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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.10215 OF 2016

Smt. Sumanbai w/o Subhash Mohite,
Age: 68 years, Occ: Agri., &
Household, R/o. Hatnur, Tal. Kannad,
District Aurangabad. ..PETITIONER

VERSUS

1. Sham s/o Pundlik Mohite,
Age: 23 years, Occ: Education,
R/o. Hatnur, Tal. Kannad,
Dist. Aurangabad.
2. Pundlik s/o Ramrao Mohite,
Age: 65 years, Occ: Agri.,
R/o. Hatnur, Tal. Kannad,
Dist. Aurangabad. ..RESPONDENTS

Mr K.C. Sant, Advocate for petitioner;
Mr P.V. Barde, Advocate for respondent No.2

CORAM : NITIN W. SAMBRE, J.

DATE : 11th OCTOBER, 2017

ORAL ORDER :

The petitioner-plaintiff filed suit for declaration that the sale deed in question was executed, wherein consent was not free consent and which was under the influence that the document was got executed.

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2. When the suit was fixed for arguments, the application under Order 20 Rule 5 of the Code of Civil Procedure for recasting of issues is made. The nature of issue, that is sought to be recasted is, having regard to the age of vendor and her state of mind, whether the defendants have discharged burden by establishing that sale deed was executed, which was free from undue influence.

3. A support is drawn from the judgment of the Apex Court in the matter of **Mst. Sethani vs Bhana** reported in **A.I.R. 1993 SC 956** and in **Bellachi (dead) by L.R. vs Pakeeran** reported in **A.I.R. 2009 SC 3293** so as to submit that in case of plea of undue influence, having regard to the provisions of Section 23 of the Contract Act, onus to prove that the sale deed was not executed under undue influence is on the defendants and as such, specific issue has to be framed to that effect.

4. Mr. Barde, learned Counsel for respondent No.2 submits that the suit having regard to reached

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at the end i.e. stage of arguments, the petitioner has moved the application for recasting of issues with intention to prolong the litigation. According to him, reversal of burden of proof is not permitted, particularly when the plaintiff himself is coming out with the case of undue influence. He submits that the case in hand is qualifying requirements as are considered by the Apex Court in paragraph-4 of Mst. Sethani's case and also present petitioner has not discharged her onus so as to shift burden of the present respondents.

5. Considered rival submissions. It is not brought on record as to how, while proving the issue of undue influence of present petitioner was discharged by him, when confronted, he submits that the consideration was not parted before Sub Registrar. In response to Court's query, whether Sub Registrar or witness to the document in question was examined or not, parties are not in a position to assist the Court.

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6. Apart from above, it is required to be noted that present petitioner-plaintiff was separate in mess, whose husband, son of the predecessor of vendor.

7. Respondent No.1, who has purchased the suit property, is grandson of the vendor. In the aforesaid background, the claim as is sought to be put forth, onus should be shifted by the defendant to prove that sale deed was not executed under undue influence, in my opinion, cannot be considered, particularly having regard to the stage of suit. As such, the petition lacks merit and stands dismissed.

(**NITIN W. SAMBRE, J.**)

Tupe