

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4585 OF 2014

Vasant Bajirao More ... Petitioner
Vs.
Bajirao Mahadeo More (decd) through Laxmann
Khandagale and others ... Respondents

Mr. Shashikant B. Deshpande for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : APRIL 25, 2016

P.C. :

Heard Mr. Deshpande, learned Counsel for petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 12.02.2014 passed by the learned Joint Civil Judge, Junior Division, Kadegaon below exhibit-100 in Regular Civil Suit No.715 of 2008. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as plaintiff, to adduce secondary evidence as per Section 65(a) of the Indian Evidence Act, 1872 (for short 'Act').

3. Plaintiff has instituted Suit for partition in respect of property described in paragraph 1(a) of the plaint, between plaintiff and defendants No.1 and 2; for declaration that the plaintiff is the owner of the property described in paragraph 1(b) of the plaint; for declaration that transaction dated 17.08.2006 entered into by and between defendant No.1 and defendants No.3 and 4 is not binding on the plaintiff; for perpetual injunction restraining defendants No.2 to 4 from obstructing plaintiff's peaceful possession over the property described in paragraph 1(b) of the plaint.

4. It is the case of the plaintiff that the property described in paragraph 1(b) of the plaint was allotted to him in oral partition of 1990 between himself and the defendants. Pursuant thereto, a memorandum of partition was reduced in writing and came to be prepared on 06.12.1999. It is the case of the plaintiff that original memorandum of partition is in custody of defendant No.2. He issued notice to the defendant No.2 on 15.01.2014 for the production of the original document. Defendants denied his theory of oral partition as also preparation of memorandum of partition and refused to produce original memorandum of partition. Plaintiff, therefore, made application exhibit 100 under Section 65(a) of the Act for leading secondary evidence. By the impugned order, the learned trial Judge rejected the application.

5. In support of this Petition, Mr. Deshpande relied upon the following decisions:

a. ***Balkrishna Vs. Taher Mahmud*, 2001 (2) Mh.L.J. 931** to contend that the oral evidence cannot be substitute for documentary evidence;

b. ***Nawab Singh Vs. Inderjit Kaur*, AIR 1999 SC 1668** to contend that rejection of application, without affording tenant an opportunity of adducing secondary evidence is unjustified.

6. I have considered the submissions advanced by Mr. Deshpande. I have also perused the material on record. By the impugned order, the learned trial Judge rejected the application on the ground that during the course of cross-examination, plaintiff gave certain admissions. By the application for leading secondary evidence, plaintiff wants to withdraw the admissions given during the cross-examination. Paragraphs 6 and 7 of the impugned order read thus,

“6. Here, it will be worthwhile to notice certain admissions

given by the plaintiff in his cross examination at Exh.95. He admitted that, he does not know the date and day of his alleged oral partition. He further admitted that, except his bare words, he does not have any documentary evidence with regard to the said oral partition. He further categorically admitted that, since memorandum of partition in writing had not been prepared in 1999, he does not have custody of the original thereof. He further admitted that, the said oral partition has not been implemented. He further admitted that, he had not been given separate possession of his share with the boundaries in the said partition.

7. The aforesaid vital and categorical admissions of the plaintiff in his cross-examination at Exh.95 completely destructs his theory of oral partition of year 1990 and consequent preparation of memorandum of partition on 06.12.1999. Therefore, it is difficult to rely on his theory of preparation of the said memorandum of partition and the custody of its original with defendant No.2. Hence, he failed to show the existence and the custody of the original memorandum of partition dated 6.12.1999 with defendant No.2. Then, defendant No.2 cannot be made liable to produce the same in the Court. Hence, the application seeking permission to lead secondary evidence with regard to the said memorandum of partition is devoid of merit and liable to be rejected. Accordingly, I pass the following order,”

2. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the application. Mr. Deshpande relied upon decision of **Balkrishna** (*supra*). In that case, the learned Single Judge of this Court held that oral evidence cannot be substitute for documentary evidence. There is no dispute with this proposition. In the case of **Nawab Singh** (*supra*), appellant before the Apex Court contended that he is a tenant in the suit shop inducted by the defendant as per the rent note dated 23.09.1994. Respondent disputed the tenancy. Appellant moved application before the trial Court seeking production of rent note from the custody of the respondent, which was rejected by the trial Court. He thereafter took out application for production of secondary evidence of the rent note, which was rejected by the trial Court as also by the High Court. Application was rejected mainly on the ground that the copy of the rent note sought to be produced by the

appellant was of doubtful veracity. It is in that context, the Apex Court held that the trial Court was not justified in forming that opinion without affording the appellant an opportunity of adducing secondary evidence.

3. In the present case, the learned trial Judge has rejected the application after considering the admissions given by the plaintiff during the course of cross-examination. In view thereof, decision in the case of **Nawab Singh** (*supra*) does not advance the case of the plaintiff. Hence, Petition fails and the same is dismissed.

4. 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.)

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