

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 4413 OF 2017

Umme Habiba Istiyas Hashmi

..PETITIONER

VERSUS

Tarakhbeen Mubarakbeen Mazi and Another

..RESPONDENTS

....
Smt. C.S. Deshmukh, Advocate for petitioner.
Mr. J.R. Patil, Advocate for Respondent No.1.

....

**CORAM : RAVINDRA V. GHUGE, J.
DATED : 26th JULY, 2017**

ORDER :

1. The petitioner is aggrieved by the order dated 02nd February, 2017 by which the Trial Court has allowed application Exhibit 68 and permitted the respondents – defendants to lead secondary evidence on the compromise deed dated 11th April, 2005.

2. Office bailiff report after issuance of notice to the respondents indicates that Respondent No.2, who is the real brother of Respondent No.1, has refused to accept the Court notice though it was read out and explained to him. The service of Respondent No.2 is therefore complete.

3. I have considered the submissions of the learned Counsel for the respective sides.

4. It is quite evident from the record that the defense of the defendants while opposing Regular Civil Suit No. 265 of 2007 is that there was no encroachment on the land owned by the plaintiff. There was a compromise in between the plaintiff and the defendants on 11th April, 2005. Based on the said compromise, the construction has been undertaken by the defendants. The original copy of the said compromise deed is deposited in the office of the Taluka Inspector of Land Records, Ambad (hereinafter referred to as “the T.I.L.R.”) and a certified true copy is obtained by them.

5. The Defendant No.1 has moved application Exhibit 68 on the premise that he has obtained the certified copy of the compromise deed from the T.I.L.R. As it is obtained from the office of the T.I.L.R., it has evidential value and it is admissible by way of secondary evidence.

6. The Trial Court has allowed application Exhibit 68 on the ground that no loss or harm would be caused to the plaintiff since the certified copy of the document can be believed to be genuine under Sections 63(2), 65(c) and 79 of the Evidence Act.

7. There can be no debate that secondary evidence can be allowed subject to fulfilling the requirement under the Evidence Act. However, if the original document is in existence, secondary evidence is not to be permitted casually. The defendants claim that the purported original compromise deed is a part of the record of the T.I.L.R. office as the defendants have deposited the said document in the office of the T.I.L.R. I am quite sure that if the document has been tendered by the defendants, it must have been recorded in the records of the T.I.L.R. office, in as much as, the defendants must be having an acknowledgment.

8. The issue therefore is that when the original document is in existence, can the Trial Court permit recording of secondary evidence. In my view, unless the original document, which is in existence, cannot be brought before the Court due to the reasons which are beyond the control of the litigating sides and it would be impossible to bring the original document before the Court, the option of permitting the secondary evidence could be allowed. (Read *Rambhau Sadashivappa Jatkar Vs. Tryambak Shenfal Satbharkre 2006 (3) Mh.L.J. 85.*) I do not find from the impugned order, that the Trial Court has applied its mind to this aspect of the case.

9. Considering the above, this petition is allowed. The impugned order dated 07th February, 2017 below Exhibit 68 is set aside and application Exhibit

68 stands disposed of. The defendants would be at liberty to move an application before the Trial Court for seeking a specific direction to the office of the T.I.L.R., Ambad to produce the original compromise deed. The Trial Court can therefore direct the T.I.L.R. to produce the original compromise deed, keeping in view that it is not the defendant's case that the original copy is missing or lost or destroyed.

(RAVINDRA V GHUGE, J.)

SSD