

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2198 OF 2017

Balasaheb Ganajananrao Shinde
(since deceased) Through L.Rs.

...Petitioners

Versus

Madhukar Balwant Salunkhe

...Respondent

....

Mr.N.J. Patil i/b. Amey N. Patil, Advocate for the Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 14th MARCH, 2017

P.C.

1. Heard Mr.N.J. Patil, learned Counsel for the petitioners at length.

2. Leave to substitute the figure Rs.70,90,460/- by the figure Rs.17,90,460/- in paragraph-1 of the Petition is granted. Amendment shall be carried out forthwith.

3. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter collectively referred to as the 'plaintiffs', have challenged the judgment and order dated 19.12.2016 passed by the learned Civil Judge, Senior Division, Sangli below Exhibit-78 in Special Civil Suit No.117/2005. By

that order, the learned trial Judge allowed the application filed by the respondent, hereinafter referred to as the 'defendant', for exhibiting original Memorandum of Understanding dated 7.9.2002 produced along with list at Exhibit-54/5 as Exhibit-80.

4. In support of this Petition, Mr. Patil submitted that the plaintiff Balasaheb Gajananrao Shinde as well as attesting witnesses Madhavrao Desai and Vishnupant Gawandi expired. The defendant has examined sons of the attesting witnesses by name Shridhar Desai and Arun Gawandi. He submitted that basically the defendant has not proved the contents of memorandum of understanding. The learned trial Judge was, therefore, not justified in marking that document as exhibit. In support of this submission, he relied upon the decision of this Court in ***Prakash Cotton Mills Pvt. Ltd. vs. Municipal Commissioner for Greater Bombay and another, AIR 1982 BOMBAY 387*** which also made reference to the decision of this Court in ***Madholal Sindhu vs. Asian Assurance Co. Ltd., AIR 1954 Bom 305***. He submitted that in the present case, at the highest the defendant has proved the signatures of the attesting witnesses and not the contents of the Memorandum of

Understanding. He, therefore, submitted that the learned trial Judge committed error in allowing application Exhibit-78.

5. I have considered the submissions advanced by Mr.Patil. I have also perused the material on record. Perusal of written statement filed by the defendant and in particular paragraph-14(d) shows that the defendant has made reference to the Memorandum of Understanding signed by the original plaintiff Balasaheb Shinde, defendant and the attesting witnesses. The defendant has also filed affidavit of examination-in-chief at Exhibit-61 on 13.7.2016. In paragraph-4, the defendant has specifically referred to Memorandum of Understanding dated 8.9.2002 entered into between the original plaintiffs and the defendant and was attested by Madhavrao Desai and Vishnupant Gawandi. He has produced that Memorandum of Understanding along with list Exhibit-54/5. A perusal of the impugned order also shows that the defendant has produced original Memorandum of Understanding along with list Exhibit-54/5. It is in that context in paragraph-3, the learned trial Judge has observed that the Memorandum of Understanding is signed by the defendant at Sr. No.2. The signature of attesting witnesses is proved by examining their

sons, namely, Shridhar Desai and Arun Gawandi. The learned trial Judge also noted that during pendency of the suit, the original plaintiff Balaso Shinde as well as the attesting witnesses Madhavrao Desai and Vishnupant Gawandi expired. The learned trial Judge, therefore, observed that in such circumstances *prima facie* it appears that the execution of memorandum of understanding is proved by the defendant and accordingly marked MOU as Exhibit-80.

6. Mr. Patil relied upon the decision of this Court in ***Prakash Cotton Mills Pvt. Ltd. (supra)***. In that case, the learned Judge of the Small Causes Court declined to mark the sale deed as Exhibit on the ground that the executant of the sale deed was not examined. The learned trial Judge observed that the proof of the signature of the executant was offered but that itself could not prove the contents of the sale-deed or the truth of the contents of the sale-deed and accordingly refused to exhibit the sale-deed. In paragraph-3, the decision of Apex Court in ***Bishwanath Rai vs. Sachhidanand Singh, AIR 1971 SC 1949*** was considered, wherein it was held that the correctness of the contents of the letter can only be proved by

examining the writer of that letter.

7. In the present case, the plaintiffs have challenged marking of MOU as exhibit. For the reasons recorded in paragraph-3 of the impugned order, I do not find that the learned trial Judge has committed any error in marking original MOU as exhibit. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

8. It is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of C.P.C.

(R. G. KETKAR, J.)