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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9281 OF 2017

Sk. Shafique Ahemad s/o Sk. Basheeruddin Ahmed PETITIONER
Age - 32 years, Occ - Business & Agriculture
R/o C/o Fancy Readymade,
Umariya Complex, Ambedkar Road,
Parbhani, Taluka and District - Parbhani

VERSUS

- | | |
|---|-------------|
| 1. Sk. Ashafaque Ahemad
s/o Sk. Basherrudin Ahmed
Age - 41 years, Occ - Business
R/o Quadrabad Plot, Parbhani
Taluka and District - Parbhani | RESPONDENTS |
| 2. Sk. Ishtiyaque s/o Sk. Basheeruddin
Age - 39 years, Occ - Private Service
R/o Quadrabad Plot, Parbhani
Taluka and District - Parbhani | |

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Mr. Pravin N. Kalani, Advocate for the petitioner
Mr. Kayyum N. Shaikh, Advocate for respondents
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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 4th SEPTEMBER, 2018

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith and heard learned advocates for the parties finally with consent.
2. Petitioner challenges order dated 18th July, 2014 on Exhibit-1 in Regular Civil Suit No. 147 of 2012, whereunder defendants'

request, to cast burden in respect of pleadings appearing in paragraph No. 6 of the plaint and averments appearing in paragraph No. 7 of the written statement, looking at the nature of averments and sections 101 and 102 of the Indian Evidence Act, 1872, should be placed on the plaintiffs, has been turned down. As such, petitioner - defendant No. 3 in Regular Civil Suit No. 147 of 2012 is before this court.

3. Learned advocate for the petitioner submits that generally, presumption is in favour of transactions and in the circumstances, while a party asserts those are not to be legal, burden is to be discharged by such a party who claims the transactions to be illegal or not legal. He submits that strangely, however, learned judge appears to have presumed the transactions to be not legal and has purportedly cast burden on defendants to show that those are legal. He submits that if the plaintiffs failed to discharge their burden, there is no question of rebutting the evidence so led by the plaintiffs and if the plaintiffs would discharge such a burden, in such a case, defendants would have an opportunity to rebut the evidence, which in the circumstances, gets lost for them. He, therefore, submits that having regard to pleadings as well as provisions of law, burden is required to be cast on the plaintiffs to prove that transactions entered into, referred to in paragraph No. 6 of the plaint, are not

legal.

4. On the other hand, Mr. Kayyum Shaikh, learned advocate appearing on behalf of the respondents submits that while the defendants aver that the transaction is legal, in natural course, burden would be on them to show that it is legal. He submits that the issue has been framed having regard to factual background of the matter and the legal position. He submits that on appreciation of pleadings, learned judge has framed issue No. 6. It does not cause any prejudice to the defendants. According to him, issue has been framed since *prima facie* sequence of events and the transactions indicate that those are not legal. As such, no fault be found with the framing of issues.

5. Although, learned advocate for the respondents has contended so, one may have to give regard to provisions of Order XIV of the Civil Procedure Code and sections 101 and 102 of the Indian Evidence Act. All these aspects are not reflected in the impugned order. In the circumstances, it would be expedient that the claim of the defendants will have to be re-addressed before trial court in accordance with facts and law.

6. As such, impugned order dated 18th July, 2014 on Exhibit-1 in Regular Civil Suit No. 147 of 2012 passed by 2nd Joint Civil Judge, Senior Division, Parbhani is set aside. Matter is remitted

to the trial court for reconsideration. Writ petition, as such, is partly allowed. Rule is made absolute in aforesaid terms. It is open for the defendants to file appropriate application.

Dinesh
Ramrao
Pawar

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Ramrao
Pawar
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[SUNIL P. DESHMUKH, J.]

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