

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6939 OF 2015

Sitaram Agarawal ... Petitioner
Vs.
Sushilabai Nirmalkumar Rungta and another ... Respondents

Mr. Shishir Joshi i/b. Mr. Chetan Mhatre for Petitioner.
Mr. J. S. Chandnani for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : 13TH AUGUST, 2015

P.C. :

Heard Mr. Joshi, learned Counsel for the petitioner and Mr. Chandnani, learned Counsel for respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant No.1 has challenged the judgment and order dated 13.03.2015 passed by the learned Judge, City Civil Court, Mumbai in Notice of Motion No.887 of 2015 in S.C.Suit No.8280 of 1994 (High Court Suit No.2240 of 1994). By that order, the learned trial Judge allowed the Motion taken out by the respondent No.1, hereinafter be referred to as plaintiff, in terms of prayer clause (a). The learned trial Judge allowed the plaintiff to lead secondary evidence of documents at Sr. No.1, 14 and 16 in the compilation dated 27.04.2010.

3. In support of this Petition, Mr. Joshi submitted that plaintiff intends to lead secondary evidence of document at Sr. No.1, which is purported indenture of mortgage dated 03.05.1949. In paragraph 1 of the plaint, plaintiff has referred to that mortgage deed and craved leave to refer to and rely upon the said indenture of mortgage dated 03.05.1949. As far as the document at Sr. No.14, that is, an adoption

deed dated 07.01.1932 and reconveyance-deed at Sr. No.16 are concerned, they are not referred in the plaint. Even the list of documents filed along with the plaint does not include the said documents. The plaintiff has also not filed affidavit of documents. The said documents are for the first time referred in affidavit of plaintiff Sushilabai Rungta dated 27.04.2010.

4. Mr. Joshi submitted that the certified copy of the indenture of mortgage dated 03.05.1949 is applied for by one Raghunath Ogate on 19.04.2010. Plaintiff has not applied for the certified copy. In other words, the certified copy of the indenture of mortgage dated 03.05.1949 is not coming from the proper custody.

5. As far as the document at Sr. No.14 namely Deed of Adoption is concerned, that is also not referred in the plaint and for the first time, is referred in the affidavit. As far as the document at Sr. No.16 is concerned, again one Mr. Raghunath Ogate had applied for certified copy of the re-conveyance deed dated 17.11.1950. Mr. Joshi, therefore, contended that it is not coming from the proper custody. He, therefore, submitted that the learned trial Judge was not justified in allowing the Motion in terms of prayer clause (a).

6. He submitted that the learned trial Judge mainly relied upon the decision of this Court in the case of *Pandurang D. Dodke Vs. Lanka P. Kshirsagar*, **2006 (2) Bom.C.R. 785**. In paragraph 8 of that report, it was observed that a bare statement of the person on affidavit, who was required to file that document and prove the said fact, that the document was lost, would ordinarily be the evidence on the said fact. He submitted that basically, documents at Sr. No.14 and 16 were not referred to and relied upon by the plaintiff in the plaint as also in the list

of documents filed along with the plaint. Documents at Sr. No.14 and 16 are also not included. No affidavit of documents is filed by the plaintiff.

7. On the other hand, Mr. Chandnani supported the impugned order. He submitted that as far as the document at Sr. No.1 namely, indenture of mortgage dated 03.05.1949 is concerned, it is specifically referred in paragraph 1 of the plaint and the plaintiff has craved leave to refer and rely upon the said indenture. The plaintiff has produced the certified copy of the indenture deed. The learned trial Judge has kept the question of custody, proper or improper, open to be considered at the time of deciding the main Suit. As far as the document at Sr. No.14 namely, adoption deed dated 07.01.1932 is concerned, he submitted that defendant No.1 has referred to and relied upon the family arrangement dated 07.01.1932 in paragraph 5 of the written statement. He also invited my attention to the order dated 17.09.2985 passed by the Division Bench of this Court in Appeal No.822 of 1985 in Notice of Motion No.2068 of 1984 in Suit No.2240 of 1984. He further submitted that by notice dated 24.04.2010, plaintiff issued notice to Advocate for defendant No.1 to produce the original adoption deed dated 07.01.1932. The Advocate for defendant No.1 received the same on 28.04.2010. However, till date, the original deed of adoption is not produced.

8. Lastly, as far as document at Sr. No.16 is concerned, the same is the re-conveyance deed dated 17.11.1950. Plaintiff desires to lead secondary evidence of that re-conveyance deed on the ground that the defendant No.1 claims to have acquired the property. However, the said property is not subject matter of re-conveyance deed. Defendant No.1 claims that the suit property is re-conveyed and the plaintiff, on the other hand, contends that the suit property is not re-conveyed. In any case, he submitted that the question of custody, proper or improper, is kept open

by the learned trial Judge.

9. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As far as document at Sr. No.1 is concerned, admittedly, plaintiff has referred to deed of indenture of mortgage dated 03.05.1949 as also craved leave to refer to and rely upon the said indenture in paragraph 1 of the plaint itself. Mr. Joshi submitted that plaintiff has not applied for certified copy of the said indenture and the same is applied by Mr. Raghunath Ogate. It is not coming from the proper custody. In paragraph 5 of the impugned order, the learned trial Judge has kept that question open. It, therefore, cannot be said that the said document is not referred by the plaintiff in the Suit.

10. As far as the document at Sr. No.14 and 16 namely, adoption deed dated 07.01.1932 and re-conveyance deed dated 17.11.1950, are concerned, prima facie, these documents are not referred to in the plaint. In regard to document at Sr. No.14, plaintiff gave notice dated 26.04.2010 to the defendant No.1 for producing original deed of adoption. Defendant No.1 failed to produce the deed of adoption. Plaintiff has produced photocopy of deed of adoption. In paragraph 6 of the impugned order, the learned trial Judge held that plaintiff has complied the requirements under Section 65(a) of the Act, and is therefore, entitled to secondary evidence in regard to this document.

11. As far as document at Sr.No.16 namely, re-conveyance deed dated 17.11.1950, plaintiff contended that original of this deed is lost and inspite of the efforts made by him, he could not trace out original. The plaintiff, on application, obtained certified copy of the deed of re-conveyance from the office of the Sub-Registrar of Assurances, Mumbai. The deed of re-conveyance was executed by Shri Shreelal

Goenka i.e. plaintiff's grandfather and by Shri Charanjilal Shreelal i.e. plaintiff's father and original plaintiff in favour of Shri Bhagwandas Kishorilal, Smt. Krishnabai Bhagwandas and Shri Gopikumar Bhagwandas in respect of only one property out of the three properties mentioned. Plaintiff, therefore, sought permission to lead secondary evidence on a certified copy of the said deed. The learned trial Judge has kept the question of custody, proper or improper, open. The learned trial Judge also relied upon the decision of this Court in the case of **Pandurang D. Dodke** (*supra*), and in particular paragraph 8 thereof. Paragraph 8 reads thus,

“8. In fact, a bare statement of the person on affidavit who was required to file that document and prove said fact, that the document was lost, would ordinarily be the evidence on said fact. Therefore, some other evidence than a bare statement may not be necessary to prove that document was lost. Question of trustworthiness of such document is a different question. Such affidavit can always be opposed by opposite party's knowledge contrary to the said story of loss of document.”

12. In view thereof, I do not find that the learned trial Judge has committed any error in allowing the Motion in terms of prayer clause (a). It is needless to observe that even if plaintiff is permitted to lead secondary evidence, the plaintiff will have to prove the contents of the documents. Subject to this clarification, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)