

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

WRIT PETITION(ST) NO.26458 OF 2014

Mrs. Suman Vijay Mahabaleshwarkar
since deceased through her LRs
Deepal Vijay Mahabaleshwarkar & ors. ...Petitioners

vs.

Manohar Balkrsihna Mahabaleshwarkar
since deceased through LRs
Smt. Mangla Manohar Mahabaleshwarkar
& Ors. ...Respondents

Mr. S. N. Chandrachood for the Petitioners.
Mr. Venkatesh Shastry i/b. Manmath S. Athalye for the Respondent
No.2.

CORAM : R. M. SAVANT, J.

DATE : 11th MARCH, 2015.

PC. :-

The writ jurisdiction of this Court is invoked against the order dated 12th August, 2014 passed by the learned 3rd Joint Civil Judge, Senior Division, Satara, by which order, the application Exhibit 191 filed by the Petitioner-Defendant No.1A to lead secondary evidence in respect of the Will dated 22nd February, 1987 of one Balkrishna Mahabaleshwarkar, came to be rejected.

2] It is not necessary to burden this order with unnecessary details. Suffice it would be to state that the Respondent No.1A to 2 herein are the original Plaintiffs who have filed the suit in question

for partition and for a declaration that the Will dated 22nd February, 1987 of the said Balkrishna Mahabaleshwarkar is not binding on their share. The Plaintiffs have questioned the said Will on the ground that the same is bogus. Amongst the issues which are framed are two issues being issue nos.2 and 4 which are relevant in the context of the challenge raised in the above Petition, which issues read thus:-

“(2) Whether the Plaintiff prove that the Will deed executed in the name of Balkrishna is bogus?

(4) Whether the Defendants prove that by Will deed dated 22nd February, 1987 late Balkrishna bequeathed suit properties to Defendant No.1?”

3] Hence, the Trial Court having regard to the controversy between the parties in respect of the said Will dated 22nd February, 1987 has framed the relevant issues. In so far as the suit is concerned, the same proceeded to trial and the Plaintiffs evidence has been closed. It is after the closing of the Plaintiffs evidence and after the Defendant No.1A had examined witnesses, that the instant application Exhibit 42 came to be filed. The said application was founded on the fact that the original of the Will is with Dhananjay Mahabaleshwarkar who is one of the Plaintiffs. The case set up is that after the Will was executed by Balkrishna the same was notarized and six copies were made and the Will was also submitted to the City Survey Office. It is the case of the Defendant No.1A that

since Balkrishna was working in a Bank and had a safe deposit locker therein that the original of the said Will was handed over to Dhananjay for keeping it in safe custody. The Applicant i.e. the Defendant No.1A who is the heir of the original Defendant No.1 issued a notice under section 66 to the Plaintiff No.2, the Defendant Nos.4 and 6 to produce the original of the said Will. However, the said notice did not meet with any response. The aforesaid facts have been mentioned in the instant application Exhibit 42. The Plaintiffs questioned the said application Exhibit 42 by filing a reply. The main objection of the Plaintiffs appears to be that the case which is put up in the said application Exhibit 191 has not been pleaded in the written statement.

4] The Trial Court considered the said application and has by the impugned order dated 12th August, 2014 has rejected the same. The rejection is on the ground that the case now pleaded in the application Exhibit 191 does not find a place in the written statement which has been filed on behalf of the Defendant No.1 as well as in the additional written statement filed by the legal heirs of the Defendant No.1. The Trial Court as can be seen from the impugned order, has perused the documents which were filed by the Defendant No.1 vide Exhibit 140 amongst the said documents is the Will dated 22nd February, 1987. The Trial Court has considered the said

document which is filed at serial no.1 i.e. Will dated 22nd February, 1987. The Trial Court has, thereafter, opined that if the entire document is seen, it cannot be said that the copy produced on record came to be prepared at the same time. This conclusion the Trial Court has drawn on the basis that the certificate of Dr. Sathe is a xerox. However, the principal reason for the rejection of the said application Exhibit 191 appears to be that the averments made in the said application Exhibit 191 are not there in the written statement. As indicated above, the said application which can be said to be referable to section 65 clause (a) of the Evidence Act, the said clause covers the cases where the document is said to be in possession of a particular person but he does not produce the same. In the instant case, the Plaintiff Dhananjay to whom the notice under section 66 was addressed has not produced the same. In fact, as indicated above, it is the case of the Plaintiffs that the said document is bogus. Upon which the Trial Court has framed the issues. In so far as the order impugned in the present Petition is concerned, the same has been passed considering that the application is one filed under section 65(a) of the Evidence Act to lead secondary evidence in respect of the Will dated 22nd July, 1987.

5] In my view, for the reasons mentioned by the Trial Court, the rejection of the application which is referable to

section 65 clause (a) of the Evidence Act cannot be faulted with.

6] However, what is required to be considered in the instant case is that a copy of Will dated 22nd February, 1987 is already placed on record vide the list of documents filed by the Defendant No.1 vide Exhibit 140. The Trial Court whilst adjudicating the instant application Exhibit 191 has already taken note of the said document, however, has unfortunately commented upon the merits of the said document when it was not required to do so. Since the application which was filed was for leading secondary evidence. It is, therefore, not a case where for the first time the document is sought to be placed on record and secondary evidence is sought to be led. As indicated above, the parameters of the controversy between the parties can be said to be accepted by the Trial Court by framing the two issues which have been adverted to hereinabove. The parties are, therefore, required to be given an opportunity to prove their respective assertions and cannot be non suited on a technical ground. Though the application Exhibit 191 has been rejected by the Trial Court, the said rejection can only be restricted to the application filed under section 65(a) of the Evidence Act. The same would not preclude the Defendant No.1A to file an application invoking section 65(c) of the Evidence Act for leading secondary evidence in respect of the said document i.e. dated 22nd February, 1987 which is the Will

of the said Balkrishna. This is in view of the fact that the said Dhananjay and the other Defendants have not replied the notice issued under section 66 of the Evidence Act. The Defendant No.1A may do so within two weeks from date, if any, such application is filed, the Trial Court would consider the same without being influenced by the impugned order or the observations made therein in respect of the copy which is already on record filed vide Exhibit 140. In so far as the Will which is on record, the observations made by the Trial Court can therefore be said to be, prima facie, observations of the Trial Court. If the Defendant No.1A is ultimately held to be entitled to lead secondary evidence in respect of the said Will dated 22nd February, 1987 the Plaintiffs would, then, be entitled to lead rebuttal evidence if they so choose. This Court does not express any opinion as regards the merits of the application that would be filed by the Plaintiffs having regard to section 65(c) of the Evidence Act. The said application would be tried on its own merits and in accordance with law uninfluenced by the impugned order. With the aforesaid directions, the Writ Petition is disposed of.

(R. M. SAVANT, J.)