

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 7414/2017

(USHAKANT RAJLINGAM YEDALWAR **VERSUS** MADANKUMAR LAXMANRAO SONGLE & ORS)

Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

Shri M.S. Sharma, counsel for petitioner.
 Shri S.G. Shukla with A.G. Agrawal, counsel for R-1.

CORAM : A.S. CHANDURKAR, J.

DATE : APRIL 18, 2019.

Heard finally with consent of counsel for the parties.

The original defendant in the suit for partition and separate possession filed by the respondent no.1 herein is aggrieved by the order passed by the trial Court below Exhibit 66 thereby refusing to recast the issues as sought.

In the suit as filed by the respondent no.1 which has been duly amended, a declaration has been sought that the house properties bearing House Nos.803, 804 and 819 are entitled to be partitioned and the plaintiff has 1/20th share therein. A further prayer has been made that the sale-deed dated 03.12.1927, gift-deed dated 11.01.1937 as well as will-deed dated 19.11.2007 do not relate to House No.804 and are thus not binding on the plaintiff. The trial Court after considering the pleadings of the parties had framed issues at Exhibit 65. Issue Nos. 3 and 4 were sought to be recasted by the defendant no.1 on the ground that the initial burden to prove that one Gangubai had no authority to execute the gift-deed in respect of House No.804 was on the plaintiff. The trial Court after considering the pleadings on record rejected the said application on the ground that since the defendant no.1 was claiming right on the basis of the will-deed dated 19.11.2007, the burden to prove the same was on the defendant no.1.

Heard Shri M.S. Sharma, learned counsel for the petitioner and Shri S.G. Shukla, learned counsel for the respondent no.1. After perusing the issues as framed below Exhibit 65 and especially Issue Nos.3 and 4, it is seen that by framing Issue No.1 the burden is on the plaintiff to prove that the entire suit property belonged to the father of the plaintiff's mother. Issue Nos. 3 and 4 are based on the pleadings of the defendant no.1 in her written statement. However, insofar as amended prayer 1-A in the plaint as regards seeking declaration that various documents executed do not relate to House No.804 and hence they are not binding on the plaintiff, it is seen that said aspect is not covered by the issues framed at Exhibit 65. Insofar as the prayer for recasting of Issue Nos.3 and 4 is concerned, it is found that those issues are based on the pleadings of defendant no.1 while defending the suit as filed by the plaintiff. It would not be necessary to recast those issues especially when Issue No.1 casts the burden on the plaintiff. However, it is found that an additional issue is required to be framed in the light of the reliefs sought by the plaintiff in the amended plaint. That issue would be, "Whether the plaintiff proves that the sale-deed dated 03.12.1927, gift-deed dated 11.01.1937 as well as will-deed dated 19.11.2007 do not relate to House No.804 and hence not binding on the plaintiff?" When this additional issue is framed, the apprehensions expressed by the defendant no.1 would be taken care of.

Accordingly, by maintaining the order passed below Exhibit 66, an additional issue is directed to be framed below Exhibit 65 which would be Issue No.1-A.

“Whether the plaintiff proves that the sale-deed dated 03.12.1927, gift-deed dated 11.01.1937 as well as will-deed dated 19.11.2007 do not relate to House No.804 and hence not binding on the plaintiff?”

With aforesaid directions, the writ petition is disposed of. No costs.

JUDGE

APTE