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

WRIT PETITION NO. 5986 OF 2013

Shridhar S/o Bapurao Dighole,
age 56 years occupation Advocate
R/o Shreenagar, Ambajogai District Beed.

...PETITIONER

VERSUS

1. Vishwanath S/o Nivartti Kokate,
age 77 years occupation agriculture
R/o Sangam Taluka Parali District Beed.
2. Vajjnath S/o Nivartti Kokate,
age 69 years occupation & R/o as above
3. Bhagwat S/o Baburao Kokate,
age 40 years occupation & R/o as above.
4. Radhabai W/o Baburao Kokate,
age 77 years occupation & R/o as above.
5. Shivkumar S/o Narayan Tiwari,
age 69 years occupation agriculture
R/o Nagzari, Ambajogai Dist. Beed.
6. Kujanprasad S/o Vithalprasad Tiwari,
age 70 years occupation agriculture
R/o Degloor Taluka Deglur Dist. Latur
7. Dwarkaprasad S/o Ramlal Tiwari,
age 70 years occupation Agriculture
R/o Dharmapuri Taluka Parali District Beed.
8. Ayodhyaprasad S/o Ramlal Tiwari,
age 80 years occupation agriculture
R/o Bitergaon Taluka Umarkhed Dist. Nanded.

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9. Shivaji S/o Sanjiwanrao Bidgar,
age 55 years occupation agriculture
R/o Daudpur Taluka Parali Dist. Beed.
10. Mauli Sanjiwanrao Bidgar,
age 45 years occupation & R/o as above.
11. Sanjiwan Venkat Bidgar,
age 75 years occupation & R/o as above.
12. Gangabai Sanjivan Bidgar,
age 70 years occupation and R/o as above.

...RESPONDENTS

Shri V.V. Bhavthankar, Advocate for petitioners,
Shri S.S. Choudhary, Advocate for respondents No.1 to 4.

CORAM : R.D. Dhanuka, J.

DATE : 14th August, 2017

ORAL ORDER

Rule returnable forthwith. Learned Counsel for petitioner and contesting parties are present. Learned Counsel for the contesting parties waives service. By consent, petition is heard finally.

2. By this petition filed under Articles 226 and 227 of the Constitution of India, the petitioner has impugned the order dated 12th March 2013 passed by the Civil Judge (Senior Division), Ambajogai, below Exh. 181 in Special Civil Suit No. 21 of 2006, thereby rejecting application of the petitioner for recalling witness

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summons and for allowing application Exh. 181 filed by him.

3. The relevant facts for deciding this petition are as under:

Respondents No. 1 to 4 are original plaintiffs in Special Civil Suit No. 21 of 2006, filed against respondents No. 5 to 12 for declaration and permanent injunction in respect of suit land in the Court of Civil Judge (Senior Division), Ambajogai. Defendants No. 5 to 7 in the said suit and their cousin had filed an application for declaration of ownership under section 38(E) and determination of purchase price of land. The suit was resisted by defendants No.1 to 4 and 5 to 7.

4. On 22nd July 2011 the plaintiffs filed an application in the said suit bearing No. 92/Inam/BD/9716 in respect of suit land and other lands bearing survey Nos. 57, 83 and 84 before the Deputy Collector between plaintiffs and others against Balaji Mandir Trust. It was contended that plaintiffs and defendants had engaged the petitioner herein as an Advocate on their behalf before the said authority. It was further alleged that the petitioner had filed several applications, documents and written arguments on behalf of the plaintiffs and defendant Sanjivan before the Deputy Collector, Ambajogai. It was stated that they had filed certified copies of the

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documents. The plaintiffs applied before the learned Trial Judge for issuance of witness summons upon the petitioner-advocate in order to prove the said documents. By an order dated 22nd July 2011 the learned Trial Judge issued witness summons upon the petitioner-advocate to prove documents filed by the plaintiffs through their Advocate. The witness summons was served upon petitioner.

5. The petitioner filed an application on 19th August 2011 stating that he was engaged by one of the litigants in the previous matter before the Deputy Collector, Ambajogai. It was further contended that he was not the author of those documents, which were intended to be proved by the plaintiffs through the petitioner, who had represented them before the Deputy Collector. Similarly, he also contended that he being an Advocate for one of the litigants, cannot prove the contents of the notes of argument and applications for adjournment. The defendants gave their no objection to the said application filed by the petitioner for recalling of the order of issuance of summons to the petitioner passed on 12th March 2013. The learned Trial Judge rejected the said application for recalling the said order issuing witness summons upon the petitioner. This order of the learned Trial Judge is impugned by the petitioner in this petition under Articles 226 and 227 of the Constitution of India.

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6. Learned Counsel for the petitioner invited my attention to the application filed by the plaintiffs before the learned Trial Judge contending that in a matter between plaintiffs and others Vs. Balaji Mandir Trust, plaintiffs had engaged present petitioner as their Advocate, who had filed several applications and written arguments on behalf of plaintiffs, under his signature, before the Deputy Collector, Ambajogai. It was further stated in the said application that plaintiffs had filed certified copies of said documents obtained from the file of the office of the Deputy Collector, Ambajogai, and seek to examine petitioner herein as their witness to prove those documents. The learned Civil Judge (Senior Division), Ambajogai, passed a cryptic order allowing the said application on 22nd July 2011.

7. The petitioner further applied for recalling the said order on 19th August 2011. The said application for recalling the said order is rejected on 12th March 2013.

8. The learned Counsel for the petitioner submits that in the said proceedings, before the Deputy Collector, under the instructions received from the plaintiffs, he had filed applications, documents and written arguments on behalf of the plaintiffs as their Advocate. He submits that the petitioner being an Advocate, who acted on behalf

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of his clients, cannot be called upon to prove the contents of the documents and pleadings in the said proceedings. He submits that the order passed by the learned Trial Judge initially allowing such application for issuance of witness summons against petitioner and thereafter refusing to recall the said order, is totally perverse, illegal and deserves to be set aside.

9. Learned Counsel for the original plaintiffs, on the other hand, submits that since the petitioner as an Advocate had filed applications, documents and the written arguments on behalf of his clients before the Deputy Collector, Ambajogai, the contents of those documents and the pleadings can be proved only by their learned Advocate. He tried to justify the impugned orders passed by the learned Trial Judge and submits that there is no infirmity in the orders passed by the learned Trial Judge. He submits that as and when, the petitioner enters the witness box, he may give appropriate reply to questions being asked to him in examination-in-chief and in cross-examination.

10. It is not in dispute that the petitioner is an Advocate and had appeared for the plaintiffs in one of the proceedings before the Deputy Collector. He had also filed applications, documents and the written arguments on instructions of his clients. In the application

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filed by the original plaintiffs before the Civil Judge (Senior Division) for issuance of witness summons, it was alleged that the petitioner had filed various applications, documents and written arguments on behalf of the plaintiffs and defendant Sanjivan in one of the matters before the Deputy Director, Ambajogai, under his signature. A perusal of the said application indicates that plaintiffs have filed certified copies of documents obtained from the file of the office of the Deputy Director, Ambajogai. The plaintiffs have applied for proving the contents of those documents, applications and written argument filed on their behalf by the petitioner through the petitioner.

11. In my view, an Advocate, who files proceedings on behalf of his clients, cannot be called upon to prove the contents of the pleadings and documents on behalf of his clients. The contents of those documents and pleadings have to be proved by the clients and not by their Advocate. The plaintiffs have already obtained certified copies of those documents including written arguments.

12. A perusal of the impugned order passed by the learned Civil Judge (Senior Division), Ambajogai, on the application (Exh. 181) filed by the petitioner indicates that the learned Trial Judge has rejected the said application on the premise that Section 126 of the

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Evidence Act prevents an Advocate from disclosing the professional powers and communication took place between Advocate and litigants during the course of pendency of proceedings. He has erroneously observed that once an Advocate submits applications, say and notes of argument on behalf of his client, it does not come within the purview of professional communication because it is within the knowledge of all the parties.

13. Under Section 61 and 62 of the Indian Evidence Act, 1872, in my view, the truth and the contents of the documents cannot be proved by production of document simplicitor. The author of the documents must be examined to prove the contents of the documents. An Advocate, who drafts a document and pleadings, based on the instructions of his client, does not become author of the document or pleadings for the purposes of proof of such documents and pleadings, within the meaning of Section 61 and 62 of the Indian Evidence Act, 1872. An Advocate, thus, cannot be called upon to prove the contents of documents and facts pleaded in pleadings and written arguments on behalf of his client.

14. By the impugned order, the learned Trial Judge held that considering the facts and circumstances of the case and since

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plaintiffs had intended to prove the contents of the application, say and notes of argument submitted in the proceedings before the Deputy Director, by examination of the petitioner as a witness by the plaintiffs, it would not cause any prejudice to the privilege of the petitioner as an Advocate. In my view, the findings recorded by the learned Trial Judge are totally perverse, without application of mind and contrary to the provisions of the Advocates Act, 1961, and the Indian Evidence Act, 1872.

15. I, therefore, pass the following order:-

ORDER

- (I) Impugned order dated 12th March 2013 passed by the learned Civil Judge (Senior Division), Ambajogai, in Special Civil Suit No. 21 of 2006 below Exh. 181, is set aside. Application Exh. 181 filed by the petitioner is allowed.
- (II) Writ Petition is allowed In aforesaid terms.
- (III) No order as to costs.

(R.D. DHANUKA, J.)