

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

67 WRIT PETITION NO.13841 OF 2019

**PRITI MONESH SARDA
VERSUS
SATYNARAYAN GIRIDHARILAL BAJAJ AND ANR**

...
Advocate for Petitioner : Mr. Nilkanth P. Bangar
Advocate for Respondent No.2 : Mr. V.P. Golewar h/f.
Mr. Arvind R. Joshi

...

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 20-02-2023

PER COURT :

1. By this petition the challenge is to the order dated 16.01.2019 passed by the trial Court below Exh.47 in Regular Civil Suit No.334 of 2016 as regards recasting of the issues.

2. Learned counsel for the petitioner at the outset submits that the arguments in the present case are restricted to the extent of recasting of issue no.1.

3. Regular Civil Suit No.334 of 2016 was instituted by the petitioner against her father - respondent no.1 and respondent no.2 - Sangali Urban Co-operative Bank Ltd., for a declaration that the mortgage deed dated 23.12.2013 is void and is not binding on the petitioner and for an order of injunction restraining the respondent

no.2 from taking any action on the basis of the mortgage deed. It is the case of the petitioner that the properties forming part of the mortgage which is described in para 1-A and 1-B of the plaint are the joint family properties. It is further the case of the petitioner that as far as the property described in para 1-C is concerned, it is purchased out of the joint family funds and this property is also joint family property of the defendant no.1. In the said proceedings, written-statement came to be filed by the respondent no.2 - Bank. On 09.07.2018 the issues were framed by the trial Court and as far as the issue no.1 which is the subject matter of the present petition reads as under:

“1. Does plaintiff prove that suit properties are ancestral, undivided and joint family properties of herself, defendant No.1 and her two brothers?”

4. By an application dated 12.09.2018, the petitioner sought recasting of the issue by placing the burden on respondent no.2 to prove that the property described in para no.1-C is not the joint family property of the petitioner, defendant no.1 and two brothers of the petitioner. The trial Court by order dated 16.01.2019 while recasting some of the issues has held that there is no necessity to recast issue no.1.

5. Heard the learned counsel appearing for the parties.

6. Learned counsel appearing for the petitioner submits that it is admitted by the respondent no.2 - Bank that the property described in paragraph no.1-A and 1-B are hindu undivided family properties. He further submits that considering the admission as regards the nature of the property as the joint hindu family property, the burden is upon the respondent no.2 to prove that the property described in paragraph no.1-C is not the joint family property particularly considering the averments that the property at paragraph no.1-C of the plaint has been purchased out of the nucleus of the joint family property funds.

7. The learned counsel for respondent no.2 opposes the petition and contends that respondent no.1 has executed a mortgage deed in the year-2013 in respect of properties and it is only for the purpose of stalling the recovery of the amount of loan that the present proceeding has been filed.

8. Considered the rival submissions of the parties.

9. After the mortgage deed was executed in the year 2013, the petitioner has filed Regular Civil Suit No.334 of 2016 seeking declaration that the mortgage deed is void and is not binding on the petitioner and for grant of injunction restraining the respondent no.2

from taking any action on the basis of mortgage deed dated 23.12.2013. The petitioner has come with the case that the properties described in paragraph 1 i.e. 1-A, 1-B and 1-C are the joint family properties and as such the petitioner is having a right in the properties and the loan was not for any legal necessity or for the benefit of the family. In the entire plaint, there is no whisper that there were any strained relationship between respondent no.1 and the petitioner by reason of which the petitioner was not aware of the mortgage deed which was executed by respondent no.1 in the year 2013. The petitioner is also not seeking any decree of partition or separate possession, but the singular challenge in the plaint is to the mortgage deed of the year 2013. It is obvious that the petitioner, who is daughter of the respondent no.1, has been set up by respondent no.1 in order to stall the proceedings for the recovery of the loan which has been obtained by the respondent no.1 from the respondent no.2. Pertinently, the other members of the joint family property i.e. brothers of the petitioner have not been impleaded and the challenge appears to be only to ensure that the respondent no.2 does not take any action on the basis of the mortgage deed. As far as the averment in the written-statement regarding the joint family property is concerned to which the attention of this Court was invited, in my opinion, considering that the respondent no.2 is a

bank, there is no occasion for the respondent no.2 to have any personal knowledge about the nature of the properties and the averments, if any, cannot be held adverse to the interest of the respondent no.2 - bank.

10. As regards recasting of the issues are concerned, by the application the petitioners seek to place burden upon the respondent no.2 Bank to prove that the property described in paragraph 1-C is not joint family property of the petitioner, defendant no.1 and other two brothers of the defendant no.1. It is specific case of the petitioner that the property described in para nos.1-A and 1-B are the joint family properties and property bearing 1-C has been purchased out of the joint family funds. It is therefore the petitioner who will have to prove the existence of nucleus to show that the property which is described in para 1-C is purchased out of the funds of the joint family property. In the present case considering that the respondent no.2 is a bank, there is no occasion for the respondent no.2 to assert or claim that property in para 1-C is a joint family property and / or individual property.

11. I find no infirmity in the order passed by the trial Court rejecting the application for recasting of the issues. It is settled that when the fact is asserted by one party then the burden to prove the

fact is on the party who asserts it. In the present case, it is the petitioner who has come with the case that the property described in para 1-C is a joint family property purchased from the nucleus of the joint family funds and it is for the petitioner to prove the case.

12. In light of the facts above, the present petition is totally misconceived and is dismissed.

13. Considering that the proceeding is of the year 2016, the trial Court is requested to decide the same expeditiously and in any event within one year from the date of passing of this order.

(SHARMILA U. DESHMUKH, J.)

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