

JANUARY 25, 2007

[DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

B

Hindu Law—Sale of part of ancestral property by Karta with consent of all coparceners except one—Separate Sale effected by opposing coparcener of the same land—Suit for possession of land by successors-in-title of karta against successors-in-title of opposing coparcener—Trial Court decreed the suit holding that the alienation was for legal necessity—Appellate Court also dismissing the appeal but holding that the legal necessity was not a ‘fact in issue’—High Court dismissing the Second Appeal —Correctness of—Held, the alienation for legal necessity becomes irrelevant since neither the opposing coparcener nor his successors-in-title filed a suit for partition.

C

D

A Karta of Hindu Undivided Family had five sons. The Karta and four sons entered into an agreement of sale with respondents for selling part of their ancestral lands and thereafter executed a sale deed. The fifth son opposed the transaction and entered into a separate agreement of sale for selling part of the sold lands with appellants.

E

The respondents-plaintiff filed a suit for possession of lands before trial court contending that the agreement entered into by the opposing son with the appellants-defendants was a fabricated antedated document. The appellants contested the suit contending that their agreement of sale was genuine and first in point of time: that they were not aware of the agreement executed by the Karta in favour of the respondents: and that the transaction was not for legal necessity. The trial court decreed the suit holding that the transaction was for legal necessity. The appellate court also dismissed the appeal but held that the legal necessity for possession was not a ‘fact in issue’ The High Court dismissed the second Appeal of the appellants holding that the transaction was on account of legal necessity.

F

G

In appeal to this court, the appellants contended that there was no legal necessity for the Karta and his four sons to execute the conveyance in favour

A of the respondents; that the conveyance was executed without the consent of one of the coparceners; that the opposing son entered into a conveyance with them in respect of his undivided share and was it earlier in point of time.

Dismissing the appeal, the Court.

B HELD: A karta has power to alienate for value the joint family property either for necessity or for benefit of the estate. He can alienate with the consent of all the coparceners of the family. When he alienates for legal necessity he alienates an interest which is larger than his undivided interest. When the Karta, however, conveys by way of imprudent transaction, the alienation is voidable to the extent of the undivided share of the non-consenting coparcener.

C Neither the opposing son nor his successors-in-title instituted a suit for partition and for demarcation of their share by metes and bounds. In the suit for possession filed by the respondents, the issue of legal necessity becomes irrelevant. A mere declaration that transaction was imprudent or was not for legal necessity in such a suit cannot give any right to the appellants to get their share without taking appropriate proceedings in accordance with law.

D The legal necessity in the present suit for possession was not a "fact in issue". [Paras 12 & 16] [6-B-F; 11-D]

E *Sunil Kumar & Anr. v. Ram Parkash & Ors.*, AIR (1988) SC 576; *Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh & Ors.*, AIR (1953) SC 487 and *Balamukund s. Kamla Wati & Ors.*, AIR (1964) SC 1385, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1584 of 2004.

F From the Judgment and Final Order dated 24.3.2003 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in S.A. No. 128/1990.

V.A. Mohta, A.K. Sanghi and Neelkanth Nayak for the Appellants.

G Satyajit A. Desai, Anagha S. Desai, Amol N. Suryawanshi, Vikram Saluja and venkateswara Rao Anumolu for the Respondents.

The Judgment of the Court was delivered by

H KAPADIA, J. 1. The short question which arises for consideration in this civil appeal is : whether on the facts and circumstances of the case the lower appellate court was right in holding that the issue of legal necessity

even if decided in favour of defendant nos.1 to 5 (appellants herein) was not a "fact in issue" and was therefore not a relevant fact in a suit for possession. A

2. The facts giving rise to this civil appeal are as follows.

3. Land admeasuring 12 acres 16 gunthas in Survey No.218 situated within Chikhli Municipal Limits, District Buldhana, was owned by Nimbaji and his family members. It was an ancestral property. Nimbaji had five sons. One of his sons was Panditrao (defendant no.6). Nimbaji and his four sons excluding Panditrao agreed to sell 9 acres 16 gunthas out of the above ancestral lands to the plaintiffs (respondent nos.1 to 4 herein). The agreement was reduced to writing. It was registered on 18.3.75. It was followed by a conveyance dated 31.3.75. Panditrao was neither a party to the writing agreement nor to the sale deed. He did not consent. He protested against the transaction. Panditrao had entered into an agreement with defendant nos.1 to 5 on 5.11.74. It was an unregistered agreement. It was followed by a conveyance executed by Panditrao in favour of defendant nos.1 to 5 on 29.3.75. The transaction between Panditrao and defendant nos.1 to 5 was confined to an area admeasuring 2 acres and 2 gunthas of land out of 9 acres and 16 gunthas purchased by the plaintiffs. In the suit, defendant nos.1 to 5 claimed southern portion to be in their possession. B C D

4. Plaintiffs contended that the agreement executed by Panditrao in favour of defendant nos.1 to 5 dated 5.11.74 was a fabricated antedated document, engineered to defeat the plaintiffs' agreement with Nimbaji (*karta*) dated 18.3.75 under which plaintiffs were put in possession of the land admeasuring 9 acres and 16 gunthas on 18.3.75 and, therefore, though the defendants' conveyance dated 29.3.75 is before the conveyance in favour of the plaintiffs dated 31.3.75 the plaintiffs were entitled to possession of the whole land admeasuring 9 acres and 16 gunthas. Accordingly suit for possession was filed by the plaintiffs on the basis of the conveyance deed dated 31.3.75. The plaintiffs, however, did not seek formal cancellation of the conveyance executed by Panditrao in favour of defendant nos.1 to 5 dated 29.3.75. E F

5. On the other hand, defendant nos.1 to 5 contended that their agreement dated 5.11.74 was genuine and first in point of time; that they had valid title to the land admeasuring 2 acres and 2 gunthas and that they were not aware of the agreement executed by Nimbaji in favour of the plaintiffs dated 18.3.75. The said defendant nos.1 to 5 further contended that the sale dated 31.3.75 G H

A by Nimbaji and the four coparceners was not for legal necessity and was, therefore, not binding on the sons of Nimbaji including Panditrao and consequently the conveyance executed by Panditrao in favour of defendant nos.1 to 5 dated 29.3.75 was good in law as Panditrao was a coparcener who had transferred his undivided share to defendant nos.1 to 5 in accordance with law.

B

6. Considering all the evidence on record and after hearing both sides, the trial court held that the agreement executed by Panditrao in favour of defendant nos.1 to 5 on 5.11.74 was fabricated and antedated; that there was no partition between Panditrao and his brothers and Nimbaji as alleged by defendant nos.1 to 5; and that the transaction between Nimbaji and the plaintiffs was for legal necessity. Consequently, the trial court decreed the suit in favour of the plaintiffs upholding conveyance dated 31.3.75 executed by Nimbaji in favour of the plaintiffs.

C

7. Aggrieved by the aforestated decision, defendant nos.1 to 5 went in appeal to the Additional District Judge, Buldhana, *vide* Regular Civil Appeal No.82 of 1986.

D

8. By judgment and order dated 12.3.1990 the lower appellate court came to the conclusion, *inter alia*, that the transaction between Nimbaji and the plaintiffs was not for legal necessity; that in a suit for possession based on the conveyance executed by the karta and four coparceners the issue of legal necessity was redundant as Nimbaji and his four sons had consented to the transfer of their undivided share in the lands admeasuring 9 acres and 16 gunthas in favour of the plaintiffs; and that the issue of legal necessity was irrelevant as it did not create any right in favour of defendant nos.1 to 5. It was further held that agreement dated 5.11.74 executed by Panditrao in favour of defendant nos.1 to 5 was antedated and that defendant nos.1 to 5 were not the *bona fide* purchasers for value without notice. The lower appellate court further held that in any event since the conveyance was executed by Nimbaji with his four sons in favour of the plaintiffs pursuant to which the plaintiffs were put in possession of the land admeasuring 9 acres 16 gunthas the issue of legal necessity became irrelevant. The lower appellate court also came to the conclusion that the plaintiffs were forcibly dispossessed and, therefore, they were entitled to possession even if they failed to prove their title.

E

F

G

9. Aggrieved by the aforestated judgment, defendant nos.1 to 5 carried the matter in second appeal to the High Court.

H

10. By impugned judgment dated 24.3.03, the High Court came to the conclusion that the transaction in favour of the plaintiffs executed by Nimbaji and his four sons was on account of legal necessity; that the plaintiffs had established their need by way of marriage and educational expenses; that the plaintiffs had proved the legal necessity; that the law requires that the need should be established and it was not necessary to consider whether the consideration received by Nimbaji and his four sons exceeded their need and accordingly it was held that the trial court was right in coming to the conclusion that the conveyance executed by Nimbaji in favour of the plaintiffs dated 31.3.75, was for legal necessity. In the result, all the three courts decreed the suit in favour of the plaintiffs for different reasons.

11. Mr. V.A. Mohta, learned senior counsel appearing on behalf of defendant nos.1 to 5 (appellants herein), submitted that the lower appellate court had rightly held that there was no legal necessity for Nimbaji and his four sons to execute the conveyance in favour of the plaintiffs on 31.3.75. It was urged that the lower appellate court was pleased to give the above finding as a court on facts. Learned counsel urged that on this finding alone the lower appellate court should have dismissed the suit of the plaintiffs for possession and mesne profits. Learned counsel submitted that conveyance dated 31.3.75 was executed by the *Karta* and his four sons in favour of the plaintiffs without consent of Panditrao and without legal necessity. Learned counsel submitted that Panditrao was also coparcener and entitled to a share in the property who neither consented nor signed the conveyance in favour of the plaintiffs and who on the contrary had entered into a conveyance on 29.3.75 in favour of defendant nos.1 to 5 in respect of his undivided share and since Panditrao had sold 2 acres and 2 gunthas of land out of 9 acres and 16 gunthas earlier in point of time Nimbaji could not have sold the same land twice over.

12. We do not find any merit in the above civil appeal. Even assuming for the sake of argument that the conveyance dated 31.3.75 executed by Nimbaji and his four sons was not for legal necessity even then the defendants' position cannot improve. Nimbaji was the *Karta* of the Hindu Undivided Family. Lands admeasuring 9 acres and 16 gunthas was an ancestral property of Nimbaji. Nimbaji had five sons. Nimbaji and his four sons agreed to sell their ancestral lands to the plaintiffs. Agreement was reduced into writing. Agreement was registered. Agreement was followed by a conveyance. Conveyance was followed by possession given to the plaintiffs who claim to be forcibly dispossessed. Defendant nos.1 to 5 failed to institute proceedings

A for general partition. The primary step of defendant nos.1 to 5 was to sue for partition. They failed to take any steps in this regard. No consequential relief was claimed by them for partition and for demarcation for their share. The plaintiffs had instituted the suit for possession on the ground that they were forcibly dispossessed by defendant nos.1 to 5. Since the *Karta* of Hindu Undivided Family with his four sons had executed the conveyance in favour of the plaintiffs, the suit filed by the plaintiffs for possession cannot be dismissed on the ground of lack of legal necessity. A *karta* has power to alienate for value the joint family property either for necessity or for benefit of the estate. He can alienate with the consent of all the coparceners of the family. When he alienates for legal necessity he alienates an interest which is larger than his undivided interest. When the *Karta*, however, conveys by way of imprudent transaction, the alienation is voidable to the extent of the undivided share of the non-consenting coparcener which in the present case was Panditrao. In the present case, Panditrao did not sue for partition. He did not ask for demarcation of his share. Defendant nos.1 to 5 who claim through Panditrao seek possession of a specific portion of the land to be demarcated without filing a suit for partition by metes and bounds. The conveyance by Nimbaji and his four sons is not disputed by the said coparceners. The conveyance executed by Nimbaji and others is true which is different from saying that it is an imprudent transaction. Once it is found that the conveyance executed by Nimbaji and others is true under which the plaintiffs were put in possession and later on disposed, in the suit for possession, in such an event, the issue of legal necessity becomes irrelevant. A mere declaration that transaction was imprudent or was not for legal necessity in such a suit cannot give any right to defendant nos.1 to 5 to get the demarcated portion of 2 acres 2 gunthas of land on the southern side without the said defendants taking appropriate proceedings in accordance with law.

13. In the case of *Sunil Kumar and Anr. v. Ram Parkash and Ors.*, AIR (1988) SC 576, this Court has held that the right to obstruct alienation is different from the right to challenge the alienation. The coparcener has a right to challenge the alienation. However, he has no right to interfere in the act of management of the joint family affairs. In this connection, the following observations in paras 21 to 26 of this Court are relevant to be noted:

“21. In a Hindu family, the *karta* or manager occupies a unique position. It is not as if anybody could become manager of a joint Hindu family.

“As a general rule, the father of a family, if alive, and in his absence

the senior member of the family, is alone entitled to manage the joint family property.” The manager occupies a position superior to other members. He has greater rights and duties. He must look after the family interest. He is entitled to possession of the entire joint estate. He is also entitled to manage the family properties. In other words, the actual possession and management of the joint family property must vest in him. He may consult the members of the family and if necessary take their consent to his action but he is not answerable to every one of them.

22. The legal position of *karta* or manager has been succinctly summarised in the MAYNE’S Hindu Law (12th Ed. Para 318) thus:

318. Manager’s Legal position “The position of a *karta* or manager is *sui generis*: the relation between him and the other members of the family is not that of principal and agent, or of partners, it is more like that of a trustee and cestui que trust. But the fiduciary relationship does not involve all the duties which are imposed upon trustees.

23. The managing member or *karta* has not only the power to manage but also power to alienate joint family property. The alienation may be either for family necessity or for the benefit of the estate. Such alienation would bind the interests of all the undivided members of the family whether they are adults or minors. The oft quoted decision in this aspect, is that of the Privy Council in *Hanuman Parshad v. M.T. Babooee* (1956) 6 Moo Ind. App. 393. There it was observed at p. 423: (1) “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 case of need, or for the benefit of the estate.” This case was that of a mother, managing as guardian for an infant heir. A father who happens to be the manager of an undivided Hindu family certainly has greater powers to which I will refer a little later. Any other manager however, is not having anything less than those stated in the said case. Therefore, it has been repeatedly held that the principles laid down in that case apply equally to a father or other coparcener who manages the joint family estate.

Remedies against alienations:

24. Although the power of disposition of joint family property has

A been conceded to the manager of joint Hindu family for the reasons aforesaid, the law raises no presumption as to the validity of his transactions. His acts could be questioned in the Court of law. The other members of the family have a right to have the transaction declared void, if not justified. When an alienation is challenged as being unjustified or illegal it would be for the alienee to prove that there was legal necessity in fact or that he made proper and *bona fide* enquiry as to the existence of such necessity. It would be for the alienee to prove that he did all that was reasonable to satisfy himself as to the existence of such necessity. If the alienation is found to be unjustified, then it would be declared void. Such alienations would be void except to the extent of manager's share in Madras, Bombay and Central Provinces. The purchaser could get only the manager's share. But in other provinces, the purchaser would not get even that much. The entire alienation would be void. [Mayne's Hindu Law 11th ed. para 396].

D 25. In the light of these principles, I may now examine the correctness of the contentions urged in this appeal. The submissions of Mr. H.N.Salve, as I understand, proceeded firstly on the premise that a coparcener has as much interest as that of karta in the coparcenary property. Second, the right of coparcener in respect of his share in the ancestral property would remain unimpaired, if the alienation is not for legal necessity or for the benefit of the estate. When these two rights are preserved to a coparcener, why should he not prevent the *karta* from dissipating the ancestral property by moving the Court? Why should he vainly wait till the purchaser gets title to the property? This appears to be the line of reasoning adopted by the learned Counsel.

F 26. I do not think that these submissions are sound. It is true that a coparcener takes by birth an interest in the ancestral property, but he is not entitled to separate possession of the coparcenary estate. His rights are not independent of the control of the *karta*. It would be for the karta to consider the actual pressure on the joint family estate. It would be for him to foresee the danger to be averted. And it would be for him to examine as to how best the joint family estate could be beneficially put into use to subserve the interests of the family. A coparcener cannot interfere in these acts of management. Apart from that, a father-karta in addition to the aforesaid powers of alienation has also the special power to sell or mortgage ancestral property to

H

discharge his antecedent debt which is not tainted with immorality. If there is no such need or benefit, the purchaser takes risk and the right and interest of coparcener will remain unimpaired in the alienated property. No doubt the law confers a right on the coparcener to challenge the alienation made by *karta*, but that right is not inclusive of the right to obstruct alienation. Nor the right to obstruct alienation could be considered as incidental to the right to challenge the alienation. These are two distinct rights. One is the right to claim a share in the joint family estate free from unnecessary and unwanted encumbrance. The other is a right to interfere with the act of management of the joint family affairs. The coparcener cannot claim the latter right and indeed, he is not entitled for it. Therefore, he cannot move the court to grant relief by injunction restraining the *karta* from alienating the coparcenary property.”

14. In the case of *Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh and Ors.*, AIR (1953) SC 487, this Court vide paras 9 and 11 has held as follows:

“9. It is true that under the Mitakshara law, as it is administered in the State of Bihar, no coparcener can alienate, even for valuable consideration, his undivided interest in the joint property without the consent of his coparceners; but although a coparcener is incompetent to alienate voluntarily his undivided coparcenary interest, it is open to the creditor, who has obtained a decree against him personally, to attach and put up to sale this undivided interest, and after purchase to have the interest separated by a suit for partition.

11. ‘Civil Appeals Nos.54 and 55 of 1951’. Coming now to the Money Appeals, the point for consideration is a short one. The suits out of which these appeals arise were instituted by the plaintiff in the partition suit against the first party defendants for recovery of his 4 annas share of the income or profits of the properties specified in the schedules to the plaints and which were included admittedly in his purchase, on the allegation that the defendants first party appropriated the entire profits to themselves and refused to give the plaintiff his legitimate share. The High Court has held that this claim of the plaintiff must fail. *All that he purchased at the execution sale was the undivided interest of the coparceners in the joint property. He did not acquire title to any defined share in the property & was not entitled to joint possession from the date of his purchase. He could*

- A *work out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour.* In our opinion, this is the right view to take and Mr. Daphtary, who appeared in support of the appeals, could not satisfy us that in law his client was entitled to joint possession on and from the date of purchase. The result is that these appeals are dismissed with costs.”
- B

15. In the case of *Balmukand v. Kamla Wati and Ors.*, AIR (1964) SC 1385, this Court has held that in exceptional circumstances the Court will uphold the alienation of a part of a joint family property by a *Karta*. We quote hereinbelow para 7 of the said judgment in this regard:

- C
- “7. The next case is *Sital Prasad Singh v. Ajablal Mander*, I.L.R. 18 Pat. 306 : (AIR 1939 Pat. 370). That was a case in which one of the questions which arose for consideration was the power of a manager to alienate part of the joint family property for the acquisition of new property. In that case also the test applied to the transaction entered into by a manager of a joint Hindu family was held to be the same, that is, whether the transaction was one into which a prudent owner would enter in the ordinary course of management in order to benefit the estate. Following the view taken in the Allahabad case the learned Judges also held that the expression “benefit of the estate” has a wider meaning than mere compelling necessity and is not limited to transactions of a purely defensive nature. In the course of his judgment Harries C.J. observed at p. 311 (of I.L.R. Pat.) : (at p.372 of AIR) :
- D
- “..... the *karta* of a joint Hindu family being merely a manager and not an absolute owner, the Hindu law has, like other systems of law, placed certain limitations upon his power to alienate property which is owned by the joint family. The Hindu law givers, however, could not have intended to impose any such restriction on his power as would virtually disqualify him from doing anything to improve the conditions of the family. The only reasonable limitation which can be imposed on the *karta* is that he must act with prudence, and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct.”
- E
- F
- G

After observing that the transaction entered into by a manager should not be of a speculative nature the learned Chief Justice observed:

- H “In exceptional circumstances, however, the court will uphold

the alienation of a part of the joint family property by a karta A
for the acquisition of new property as, for example, where all the
adult members of the joint family with the knowledge available to
them and possessing all the necessary information about the
means and requirements of the family are convinced that the
proposed purchase of the new property is for the benefit of the B
estate.”

(emphasis supplied)

16. In the present case, Nimbaji and his four sons have conveyed, in
any event, their undivided share in the land admeasuring 9 acres 16 gunthas C
to the plaintiffs. Defendant nos.1 to 5 are seeking a certain specific portion
out of the total area of 9 acres 16 gunthas to be allotted to them coming from
the share of Panditrao. However, neither Panditrao nor their successors-in-
title, namely, defendant nos.1 to 5 (appellants herein) instituted a suit for
partition. In the circumstances, the lower appellate court was right in holding D
that legal necessity in the present suit for possession was not a “fact in
issue”. All the courts below decreed the suit in favour of the plaintiffs.
However, it is not in dispute that Panditrao was the non-consenting coparcener;
that he had objected to the transaction by Nimbaji right from inception; that
in the suit plaintiffs did not seek cancellation of the sale deed by Panditrao
and, therefore, it will be open to the appellants herein to take appropriate E
proceedings in accordance with law for specific demarcation of the undivided
share of Panditrao.

17. Subject to what is stated above, the present civil appeal is dismissed
with no order as to costs.

B.S.

Appeal dismissed. F