

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

WRIT PETITION NO. 8939 OF 2015

1. Smt. Naseem Begum Wd/o Sk. Afsar,
Age : 62 years, Occ : Agriculture & Household,
R/o Paithan Gate, Aurangabad.
2. Sk. Azhar s/o Sk. Afsar,
Age : 35 years, Occ : Agriculture & Business,
R/o Paithan Gate, Aurangabad.
3. Sk. Zafar s/o Sk. Afsar,
Age : 31 years, Occ : Agriculture & Business,
R/o Paithan Gate, Aurangabad.
4. Sk. Qaiser s/o Sk. Afsar,
Age : 29 years, Occ : Agriculture & Business,
R/o Paithan Gate, Aurangabad.
5. Shireen Begum D/o Sk. Afsar,
Age : 27 years, Occ : Agriculture & Business,
R/o Paithan Gate, Aurangabad.
6. Sk. Feroz s/o Sk. Afsar,
Age : 25 years, Occ : Agriculture & Business,
R/o Paithan Gate, Aurangabad.
7. Sk. Aamar s/o Sk. Afsar,
Age : 23 years, Occ : Agriculture & Business,
R/o Paithan Gate, Aurangabad.

...PETITIONERS

(Orig. defendants No. 4 to 10)

V E R S U S

1. Smt. Saheb Bi Wd/o Sk. Jani,
Age: 73 years, Occ.: Nil,
R/o : Chota Takiya, Ajabnagar,
Near Nutun Colony, Aurangabad.
2. Sk. Aziz s/o Sk. Jani,
Age: 50 years, Occ.: Business,
R/o : Chota Takiya, Ajabnagar,
Near Nutun Colony, Aurangabad.
3. Sk. Anwar s/o Sk. Jani,
Age: 49 years, Occ.: Business,
R/o : Chota Takiya, Ajabnagar,
Near Nutun Colony, Aurangabad.

4. Sk. Baba s/o Sk. Jani,
Age : 46 years, Occ.: Business,
R/o : Chota Takiya, Ajabnagar,
Near Nutun Colony, Aurangabad.
5. Sk. Irfan s/o Sk. Jani,
Age: 41 years, Occ.: Business,
R/o : Chota Takiya, Ajabnagar,
Near Nutun Colony, Aurangabad. (Ori. Plaintiffs)
6. Shaikh Azam s/o Sk. Mehmood,
Age : 51 years, Occ : Business & Agriculture,
R/o Paithan Gate, Aurangabad.
7. Shaikh Akbar s/o Sk. Mehmood,
Age : 49 years, Occ : Business & Agriculture,
R/o Paithan Gate, Aurangabad.
8. Shaikh Azeem s/o Sk. Mehmood,
Age : 46 years, Occ : Business & Agriculture,
R/o Paithan Gate, Aurangabad. (Ori. Defendants No. 1 to 3)
...RESPONDENTS

.....
Mr. S.V. Advant, Advocate for Petitioners
Mr. A.D. Kasliwal , Advocate for respondents No. 1 to 5
.....

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 purports to challenge order dated 27-01-2015 on Exhibit-178 in Regular civil Suit No. 716 of 2011 passed by 7th Joint Civil Judge, Junior Division, Aurangabad, allowing the plaintiffs to lead secondary evidence.
3. Present petitioners are original defendants No. 4 to 10 whereas respondents No.1 to 5 are original plaintiffs and remaining respondents

are co-defendants in Regular Civil Suit bearing No. 716 of 2011. In said suit, application Exhibit-178 had been moved by the original plaintiffs for leading secondary evidence, which came to be allowed under aforesaid order.

4. Learned counsel for the petitioners submits that application Exhibit-178 cannot be said to be in compliance with rules, particularly rules of evidence under the Evidence Act. To buttress this submission, he relies on the judgment in the case of *J. Yashoda Vs. K Shobha Rani* reported in *2007(5) Supreme Court Cases, 730*. Said judgment refers to that for adducing secondary evidence it is necessary for the party to prove existence and execution of the original documents. Conditions laid down in Section 65 of the Evidence Act, 1872 must be fulfilled before secondary evidence can be admitted. In the present case, learned counsel for the petitioners relies on paragraph No. 7 of said judgment which reads thus,

“7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.”

5. However, the facts in the present case cannot be equated with the facts of the citation relied on, for, in the present case it is an admitted position that the documents concerned are in the custody of the defendants, their certified copies have been produced and that they have unequivocally referred to that those are not being traced out. In the circumstances, this citation would not carry forward the case of the present petitioners.

6. It would be worthwhile to refer to that respondents – 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.

7. 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.

8. 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 (अंगुठी 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 against which writ petition No.2268 of 2015 has been filed.

9. Even otherwise, this petition has been moved incidentally, while writ petition No. 2268 of 2015 was being heard, order on Exhibit-178 was being perceived to be obstruction for the defendants. In any case, no error can be said to be found in the impugned order, since defendants have referred to that original sale deeds are not traceable, their certified copies have been produced, which clearly indicates that sale deeds are in existence and that defendants were having possession of the same. They had deferred also admission or denial of certified copies of the sale deeds, until the sale deeds can be traced. In the circumstances, challenge to impugned order raised is devoid of substance.

10. The writ petition, as such, stands dismissed. Rule discharged.

Sd/-
(**SUNIL P. DESHMUKH, J.**)