

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.544 OF 2016

Maruti Pandurang Kakade (Mahangade) ... Petitioner
Vs.
Shantaram Laxman Devghare and others ... Respondents

Mr. Shirish V. Pitre for Petitioner.
Mr. Satyajeet H. Joshi for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : DECEMBER 2, 2016

P.C. :

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

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'plaintiff', has challenged the judgment and order dated 06.11.2015 passed by the learned Civil Judge Junior Division, Karjat, District Raigad below exhibit-59 in Regular Civil Suit No.82 of 2011. By that order, the learned trial Judge rejected the application made by the plaintiff for leading secondary evidence in respect of two sale deeds dated 04.08.1970.

3. In support of this Petition, Mr. Pitre submitted that on 04.08.1970, two sale deeds in respect of the suit property were executed in favour of the plaintiff's father. On 13.07.2010, defendants No.1 and 12 sold the suit property to defendant No.13. He has taken me through the amended paragraph 7A of the plaint as also exhibit-59. He submitted that by application exhibit-59, plaintiff desires to produce certified copies of two sale deeds. Section 63(1) of the Indian Evidence Act, 1872 (for short 'Act') lays down that secondary evidence means and includes certified copies given under the provisions hereinafter contained. In other words,

he submitted that the secondary evidence includes even the certified copies. As the plaintiff proposes to produce the certified copies of the sale deeds dated 04.08.1970, chance may be given to establish his case. He submitted that the original sale deeds are not in the custody of either of the plaintiff or his father. Earlier, it was inadvertently admitted that original sale deeds are in the custody of the plaintiff. He submitted that the certified copies are also coming from the proper custody, and therefore, the learned trial Judge should have allowed application exhibit-59. He relied upon the decision of the Apex Court in the case of ***J. Yashoda Vs. K. Shobha Rani, 2007 (5) SCC 730.***

4. On the other hand, Mr. Joshi supported the impugned order.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In paragraph 5, the learned trial Judge has considered the pleadings of the parties. Defendants No.1 to 12 filed written statement exhibit-38 wherein it is contended that Lazman Devdhare never sold Survey No.4, Hissa No.11 to the plaintiff's father. Plaintiff's father got executed bogus documents by false personation of Laxman Devdhare. The learned trial Judge observed that if the plaintiff is claiming ownership on the basis of the sale deeds, naturally, he must be aware about whereabouts of the document at the time of filing of the Suit. Suit is instituted in the year 2011. Plaintiff did not come with the case about loss of sale deeds in the Suit.

6. The learned trial Judge referred to Order VII, Rule 14 in paragraph 6 which requires the plaintiff to set out document in possession or power of the plaintiff and wherever it is not with the plaintiff to state in whose possession or power it is. The learned trial

Judge also noted that initially plaintiff admitted its custody and now he is coming out with the case that it was inadvertently stated that sale deeds are in the custody of the plaintiff. For the reasons recorded in paragraphs 5 and 6 of the impugned order, I do not find that the learned trial Judge has committed any error in rejecting the application. Mr. Pitre relied upon the decision of **J. Yashoda** (*supra*). The said decision is clearly not applicable to the facts of the present case as defendants have specifically asserted that documents are obtained by false personation. Hence, Petition fails and the same is dismissed. However, it is made clear that where a decree is challenged 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 proposed proceedings as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)

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