

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

WRIT PETITION NO.10188 OF 2014

1. Natha s/o Kisan Raut,
Age 78 years, Occu. Agri.,
R/o Bidkin, Taluka Paithan,
District Aurangabad

2. Babu s/o Natha Raut,
Age 48 years, Occu. Agri.,
R/o Bidkin, Taluka Paithan,
District Aurangabad

.. Petitioners
(Orig.Defendants)

Versus

. Dattatraya s/o Shripatrao Kate,
Age 50 years, Occu. Agri.,
R/o 'Indralaya', Shrinagar Housing
Society, Garkheda, Aurangabad

.. Respondent
(Orig. Plaintiff)

Mr S.S. Pawar, Advocate for petitioners
Mr A.B. Kale, Advocate for respodnent

CORAM : N.W. SAMBRE, J.

DATE : 9th December 2015

PER COURT

Heard.

2. In Special Civil Suit No.46 of 2012 for specific performance, the defendants – petitioners herein, an order impugned in the present petition granting permission to plaintiff to lead secondary evidence pursuant to provisions of Section 65 of the Evidence Act on 19th September 2014 by the 4th Joint Civil Judge, Senior Division, Aurangabad is questioned herein.

3. Learned Counsel for the petitioners-defendants, while relying upon the judgment of Apex Court in the matter of **H. Siddiqui (dead) by L.Rs. Vs. A. Ramalingam**, reported in **2011 (4) Mh.L.J.88**, invited attention of this Court to the observations made in paragraph, which read thus :

“10. Provisions of section 65 of the Act 1872 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 original documents are not produced at any time, nor, any factual foundation has been led 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 [Vide : *The Roman Catholic Mission and anr. vs. The State of Madras and ors.*, AIR 2000 SC 1759; *Life Insurance Corporation of India and anr. vs. Ram Pal Singh Bisen*, (2010) 4 SCC 491; and *M. Chandra vs. M. Thangamuthu and anr.*, (2010) 9 SCC 712].”

4. In the above referred background, he would urge that unless the original of such document which is sought to be proved through secondary evidence is brought on record, the party is not entitled to adduce secondary evidence in the matter.

5. The claim is opposed by learned Counsel for the respondent on the ground that what is permitted is the permission to lead secondary evidence and not appreciation of such evidence about its admissibility and prayed for rejection/dismissal of the petition.

6. Upon perusal of the order impugned, it is required to be noted that the Court, in exercise of powers under Section 65 of the Evidence Act has permitted the respondent - plaintiff to lead secondary evidence in relation to a document, i.e. under certificate of posting receipt/acknowledgement dated 24th January 2011. While granting such permission, whether there was a basic foundation led in the application, seeking such permission could be ascertained from the contents of the application Exh.38 moved to that effect. The respondent-plaintiff, in clear terms has established a foundation for the purpose of seeking permission to lead secondary evidence.

7. What is granted by the impugned order is the permission to lead the evidence and has not decided the admissibility of such secondary evidence. In view of above submissions that is sought to be relied upon in paragraph 10 of the judgment of Apex Court in the matter of H. Siddiqui Vs. A. Ramalingam (cited supra) are wholly misconceived.

8. The second submission of the Counsel for the petitioners that unless original is produced, the plaintiff cannot be permitted to adduce secondary evidence is concerned, it is only in absence of original, the secondary evidence is permitted to be led provided a foundation as regards the loss of original is led and established in the application in support thereof.

9. In my opinion, in view of above observations, it could be easily inferred that the learned trial Court has passed the order after taking into account the scope and requirement of Section 65 of the Evidence Act. No illegality is noticed in the order impugned. As such, petition fails, stands dismissed.

10. It is made clear that the petitioner will be at liberty to raise an objection at an appropriate stage as regards merits of secondary evidence and its admissibility.

(N.W. SAMBRE, J.)

vvr