

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 10579 OF 2016

Gopal Narayan Kanade (decd)
Through Lrs. And Ors.

...Petitioners

Versus

Shiva Saba Kanade (decd)
Through Lrs. And Ors.

...Respondents

....

Mr.S.S. Deshmukh, Advocate i/b. Pravin Gole, Advocate for the
Petitioners.

Mr. Milind Parab, Advocate for Respondents No.1 to 8.

....

CORAM : R. G. KETKAR, J.

DATE : 02nd FEBRUARY, 2017

P.C.

1. Not on board. At the request of Mr.Deshmukh taken up for admission.
2. Heard Mr. S.S. Deshmukh, learned Counsel for the petitioners and Mr. Milind Parab, learned Counsel for respondents No.1 to 8, at length.
3. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants', have challenged the judgment and order dated 28.6.2016 passed by the learned Civil Judge, Junior Division, Kudal below Exhibits-271 and 272 in R.C.S. No.73/1996. By that order, the learned trial Judge

has permitted the respondents, hereinafter referred to as the 'plaintiffs', to adduce secondary evidence.

4. In support of this Petition, Mr. Deshmukh raised twofold contentions, firstly, earlier applications Exhibits-249 and 250 made by the plaintiffs were not entertained by the learned trial Judge. By order dated 13.12.2013, the learned trial Judge rejected those applications. Secondly, he submitted that the plaintiffs came with the case that original documents are in the custody of the High Court. No material is produced on record as to why the plaintiffs cannot obtain original documents or request the High Court to transmit the original documents before the trial Court. He submitted that when original documents could be produced by the plaintiffs it cannot be permitted to adduce secondary evidence.

5. On the other hand, Mr. Parab supported the impugned order. He submitted that earlier applications Exhibits-249 and 250 were not entertained on the ground that the plaintiffs did not comply with the requirements under Section 66 of the India Evidence Act, 1872 (for short, 'Act'). In other words, the applications were not dismissed on merits. The learned trial Judge has considered the order dated 13.12.2013 passed below Exhibits-249 and 250. The learned trial Judge observed that applications Exhibits-249 and

250 were rejected on the ground that the plaintiffs did not comply the requirements for leading secondary evidence. He further submitted that in paragraph-2 of the impugned order, the learned trial Judge observed that from the contents of the application and facts admitted by both the parties it is clear that all these documents are in custody of High Court in connection with some other matters. He submitted that the plaintiffs have produced the certified copies and, therefore, the learned trial Judge was justified in permitting the plaintiffs to lead secondary evidence.

6. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. Section 63(1) of the Act provides that the secondary evidence means and includes certified copies given under the provisions hereinafter contained. It is not in dispute that the plaintiffs have produced the certified copies and have prayed for permission to lead secondary evidence. Section 65(a) lays down that secondary evidence may be given of the existence, condition, or contents of a document in the following cases, namely, (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. In the present case, in paragraph-2 of the impugned order the learned trial Judge has recorded a finding that production of these documents is not possible. In my opinion, the requirements of Section 63(1) and Section 65 of the Act are fulfilled by the plaintiffs and, therefore, the learned trial Judge was fully justified in allowing the application.

7. For the reasons recorded in paragraphs-1 and 2 of the impugned order, no fault can be found with the impugned order. However, by way of abundant caution it is made clear that even if the plaintiffs are permitted to lead secondary evidence it will be subject to proof of contents thereof. Hence, Petition fails and the same is dismissed.

8. It is made clear that where a decree is challenged by the petitioners, 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.)