

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION (STAMP) NO.32152 OF 2014

Shri. Vikas Bapuso Magdum

.. Petitioner

Versus

Shri. Manikchand Kallappa Chaugule and others

.. Respondents

Mr. Kuldeep U. Nikam, for the Petitioner.

CORAM : R.M. SAVANT, J.

DATE : 12th FEBRUARY, 2015

PC.

1. The Writ Jurisdiction of this Court is invoked against the order dated 07.11.2014 passed by the Learned Civil Judge, Junior Division, Palus, District-Sangli, by which order the applications Exh.23 and 41 came to be allowed and the applications Exh.21 and 39 came to be filed. The Petitioner herein is the original Defendant and the Respondents No.1 to 3 herein are the original Plaintiffs. The suit in question has been filed for redemption of mortgage dated 27.02.1997. It has been averred in the plaint that the document dated 27.02.1997 is actually a mortgage by conditional sale. Suffice it to state that the Defendant has denied the execution of any such document and has stated in paragraph 21 that the Plaintiff has executed an out and out sale, a reading of the said written statement of the Defendant reveals that the undertone of the defence of

the Defendant is that the Plaintiff has executed an out and out Sale Deed in favour of the Defendant. Hence, the Defendant has denied the execution of any mortgage by conditional sale by the Plaintiff in his favour. The Plaintiff filed application Exh.21 seeking a direction from the Trial Court to the Defendant to produce the document purportedly being a mortgage by conditional sale dated 27.02.1997 and thereafter the agreement dated 05.01.2002 by which the period of the mortgage was purportedly extended till 27.02.2005. The Plaintiffs thereafter moved application Exh.23 for being permitted to lead secondary evidence in respect of the said two documents i.e. document purported to be a mortgage by conditional sale dated 27.02.1997 and agreement dated 05.01.2002. The said application Exh.23 had also its basis in the application Exh.21 filed by the Plaintiffs. The Defendant filed his reply Exh.26 to both the applications Exh.21 and 23 and took a stand that unless the affidavit of evidence is filed by the Plaintiffs, the applications Exh.21 and 23 cannot be considered. The Plaintiff accordingly filed his affidavit of evidence Exh.36, wherein the reference was made to the said two documents. The parties it seems agreed that the applications Exh.21 and 23 can be taken up for hearing at the time of the hearing of the suit itself. The Plaintiff thereafter filed his affidavit of evidence Exh.36 where he refers to the aforesaid two documents i.e. document dated 27.02.1997

and the document dated 05.01.2002. The said reference was made in paragraph 6 of the affidavit of evidence. The Defendant therefore filed application Exh.39 for deletion of the said reference to the said document in the said paragraph 6. The said application was opposed to on behalf of the Plaintiff. The Plaintiff thereafter filed application Exh.41 again praying that the application Exh.23 be allowed that is how the three applications Exh.23, 39 and 41 have been taken up for hearing together. In so far as application Exh.23 is concerned, as indicated above, the same was filed by the Plaintiff for being permitted to lead secondary evidence in respect of the said two documents. The said application Exh.23 was filed when the affidavit of evidence had not been filed by the Plaintiff. It is in the said circumstance that the parties probably agreed to postponing of the hearing of the said applications Exh.21 and 23 to a later date. The Trial Court considered the said application Exh.23 and has by the impugned order allowed the applications Exh.23 and 41 filed by the Plaintiff. The Trial Court held that the Plaintiff has made a specific averment in the plaint that the first document i.e. mortgage by conditional sale dated 27.02.1997 is in possession of the Defendant. The Trial Court took into consideration the stand of the Defendant in the written statement, wherein the Defendant has denied the execution of any such mortgage by conditional sale. However, has accepted that an out and out Sale Deed has been

executed between the Plaintiff and the Defendant. The Plaintiff had produced a certified copy of the said document dated 27.02.1997 and in view thereof the Trial Court deemed it appropriate to allow the leading of secondary evidence in respect of the said document dated 27.02.1997. In so far as the document dated 05.01.2002 is concerned, as indicated above, it is an agreement by which the period of mortgage has been extended. The Trial Court held that Exh.21 is deemed to be a notice to the Defendant to produce the said documents and since the said documents have not been produced amongst which is the document dated 05.01.2002 the Plaintiff would be entitled to lead secondary evidence. The Trial Court as indicated above has accordingly allowed the applications Exh.23 and 41 and in so far as application Exh.39 filed by the Defendant, whereby the Defendant had sought deletion of the last line in paragraph 6 of the affidavit of evidence of the Plaintiff, the Trial Court deemed it appropriate to direct the filing of the said application meaning thereby that the said application was rejected. In view of the order passed on Exh.23, the Trial Court also directed the filing of Exh.21 as the said Exh.21 filed by the Plaintiff had turned infructuous in view of the order passed by the Trial Court permitting the Plaintiff to lead secondary evidence. In the conspectus of the facts as afore stated, wherein by application Exh.21 a direction was sought against the Defendant to produce the said two

documents as also having regard to the fact that the Defendant has denied the execution of any such document in his written statement and in turn has stated that an out and out Sale Deed has been executed as also having regard to the fact that the Plaintiff had produced a certified copy of the said document dated 27.02.1997 from the office of the Sub Registrar. The Trial Court was right in holding that the Plaintiff had satisfied the requirements of Section 65 for leading secondary evidence. The Learned Counsel for the Petitioner sought to place reliance on the judgment of the Apex Court reported in **2007 AIR (SC) 1721** in the matter of **Smt. J. Yashoda Vs. Smt. K. Shobha Rani**. The Apex Court in the said judgment has held as regards the circumstances in which the secondary evidence can be permitted to be led having regard to Sections 65 and 66 of the Evidence Act. The Apex Court has held that unless notice to the other side to produce the said document is given, then only the permission to lead secondary evidence can be granted. In my view, having regard to the facts prevailing in the instant case, which have been adverted to herein above, the Plaintiff can be said to have satisfied the test laid down by the Apex Court for leading secondary evidence. In that view of the matter, no case for interference in the Writ Jurisdiction of this Court is made out. The Writ Petition is accordingly dismissed.

[R.M. SAVANT, J]