

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2759 OF 2014

Shri Dhondiram Rambhau Khaire & Ors.

...Petitioners

vs.

Smt. Indubai Tarachand Khaire & Ors.

...Respondents

Mr. Dilip Bodake for the Petitioners.

Mr. Rahul D. Motkari for Respondent No.1.

CORAM : SMT. SADHANA S. JADHAV, J.

DATE : 16th November, 2017

P.C.:

. Heard. Rule. Rule is made returnable forthwith with the consent of the parties.

2. The Petitioners herein happens to be the original defendant No.1 in Regular Civil Suit No.152/2003. The suit is filed by Smt. Indubai Tarachand Khaire seeking relief of partition and separate possession against the Defendants. In paragraph Nos.8 and 9 of the plaint, the Plaintiff has specifically contended that Defendant Nos.1 to 3 had issued notice to the Plaintiff on 10/11/2003 contending therein that the Defendant No.1 i.e. the present Petitioner is adopted son of the Plaintiff No.1. It is contended that the said document is sham and bogus and that there was never an adoption ceremony nor the Petitioner was ever adopted by Plaintiff No.1. It is pertinent to note that the prayers in the plaint are seeking declaratory relief that the adoption deed be declared as null and void and that Defendant No.1 is not entitled to the share of the property of the deceased

Tarachand. The Petitioner in his written statement had specifically contended that Defendant No.1 is adopted by Plaintiff No.1 on 13/8/1976 as per the Hindu rites and rituals and that after the said ceremony a registered adoption deed was executed before the sub-Registrar at Chandwad. It is also stated in the written statement that the father of Plaintiff No.1 and her uncles viz., Ragho and Namdev have signed as witnesses. In the written statement Defendant No.1 has also given the names of other witnesses. It is also specifically contended in the written statement that the revenue record would clearly show that after adoption name of the Petitioner is shown as Madhav. He is the natural son of Dhondiram and genetic parents of the present Petitioner are Dhondiram and Shevantabai.

3. It is in above circumstances, that the Petitioner had filed an application below Exh.99 calling upon the Plaintiffs to produce the original adoption deed and it was specifically contended that the original adoption deed is in the custody of the Plaintiff and application was also filed below Exh.100 under section 65 of the Evidence Act. It was specifically contended that the Petitioner who is the defendant and who claimed to be the adopted son was prepared to file registered deed on record and same be read in evidence. However, by common order dated 20/1/2014 the learned Judge, Chinchwad has rejected both the applications below Exh.99 and 100.

4. Section 65 of the Indian Evidence Act reads as follows:

Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—
(a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when 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, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1[India] to be given in evidence2; 1[India] to be given in evidence2;"

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

5. It is further pertinent to note that the Petitioner by filing application below Exh.100 was prepared to file registered adoption deed and had prayed to the Court that the same be exhibited.

6. Mr. Bodake, learned counsel for the Petitioner submits that the Petitioner has filed a registered adoption deed on record and has requested the Court to read it as secondary evidence. At this stage it would be relevant to refer to section 79 of the Indian Evidence Act

“Presumption as to genuineness of certified copies.—The Court shall presume 1[to be genuine] every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer 2[of the Central Government or of a State Government, or by any officer 3[in the State of Jammu and Kashmir] who is duly

authorized thereto by the Central Government]: Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such paper.”

7. In fact the said registered document was filed on record and therefore, even there was prayer for reading it as secondary evidence and the learned court would presume the document to be genuine under section 79.

8. It is further pertinent to note that the Applicant has subsequently prayed in the application below Exh.99 that the original adoption deed is in the custody of the Plaintiff No.1 and she shall be directed to produce the same. The Applicant had specified mandatory conditions contemplated under section 65 of the Indian Evidence Act.

Section 65(a) specifically contemplates that the secondary evidence may be given of the existing condition or contents of a document in the following cases.

(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when 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, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in

1[India] to be given in evidence2; 1[India] to be given in evidence2;"

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

9. The learned counsel for the Respondent submits that the order under section 65 can be passed provided that there is a notice under section 66 of the Evidence Act. In the present case this objection may not be sustainable for the simple reason that the Petitioner had specifically contended in his written statement about details of the adoption deed including the witnesses thereto and therefore the act of the Petitioner can be read in consonance with the provisions of section 66 which provides that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

10. It is in these circumstances that the contentions of the written statement can be read as sufficient notice under section 66 of the Evidence Act. That the written statement was filed in the course of the proceedings

and hence notice under section 66 would not be necessary in the facts of the present case.

11. It is for the above mentioned reason that the order dated 28/1/2014 passed by the Civil Judge, Junior Division, Chandwad deserves to be quashed and set aside.

12. Petition is allowed. Rule is made absolute in terms of prayer clause (b). Petition is accordingly disposed of.

(SMT. SADHANA S. JADHAV, J.)