

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

WRIT PETITION NO. 2268 OF 2015

1. Smt. Saheb Bi W/o Shaikh Jani,
Age: 76 years, Occ.: Nil,
R/o : Chota Takiya, Ajab Nagar,
Near Nutun Colony, Aurangabad.
2. Shaikh Aziz s/o Shaikh Jani,
Age: 54 years, Occ.: Business,
R/o : Chota Takiya, Ajab Nagar,
Near Nutun Colony, Aurangabad.
3. Shaikh Anwar s/o Shaikh Jani,
Age: 52 years, Occ.: Business,
R/o : Chota Takiya, Ajab Nagar,
Near Nutun Colony, Aurangabad.
4. Shaikh Baba s/o Shaikh Jani,
Age : 49 years, Occ.: Business,
R/o : Chota Takiya, Ajab Nagar,
Near Nutun Colony, Aurangabad.
5. Shaikh Irfan s/o Shaikh Jani,
Age: 44 years, Occ.: Business,
R/o : Chota Takiya, Ajab Nagar,
Near Nutun Colony, Aurangabad.

...PETITIONERS
(Ori. Plaintiffs)

versus

1. Shaikh Azam s/o Shaikh Mehmood,
Age : 54 years, Occ : Business,
R/o Paithan Gate, Aurangabad.
2. Shaikh Akbar s/o Shaikh Mehmood,
Age : 52 years, Occ : Business,
R/o Paithan Gate, Aurangabad.
3. Shaikh Azeem s/o Shaikh Mehmood,
Age : 49 years, Occ : Business,
R/o Paithan Gate, Aurangabad.

4. Smt. Naseem Begum w/o Shaikh Afsar,
Age : 54 years, Occ : Business,
R/o Paithan Gate, Aurangabad.
5. Shaikh Azhar s/o Shaikh Afsar,
Age : 49 years, Occ : Business,
R/o Paithan Gate, Aurangabad.
6. Shaikh Zafar s/o Shaikh Afsar,
Age : 34 years, Occ : Business,
R/o Paithan Gate, Aurangabad.
7. Shaikh Qaiser s/o Shaikh Afsar,
Age : 32 years, Occ : Business,
R/o Paithan Gate, Aurangabad.
8. Shireen Begum s/o Shaikh Afsar,
Age : 30 years, Occ : Household,
R/o Paithan Gate, Aurangabad.
9. Shaikh Feroz s/o Shaikh Afsar,
Age : 28 years, Occ : Business,
R/o Paithan Gate, Aurangabad.
10. Shaikh Aamer s/o Shaikh Afsar,
Age : 26 years, Occ : Business,
R/o Paithan Gate, Aurangabad.

...RESPONDENTS
(Orig. defendants)

.....
Mr. A.D. Kasliwal, Advocate for Petitioners
Mr. S.V. Advant, Advocate for respondents No. 4 to 10
.....

CORAM : SUNIL P. DESHMUKH, J.

DATED : 3RD SEPTEMBER, 2015

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard the learned counsel for parties finally, with consent.
2. Present petition has been moved by original plaintiffs against order dated 03-02-2015 on Exhibit-181 in Regular Civil Suit No. 716 of

2011 passed by 7th Joint civil Judge Junior Division, Aurangabad, whereunder their application Exhibit-181 under Order XVII, Rule 6 of Code of Civil Procedure, 1908 requesting to call for record viz thumb impression book (अंगुली पुस्तिका) depicting thumb impression of the parties to the sale-deeds along with those of witnesses has been rejected.

3. Petitioners – original plaintiffs have instituted suit bearing Regular Civil Suit No. 716 of 2011 seeking possession of their shares and perpetual injunction against defendants. While trial of suit was in progress, during its course, three sale-deeds bearing registration no. 5372, 5373 and 5374 dated 20-11-1979 which are in the custody of defendants, the plaintiffs requested to direct the original sale deeds be produced by defendants and to allow their certified copies to be produced under application Exhibit-165, which initially had been rejected on 22-11-2014. Subsequently, application Exhibit-169 had been moved for review of order dated 22-11-2014 and that was allowed under order dated 03-01-2015 and respondents (original defendants No. 1, 2 and 4 to 10) were directed to produce original sale deeds and also production of its certified copies was allowed. Notice Exhibit-176 was given by plaintiffs to defendants for admission of aforesaid sale deeds, however, the same was responded to by stating that till the time originals are traced and compared, defendants reserve their right of admission and denial of documents.

4. Under the circumstances, application Exhibit-178 came to be moved by plaintiffs seeking permission to lead secondary evidence in

respect of sale-deeds bearing registration no. 5372, 5373 and 5374 dated 20-11-1979. Said application had been purportedly opposed by defendants. Application Exhibit-178 came to be allowed by 7th Joint Civil Judge, Junior Division under order dated 27-01-2015.

5. While evidence was going on, as permission to lead secondary evidence had been granted, plaintiffs moved application Exhibit-181 for summons pursuant to Order XVI, Rule 6 of the Code of Civil Procedure, 1908 to Sub-Registrar No. 1, Aurangabad for production of Day-Book No. 1 and Thumb Impression Book (अंगुली पुस्तिका) in respect of aforesaid sale deeds dated 20-11-1979. This application came to be opposed by defendants. Application Exhibit-181 came to be rejected under order dated 03-02-2015, which is subject-matter of challenge of present writ petition.

6. Application Exhibit-181 in paragraph No. 3 amply reflects its intention is to further the secondary evidence and paragraph No. 4 refers to that it can be useful to cross examine the defendants, as well.

7. Reference to aforesaid background had been made in impugned order. In the course of hearing, it appears that along side submissions were also advanced in respect of section 145 of the Evidence Act and it was canvassed that documents can well be used for confronting defendants. The impugned order depicts that the court got swayed-away by this aspect of the matter and considered that confrontation can be in respect of previous statement made by a person and cannot be possible for statements made by others.

8. Learned counsel Mr. Ajeet D. Kasliwal for petitioners submits that in the background which has been referred to hereinbefore basic thrust of the application ought to have been considered that summons is requested fundamentally to further the purpose of secondary evidence as originals were not being produced by the defendants despite those were in their custody. He submits that even if it is assumed that thrust of the application may not be expressly referring to this, however, having regard to the background it had all along been implied and subsisting and accordingly action was being taken in the proceedings on behalf of the plaintiffs. The court has lost sight of this aspect of the matter and got overwhelmed by the submissions with reference to section 145 of the Evidence Act.

9. Learned counsel for petitioners states that Day-Book No. 1 and Thumb Impression Book (अंगुली पुस्तिका) are maintained by Sub-Registrar's Office and the same would be pertinent in the matter. Therefore, he submits that pedantic approach ought to have been avoided in the matter and application ought to have been granted accordingly.

10. Learned counsel for petitioners further refers to a citation in this respect, in the case of *Chekka Krishna Prasad Vs. Kotha Appa Rao* reported in 1997 DGLS (AHC) 2981 : 19988(1) A.L.D. 680. emphasizing text of paragraphs No. 3 and 4 of the judgment, which read thus-

“ 3. Order 16 Rule 6 of C.P.C. Is to the following effect :

Summons to produce document : Any person may be summoned to produce a document without being summoned to give evidence and

any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

4. It must be remembered that the parties to the suit are at liberty to adduce oral and documentary evidence, whatsoever according to their choice in order to substantiate their case. The question of relevancy or validity of documents, after they are tendered in evidence, shall be considered by the court in accordance with law. Before a document is summoned from the custody of any office, the Court cannot embark upon a duty of scrutinize or consider the legality or relevancy of the same before it is actually tendered" in evidence and Order 16 Rule 6 C.P.C. Does not mandate this to the court. Order 16 Rule 6 C.P.C. Is in simple language wherein it is slated that any person may be summoned to produce a document without being summoned to give evidence and any person summoned merely to produce a document shall be deemed to have complied with the summons, if he causes such document to be produced instead of attending personally to produce the same. The affect of this Rule is that the Court has the authority to summon any person to be summoned to produce a document and if a document is produced or it is caused to be produced before the Court in compliance with such summons, it is due compliance or order 16 Rule 6 C.P.C."

11. On the other hand, learned counsel Mr. Shrikant V. Adwant for respondents, however, submits that thrust of the application Exhibit-181 appears to be of section 145 of the Evidence Act and as such, no fault can be said to have been committed by the trial court while rejecting application Exhibit-181 under order dated 03-02-2015.

12. Learned counsel refers to the judgment in the case of *Rashidunnissa and another Vs. Ata Rasool* reported in 1958 Allahabad, 67 relying on, paragraph No. 8 of said judgment, which reads as under:-

“ 8. There does not appear to be much force in the first contention of the plaintiffs' counsel. The existence of the supplementary deed of waqf had been mentioned by them in their plaint and if it was their case that the deed stood vitiated on account of any fraud or misrepresentation it was for them to prove their allegations. They did not lead any evidence in the first instance nor had they reserved any right to produce any evidence in rebuttal after the defendant's evidence had been closed. ”

This citation does not appear to have any nexus with the context of present petition.

13. Learned counsel for respondents also relies on judgment in the case of *Arjun Singh Vs. Kartar Singh and others* reported in AIR 1951 Supreme Court, 193. In the context of present case, he purports to refer to paragraph No. 7 of said judgment reading thus:-

“7. It was strenuously argued by the learned counsel for the applt. That it was not open to the H.C. to interfere with the discretion exercised by the Dist. J. in allowing additional evidence to be adduced and that even assuming that there was an erroneous finding of fact, it must stand final as a second appeal can be entertained only on the specific grounds mentioned in S. 100, Civil P.C. There is, however, a fallacy underlying this argument. The discretion to receive and admit additional evidence is not an arbitrary one, but it is a judicial one circumscribed by the limitations specified in O41, R27, Civil P.C. If the additional

evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent. Under O. 41, R.27, it is the appellate ct. that must require the evidence to enable it to pronounce judgment as laid down by the P.C. In the well-known case fo Kessowji V. G.I.P. Railway, 34 I.A. 115 : (31 Bom. 381 (P.C.)

This case as well does not appear to further the case for respondents and in present case discretion by the trial court has already been exercised in favour of plaintiffs granting opportunity to lead secondary evidence.

14. For another aspect, learned counsel for respondents relies on the case of *Rani Bai and others Vs. Thakur Ganesh Sing and others* reported in 2003 CJ(AP) 1129 and submits that at such a belated stage application could not have been favourably considered by the Court. However, the citation on facts is distinguishable and does not appear to be applicable in the present case.

15. Learned counsel further relies on the decision in the case of *Sunder Vs. Mohd Ismail and another* reported in 2004CJ (AP) 1196. In the present case, one has to bear in mind that secondary evidence by plaintiffs had been let by the court and thus citations on different factual background do not appear to be applicable in the present case.

16. Looking at undisputed background upon which the plaintiffs are allowed to lead secondary evidence in respect of sale deeds and that application Exhibit-181 has been moved under Order XVI, Rule 6 of the Code of Civil Procedure, it appears to be aimed basically at leading secondary evidence. In the circumstances, pedantic approach in the peculiar situation of the matter needs to be eschewed and the matter deserves to be viewed accordingly.

17. Under the circumstances, impugned order dated 03-02-2015 on Exhibit-181 in Regular Civil Suit No. 716 of 2011 passed by 7th Joint civil Judge Junior Division, Aurangabad has been rendered unsustainable.

18. As such, writ petition stands allowed in terms of prayer clause "B". Rule is made absolute accordingly. No order as to costs.

Sd/-

(SUNIL P. DESHMUKH, J.)

MTK
