
(2010) 05 BOM CK 0028

In the Bombay High Court

Case No : Second Appeal No. 851 of 1999

Ramchandra Chunilal Dagad (deceased by his LRs. Paras
Ramchandra Dagad and Others) and Pandurang Rama Deokar

APPELLANT

Vs

Vasant Bansi Somwanshi and Others

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Citation : (2010) 05 BOM CK 0028

Hon'ble Judges : R.M. Borde, J

Bench : Single Bench

Advocate : Yuvraj S. Choudhari and S.S. Choudhari, for the Appellant; C.V. Korhalkar, for the Respondent

Final Decision : Allowed

Judgement

R.M. Borde, J.—This is an Appeal by the original defendants raising exception to the judgment and decree passed in Regular Civil Suit No. 827 of 1974 and confirmed in Regular Civil Appeal No. 270 of 1985 by the first appellate Court.

2. The respondents-the original plaintiffs instituted a suit claiming a decree of declaration that the lease deed executed by defendant No. 3 in favour of defendant No. 1 so also various agreements to sale executed by defendant No. 3 are not binding on the plaintiffs. The plaintiffs also prayed for a decree restraining the defendants 1 and 2 from securing execution of the sale deed of suit land from defendant No. 3. In the alternative plaintiffs claimed a decree for partition and separate possession of their 3/4th share and also for mesne profits. The plaintiff contends that the suit lands more specifically described in the plaint are ancestral properties of the family consisting of plaintiffs and defendant No. 3. The defendant No. 3 is husband of plaintiff No. 3, father of plaintiffs 1 and 2. The defendant No. 1 got executed the lease deed dated 13.4.1961 from defendant No. 3 in respect of suit land and also got executed further agreement to sale in respect of said land on 3.9.1983. The defendant No. 3 executed agreement to sale and earnest receipt dated 1.7.1964 for Rs. 4000/- and agreement dated

25.9.1965 for Rs. 3500/- and further agreement dated 28.9.1965 for Rs. 3500/- in respect of the agricultural property and put the defendant No. 1 in possession of the properties. The defendant No. 3 was not in need of the amount nor he has utilised the amount for benefit of the family. According to the plaintiffs the defendant No. 3 had no entitlement to dispose of the ancestral property in which the plaintiffs have entitlement. The plaintiffs also contend that there is encumbrance created over the property in respect of loan obtained from the cooperative society and as such in view of the provisions of Maharashtra Co-operative Societies Act, the defendant No. 3 had no entitlement to enter into an agreement for alienation of the agricultural property. The plaintiffs also contend that as a result of implementation of the consolidation scheme in the village the lands are allotted to defendant No. 3 without making any provision or without considering the entitlement of the plaintiff. It is further contended that neither the defendants 1 and 2 have any right or entitlement to remain in possession of the property nor defendant No. 3 alone has entitlement to dispose of the same. There was a suit instituted by defendant No. 1 being Regular Civil Suit No. 260 of 1966 against defendant No. 3 seeking a decree of injunction however the suit came to be disposed of in terms of the compromise keeping open the questions which are being raised in the instant suit relating to the agreement to sale executed by the defendant No. 3. In the alternative the plaintiffs claim partition and separate possession of their 3/4th share in the property.

3. Defendants 1 and 2 appeared and resisted the claim raised by the plaintiffs by filing written statement. It is not disputed that the lease deed was not executed on 13.4.1961 and 3.9.1963 in respect of the property and defendant No. 3 has executed the documents in his capacity as manager of the joint Hindu family. The defendants further contend that there were 3 agreements to sale executed on 25.9.1965, 28.9.1965 and 1.7.1964 in respect of the suit land and the defendant No. 3 has signed the documents in his capacity as the manager of the joint Hindu family. It is contended that defendant No. 3 was indebted to Godawari Sugar Mill and also owe certain sum to Banimiya S/o Dadamiya. The amount received has been spent for marriages of the sons of the defendant No. 3 as well as for obsequies ceremonies of the mother of defendant No. 3 as well as household expenses. It is contended that the defendants have ascertained the existence of legal necessity for alienating the property by defendant No. 3 before entering into agreements. The plaintiffs have instituted the suit so as to defeat the rights of the defendants and at the instance of defendant No. 3. The defendant No. 3 however, remained absent and did not contest the suit and as such the suit proceeded ex-parte against him.

4. On consideration of the contentions raised by the parties as well as on consideration of the evidence placed on record, the trial Court came to the conclusion that the plaintiffs have established their entitlement in respect of 3/4th share in the property. The trial Court also recorded a finding that the defendants have failed to prove the existence of legal necessity for making alienation of the property by defendant No. 3 and that the property was sold for

paying off the antecedent debt. The trial Court as such granted decree in favour of the plaintiffs on 24.9.1979. The judgment and decree passed by the trial Court was subjected to challenge in Regular Civil Appeal No. 270 of 1985 which came to be heard and disposed of by Additional District Judge, Kopargaon who was pleased to dismiss the appeal by judgment and decree dated 7.7.1999. Both the judgments recorded by the Courts below are subjected to challenge in the instant Second Appeal.

5. The only substantial question of law that arises for consideration in this Appeal is as under:

Whether the defendants have established the existence of legal necessity in making alienation of the property by defendant No. 3 in their favour and as to whether the judgments of the Courts below are based on mis-appreciation of the documentary evidence or ignoring the material evidence and in disregard to settled principles of law?

6. The execution of lease deeds on 14.4.1961 and 3.9.1963 by defendant No. 3 in favour of the other defendants so also execution of the agreements to sale in respect of the landed property on 1.7.1964, 28.9.1965 and 25.8.1965 is not controverted by the parties. The plaintiffs claim that the agreement to sale as well as the lease agreements are not binding on them as those are executed by defendant No. 3 without existence of legal necessity. It is contended that the property in question is the ancestral property and the alienation by the manager of the Hindu family would be binding on the plaintiffs who are the co-parceners of the joint family so far as it relates to the antecedent debts. It is contended that the transactions are neither for legal necessity nor for the benefit of the family. It is contended that there is no evidence placed on record by defendant that the transactions entered into by defendant No. 3 are effected for paying any antecedent debt. The defendants 1 and 2 have placed on record the copies of the agreements in question as well as the lease deeds and have also led evidence in respect of the existence of legal necessity for entering into the agreements in respect of proposed alienation of the property by the defendant No. 3. The trial Court as well as the first appellate Court has framed an issue and the appellate Court has formulated the point for consideration as to whether the transfers in question are for purpose of paying off antecedent debts and for legal necessity and for welfare of the joint family? The burden obviously shifts on the defendants to establish the existence of legal necessity.

7. I have perused the judgments recorded by the Courts below, scanned the record as well as heard the arguments advanced by the counsel for the respective parties. It is not controverted that the defendant No. 3 was a disabled person and was not in a position to undertake any manual work. This fact has been admitted by the plaintiffs. It also transpires that when the transactions in question were effected or the agreements were executed the plaintiffs 1 and 2 were minor. It was the responsibility of defendant No. 3 to maintain the family and as admitted by the plaintiffs the defendant No. 3 was a disabled person, as

such there were limitations for earning income. This is one of the important circumstance which has not been taken into account by the Courts below apart from the evidence led by the defendant No. 3 for establishing the existence of circumstances compelling defendant No. 3 to enter into transaction for disposal of the ancestral property. On perusal of agreement dated 1.7.1964 it is evident that the transaction is effected for clearing off the loan liability towards tagai loan as well as for satisfying the decree passed in Regular Civil Suit No. 99 of 1962 and Regular Civil Suit No. 22 of 1964. There is recital in the document at exhibit 43 agreement to sale dated 1.7.1964 to the effect that the transaction is being entered into for satisfying the loan liability as well as for satisfying the decrees referred above. The defendant No. 3 has received Rs. 4000/- under the said agreement whereas he received Rs. 3500/- each under the agreement dated 25.8.1965 and 28.9.1965. In the agreement at exhibit 44, there is recital in respect of making payment to one Banemiya S/o Kalemiya Maniyar. It is recited in the agreement that certain sum was already received by the defendant No. 3 for making payment to Banemiya S/o Kalemiya whereas a further sum of Rs. 2500/- was stated to have been received on the date of execution of the agreement. Thus the defendant No. 3 admitted receipt of consideration amount of Rs. 3500/-. Similarly agreement in respect of sale of property for consideration of Rs. 3500/- appears to have been executed by the defendant No. 3 on 25.8.1965. In the agreement at exhibit 45, it is recited that the defendant No. 3 needed the amount for repayment of amount to Godawari Sugar Mills. It is specifically recited that the civil suit bearing No. 7 of 1965 is presented seeking recovery of amount by Godawari Sugar Mills and for satisfying the loan liability the transaction is being entered into.

8. The recitals contained in the document noted above also appear to have been substantiated by the defendants 1 and 2 by leading proper evidence in that regard. It is contended by the counsel appearing for the plaintiffs that mere recitals contained in the document are not sufficient to discharge the burden of establishing the existence of legal necessity in making alienations of the property by the alienor. It is contended that the copies of the decree passed in the suits referred to in the document have not been placed on record and therefore, it cannot be inferred that the consideration received by the defendant No. 3 has been applied for making repayment. The contention raised by the plaintiffs is not acceptable for the reason that there is ample evidence placed on record to substantiate the contentions raised by the defendant Nos. 1 and 2 in respect of existence of legal necessity for entering into the transaction by the defendant No. 3. It is specifically contended by the defendant Nos. 1 and 2-appellants herein that defendant No. 3 was indebted to one Dahegaon Korale Co-operative Society and dispute in respect of recovery of amount was lodged before the Co-operative Court by the society. A copy of order passed by the Co-operative Court in dispute bearing No. 57/1 of the year 1961 instituted by Dahegaon Korale Co-operative Society is placed on record at exhibit 99. The final order passed in that matter is in respect of the recovery of sum of Rs. 4300/- alongwith interest @ 9.00% p.a.

from 1.1.1964 onwards. The defendant No. 3 is one of the respondents arrayed in the dispute against whom the liability is saddled. In order to establish existence of another loan liability the defendant has also placed on record the copies of the extract of register maintained by the Civil Court to substantiate their contention in respect of initiation of recovery proceedings by the decree holder i.e. Godawari Investment and Finance Corporation. The Execution Application presented by the decree holder appears to be in respect of the recovery of sum of Rs. 3020/- alongwith interest. It is noted in the extract at exhibit 111 that the judgment debtor i.e. defendant No. 3 herein has paid an amount of Rs. 2650/- and as such the Execution Application has been disposed of in view of the recovery made, on 31.8.1965. Annexure at exhibit 112 also discloses that the defendant No. 3 has paid the amount of Rs. 250/- on 7.7.1964 towards the liability arising out of Regular Civil Suit No. 99 of 1962 instituted by Godawari Investment and Finance Corporation and Godawari Sugar Mills. Thus there is ample evidence placed on record in respect of loan liability incurred by defendant No. 3 so also in respect of repayment made by defendant No. 3. Thus it transpires that the defendant No. 3 entered into agreement for disposal of part of the property on 25.8.1965 and out of the amount of consideration received he appears to have paid certain sum in favour of Godawari Sugar Mills i.e. decree holder in Regular Civil Suit No. 99 of 1962 and therefore, the execution proceedings initiated by the decree holder appears to have been disposed of on 31.8.1965. Thus there is evidence not only in respect of the loan liability incurred by the defendant No. 3 but also in respect of repayment of loan after entering into the agreement in respect of sale of the agricultural property by defendant No. 3. It is therefore, an error on the part of the Courts below to hold that there is no nexus in the loan liability incurred by the defendant No. 3 and the impugned transaction which are subject matter of challenge in the instant proceedings.

9. Apart from these aspects, the defendants 1 and 2-appellants herein have specifically contended in the written statement in respect of repayment of amount borrowed by defendant No. 3 from one Banemiya Dadamiya as well as repayment made by him towards the tagai loan. In order to substantiate these contentions the defendants 1 and 2 had led evidence of Banemiya S/o Dadamiya. He has specifically stated in his deposition that defendant No. 3 had earlier leased out 4 acres land in his favour and obtained money. However, thereafter defendant No. 3 repaid him the amount of Rs. 2500/- or Rs. 3000/- and terminated the lease. He has also produced a copy of the 7/12 extract for the year 1965-1966 which records entries in respect of lease of the property in his favour. Thus there is evidence in respect of entering into the agreement of lease by defendant No. 3 in favour of Banemiya S/o Dadamiya and also termination of the lease after making repayment of the amount to him. Entry in respect of the agreement to lease executed in favour of Banemiya is also recorded in the 7/12 extract for the relevant year. Thus, it appears that the recitals contained in the documents i.e. agreement to sale in respect of repayment of amount made to

Banemiya is substantiated by the oral evidence of Banemiya as well as the documentary evidence in the form of 7/12 extract wherein the entry in respect of the lease agreement entered into by the defendant No. 3 with Banemiya finds mention. Thus, the contentions raised by the original plaintiff, that the recitals contained in the document i.e. agreement to sale are not substantiated by leading evidence by the other defendants does not appear to be correct. There is also entry recorded in the 7/12 extract of the suit land in respect of the tagai loan borrowed by the defendant No. 3. Thus, there is ample evidence placed on record to come to the conclusion that the defendant No. 3 has applied the amount of consideration received from the defendants 1 and 2 in making repayment of loan so also in satisfying the liability arising from the civil suits instituted against him. Thus, there can be no denial of the fact that the defendant No. 3 was indebted and in order to satisfy the loan liability he had to enter into agreements in respect of alienation of the property. There is also evidence to the effect that the consideration amount has been applied for making repayment of loan. This circumstance has also to be viewed together with the additional circumstances that the defendant No. 3 is a person suffering from physical disability. In order to maintain the family in all probabilities he had to borrow loan and in order to satisfy the loan liability he had entered into the agreements in respect of the alienation of suit properties. The plaintiffs are not successful in establishing that the defendant No. 3 was a person of doubtful virtues. It has neither been pleaded nor proved that the defendant No. 3 was addicted to vices and in order to satisfy vices he has disposed of the property. The debt incurred by the defendant No. 3 which is obviously for maintaining the family, cannot be termed as avyavaharika debt. Plaintiffs have failed to establish that the debt incurred by the defendant No. 3 can be termed as avyavaharika and as such they are not liable to bear the burden of the loan liability incurred by the defendant No. 3. The defendant No. 3 was admittedly the karta of the family and during the period the transactions in question were entered into, the plaintiffs were minor. The defendant No. 3 was admittedly having physical disability. Thus, in order to meet the family liabilities and in order to discharge legal obligations the defendant No. 3 has burdened the property belonging to the joint family. There is evidence in respect of the existence of loan liability and the repayment of the amount by defendant No. 3 after entering into the transaction with defendants 1 and 2.

10. In view of these facts it cannot be said that defendants 1 and 2 have failed to discharge their burden in proving existence of legal necessity on the part of defendant No. 3 while entering into agreements for alienation of the ancestral property. The findings recorded by the Courts below are not only contrary to the evidence placed on record but are also perverse.

11. My attention is invited to deposition of witness No. 1 for the plaintiffs i.e. Vasant Suryawanshi. He has stated in his deposition that he was married in the year 1965. He states that the family had incurred expenses of Rs. 400/- to Rs. 500/- for the marriage purpose. He has denied the suggestion that his father had

spent Rs. 3500/- to Rs.4000/- for the purpose of his marriage. He has also admitted that his father performed shradh ceremony of his grand-mother and incurred expenses of Rs. 1000/- to Rs. 1500/-. He has feigned ignorance in respect of the loan liability of his father towards Godawari Sugar Mills and Dahegaon Society. It is to be noted that the defendants in their written statement have also contended that defendant No. 3 had incurred expenses for solemnizing marriage of the plaintiff in the year 1965 as well as for performing obsequies i.e. shradh ceremony of his mother. The defence raised in the written statement in respect of the application of consideration amount by the defendant No. 3 for discharging his family liabilities appears to have been substantiated by the admissions given by the plaintiff No. 1 in his deposition.

12. In view of the reasons recorded above, I am of the considered opinion that the Courts below have committed a grave error in recording finding that the defendants 1 and 2 have failed to discharge their burden of proving existence of legal necessity in entering into transactions with them by the defendant No. 3.

13. It is not necessary for the defendant in order to discharge the burden of proving the existence of legal necessity to demonstrate application of funds. It would be sufficient if the defendants establish existence of legal necessity. In the instant matter, the defendants have pleaded and placed on record documentary evidence to demonstrate existence of legal necessity, so also application of funds received by defendant No. 3 for satisfying the debt. Reliance can be placed on the judgments of the Apex Court reported in Radhakrishnadas Vs. Kaluram, . The Apex Court has observed in paragraph No. 5 of the judgment thus:

5. Before us Mr. S.P. Sinha accepts the position that Rs. 45,000 out of the consideration of Rs. 50,000 was in fact for debts binding on the family, but contends that even so it cannot be said that there was legal necessity for the sale. His argument is that a sum of Rs. 5,000 or so for which, according to him, legal necessity had not been established was not a negligible part of the consideration of Rs. 50,000. This argument is based upon a misapprehension of the true legal position. It is well established by the decisions of the Courts in India and the Privy Council that what the alienee is required to establish is legal necessity for the transaction and that it is not necessary for him to show that every bit of the consideration which he advanced was actually applied for meeting family necessity. In this connection we may refer to two decisions of the Privy Council. One is AIR 1927 37 (Privy Council) . In that case the consideration for the alienation was Rs. 3,500. The alienee was able to prove that there was legal necessity only to the extent of Rs. 3,000 and not for the balance. The High Court held that the alienation could be set aside upon the plaintiff's paying Rs. 3000 to the alienee. But the Privy Council reversed the decision of the High Court observing that the High Court had completely misapprehended the principle of law applicable to a case of this kind. What the alienee has to establish is the necessity for the transaction. If he establishes that then he cannot be expected to establish how the consideration furnished by him was applied by the alienor.

The reason for this, as has been stated by the Privy Council in some other cases, is that the alienee can rarely have the means of controlling and directing the actual application of the money paid or advanced by him unless he enters into the managements himself.

Applying the ratio laid down in the judgment cited supra, in the instant matter the defendants have established existence of necessity and application of part of the funds for satisfying the liability. It is not necessary for the defendants to account for the consideration amount received by the alienor. It would be sufficient if the purchaser demonstrates that before entering into the transaction he has made proper inquiries and after satisfying himself in respect of the existence of legal necessity he has entered into the transaction. In the instant matter it transpires that the defendants are successful in demonstrating the need in making alienation by defendant No. 3 as well as application of funds received by way of consideration for lawful purposes.

14. My attention is invited to another case reported in AIR 1946 Oudh page 92 Sant Baksh Singh and Ors. Appellants v. Lachhman Prasad and Ors. Respondents. It is observed by the Oudh High Court as under:

Where the father executes a sale-deed by which he alienates joint family property to satisfy his previous liabilities and his son, on attaining majority, files a suit to set aside the sale-deed on the ground that it was executed without any legal necessity impleading the father as defendant and the father does not come forward to give evidence whether all or any of the debts borrowed by him were not for legal necessity, it must be held that the suit is a collusive suit filed at the instance of the father and the failure of the father to come into the witness-box and to state the real facts raises a presumption against the plaintiff that the money must have been needed for legal necessity.

In the instant matter also the alienation is effected by the father and the sons are impeaching the proposed alienation. Although the defendant No. 3 is father of the defendants 1 and 2 he failed to even file his written statement. So also defendant No. 3 did not examine himself on oath to state the real facts. In these circumstances, the principle laid down in the judgment noted above, shall have to be held applicable.

15. Counsel appearing for respondents has vehemently contended that the scope of interference in a second appeal is quite limited. It is contended that this Court cannot re-appreciate the evidence and substitute it's own views on the ground that it is also a possible view. It is contended that the decision of the appellate Court can be disturbed only when it is found to be perverse or not based on evidence. The counsel for respondents has placed reliance on the judgment of the Apex Court in the matter of Smt. Satya Gupta alias Madhu Gupta v. Brijesh Kumar 1998(2) Mh. L.R. 433.

16. In the instant matter, however, for the reasons recorded above, I am of the opinion that the findings recorded by the Courts below are perverse. Although

there is sufficient evidence placed on record by the defendants to discharge their burden in respect of proving existence of legal necessity, the Courts below have overlooked the evidence. As stated above, the defendants 1 and 2 have not only established that the defendant No. 3/alienor was indebted and needed funds for satisfying his family liability but have also established that the funds received by the defendant No. 3 were applied for satisfying the loan liability as well as for discharging his family liabilities.

17. Reliance is also placed on the judgment reported in Yadarao Dajiba Shrawane (dead) by Lrs. Vs. Nanilal Harakchand Shah (dead) and Others, -Respondents and more particularly the observations of the Apex Court in paragraph No. 31 of the judgment, which reads as under:

31. From the discussions in the judgment it is clear that the High Court has based its findings on the documentary evidence placed on record and statements made by some witnesses which can be construed as admissions or conclusions. The position is well settled that when the judgment of the final court of fact is based on misinterpretation of documentary evidence or on consideration of inadmissible evidence or ignoring material evidence the High Court in second appeal is entitled to interfere with the judgment. The position is also well settled that admission of parties or their witnesses are relevant pieces of evidence and should be given due weightage by courts. A finding of fact ignoring such admissions or concessions is vitiated in law and can be interfered with by the High Court in second appeal. Since the parties have been in litigating terms for several decades, the records are voluminous. The High Court as it appears from the judgment, has discussed the documentary evidence threadbare in the light of law relating to their admissibility and relevance.

I am of the opinion that the judgments delivered by the Courts below are in ignorance of the material evidence placed on record by the defendants 1 and 2. For the reasons recorded above, the interference at the hands of this Court is necessitated.

18. In the result, the Appeal stands allowed. The judgment and decree passed by the trial Court in Regular Civil Suit No. 827 of 1974 dated 24.9.1979 and confirmed by the first appellate Court in Regular Civil Appeal No. 270 of 1985 dated 7.7.1999, is quashed and set aside. The suit presented by the plaintiffs shall be deemed to have been dismissed. In peculiar facts and circumstances of this case, there shall be no order as to costs. Consequently, Civil Application No. 4134 of 2001 seeking injunction and Civil Application No. 6389 of 1999 seeking stay also stand disposed of.