

Mr. T. D. Deshmukh for Petitioners.
Mr. Drupad S. Patil for Respondents.

P.C. :

Heard Mr. Deshmukh, learned Counsel for petitioners and Mr. Patil, learned Counsel for respondents at length. Rule. Mr. Patil waives service for respondents. Having regard to the short controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants', have challenged the judgment and order dated 30.03.2016 passed by the learned Civil Judge, Senior Division, Khed-Rajgurunagar below exhibit-226 in Special Civil Suit No.14 of 2014. By that order, the learned trial Judge rejected the application filed by defendants under Section 65 of the Indian Evidence Act, 1872 (for short 'Act') for granting permission to lead secondary evidence in respect of earnest receipt (styled as 'Visarpavati') dated 29.06.1999 mentioning the rate of the suit land as @ Rs.41,000/- per Acre.

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Suit for specific performance of agreement of sale dated 23.09.1999 and in the alternative, if the Court comes to the conclusion that plaintiffs are not in possession, for possession of the suit lands. Plaintiffs contended that defendants agreed to sell the suit lands for the consideration @ Rs.31,000/- per Acre. Defendants No.1 to 36 filed written statement dated 23.02.2004 resisting the Suit. Defendant No.18 filed the written statement for himself and as a Power of Attorney of defendants No.1 to 17 and 20. Defendant No.21 filed written statement for himself and as Power of Attorney of defendants No.22 to 26 and 28 to 34. Defendant No.27 also was signatory to the written statement dated 23.02.2004.

4. Defendants No.8 to 10, 12 to 17, 29 and 31 to 34 filed written statement upon attaining majority. In paragraph 5 of their written statement at exhibit-171, they contended that plaintiffs had obtained two earnest receipts quoting different rates and the said fact was suppressed by the plaintiffs. It was contended that defendants never agreed to sell the suit lands @ Rs.31,000/- per Acre and the rate agreed was Rs.41,000/- per Acre. In order to save expenses on stamp duty and registration charges, plaintiffs obtained two separate earnest receipts from the defendants.

5. On the basis of the pleadings of the parties, the learned trial Judge framed issues at exhibit-72 on 19.11.2012 and additional issues on 18.11.2015. Issue No.1 and additional issue No.1 read thus,

Issue

1. Do plaintiffs prove that by agreement to sale dated 23/9/1999 defendants have agreed to sale the suit land to the plaintiff for the price of Rs.31,000/- per acre?

Additional Issue

1. Do defendants No.8 to 10, 12 to 17, 29 and 31 to 34 prove that the price of the suit lands was fixed at the rate of Rs.41,000/- per Acre and not at the rate of Rs.31,000/- per Acre?

2. On behalf of the plaintiffs, plaintiff No.1 filed affidavit of examination-in-chief at exhibit-77. Defendants issued notice under Order XII, Rule 8 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') calling upon the plaintiffs to produce the original document. Along with that application, photocopy of Visarpavati was enclosed. On 15.02.2016, plaintiffs gave reply denying the contentions. Plaintiffs denied that Visarpavati-Karnama dated 29.06.1999 is in possession, custody or power of plaintiffs. They also denied that plaintiffs had given photocopy annexed to the notice to the defendants. Plaintiffs contended that the photocopy annexed along with the notice was not executed by defendants No.21, 27 and 28 in respect of the suit land and it was also not signed by plaintiffs No.1, 3, 5, 7, 11, 12, 15 and Ganpat Martand Bangar, husband of plaintiff No.18. The alleged Visarpavati is false, forged and bogus document.

3. Defendants thereafter filed application exhibit-226 on 17.02.2016 seeking permission to lead evidence in respect of Visarpavati dated 29.06.1999 mentioning the rate of Rs.41,000/- per Acre. This was resisted by plaintiffs by filing reply at exhibit-230 dated 24.02.2016. By the impugned order, the learned trial Judge has rejected the application. It is against this order, defendants have instituted the present Petition.

4. In support of this Petition, Mr. Deshmukh submitted that in paragraph 5 of the written statement filed by defendants No.8 to 10, 12 to 17, 29 and 31 to 34, these defendants specifically contended that plaintiffs have obtained two separate Visarpavatis and the said fact was suppressed by them. It was never agreed to sell the suit lands @ Rs.31,000/- per Acre. Plaintiffs agreed to purchase the suit lands @ Rs.41,000/- per Acre. Plaintiffs have brought into existence two separate Visarpavatis with a view to avoiding payment of stamp duty

and registration charges. He invited my attention to the notice given on behalf of the defendants calling upon the plaintiffs to produce original documents on the ground that Visarpavati dated 29.06.1999 mentioning the rate of Rs.41,000/- per Acre is in custody, possession and power of the plaintiffs. He also invited my attention to paragraphs 3 and 4 of the application exhibit-226 and submitted that the learned trial Judge was not justified in rejecting the application.

5. On the other hand, Mr. Patil supported the impugned order. He invited my attention to Sections 63 and 65 of the Act. He submitted that in the present case, defendants have not fulfilled the criteria laid down under Section 65(a) of the Act. He also relied upon the decision of the Apex Court in the case of ***J. Yashoda Vs. K. Shobha Rani, 2007 (5) SCC 730***, and in particular paragraph 9 thereof. He submitted that in order to enable a party to produce secondary evidence, it is necessary for the party to prove existence and execution of the original document. In the present case, the learned trial Judge observed in paragraph 14 that defendants in order to get permission to lead secondary evidence in respect of earnest receipts, have to prove execution of said earnest receipts. In the present case, execution of earnest receipts is not proved by the defendants. He, therefore, submitted that no case is made out for interfering with the impugned order.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, in the written statement filed by defendants No.8 to 10, 12 to 17, 29 and 31 to 34, in paragraph 5, it was specifically contended about execution of two different Visarpavatis. Defendants have issued notice to the plaintiffs asserting that plaintiffs are in possession of original Visarpavati. Mr. Patil submitted that this is not in

compliance with requirement of Sections 65 and 66 of the Act. It is also required to be borne in mind that though the notice was styled under Order XII, Rule 8 of C.P.C., it is settled principle of law that mentioning of wrong provision will not vitiate the proceedings if the power is referable to some other provision. Prima facie, this notice could have been treated as one under Section 66 of the Act. Perusal of application exhibit 226, and in particular paragraphs 3 and 4 thereof shows that defendants specifically asserted that when P.W.1 had filed affidavit in examination-in-chief, he did not deny the fact of existence of Visarpavati. Not only that, when the minor defendants became major, they filed their separate written statement and plaintiffs were given opportunity to lead additional evidence to deny the contentions of the written statement of the defendants. Even the plaintiffs did not specifically deny existence of two separate Visarpavatis. In paragraph 4, defendants asserted that both Visarpavatis are in possession of the plaintiffs. The learned trial Judge, however, has not considered this aspect while passing the impugned order. Section 63 of the Act lays down that 'secondary evidence' means and includes-

- (1) ...
- (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

7. Section 65(a) of the Act reads thus,

“65. Cases in which secondary evidence relation 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;”

8. In the present case, the learned trial Judge has not considered the fact set out by the defendants in paragraphs 3 and 4 of the application exhibit-226.

9. In view thereof, the impugned order deserves to be set aside for non-consideration of these aspects. Hence, the following order:

- a. Impugned order dated 30.03.2016 is set aside and the application exhibit-226 is restored to the file of the learned trial Judge for deciding the application afresh;
- b. All contentions of the parties are kept open;
- c. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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