

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

WRIT PETITION NO. 36 OF 2016

Shaikh Farooque Abdul Rehman
and others

.. Petitioners

Versus

Tatyarao Atyaji Shejwal and another

.. Respondents

Shri Shaikh Mustfa Gulam Mustafa, Advocate for Petitioners.
Shri R. M. Joshi, Advocate for Respondent Nos. 1 and 2.

CORAM : S. V. GANGAPURWALA , J.

DATE : 21ST APRIL, 2017.

PER COURT :

. The present petitioners are original plaintiffs. The petitioners have filed suit bearing R.C.S. No. 202 of 2008 seeking relief of injunction. The defendants filed their written statement and based their claim on the sale deed dated 15.03.1972, which according to them is executed by the father of the present plaintiffs. After evidence of the plaintiff's was recorded, the defendants filed application U/Sec. 65 of the Indian Evidence Act seeking permission to adduce secondary evidence of the sale deed dated 15.03.1972. The defendants produced certified copy of the registered sale deed dated 15.03.1972. The said application is allowed. Aggrieved thereby the present petition by the plaintiffs.

2. Mr. Mustafa, the learned counsel for petitioners strenuously contends that, for permitting a party to adduce secondary evidence, the compliance of provision of Sec. 65 of the Indian Evidence Act is mandatory. The party has to prove that the original has been destroyed or lost or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect is not in a position to produce it within reasonable time. The said provision does not entitle a party to take advantage of his own negligence. The respondents have not been in a position to show as to when the alleged sale deed has been lost or destroyed. No details are laid down in the application. The bald statement is made about the fact that, original cannot be traced out. Even the learned Judge while passing the order has concluded that the details are not given how the said document is misplaced by the defendants, but only on the premise that the defendants have contended that efforts are taken has allowed the application. The said approach is erroneous. The compliance of ingredients of Sec. 65 of the Evidence Act is *sine qua non* for allowing production of secondary evidence. The learned counsel relies on the judgment of the Apex Court in a case of Rakesh Mohindra Vs. Anita Beri reported in **2016 All S.C.R. 1**, so also relies on another judgment of the learned Single Judge of this Court in a case of Rambhau Sadashivappa Jatkar Vs. Trymbak Shenfal Satbharkre reported in **2006 (2) All M. R. 659**. Mr. Mustafa the learned

counsel further submits that, even it is hit by Sec. 65(E) of the Indian Evidence Act.

3. Mr. Joshi, the learned counsel for respondents/original defendants submits that, earlier the suit was filed by the plaintiff's father for possession. In the said matter the sale deed was produced. Said suit was dismissed. Appeal was also dismissed. The reference of sale deed in question very much appears in the said judgment. According to the learned counsel, the respondents could not gain by withholding said document. As the said document could not be traced out, the certified copy of the said document is produced.

4. I have considered submissions canvassed by the learned counsel for respective parties.

5. It is not disputed that the defendants have produced the certified copy of the registered sale deed dated 15.03.1972. No doubt, the contents of the same have to be proved by the party producing it. However, question before the Court was for allowing the party to adduce secondary evidence. While considering an application for secondary evidence, the party has to prove about existence of the document that such a document *prima facie* existed. The learned counsel for respondents has stated across the bar that, the copy of judgment in R.C.S. No. 131

of 1990 and R. C. A. No. 259 of 1993 is produced on record in the instant civil suit. The said statement is accepted.

6. In the said judgment reference appears of the sale deed dated 15.03.1972. Thus, *prima facie* existence of the document can be shown. Of course, sale deed is not a public document. The sale deed in question is a registered sale deed. The certified copy of the said document is sought to be produced, when the original is not available. It would also not be advantageous for the respondents to withhold said sale deed. Judgments are produced in the suit, where reference to the said sale deed in question is already made. Of course the respondents are required to prove all these aspects. In my opinion, the order passed on application of respondents for secondary evidence by the Court needs no interference. The writ petition is disposed of. No costs.

[S. V. GANGAPURWALA, J.]