

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.

WRIT PETITION NO.3111 OF 2015

(Shri Govind s/o Ballabhdas Gandhi and another ..vs.. Shri Nitin s/o Dattatraya Patil and others)

Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

CORAM : Z.A. HAQ, J.

DATED : 22-07-2015

Heard Shri Ashish Bhide, learned Advocate for the petitioners.

2. The petitioners/original defendant Nos.2 and 3 have filed this petition challenging the order passed by the trial Court, allowing the application (Exhibit 45) filed by the respondent Nos.1 and 2/plaintiffs, seeking permission to lead secondary evidence.

3. It is submitted by the learned Advocate for the petitioners that the respondent Nos.1 and 2/plaintiffs have not pleaded in the plaint that the original will-deed dated 23-04-2001 is not available with the respondent Nos.1 and 2/plaintiffs and that it was with Nalini Vasantrya Marathe and then after the death of Nalini Vasantrya Marathe, the document was in possession of the defendant No.1. It is submitted that in the absence of such pleadings in the plaint, the trial Court cannot permit the respondent Nos.1 and 2/plaintiffs to lead secondary evidence.

Shri Ashish Bhide, learned Advocate for the petitioners has relied on the judgments given by the Hon'ble Supreme Court in the case of ***Ashok Dulichand vs. Madhavlal Dube and another*** reported in ***AIR 1975 SC 1748*** and in the case of ***Smt. J. Yashoda v. Smt. K. Shobha Rani*** reported in ***AIR 2007 SC 1721***.

4. In my view, the submission made on behalf of the petitioners cannot be accepted. The learned Advocate for the petitioners have not been able to point out any provision which requires that the pleadings to the above effect should be in the plaint or in the written statement. In the present case, it is undisputed that the respondent Nos.1 and 2/plaintiffs had given notice to produce the original registered will-deed dated 23-04-2001 to the defendant No.1, however, as the defendant No.1 failed to produce the said document, the plaintiffs have filed the application (Exhibit 45) specifying the details that the original will-deed dated 23-04-2001 executed by Late Nalini Vasant Rao Marathe in favour of the plaintiffs was in the custody of Late Nalini Vasant Rao Marathe, who was living on the ground floor of the house and the upper floor of that house was occupied by the defendant No.1-Shri Santosh Marathe, who happened to be the nephew of Late Nalini Vasant Rao Marathe. It is stated in the application that after the death of Nalini Vasant Rao Marathe, the defendant No.1 took possession of the ground floor of the house and removed the registered

will. These averments are made by the plaintiffs on solemn affirmation. The learned trial Judge has considered all these aspects and has rightly allowed the application filed by the plaintiffs, permitting to lead secondary evidence. The judgments relied upon by the petitioners do not assist them as in the present case the necessary averments are made by the plaintiffs on oath. The impugned order does not suffer from any patent illegality which necessitates the interference by this Court in the extra-ordinary jurisdiction. The writ petition is dismissed. No costs.

JUDGE

pma