

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.609 OF 2015

Shri Bhiqui Dangui @ Babuli Naique Dangui
Expired) & 2 Ors.

...Petitioners

vs.

Shri Vithal Jaganath Kamat (Expired) &
13 Ors.

...Respondents

Mr. Ashwin D. Bhobe for the Petitioners.

CORAM :- C. V. BHADANG, J

Date: - 31st March, 2017

ORDER :

. On 14/9/2015 a notice for final disposal was issued in this case. Accordingly, the Petition is being disposed of finally.

2. The Petitioners have filed Regular Civil Suit No.85/2001/A which is pending before the learned Senior Civil Judge at Ponda. The suit is filed for permanent injunction restraining the Respondents from creating any third party rights in respect of the suit property and for a declaration that the agreement dated 5/4/1993 executed by and between the Respondents is null and void. The petitioners are further claiming a decree that any deeds executed by the Respondents in respect of the suit property in favour of third parties are null and void.

3. It appears that the parties led evidence. The Petitioners filed an application (Exhibit 83) on 18/6/2015 under section 65 of the Evidence Act, for leading secondary evidence claiming that xerox copy of the agreement dated 5/4/1993 (marked 'X' for identification) may

be taken on record as secondary evidence and the same be marked as Exhibit.

4. The Respondent Nos.9 to 14 objected to the said application on the ground that the Petitioners have already closed their evidence and they cannot be allowed to produce secondary evidence in respect of the said agreement.

5. The learned Trial Court by the impugned order dated 7/7/2015 has dismissed the Application (Exhibit 83) which is the subject matter of challenge in this Petition.

6. I have heard the learned counsel for the Petitioners. There is no appearance on behalf of the Respondents though served.

7. It is submitted by the learned counsel for the Petitioners that the agreement for sale dated 5/4/1993 was executed by and between the Respondents, execution of which is not disputed. It is submitted that Dilip Dharma Kurtarkar (DW-1) in his cross examination has stated that the agreement for sale dated 5/4/1993 was executed before the Notary viz. Ashok Prabhudessai from Margao. DW-1 further admitted that he is aware of the clauses of the said agreement. However, he was not having the original of the agreement with him. On a subsequent date i.e. 9/6/2015 DW-1 stated in his cross examination that the original agreement for sale is not traceable. It is thus, submitted that once it is shown that the original agreement for sale cannot be produced, the learned Trial Court ought to have granted permission to lead secondary evidence in respect of the said document

thereby exhibiting the xerox copy which was already on record (marked 'X' for identification). It is further submitted that the observations in paragraph 4 of the impugned order that the plaintiffs are signatories to the said document is not correct.

8. It is submitted that the learned Trial Court has misread and misinterpreted the provisions of section 63 and 65 of the Evidence Act.

9. I have carefully considered the circumstances and the submissions made.

10. The learned Trial Court has dismissed the application mainly on the ground of the stage at which the application is filed. The learned Trial Court has noticed that the suit is of the year 2001 in which issues were settled on 2/8/2003. The learned Trial Court has further noticed that considering the nature of the suit filed by the Petitioners and the relief sought therein, the agreement for sale was the material document and, therefore, it ought to have been produced along with the suit or latest at the stage of compliance of Order XIII Rule 1 and 2. However, it was not done. The learned Trial Court has further noticed that deposition of the Petitioner's witness PW-1 was started in the year 2009 and it went on till 2014 and at the time when the impugned order was passed DW-1 was under cross examination. The learned Trial Court has further found that the party has either to produce the original document or a certified copy of the document and not a mere xerox copy. The Trial Court has further found that the application was filed in a casual manner and without verifying the fact

and the application was not supported by an affidavit.

11. It cannot be disputed that the agreement for sale dated 5/4/1993 is a material document, considering the nature of the suit claim and as such the plaintiff ought to have produced the same or sought permission to lead secondary evidence in respect of the same at the proper stage and could not have waited till DW-1 had entered into witness box. That apart, the whole basis of the claim that the document may be permitted to be produced on record as secondary evidence, a certain part of cross examination of DW-1. Perusal of the relevant part of the cross examination conducted on 18/4/2015 and 9/6/2015 would show that according to DW-1, the agreement for sale was a notarized document. It is evident that the agreement for sale which is marked 'X' for identification (at page 98 of the compilation) does not have any endorsement by the Notary. Thus, the agreement for sale marked 'X' for identification before the Trial Court cannot be said to be a copy of the agreement for sale which DW-1 has referred to in his cross examination.

12. Perusal of section 63 of the Indian Evidence Act would make it explicit that the secondary evidence means and includes copies made from original by mechanical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies. The document which is marked 'X' for identification cannot be said to be copy obtained by mechanical process of a document which DW-1 states to be a notarized document. Thus, in my considered view, the document (marked 'X' for identification before the Trial Court) cannot be said to be the secondary evidence of the notarized

agreement for sale which DW-1 refers to in his cross examination.

13. For these reasons alone, I find that the permission as sought for cannot be granted. The impugned order of dismissal of the application does not suffer from any infirmity. The Petition is without any merit and is accordingly dismissed.

(C. V. BHADANG, J.)