

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION (STAMP) NO.3574 OF 2015

Smt. Rukminibai alias Rukmini Namdeo Ubhe .. Petitioner

Versus

Shri. Dattatray Bahdu Tupe and and others .. Respondents

Mr. Sanskar Marathe, for the Petitioner.

CORAM : R.M. SAVANT, J.

DATE : 15th SEPTEMBER, 2015

PC.

1. The Writ Jurisdiction of this Court is invoked against the order dated 31.10.2014 passed by the Learned 18th Joint Civil Judge Junior Division, Pune, by which order the application for recasting of issue No.2 came to be rejected. The Petitioner is the original Plaintiff who has filed the suit in question for partition and for declaration of her share in the suit property. In the said suit, a Release Deed allegedly executed by the Petitioner/Plaintiff is in contention. On the basis of the pleadings of the parties, the issues were framed, amongst which is the issue No.2 which reads thus :-

“Whether the plaintiff further proves that the defendant No.1 to 3 have got executed release deed fraudulently ?”

The Plaintiff has thereafter filed the instant application for recasting of the said issue so as to recast the issue as under :-

“Whether defendant No.1 and 2 proves that the release deed dated 15.12.2009 executed by Plaintiff is legal and valid ?”

2. The said application was opposed to on behalf of the Defendants by filing reply vide Exh.47 and contended that there was no necessity to interfere with the issues which have already been framed vide Exh.41. Before the Trial Court on behalf of the Plaintiff reliance was placed on the judgments which have been referred to in the impugned order. The Trial Court considered the said application and rejected the same by the impugned order dated 31.10.2014. The Trial Court held that the issues have been framed pursuant to the assertions of the parties in their respective pleadings and the burden is therefore on the respective parties to prove their respective assertions and therefore the issues as framed need not be recasted. The Learned Counsel appearing on behalf of the Petitioner/original Plaintiff sought to reiterate the case of the Plaintiff before the Trial Court and by placing reliance on the judgment of the Apex Court reported in **2003 AIR (SC) 4351** in the matter of **Krishna Mohan Kul @ Nani Charan Kul Vs. Pratima Maity** would contend that since the Plaintiff is in fiduciary capacity in the instant case, the burden to prove the said Release Deed as legal and valid is required to be placed on the

Defendant and not the Plaintiff. In my view, it is not possible to accept the said contention urged on behalf of the Petitioner. It is required to be noted that the Petitioner is alleging fraud in respect of the execution of the Release Deed which she herself has allegedly executed and therefore the burden would be on the Plaintiff in so far as the said issue No.2 is concerned. In the case before the Apex Court the executant was a person aged 106 years and was illiterate and ailing who it seems was unable to comprehend the nature of the document or the contents thereof. The Apex Court observed that when the parties are in a fiduciary relationship, the burden of proof is on donee or those claiming through him. In the said case, the executant was not a party to the proceedings but reliance was sought to be placed on the Deed which was executed by the Defendants. In the instant case, as indicated above, it is the Plaintiff who is the alleged signatory to the document and who is alleging a fraud having been committed by the Defendants in getting the document executed from her. In my view, therefore, the issue No.2 as originally framed by the Trial Court vide Exh.41 does not call for any recasting of the same. The order passed by the Trial Court does not warrant any interference at the hands of this Court in its Writ Jurisdiction. The Writ Petition is accordingly dismissed.

[R.M. SAVANT, J]

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment/Order.