

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

WRIT PETITION NO.11963 OF 2015

Kanhailal s/o Sohanlal Sankhala,
Age: 75 years, Occ: Business,
R/o. Laxmi General Stores,
Shivaji Chowk, Parbhani.

...Petitioner

versus

1. Chandulal s/o Sukhraj Banthiya,
Age: 58 years, Occ: Business,
R/o. New Mondha Road, Bakadpura,
Jalna, Taluka & Dist. Jalna.

2. Ratanlal s/o Sukhraj Banthiya,
Died through L.Rs.

Rajesh s/o Ratanlal Banthiya,
Age: 27 years, Occ: Household,
R/o. Bakadpura, Jalna,
Taluka & Dist. Jalna.

3. Nirmalabai w/o Mahaveer Jain,
Age: 23 years, Occ: Household,
R/o. Balaji Galli, Sadar Bazar Chowk,
Jalna, Taluka & Dist. Jalna.

...Respondents

.....
Mr. P.N. Sonpethkar, Advocate for petitioners
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CORAM : N.W. SAMBRE, J.

DATE : 15th DECEMBER, 2015

ORAL ORDER :

Application Exhibit-70 in Regular Civil Suit No. 228 of 2008 moved by plaintiffs-landlord for permission to lead secondary evidence in respect of will deed, of which certified copies issued by

the office of Sub Registrar are placed on record and the respondents are permitted to lead secondary evidence by order 08/09/2015, as such, present writ petition.

2. Mr. Sonpethkar, learned Counsel for the petitioner made two fold submissions. According to him, in the earlier round of litigation for the same relief i.e. permission to lead secondary evidence by respondent, the order granting such permission was subject to challenge in Writ Petition No. 3144 of 2013. According to him, this Court has disposed of said writ petition by observing that the plaintiff will be at liberty to file fresh application with prayer to lead secondary evidence and the Court was directed to decide the same after giving notice to the defendants. Mr. Sonpethkar, learned Counsel for the petitioner-defendant would then urge that without complying with the said observations i.e. without granting opportunity of hearing to the petitioner-defendant, the order impugned granting permission to lead secondary evidence came to be passed, which is not sustainable. He then on merit would urge that the issue as regards laying down of foundation for leading secondary evidence is also required to be tested by this Court as upon plain reading of the order passed below Exhibit-70 and pleadings in the application would depict that basic requirement of Section 63 read with Section 65 of the Evidence Act are not complied with. According to him, the said fact is not appreciated by learned trial Court and as such, the order

impugned is not sustainable and is liable to be rejected.

3. With his assistance, I have perused the order impugned. He was right in inviting attention of this Court to the order dated 05/09/2013 passed in Writ Petition No. 3144 of 2013 with the observations that the application, if so made, be decided after notice to the present petitioner-defendant.

4. Pursuant to the above order of High Court, learned Joint Civil Judge, Junior Division, Parbhani by an order below Exhibit-70 on 14/01/2015 directed the plaintiff to comply with the order passed in Writ Petition No. 3144 of 2013 and as such, the petitioner-defendant was put to the notice about application Exhibit-70. The Court has made endorsement on 07/12/2013 calling upon the defendant to submit his say in the matter and it appears that the petitioner-defendant has not given any say in the matter, which has prompted the learned trial Court to proceed with the matter for deciding the application Exhibit-50. It is noted that pursis was filed by present petitioner on 02/09/2014 placing reliance upon the judgment of the High Court in AIR 1986 Cal. 430 and 2007(5) and 2007(5) ALL MR 554.

5. It is true that the said judgments are not discussed in the order impugned, however, the said judgments or law laid down by the

High Court, which this Court was unable to gather from the contents of pursis. Copies of said judgments are not provided so that this Court can evaluate the applicability of same to this case.

6. So far as the merits of the matter are concerned, upon pleadings of application Exhibit-70, it is to be noted that the document, will deed in support of which secondary evidence is sought to be lead are registered documents and certified copies thereof are already placed on record since original was lost. Specific plea was raised to that effect in paragraph Nos. 2,3 and 4 of the application praying permission to lead secondary evidence.

7. Considering the same, objection to absence of foundation to lead secondary evidence, in my opinion, was correctly dealt with by learned trial Court, who has proceeded to pass the order on 08/09/2015 allowing the said application.

8. Perusal of the order impugned depicts that learned Court below was aware about basic foundation and has proceeded to pass the order.

9. In view of above, in my opinion, no illegality could be noticed in the order impugned. The writ petition fails, stands dismissed.

[N.W. SAMBRE, J.]