

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD

WRIT PETITION NO. 4809 OF 2014

SHIVANAND RAJENDRA TANWADE AND OTHERS  
VERSUS  
DATTATRAYA DAGDU TANWADE AND OTHERS

Advocate for Petitioner : Shri K.K. Kulkarni  
h/f. Shri S.V. Natsu.

Advocate for Respondent No. 1 : Shri B.R. Sontakke Patil.

CORAM : RAVINDRA V. GHUGE, J.  
Dated : 12<sup>th</sup> December, 2017

PER COURT :

1. The petitioners who are the original plaintiffs, are aggrieved by the order dated 15/03/2014 passed by the Trial Court, by which, application Exhibit 99 seeking leave to read secondary evidence in R.C.S. No. 174/2008 has been allowed.

2. The contention of the petitioners is that Exhibit 91 was filed by the defendants claiming that there was a consent deed dated 19/05/1989. The said consent deed bears the signature of plaintiff No. 3. That document is lost, though a photostat copy is available with the defendant. Based on the said

contention, leave to lead secondary evidence under Section 65 (c) of the Indian Evidence Act, 1872 was sought and the Trial Court has granted the said liberty vide the impugned order.

3. Grievance is that neither any details about the consent deed have been specifically set out in the written statement, nor have the defendants mentioned in the written statement that the said consent deed is lost, is untraceable and the photostat copy has been preserved by the defendants. It is, further contended that the permission to lead secondary evidence is not to be granted casually and it is only after the requirements under Section 63 are fulfilled that the permission can be granted under Section 65 (c).

4. Learned counsel for the respondents original defendants has strenuously supported the impugned order. He stated that there is a reference to the consent deed in the written statement. Since, the original is lost, the defendants were rightly granted the permission to lead secondary evidence.

5. It is, further submitted that the Trial Court has erroneously mentioned in paragraph No. 5 of the impugned order that the plaintiffs have pleaded about the deed in their plaint. That is a typographical mistake and the said sentence should be read as 'the defendants have pleaded in the written statement about the deed'.

6. It requires no debate that grant of permission to lead secondary evidence is to be cautiously ordered and such a liberty cannot be granted at the mere askance. Secondary evidence has been defined in section 63. Section 65 relates to such documents which can be proved through secondary evidence in special circumstances.

7. It is trite law that the document which is sought to be proved under Section 65 must have its roots in the pleadings of the parties. As in this case, the defendants have not pleaded in the written statement as regards the details of the documents and have not disclosed that the said document is lost or is destroyed. A cursory reference has been given to the alleged

consent deed in paragraph No. 10 (C) of the written statement.

8. It appears from exhibit 99 that the defendants have contended that they have tried their best to search that document and as it is untraceable. The photostat copy is sought to be produced. The Trial Court, therefore, needs to assess as to whether the photostat copy has been prepared from the original while granting liberty to lead secondary evidence. No such conclusion is found in the impugned order. Moreover, in a complete sentence in paragraph No. 5, the Trial Court has recorded that "*the plaintiffs in their plaint have pleaded about the deed dated 19/05/1989.*" The defendants cannot point out from the plaint as to whether the plaintiffs have made any reference to any of the plaintiffs or their blood relatives having consented to the consent deed.

9. Learned counsel for the defendants submits that the reproduced sentence should be read as the defendants have pleaded in the written statement about the deed. This argument cannot be accepted because the above reproduced

sentence is followed by a conclusion of the Trial Court that

*“Therefore, the existence of the consent deed cannot be doubted.”*

Both these sentences are to be read together and in the absence of the plaintiffs having disclosed the consent deed dated 19/05/1989, the Trial Court cannot conclude that the existence of the consent deed is not disputed.

10. Considering the above, this petition is partly allowed. The impugned order dated 15/03/2014 is quashed and set aside and the trial Court is permitted to reconsider application Exhibit 99 in R.C.S. No. 174/2008 afresh. Needless to state, the litigating sides shall assist the trial Court on Exhibit 99 and the trial Court shall consider the said application strictly within the parameters of Sections 63 and 65 (c) of the Indian Evidence Act.

( RAVINDRA V. GHUGE, J. )