

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

WRIT PETITION NO. 9404 OF 2016

Ms. Revati Milind Tavade & Ors. ... Petitioners

Versus

Prasham Pradeep Diwadkar & Ors. ... Respondents

.....

Mr. Sanskar Marathe for the Petitioners.

Mr. Siddharth C. Wakankar for Respondent Nos. 1 to 3.

.....

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: APRIL 3, 2017

P.C. :

1. Rule. Rule made returnable forthwith. By consent, the matter is heard finally at the stage of admission itself.

2. This petition is presented before this Court against the order dated 5th February 2016 passed by the learned 4th Additional Judge, Small Causes Court, Pune under Exhibit 40 in Special Civil Suit No. 912 of 2011. The respondent nos. 1 to 6 (ori. plaintiffs) had filed a suit for declaration, partition, possession, mesne profit, damages and injunction on the basis of a Will of their grandfather Late Shri. Vasant Tavade. The original Will is not before the Court. The plaintiffs wanted to lead evidence of original Will. They are not in possession of the said Will. They called one Champa Tavade as a witness, who is

sister-in-law of the testator, to produce the original Will. However, the witness Champa Tavade stated that she did not have the original Will and therefore, the plaintiffs moved an application Exhibit 40 under section 65 of Indian Evidence Act seeking permission of the trial Court to lead secondary evidence. The said application was disputed by the petitioners, who are the original defendants. However, the said application was allowed by the learned trial Judge giving permission to the plaintiffs to tender a photocopy of the Will dated May 1999 i.e. the secondary evidence. Hence, this Writ Petition.

3. The learned counsel for the petitioners has submitted that the plaintiffs have not stated in their plaint about the issue in respect of custody of the original Will. They have deliberately suppressed this fact. The suit for declaration and possession of the property is entirely based on the said original Will which is not produced by the plaintiffs till today. The plaintiffs are required to make out a case in respect of custody of the said original Will. In the present case, there is no whisper in respect of custody of the original Will in the plaint. The order allowing the plaintiffs to lead secondary evidence is illegal and is to be set aside. The learned counsel submits that the suit is not for a probate or the letters of administration. The suit is for the partition. It is necessary for the parties to disclose the custody of the Will.

4. The learned counsel for the respondents has opposed this Petition and supports the order passed by the learned trial Judge.

5. Perused the plaint and the application at Exhibit 40 seeking permission to lead secondary evidence i.e. photocopy of the original Will. The plaintiffs have specifically mentioned in the application at Exhibit 40 that they are not in the custody of the original Will and therefore, they called the original Will which was earlier, as per the information, was in possession of father of the testator, however, he is no more. According to them, the Will must be with Champa Tawde, who is wife of the deceased and the brother of testator is also dead. Thus, it is specifically averred in the application that the plaintiffs are not in custody of the original Will and, therefore, they have sought permission to lead secondary evidence. I am of the view that the case is made out by the plaintiffs to give permission to lead secondary evidence and thus the order passed allowing them to lead secondary evidence cannot be interfered with. The Writ Petition is dismissed. Rule is discharged.

(MRIDULA BHATKAR, J.)