

AGK

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

WRIT PETITION NO.6383 OF 2019

Dattatraya Sopan Baiker

... Petitioner

V/s.

Balasaheb Pandurang Baiker

... Respondent

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Mr. Sanskar Marathe for the petitioner.

CORAM : AMIT BORKAR, J.

DATED : NOVEMBER 1, 2023

PC.:

- 1.** The petitioner/original plaintiff is challenging order of the Trial Court refusing to recast the issues.
- 2.** The petitioner/original plaintiff filed a suit seeking relief of declaration that the release deed dated 21 February 2003 is not binding on him and the registered release deed dated 26 March 2008 is nominal. Consequential injunction not to disturb his possession over the suit property is also sought.
- 3.** Based on pleadings of the parties, the Trial Court framed issues below Exhibit-13. The Trial Court casts burden on the plaintiff to prove release deed dated 21 February 2003 and 26 March 2008 being under undue influence of the plaintiff. Rest of the issues casts burden on the plaintiff.

4. The plaintiff filed an application for recasting of issues to cast burden on the defendant to prove that the suit property was purchased by the plaintiff's father in the name of the plaintiff as benami property and also to cast burden on the defendant to prove that there was previous partition of the suit property.

5. The Trial Court by the impugned order rejected the application holding that the defendant has nowhere alleged anything about benami transaction. In relation to issues to prove partition, the Trial Court holds that the defendant has already filed counter-claim and holds that the issue relating to exclusive possession is not necessary.

6. Considering the frame of the suit, it appears that the issues below Exhibit-13 are framed based on pleadings of the parties. The petitioner being plaintiff and alleges existence of positive things, therefore, burden to prove shall be on the plaintiff unless and until the defendant comes out with a positive assertion which requires defendant to prove his case. Considering the tenor of the suit, in my opinion, the Trial Court has rightly rejected the application filed by the plaintiff to recast the issues casting burden on the defendant.

7. The writ petition is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)