

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

WRIT PETITION NO. 5005 of 2018

Nirmala Sanjay More

Age : 50 years, Occ : Household,

R/o. 3/10, Kavita Nagar,

Raviwar Peth, Solapur

.. Petitioner

Vs.

Govind Ambadas Anagude

Age : 43 years, Occ.: Business,

R/o. 1193, North Kasba,

Tilak Chowk, Solapur

.. Respondent

Shri Samir Kumbhakoni, Advocate for petitioner.

Mr. Anand Shrikant Kulkarni, Advocate for respondent.

CORAM : N.J. JAMADAR, J.

RESERVED ON : 22ND MARCH 2019

PRONOUNCED ON : 5TH APRIL 2019

JUDGMENT :

1) Rule. Rule made returnable forthwith and with the consent of the learned counsels for parties, heard finally.

2) By virtue of this petition under Article 227 of the Constitution of India, the petitioner takes exception to an order dated 2nd January 2018 passed on an application for recast of issues in Special Civil Suit No.10 of 2016, whereby the learned Civil Judge, Senior Division, Solapur rejected the said application.

3) The facts in brief are as under :-

The petitioner-plaintiff purchased an open plot of land, bearing Plot No.95, admeasuring 139.40 sq.mtrs. situated at Mazarewadi, Solapur under registered sale deed executed by the respondent-defendant for a consideration of Rs.1,93,000/- ('The suit plot'). The defendant had represented, *inter-alia*, that the original land owner, viz., Dhansingh Genu Rathod had executed a Power of Attorney in favour of one Smt. Rohini Rupchand Jamadar, who had, in turn, executed Conveyance in favour of the defendant on 15th December 2005. In the year 2014, when the plaintiff visited the suit plot, it transpired that one Shri Kumar Ganpat Jadhav had erected fencing thereon. On further enquiry, it was revealed that the defendant had concealed the fact that on the date of execution of the sale deed in favour of the defendant, original holder-Dhansingh Genu Rathod, had already died. The heirs of the said Dhansingh Genu Rathod executed the sale deed in respect of the suit plot in favour of Kumar Ganpat Jadhav. As the power of attorney executed in favour of Smt. Rohini Rupchand Jamadar came to an end upon the death of the executant-Dhansingh Genu Rathod, no title passed to the defendant. The plaintiff thus instituted the suit for cancellation of the sale deed dated 25th August 2006 and for damages of Rs.8 lakhs.

4) The defendant resisted the suit by filing written statement. The

defendant contended that despite the demise of the executant of the power of attorney the transaction was not vitiated as the power of attorney was executed for consideration. The plaintiff was shown all the relevant documents and, thus, there was no misrepresentation which warrants cancellation of instrument.

5) In the light of the aforesaid rival pleadings, the learned Civil Judge framed issues at Exh.10. The parties led evidence. When the matter was posted for arguments, the plaintiff preferred application for recast of issues. The draft issues, which the plaintiff submitted, for the consideration of the Court were as under :-

“Issue No.1 -”Whether the Defendant proves that the Power of Attorney executed by the Owner Dhansingh Genu Rathod was executed for consideration in favour of Rohini Rupchand Jamdar and therefore was irrevocable?”

Issue No.2 – Whether the Plaintiff is entitled to seek declaration that the sale deed dt. 25.8.2006 executed by the Defendant in favour of Plaintiff is illegal and liable to be cancelled?

6) After hearing the parties, the learned Civil Judge was persuaded to reject the application by the impugned order. The learned Judge was of the view that the plaintiff had preferred the application for recast of issues belatedly, after the parties led evidence in support of their rival claims and the matter was posted for arguments. The learned Civil Judge made a passing observation that the issues framed at Exh.10 were proper.

7) The learned counsel for the petitioner strenuously urged that the learned Civil Judge committed a grave error in rejecting the application for recast of issues on the sole ground that the application was preferred belatedly without adverting to the merits of the application. Since the provisions of Order XIV, Rule 5 of the Code of Civil Procedure, 1908 expressly empower the Court to amend and strike out the issues at any time, before passing a decree, the rejection of the application on the ground of delay alone, according to the learned counsel for the petitioner, is wholly untenable. It was further urged that the trial Court did not properly appreciate the nature of controversy between the parties, and the necessity of the proposed issues for a complete and effectual determination thereof.

8) In opposition to this, the learned counsel for the respondent-defendant would support the impugned order. It was submitted that the issues as at Exh.10 were framed as back as 18th March 2016. Not only the plaintiff did not agitate the question of proper issues not having been framed but also went on to lead evidence to the fullest. In this background, the application for recast of issues was nothing but a litigation strategy to delay the disposal of the suit, urged the learned counsel for the respondent-defendant.

9) It is pertinent to note that the plaintiff had approached the Court with a case that the defendant had professed to sell the said plot, over which the defendant had no title, on the date of execution of the conveyance. The defect in the defendant's title, according to the plaintiff, arose on account of the death of the executant of the power of attorney in favour of Smt. Rohini Rupchand Jamadar, who had executed the conveyance in favour of Dhansingh Genu Rathod, before the said conveyance. Thus, the plaintiff sought cancellation of the sale deed and prayed for damages.

10) In this backdrop, the pivotal issues which warrants adjudication is whether the sale deed executed by the defendant, on 25th August 2006, is legal and valid and conveyed title to the plaintiff?

11) It is pertinent to note that perusal of the issues framed at Exh.10, indicates that neither the issue about the legality and validity of the sale deed, dated 25th August 2006, executed by the defendant in favour of the plaintiff, nor the validity of the sale deed executed by Smt. Rohini Rupchand Jamadar in favour of the defendant, on account of the death of the executant of the power of attorney, before the said conveyance, has been framed. On the contrary, the trial Court had framed the following issues with regard to the power of attorney executed by the original holder

Dhansingh Genu Rathod in favour of Smt. Rohini Rupchand Jamadar :-

“1 Does plaintiff prove that GPA deed dated 15.12.2005 is null and void as on 28.07.2014 and prior to that?

2 Whether plaintiff is entitle to seek declaration to that effect? ”

12) From a bare perusal of the aforesaid issues, it becomes evident that the issues do not correctly reflect the real question in controversy between the parties. The core controversy is about the legality and validity of the sale deed executed by the defendant in favour of the plaintiff. The defendant contends that the death of the original owner, Dhansingh Genu Rathod, the executant of the power of attorney, did not impinge upon the power of Smt. Rohini Rupchand Jamadar to execute the sale deed in favour of defendant as the said power of attorney was for consideration.

13) In the backdrop of this defence, the trial Court would be required to delve into the aspect of the validity of the sale deed dated 25th August 2006 executed in favour of the defendant by Smt. Rohini Rupchand Jamadar. However, the trial Court is not expected to deal with the validity of the power attorney executed by Dhansingh Genu Rathod in favour of Smt. Rohini Rupchand Jamadar and give a declaration as to whether it was null and void, as reflected from the issues extracted above.

14) While deciding the question of validity of the sale deed executed by Smt.Rohini Rupchand Jamadar in favour of the defendant, the trial Court is required to keep in view the provisions of Section 202 of the Indian Contract Act, 1872 which govern the aspect of termination of agency, where the power of attorney is coupled with an interest. It reads as under :-

“202. Termination of agency, where agent has an interest in subject-matter—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or **death**.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or **death**.”

15) The trial Court may also consider the applicability of the proposition of law that, in certain cases, where the power of attorney has been executed for consideration and the execution of the conveyances by such power of attorney is only a consequential act, the death of the executant of power of attorney does not affect the validity of such conveyances.

16) In this view of the matter, the issues, as framed by the trial Court, lead to a legitimate apprehension that it has mis-directed itself in appreciating the real question in controversy between the parties. Thus, the

impugned order deserves to be quashed and set aside. It would be necessary to remit the matter to the learned Civil Judge, Senior Division, Solapur for a fresh consideration and to suitably re-cast the issues which correctly reflect the real question in controversy between the parties, and are necessary for determining the same.

17) The upshot of the above discussion is that the petition deserves to be allowed in the following terms :

- (i) The petition stands allowed.
- (ii) The impugned order stands quashed and set aside.
- (iii) The matter stands remitted to the learned Civil Judge, Senior Division, Solapur who shall hear the application Exh.43 afresh and frame appropriate issues so as to determine the real question in controversy between the parties, keeping in view the aforesaid observations.

However, it is made clear that it may not be construed that this Court has expressed any opinion on the merits of the suit, and the observations hereinabove were made only in the context of desirability of framing proper issues.

18) In the circumstances, there shall no order as to costs.

19) Rule is made absolute in the aforesaid terms.

[N.J. JAMADAR, J.]