

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

906 WRIT PETITION NO.4269 OF 2019

**AJANTA URBAN CO OPERATIVE BANK LTD
THROUGH MANAGER AND ANOTHER
VERSUS
MANGALABAI RAMESHWAR CHARKHA AND OTHERS**

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Advocate for Petitioners : Mr. S.G. Dodya
Advocate for Respondent No.1 : Mr. A.M. Gholap h/f.
Mr. G.C. Navandar
Advocate for Respondent Nos.2 to 5 : Mr. D.B. Bhange

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CORAM : SHARMILA U. DESHMUKH, J.

DATE : 24-02-2023

PER COURT :

. The challenge in the petition is to the order dated 01.01.2019 along with the application filed by the respondent – plaintiff seeking recast of the issue. Regular Civil Suit No.409 of 2009 was instituted by the petitioners seeking a declaration as regards the ownership of the land and for a declaration that the suit property is not mortgaged and for order of perpetual injunction.

2. The petitioners herein is a Co-operative Bank and has obtained a recovery certificate under Section 101 of the Maharashtra Co-operative Societies Act. It is the case of the petitioners in the written statement that there was a mortgage deed executed by defendant nos.3 to 6 in respect of the suit property and as they failed

to deposit the installment amount recovery proceedings were instituted under Section 101 of the Maharashtra Co-operative Societies Act.

3. The trial Court below Exh.55 framed the following issues:

- '1] Does the plaintiff prove that she is owner and possessor of the suit land?
- 2] Does the plaintiff prove that there is no encumbrances or charge of any kind or mortgage on suit land?'

4. Subsequently an application came to be filed by the plaintiff below Exh.70 in view of the negative burden which was cast upon the plaintiff. The trial Court after considering the application below Exh.70 has recast the issue no.2 which reads as under:

- '2. Do defendant no.1 and 2 prove that defendants no.3 to 6 mortgage suit property in favour of defendants no.1 by executing mortgage deed?'

5. Learned counsel appearing for the petitioners submits that as it is the case of the plaintiff as there is no encumbrance of any kind on the suit land, the burden is upon the plaintiff to prove the same. He would further submits that there are various issues which have been raised particularly as regards the plaintiff not being a *bona fide* purchaser and the suit not being maintainable in view of the

recovery certificate issued under Section 101 of the Maharashtra Co-operative Societies Act and in view of the specific assertions an issue to that effect is required to be framed.

6. Per contra, the learned counsel appearing for the plaintiff – respondent submits that issue no. 2 below Exh.55 was erroneously framed as it is the specific case of the petitioner that the defendant nos.3 to 6 had executed a mortgage of the suit property in favour of the petitioner and as such the burden is upon the petitioner to prove the same.

7. Considered the rival submissions.

8. By the initial issue no.2 which was framed below Exh.55/B a negative burden was placed upon the respondent – plaintiff to prove that there is no encumbrance. It is well settled that there cannot be any proof of negative. Such negative burden is unable to be discharged. It is not disputed that the petitioners have raised a specific assertion that there is mortgage of the suit property in their favour by the defendant nos.3 to 6 and as such it is for the petitioners to discharge burden. Issues are framed when the proposition of law or fact is raised by one party and denied by the other and the burden to prove the affirmative is on the person who

asserts existence of the affirmative fact. In the present case, as the petitioners assert the existence of the mortgage deed in their favour, it is for the petitioners to prove the same. As regards the contentions that the other issues have not been framed, more particularly in respect of *bona fide* purchaser and maintainability, the learned counsel for the petitioners fairly concedes that no application was filed before the trial Court.

9. In light of the above, there is no infirmity in the recasting of the issue no.2 by the trial Court. Writ Petition is devoid of merits and stands dismissed.

10. Needless to state that if any application is being filed by the petitioners for framing of additional issue, same to be considered by the trial Court on its own merits and in accordance with law.

(SHARMILA U. DESHMUKH, J.)

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