

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9115 OF 2013**

Alkatai Narayan Dixit

..Petitioner

Vs.

Ramchandra Shamrao Patil & Ors.

..Respondents

**Mr. Mahindra Deshmukh for the Petitioner
Mr. Rakesh Patil for the Respondent No.1
Mr. Avinash Patil for the Respondent No.2
None for the Respondent No.3**

**CORAM : R. M. SAVANT, J.
DATE : 13th MARCH, 2015**

ORAL JUDGMENT

1 Rule. With the consent of the Learned Counsel for the parties made returnable forthwith and heard.

2 The Writ Jurisdiction of this court is invoked under Article 227 of the Constitution of India against the order dated 12-6-2013, passed by the Learned Civil Judge Junior Division, Vita, by which order, the application Exhibit 49 filed by the Plaintiff for leading secondary evidence in respect of the document dated 21-8-1996, came to be rejected.

3 The said document is the suit document of which specific performance is sought which is an agreement to sale executed by the Defendant No.1 in favour of the Plaintiff. The said document has been alluded to by the Plaintiff in paragraph 3 of the plaint. The Defendant No.1 in paragraph 2 of his Written Statement has averred that the said Defendant No.1 ha allegedly returned the amount of consideration and executed a cancellation deed on a stamp paper, cancelling the said agreement dated 21-8-1996. It is further averred that the said document is in possession of the Defendant No.1.

4 In paragraph 4 of the Plaint it is averred that a notice was issued to the Defendant No.1 under Section 66 on 7-1-2013 and inspite of the receipt of the notice the Defendant No.1 has not produced the same. The instant application Exhibit 49 therefore came to be filed for being permitted to lead secondary evidence. The said application came to be opposed to on behalf of the Defendant No.2 who is a subsequent purchaser by filing reply which was numbered as Exhibit 54. The Trial Court has considered the said application and has rejected the said application by the impugned order dated 12-6-2013. The rejection is inter alia on the ground that there is no mention of the existence of the Suit document in the plaint. The Trial Court has also observed that since the Plaintiff is a purchaser the document should have been in his possession. As indicated above, it is the said order dated 12-6-2013 which is impugned in the above Petition.

5 Heard the Learned Counsel for the parties. The Learned Counsel appearing for the respective parties would reiterate their contentions which were urged before the Trial Court for and against the permission being granted to lead secondary evidence.

6 Having heard the Learned Counsel for the parties I have bestowed my anxious consideration to the rival contentions. In the instant case, as indicated above the Trial Court has rejected the application for the reasons which have been adverted to in the earlier part of this Order. In the light of the averment made in paragraph 2 of his Written Statement, the observations of the Trial Court that there is no mention in the plaint in respect of the said document is not sustainable as the Plaintiff has mentioned the existence of the said document in paragraph 3 of the plaint. The fact that the Defendant No.1 is in possession of the said document has also been accepted by the Defendant No.1 in paragraph No.2 of the Written Statement. The Trial Court in making observations it has, has totally glossed over the said fact that since the Defendant No.1 has not produced the said agreement dated 21-8-1996 though called upon to do so and since the factum of the said document being in his possession, can be said to be accepted by him. The Trial Court has therefore erred in rejecting the application Exhibit 49 filed for leading secondary evidence by the Plaintiff. The impugned order dated 12-6-2013 is therefore

required to be quashed and set aside and is accordingly quashed and set aside, resultantly the application Exhibit 49 would stand allowed. The Plaintiff would be entitled to lead secondary evidence in respect of the document dated 21-8-1996. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]