provided that they were effected for legal necessity or for the benefit of the family for satisfying antecedent debts which were not incurred for immoral or illegal purposes. Antecedent debts mean debts which originated independently of and were contracted prior in time to the alienation impeached. As the power of alienation is a limited and qualified one, the burden of proof is on the alienee to show that the transaction came within that power. But in discharging the burden, he alienee is entitled to the benefit of equitable principle protecting bona fide purchasers for value. The impact of these principles was explained in *Hunooman Perhaud Pande v. Mt. Babooee Munday Kunweree*, 6 Moo Ind App 393 (PC) © and has become a statutory presumption under S. 38 of the Transfer of Property Act. The alienee is bound to inquire into the purpose of the alienation. He is entitled to succeed if he proves:

(1) either that there was in fact legal necessity or benefit to the family or discharge of antecedent debts justifying the alienation.

(2) or that he honestly satisfied himself after proper and bona fide inquiries as to their existence.

(11) Sri K. Kotayya, contended that the test for upholding an alienation is whether the bulk of the consideration was for a binding purpose. In this connection he cited a number of cases to which such alienations by managers were upheld, *Krishnan v. Govindan*, 41 Mad LJ 381: (AIR 1921 Mad 677) (D): *Mrs. N. Johnstone v. Gopal Singh*, AIR 1931 Lab 419 (E) *Gobinda Kar v. Mohan Maharana*, AIR 1949 Oriss 18 (F); *Niamat Rai v. Din Dayal*, 54 Ind App it necessary to explain how the principle followed in these decisions was entirely different from that adumbrated by the learned counsel, because the point of view

for which he stands has been expressed by Sadasiva Iyer J., in *Rukmani Sundarammal v. Mutha Ammal*, 1915 Mad WN 8 at p. 10: (AIR 1916 Mad 239 at p. 240) (H), another decision cited by him, as follows:

"Where a substantial portion of the purchase money was not required for the plaintiff's interest or benefit, then the whole sale is set aside on condition of the plaintiffs paying to the purchaser the remaining portion; where, however, a very substantial portion of the purchase money was utilised for purposes binding on the plaintiff, the sale is upheld, but the plaintiff is given a decree for recovery of the small portion of the purchase money not utilised for his benefit".

(12) This was precisely the point which was elaborately considered and negated by the Judicial Committee in *Sri Krishnan Das v. Nathu Ram*, 54 Ind App 79: (AIR 1927 PC 37) (I). The Judicial Committee said:

"In their decision the learned Judges of the High Court rely on the authority of the case of *Girdharee Lall v. Kantoo Lall*, 1 Ind App 321 (PC) (J) decided in 1874, and especially on the head note which contains this passage.

'Where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds is accounted for the fact that a small part is not accounted for will not invalidate the sale.'

While this is in itself a correct statement of the law so far as it goes, it does not by any means follow, as the learned High Court Judges seem to have thought, that it is a complete statement of the law or that the sale will be invalidated wherever the part of the consideration not accounted for cannot be described as small. If this were sound the question would in each case be a matter of arithmetical calculation, and opinions would necessarily vary as to what constituted the 'bulk of the proceeds' or 'a small part' of the same in each particular case. The learned Judges seem to be answered in such cases, viz., whether the sale itself was one which was justified by legal necessity. This is the point of view from which the matter is approached in the earliest case cited at the Bar of 6 Moo Ind App 396 (PC) (C) decided by the Board in 1856".

(13) Sri K. Kotayya urged that the criterion "whether the sale itself was one which was justified by legal necessity" is satisfied when it is shown that the sale by a father was necessary for the discharge of antecedent debts, in other words, that the antecedent debts could not be discharged otherwise than by the sale. This argument is misconceived because it would construe the words "justified by legal necessity" as equivalent to "caused or occasioned by legal necessity". What the Judicial Committee was emphasizing in 54 Ind App 79: (AIR 1927 PC 37) (I), was that the application of the consideration for the alienation was a minor matter. The alienee could rarely control the actual application of the consideration which he paid to the manager or the father.

Nor can he be reasonably expected to see that the manager or father alienated only so much of the property as would meet the necessity, because that would

mean that the alienee should undertake what was property the function of the manager or the father in managing the affairs of the family. So far as the application of the consideration is concerned, in the absence of evidence a bona fide alienee who made due enquiry could invoke a presumption of law that it has been expended for proper purposes and for the benefit of the family. The question in such cases is not whether the receipt of the consideration, for the alienation was justified by legal necessity but is whether the sale was justified by presumption legal necessity.

(14) The principles deducible from 54 Ind App 79: (AIR 1927 PC 37) (I), which followed 6 Moo Ind App 393 (PC) © are these. The alienee must address himself the question whether the alienation is one which a prudent owner would enter into, in order to meet the legal necessity or antecedent debts or for the benefit of the estate. He should make reasonable inquiries for this purpose. If, after making such inquiries, he is satisfied that the father or manager is acting within his powers and he himself acts honestly in the transaction the question whether he was deceived and the legal necessity or benefit or antecedent debts really did not exist and the further question whether the consideration was applied for them are immaterial, and it is a case of the sale itself being justified by legal necessity or benefit. No general rule can be laid down as to the extent to which an alienee should pursue his inquiries or as to the evidence necessary to prove that he acted in good faith. These are questions of fact to be determined on the circumstances of each case including the previous relationship or dealing between the alienee and the alienor, the obliterations of evidence owing to lapse of time and the like.

In *Kumaraswami Mudaliar and others vs. Rajamanikkam Udayar and others* reported in AIR 1966 Kerala 266 a Special Bench of three learned Judges has emphasized that if the alienation of family property by father is in the issue, the burden is on the buyer to establish that the sale was supported by legal necessity or benefit of the family or that the buyer had made bona fide and reasonable inquiry which made him believe that the necessity exists even though no such necessity did in fact exist.

In *Balmukand v. Kamla Wati and others* reported in AIR 1964 SC 1385 the Hon'ble Apex Court held that for a transaction to be recorded as benefit to the family it need not be of defensive character and in each case the Court must be satisfied from the material before it that such benefit was in fact conferred or was reasonably expected to confer on the family when the transaction was entered into.

In *Smt. Rani and another v. Smt. Santa Bala Debnath and others* reported in AIR 1971 SC 1028 the Hon'ble Apex Court enunciates the law thus:

10. Legal necessity to support the sale must however be established by the alienees. Sarala owned the land in dispute as a limited owner. She was competent to dispose of the whole estate in the property of the legal necessity or

benefit to the estate. In adjudging whether the sale conveys the whole state, the actual pressure on the estate, the danger to be averted, and the benefit to be conferred upon the estate in the particular insistence must be considered. Legal necessity does not mean actual compulsion: it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of proving legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and bona fide enquiries about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity.

11. Recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in evidence their value varying according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of legal necessity. The weight to be attached to the recitals varies according to the circumstances. Where the evidence which could be brought before the Court and is within the special knowledge of the person who seeks to set aside the sale is withheld, such evidence being normally not available to the alienee, the recitals go to his aid with greater force and the Court may be justified in appropriate cases in raising an inference against the party seeking to set aside the sale on the ground of absence of legal necessity wholly or partially, when he withholds evidence in his possession.

The decision of the Hon'ble Apex Court referred supra is relied upon by the Division Bench of the Orissa High Court in Surendranath Das Adhikari (dead) and after him Harendra Kumar Das and others v. Sudhir Kumar Behera and others reported AIR 1982 Orissa 30.

In Smt. Manohari Devi and others v. Choudhury Sibanova Das and others reported in AIR 1983 Orissa 135 the Division Bench of the Orissa High Court has inter alia held that since it is not proved that the purchasers made bona fide inquiry as to the existence of legal necessity or family benefit the agreement by the karta is not binding on the other members of the family. In Rangammal v. Kuppuswami and another reported in (2011) 12 SCC 220 the Hon'ble Apex Court inter alia considered the provisions of section 101 of the Evidence Act, 1872 and held that the burden lies on the person who upholds - asserts the purchase not only to show that the guardian had the power to sell but further that the whole transaction was bona fide. The relevant observations are thus:

21. Section 101 of the Indian Evidence Act, 1872 defines "burden of proof" which clearly lays down that:

"101. Burden of proof.- Whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.

22. In view of this legal position of the Evidence Act, it is clear that in the instant matter, when the plaintiff/respondent No.1 pleaded that the disputed property fell into the share of the plaintiff by virtue of the sale deed dated 24.2.1951, then it was clearly for the plaintiff/respondent No.1 to prove that it was executed for legal necessity of the appellant-while she was a minor. But, the High Court clearly took an erroneous view while holding that it is the defendant/appellant who should have challenged the sale deed after attaining majority as she had no reason to do so since the plaintiff /respondent No.1 failed to first of all discharge the burden that the sale deed in fact had been executed for legal necessity of the minor's predecessor mother was without permission of the court. It was not the defendant/respondent who first of all claimed benefit of the sale deed or asserted its genuineness, hence the burden of challenging the sale deed specifically when she had not even been dispossessed from the disputed share, did not arise at all.

23. Plethora of commentaries emerging from series of case laws on burden of proof which are too numerous to cite, lay down that when a person after attaining majority, questions any sale of his property by his guardian during his minority, the burden lies on the person who upholds/asserts the purchase not only to show that the guardian had the power to sell but further that the whole transaction was bona fide. This was held in the case of Roop Narain Singh v. Gugadgur Pershad, as also in Anna Malay v. Na U Ma2.

[12] The settled legal position is that while the karta of the family can enter into an agreement as regards the undivided share and interest of his minor children, the suit agreement must be for legal necessity or the benefit of the family or estate and that the burden to so establish would be that of the alienee or the person who seeks to enforce the agreement. It may be possible for the alienee or such person to contend that he did make every reasonable and bona fide inquiry to ascertain that the suit agreement was indeed for legal necessity or the benefit of the family or estate and if the contention is accepted by the Court on the basis of evidence on record the suit agreement would be enforceable against the minor members of the family notwithstanding that as a fact such legal necessity or benefit did not exist. It is not necessary to delve deep in the question whether such reasonable and bona fide inquiries were made since it is not even the case of the respondent that he did make reasonable and bona fide inquiry to ascertain that the defendant 1 intended to execute the suit agreement for legal necessity or benefit of the family or the estate.

[13] The evidence on record may now be examined on the touchstone of the legal position articulated by the decisions supra. In the suit plaint the solitary

averment is that since the suit field is situated near the City of Nagpur, the defendants were facing problems in cultivating the same. No evidence is adduced by the plaintiff to prove that as a fact proximity to Nagpur renders cultivation of the suit field difficult. The absence of evidence apart, even if the averment is taken at face value, the existence of legal necessity or benefit to the family or estate cannot be inferred.

The recital in the suit agreement is that since the suit property is proximately located to the village abadi cultivation is rendered difficult. The only other material which is placed in service is the endorsement on the suit agreement which is to the effect that amount of Rs.1,00,000/- is received on 14.11.2005 to enable the defendant 1 to enter into an agreement to purchase another land. The recitals and the endorsement in the suit agreement again do not necessarily suggest that the suit agreement is executed for legal necessity or for the benefit of the family or the estate. No evidence aliunde is adduced to prove that as a fact proximity to gaon abadi is an obstacle to cultivation or that the defendant 1 did intend to purchase some other land and further that such intended purchase would necessarily benefit the family. In the absence of evidence on record to prove that the defendant 1 entered into the suit agreement for legal necessity or the benefit of the estate or family the recital an endorsement in the suit agreement is too fragile a material to hold that the plaintiff has established, and it is indeed the burden of the plaintiff to so establish, that the defendant 1 karta acted prudently and for legal necessity or for the benefit of the estate or family.

[14] It has come in evidence that the suit field is the only agricultural field owned by the family of the defendant 1. This is admitted by P.W.2, who is the father-in-law of the plaintiff. The suit agreement cannot bind the minor children of the defendant 1 for reasons spelt out supra. Even if it is assumed arguendo, that the plaintiff has proved that the suit agreement binds the minor children, which he clearly failed to prove, in the factual matrix the discretion to direct specific performance of the suit agreement ought not to be exercised in favour of the plaintiff whose interest have been taken care of by the Trial Court by directing refund of the part consideration with interest at the rate of 18%, which rate of interest is not assailed and has assumed finality.

[15] The substantial questions of law are answered accordingly.

[16] The judgment and decree dated 30.07.2018 rendered by the Appellate Court in Regular Civil Appeal 222/2015 is set aside and that of the Trial Court restored.

[17] The appeal is allowed, with no order as to costs.