

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6525 OF 2014

- 01) Santosh s/o Shripati Shelake,
Age: 20 years, Occ. Agri., R/o : Ter,
Tq. & Dist. Osmanabad
- 02) Balaji s/o Shripati Shelake,
Age: 18 years, Occ. Agri., R/o : Ter,
Tq. & Dist. Osmanabad
- 03) Surekha w/o Vyankat Nade,
Age: 25 years, Occ. Household,
R/o : Murud,
Tq. & Dist. Latur

..PETITIONERS
(Orig. Pltfs.)

VERSUS

01. Balasaheb s/o Nivrutti Raibhan,
Age: 52 years, Occ. Agri.,
R/o : Panachiwadi,
Tq. & Dist. Osmanabad
(Orig. Def. no.4)
02. Shripati s/o Rama Shelake,
Age: 65 years, Occ. Agri.,
R/o : Ter,
Tq. & Dist. Osmanabad
(Orig. Def. no.1)
03. Parwatibai w/o Shripati Shelake,
Age: 62 years, Occ. Agri.,
R/o : Ter,
Tq. & Dist. Osmanabad
(Orig. Def.no.2)
04. Gopinath s/o Tukaram Bhong,
Age: 62 years, Occ. Agri.,
R/o : Jaiphal, Tq. Ausa,
Dist. Latur
(Orig. Deft.no.3)

..RESPONDENTS

Mr K. K. Kulkarni, Advocate for petitioners;
Mr B. S. Shinde, Advocate for respondent no.1;
Mr S. A. Wakure, Advocate for respondent No. 4

CORAM : N.W. SAMBRE, J.

DATE : 25th March, 2015

ORAL ORDER :

The petitioners, who are respondents no.1 to 3 in Regular Civil Appeal No.207 of 2008, restrict the present petition to the order dated 17th July, 2014, passed by Principal District Judge, Osmanabad, below Exh.124, in the said appeal, whereby respondent no.1 herein was permitted to take recourse to section 65 of the Evidence Act, in the matter of production of secondary evidence.

2. So far as the present petition *qua* the order passed below Exh.102 in the said appeal on 19th April, 2014 is concerned, the same is not pressed by the petitioners. Thus, this Court is required to decide the legality and validity of the order dated 17th July, 2014 only.

3. While questioning the legality and validity of the order impugned, learned Counsel appearing on behalf of petitioners/original respondents no.1 to 3, has invited my attention to the provisions of section 65 of the Indian Evidence Act, 1872, so as to canvass that the very foundation that

was required to be laid before the Court, in the matter of grant of permission to lead secondary evidence, in support of the sale deed dated 13th March, 1987, executed by respondent no.2 herein i.e. father of petitioners herein, in favour of third party, as provided under section 65 of the said Act, was not laid. He would further urge that what is sought to be produced on record is certified copy of the sale deed and in absence of supportive evidence as regards existence and execution of said document, the permission to lead secondary evidence ought not to have been granted by the Lower Appellate Court. In support of his contentions, he has relied on the judgment of the Apex Court in the matter of **H. Siddiqui (dead) by L.Rs. vs. A. Ramalingam**, reported in **2011 (4) Mh.L.J. 88**.

4. While resisting the above referred submissions, learned Counsel appearing on behalf of respondent no.1/original appellant, would urge that the respondent has taken recourse to the provisions of section 65 of the Act by issuing notice to original respondent no.4, i.e. father of the present petitioners, calling upon him to produce the said document, which he has failed. According to him, what is sought to be produced is certified copy of the sale deed, issued by the Sub-Registrar, in accordance with the provisions of the Registration Act, which is permissible to be produced by way of secondary evidence. Thus, he prayed for dismissal of the petition.

5. Having analyzed the contentions raised by the parties, particularly having regard to the provisions of sections 63 and 65 of the Evidence Act, at the outset, it is required to be noted that the document in question which is sought to be proved by leading secondary evidence is claimed to have been executed by original respondent no.4 in favour of third party. As such, the said document is sought to be proved with the help of secondary evidence by respondent no.1 herein against original respondent no.4. Original Respondent no.4 (respondent no.2 herein) has not at all objected to the order passed by the Lower Appellate Court permitting leading of secondary evidence in accordance with the provisions of section 65. As such, the very locus of the petitioners to question the order impugned, in my opinion, raises serious doubt. Be that as it may, if we consider the contentions raised by the respective parties on merit, it is no doubt true that original respondent no.4, in response to the notice given by the respondent no.1 herein, has appeared before the Lower Appellate Court and has submitted that he is not in possession of the original document of sale deed dated 13th March, 1987. It is not the case of original respondent no.4 that no such sale deed was executed. As such, having regard to the provisions of sub-section (f) of section 65 of the Evidence Act, in my opinion, the Court below has rightly taken into account the aspect of discharge of burden by respondent no.1 herein by issuing notice to original respondent no.4. It is also required to be noted that issuance of certified copy of a registered sale deed by the Sub-

Registrar is permissible in accordance with law prevailing in India, particularly in accordance with the provisions of the Registration Act. If a certified copy is issued in accordance with the provisions of the said Act, in my opinion, the same is permissible in accordance with the provisions of sub-section (f) of section 65 of the Act.

6. So far as reliance placed by the learned Counsel appearing on behalf of the petitioners on the judgment rendered by the Apex Court in the matter of H. Siddiqui (dead) by L. Rs. (cited supra) is concerned, it is required to be noted that the the Apex Court, while dealing with the contentions raised before it was alive to the fact as regards the admissibility of a document in secondary evidence must be preceded with the evidence to be brought on record to prove the contents of such document. The observations made in para 10 of the said judgment read thus :-

“The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in

the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.”

7. In the light of above referred observations, it is required to be noted that what is brought on record in the present case is certified copy of the sale deed, in support of which secondary evidence is sought to be led. The foundation about existence of such document is also laid by issuing notice to the executant of the said document, i.e. original respondent no.4, who has appeared before the Lower Appellate Court and has not denied the execution of the document, but has denied custody of the original document. In view thereof, the support drawn from the said judgment by the petitioners will be of hardly any assistance.

8. In the result, the instant petition fails and stands dismissed with no order as to costs.

(N.W. SAMBRE, J.)

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