

PATNA HIGH COURT

Nathuni Mishra

Vs

Mahesh Misra

(Kanhaiya Singh and R Singh, JJ.)

05.11.1962

JUDGMENT

Kanhaiya Singh, J.

1. This Second Appeal By the defendants arises out of a suit for specific performance of contract. In this case there is a competition between a contract of sale and a completed sale deed. The plaintiff had a contract of sale dated the 1st Chait, 1352 Jhasli, corresponding to the 9th March, 1955, executed in his favour by defendant No. 1. Defendant No. 1 had contracted to sell to the plaintiff 9 kathas of land for Rs. 500, and this contract of sale was entered into to raise money to meet the expenses of marriage of defendant No. 1 himself. It appears that the defendant No. 1 executed a sale deed in favour of defendants second party on the 17th of January, 1955, in respect of the suit land for a consideration of Rs. 400, which was subsequently registered on the 16th of May, 1955. In point of time, therefore, the sale deed in favor of defendants second party was prima facie earlier than the contract of sale in favour of the plaintiff. The case of the plaintiff was that this sale deed was in fact executed after the contract of: sale in his favour and was ante-dated. Defendants first party, however, denied that they had executed any contract of sale in favour of the plaintiff, and they denied also the receipt of the consideration. They admitted the execution of the sale deed in favour of defendants second party. The latter also raised the same defence, and, in addition, pleaded that they were bona fide transferees for value without notice of the contract of sale in favour of the plaintiff. Both the Courts have concurrently held that the contract of sale in favour of the plaintiff was genuine and for consideration and also for legal necessity inasmuch as the marriage expenses of defendant No. 1 was in law a legal necessity. They also held that the sale deed in favour of defendants second party was not genuine and was in fact executed after the contract of sale in favour of the plaintiff and was ante-dated. They also held that defendants second party were not bona fide purchasers and had notice of the contract of sale and have not also paid the consideration. Accordingly, both the Courts have granted the plaintiff a decree for specific performance of contract.

2. Before I proceed to consider the points urged in this appeal, it will be necessary to mention

one more fact. From the Judgment and decree of the learned Munsif two appeals had been preferred, one by the defendants first party and the other by the defendants second party. In appeal defendants first party raised the same contentions as they had urged before the learned Munsif. Both the appeals were dismissed by the learned Subordinate Judge.

3. Mr. B. C. De appearing for the appellants contended that the contract of sale was not binding on the minor defendants first party inasmuch as it was not for the benefit of the minors. His contention is that the marriage expenses of defendant No. 1 may constitute legal necessity, but under the Hindu law, in order to bind the minors the existence of legal necessity was not adequate. The plaintiff had further to prove benefit to the minors. In support of his contention he referred to a decision of the Privy Council in the case of *Subrahmanyam V, Subba Rao*, reported in 75 Ind App 115: (AIR 1948 PC 95). Learned Counsel on behalf of the plaintiff respondent argued that this ground was not available to the appellants inasmuch as the appeal preferred by the defendants first party from the judgment and decree of the learned Munsif was dismissed, and no further appeal has been taken by them to this Court. And in support of his contention he referred to a decision of the Privy Council in the case of *Bhup Narain Singh v. Gokul Chand Mahton, reported in*¹ In my opinion, the contention of learned Counsel for the respondent is correct and must be upheld. In that case the plaintiff brought a suit for specific performance of contract for sale of certain immovable property. An agreement was executed by defendant No. 1, who was respondent No. 2 before the Privy Council, as karta of the joint family which consisted of himself and his two sons. Defendant No. 4, who was respondent No. 1 before the Privy Council, claimed the property in suit by virtue of a registered sale deed dated the 22nd, December, 1926, for himself and as guardian of his two minor sons. Defendant No. 1 did not appear to defend the suit. But defendants Nos. 2 and 3 put in a written statement by their guardian ad litem, denying the plaintiff's contract, and alternatively, in the event of the contract being held proved, denying that defendant No. 1 was entitled to alienate their interests, as the sale was not for family interest or for their benefit. All the defences of defendants Nos. 2 and 3 were rejected by the Subordinate Judge, and no appeal was taken against that decision to the High Court. The appeal before the High Court was only by defendant No. 4. Before the Privy Council the points raised by defendants Nos. 2 and 3 were reiterated on behalf of defendant No. 4 in order to disentitle the plaintiff to a decree for specific performance of contract. Their Lordship of the Privy Council held that since from the decision of the learned Subordinate Judge against the contentions raised by defendants Nos. 2 and 3 no appeal was preferred to the High Court, the contention raised on behalf of the subsequent transferee, defendant No. 4, was not open and could not be maintained. In fact, their Lordships debarred defendant No. 4 from raising the contentions which were available to and could have been raised on behalf of defendants Nos. 2 and 3 simply because, against the adverse decision of the learned Subordinate Judge, no appeal was taken to the High Court. Similarly, in this case it will appear that defendants first party had no doubt preferred appeal from the decision of the learned Munsif, and that appeal was dismissed by the learned Subordinate Judge, but no further appeal has been preferred against that decree to this Court. In these circumstances, it is not open to the appellants to raise the contentions which

were germane to the defence set up by defendants first party. On this ground alone the contention raised by Mr. De is not tenable.

4. Apart from this, I find no warrant for the proposition of law that in case of a contract of sale the proof of legal necessity is not enough, and that, in addition to the legal necessity, there must be a further proof of actual benefit to the minors. The decision of their Lordships of the Privy Council in the case reported in 75 Ind App 115: (AIR 1948 PC 95), does not, in my opinion, support the contention of learned Counsel. It is true that in that case it has been mentioned that the contract must be within the competence of the guardian and further that it must be for the benefit of the minor. From this it cannot be argued that the contract, though for legal necessity, is invalid because no actual benefit accrued to the minors. The reason is obvious. This question was not pointedly raised before their Lordships of the Privy Council, and, therefore, the decision in that case cannot be regarded as authority for the proposition that in order to bind the minors in respect of a contract of sale benefit to them must also be established in addition to the existence of legal necessity. There are, however, two direct authorities of this Court on this point. In the case of *Jatadhari Prasad v. Kishun Lal*, reported in AIR 1950 Pat 535, a Bench of this Court held that in a suit instituted against a joint family a decree for specific performance can be passed, and it will be binding on all the other members of the joint family, including a minor coparcener, if the transaction is found to be warranted by legal necessity or for benefit to the estate. In other words, in order to bind the minors what is necessary to establish is legal necessity or the benefit to the estate. IF either of the two exists, the minor coparceners will be bound by the contract of sale. The same view has been expressed recently by another Bench of this Court in the case of *Bhageran Rai v. Bhagwan Singh*, reported in² in the following terms:

"It is thus settled beyond controversy that where a manager and karta of a Hindu joint family enters into a contract for the sale of immovable property belonging to the family for a legal necessity the purchaser is entitled in law to obtain a decree for specific performance of contract, though some of the members of the joint family are minors, in case the manager subsequently refuses to complete) the transaction of sale, the only requirement for the validity of such a contract of sale is that there must be a justifying necessity. Indeed, this is true of all transfers effected by the manager and karta of a Hindu joint family."

Therefore, if legal necessity for the contract of sale has been established, it is, in my opinion, enough to bind the minor coparceners also, and it is not necessary in such a case to establish, in addition to the legal necessity, actual benefit to the minors. Both the Courts below have held that the contract of sale was made for legal necessity. From this point of view this contention has no merit and must be rejected.

5. The next contention on behalf of the appellants is that, in any case, the sale deed cannot be executed now in favour of the plaintiff in view of the subsequent change in the law, and

reference was made to Section 11 of the Hindu Minority and Guardianship Act, 1956. This Act came into force on the 25th August, 1956. Apparently, the contract for sale, or for the matter of that, the sale deed in favour of defendants second party, were executed long before this Act came into force. Section 11 of the said Act provides that after the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being a de facto guardian of the minor. There are three objections to this contention: first, that this objection is not available to the appellants for the reasons stated above; secondly, that this section does not deal with the disposal of the undivided interest of a minor in a joint Hindu family governed by the Mitakshara school of law. As a matter of fact, Section 12 provides that no guardian shall be appointed for the minor in respect of the undivided interest in a joint Hindu family. It cannot reasonably be argued that Section 11 bars a sale by a karta and manager of a joint family even though the sale deed is for legal necessity or for the benefit of the estate. I fail to understand how Section 11 can be pleaded as a bar to the disposal of joint family property by the manager or the karta of the family for legal necessity. It seems beyond controversy that if the minor is a member of a joint family governed by the Mitakshara law, the father as karta or manager is entitled to the management of the whole coparcenary property, including the minor's interest. I may only refer to paragraph 519, page 680, or Mulla's Hindu law, 12th Edition.

6. The third objection is that as the opening words of Section 11 show, it is not retrospective in operation. Mr. De, however, contended that the contract for sale in favour of the plaintiff was executed, but the sale deed had not yet been executed in pursuance of that contract. Therefore, the Sale deed must be executed, if at all after the enforcement of the said Act. This contention, in my opinion, is wholly misconceived. The plaintiff's right to acquire the property by virtue of the contract for sale arose before the Act came into force, and the sale deed is only an instrument to implement that right. Therefore, this right of the plaintiff which accrued before the Act came into force cannot be taken away by Section 11 because of lack of retrospectivity.

7. Inus taking any view of the case, Section 11 has no application to the facts of the present case.

8. Lastly, Mr. De contended that the sale in favour of the appellants was protected because they had paid consideration and had no knowledge of the contract for sale in favour of the plaintiff. This contention is concluded by the unanimous findings of fact recorded by the Courts below. Three things have to be proved in such a case: first, that there was a sale in favour of the appellants; second-ly, that it was for consideration: and thirdly, that they had no notice of the prior contract for sale in favour of plaintiff. On all these three points there are findings of the Courts below. They have held that this deed of sale was ante-dated; secondly, that no consideration was paid, and thirdly, that it was a collusive transaction and they had notice of the contract of sale. In view of these findings of fact, it is not open to the appellants to contend that they had no notice of the prior contract of sale in favour of the plaintiff. Mr. De contended that notice was inferred by the Courts below from the existence of enmity between the plaintiff and

the subsequent transferees. This, in my opinion, is not correct. In fact the lower appellate court has held that defendants first party were colluding with Nathuni, one of the appellants. If the sale in favour of the appellants was brought about in collusion with defendants first party without consideration, they must be fastened with the knowledge of the prior contract, enmity or no enmity. In my opinion, these findings of fact are unassailable and cannot be challenged in Second Appeal,

9. It follows that there is no merit in this appeal, which must be dismissed with costs.

Ramratna Singh, J

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10. I agree.

Cases Referred.

161 Ind App 115: (AIR 1934 PC 68)

21962 BL JR 549: (AIR 1962 Pat 319)