

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SATISH
RAMCHANDRA
SANGAR

WRIT PETITION NO.16961 OF 2024

Digitally signed by
SATISH RAMCHANDRA
SANGAR

Date: 2024.11.29
12:25:49 +0530

Smt.Leela Ganesh Kale

Since deceased Per Legal Representatives

Shri.Girish Digambar Kulkarni

Age : Adult, Occupation : Nil,

Residing at : Flat No.103, 'Shri Ganesh

Leela Apt', 1151/1, Model Colony,

Shivajinagar, Pune : 411 016.

...Petitioner

Versus

1. **Smt.Sarita Suryakant Mhaswade**

Age : 61 Years, Occupation : Housewife

2. **Shri.Suryakant Gajanan Mhaswade**

Age : 63 Years, Occupation : Business

Both Residing at : Flat No.101, Shree Ganesh

Leela Apats., 1151, Shivajinagar, Pune.

3. **Darode-Jog and Associates**

A registered Partnership Firm,

Through its Partner : Shri.Sudhir Chandrakant

Darode, Having its Registered Office at:-

1258, Matrucharya, Deccan Gymkhana,

Pune : 411 004.

4. **M/s.Marathe Associates**

A Partnership Registered Firm,

Through its Partner : Shri.Abhijit Shashikant

Marathe, Having its Registered address at:-

1179/3, Shivajinagar, Pune : 411 005.

...Respondents

Mr.Rushikesh Sanjay Kale:-

Advocate for Petitioner.

CORAM : S. M. MODAK, J.

DATE : 22nd NOVEMBER 2024

P. C. :-

1. *Praecipe* is moved for passing of some urgent orders because now the Suit is fixed for final hearing. Earlier, it is the Defendant who has approached this Court by way of Writ Petition No.6575 of 2023. (Page No.88). In that Petition, the Defendants have challenged the order allowing the amendment in the Plaint. The said order was reversed. Now, it is the turn of the Plaintiff to file this Writ Petition. The trial Court as per the order dated 22nd October 2024 (Page No.100) refused to frame two suggested issues. Those issues find place in the impugned order on Page No.97. They are as follows:-

- 1-A) Whether the defendant No.1 proves that the defendants got execution the deed of apartment dated 13/12/2002 and all other agreements, deeds, documents in respect of the suit property from original plaintiff without any undue influence, misrepresentation?
- 1-B) Whether the defendant No.1 proves that she being the erstwhile licensee in the suit property has become a legal absolute owner of the suit property?

2. The submission is, unless and until, those issues are framed, the

Plaintiff is unable to request the trial Court to give a finding on the basis of Deed of Apartment dated 13th December 2002. The trial Court rejected that request for the reason, that amendment order is reversed, so there are no pleadings so as to frame issues and this Application is moved at fag end of the trial.

3. If we take look at the suggested issues, we may find as per issue No.1, the Plaintiff wants to put burden on Defendant No.1 “*to prove execution of Deed of Apartment (dated 13th December 2002 by original Plaintiff Leela) by applying undue influence and misrepresentation*”. Whereas, as per issue No.2, again the Plaintiff wants to put burden on Defendant No.1 to prove “*she was erstwhile licensee in the suit property and then, became absolute owner of suit property*”.

4. One of the reasons for rejecting the prayer is “*plaint which was allowed to be amended, the decision was set aside by this Court*”. Meaning thereby, amended portion is no more part of amended plaint. And if it is so, there is no question of framing additional issues. The trial Court observed in Para No.6:-

“...there is no pleading whatsoever in the plaint regarding challenge of deed of apartment dated 13/12/2002”.

Partially, the trial Court is right. It is true. There is no question of interfering in the said order. However, the trial Court is partially right. Because, there is no foundation in the plaint. But, there is averment in the written statement about this Deed of Apartment. In unnumbered para after para No.21 of the written statement (Page No.40) there is a reference of Deed of Apartment.

5. It is principle of Evidence Act, a party who pleads has to prove it. So, it can very well said that the concerned Defendants have to prove this fact. What cannot be pressed by the Plaintiff is “*this Deed was executed with undue influence*”. So, the Plaintiff can certainly advance submission on this aspect. This observation is in furtherance of observation made by this Court while reversing order of amendment.

6. Same observation “*party who pleads have to prove that fact*” is also applicable to suggested issue No.2. I believe facts on which issue No.2 is suggested is not part of earlier amendment refused. (copy of order allowing amendment is not annexed). In para No.2 (Page No.39), the Defendants have pleaded how Developer has allotted to them flat in consideration of their right to occupy flat as a licensee.

7. I do not find, the trial Court has committed any wrong to reject

the Application. There is no need to entertain this Petition. Above observations are sufficient. I have not issued any notice to the Respondents because the Petition is dismissed at the beginning itself. The above observations are made on the basis of basic principles of law of pleading and principles of Evidence Act.

8. Hence, the **Writ Petition is dismissed.**

9. **Parties to act on an authenticated copy of this order.**

[S. M. MODAK, J.]