

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 785 OF 2016

1. Pratap S/o. Babulal Madavi,
aged about 47 years, Occu.: Service,
2. Smt. Meena W/o. Pratap Madavi,
aged 42 years, Occ. Household,

Both R/o. Q. No. D-7, ISCB Colony,
Near Hislop College, Civil Lines,
Nagpur.

.... **PETITIONERS.**

// **VERSUS** //

1. Smt. Seema Hattimare, aged 49 years,
2. Anil Hattimare, Aged 30 years,

Both R/o. Behind Panchkalash Mahadeo
Temple, Panchpaoli, Nagpur.
3. Tata S/o. Isanrao Hattimare, aged 37 years,
Plot No.39A, Near House of Rathod,
Ramkrushna Nagar, Dighori, Nagpur.
4. Ravi S/o. Isanrao Hattimare, aged 33 years,
At Eros Hundai, Ghat Road, Nagpur.
5. Smt. Shalu W/o. Raju Wamankar, aged 43
Years, R/o. Gandhi Chouk, Linga, Balaghat
M.P.
6. Smt. Sangita Arvind Hukre, aged 39 yrs.
7. Smt. Durga Kishore Hukre, aged 37 yrs.

Both R/o. Ramkrushna Nagar, Dighori,
Umrer Road, Nagpur.

.... **RESPONDENTS.**

Shri S.S.Murthy, Advocate for Petitioners.
Shri R.R.Gaur, Advocate for Respondent Nos. 1 & 2.
Shri N.R.Bhishikar, Advocate for Respondent No.3.

CORAM : Z.A.HAQ, J.
DATED : MARCH 21, 2017.

ORAL JUDGMENT :

1. Heard.
2. **RULE.** Rule made returnable forthwith.
3. The original plaintiffs have challenged the orders passed by the trial Court allowing application (Exh.97) filed by the defendant Nos. 3 to 7 and allowing application (Exh.93) filed by the defendant Nos. 1 and 2.
4. By the application (Exh.97), the defendant Nos. 3 to 7 sought permission to lead secondary evidence in respect of the alleged affidavit dated 24th August, 2007 said to have been executed by the plaintiff No.1 in favour of the defendant No.3. According to the defendant Nos. 3 to 7, the original of the said affidavit is in custody of the plaintiffs and in spite of the application (Exh.85) the plaintiffs have failed to produce the same and therefore, the application (Exh.97) came to be filed.

5. The application (Exh.97) is filed after the plaintiff No.1 as well as one witness on behalf of the plaintiffs are examined and cross-examined. The defendant Nos.3 to 7 have sought permission to lead secondary evidence in respect of an affidavit alleged to have been sworn by the plaintiff No.1. There is no explanation why the application is not moved before recording of evidence of the witnesses of the plaintiffs started. If the defendant Nos. 3 to 7 are permitted to lead secondary evidence in respect of the above referred affidavit, the plaintiffs will be deprived of the opportunity of meeting the case of the defendant Nos. 3 to 7. Though there are certain pleadings on behalf of the defendant Nos. 3 to 7 about the above referred affidavit on record, the non-production of the photocopy of the document before recording of the evidence of the plaintiff started and non-filing of the application seeking permission to lead secondary evidence on that document cannot be condoned in the above facts. I find that the impugned order is unsustainable.

6. By the application (Exh.93), the defendant Nos. 1 and 2 sought permission to lead secondary evidence in respect of five documents including the alleged Will said to have been executed on 16th May, 1985. By the impugned order, the learned trial Judge has permitted the defendant Nos. 1 and 2 to lead secondary evidence in respect of the alleged Will and has rejected the prayer as far as the other documents are concerned.

7. The defendant No.1 had filed Succession Case No. 165 of 2010 in which application (Exh.9) was filed seeking permission to lead secondary evidence in respect of the Will alleged to have been executed on 6th December, 1999 (same document which is now the subject matter). In this application the averment was as follows :

“It is regretfully submitted that after the death of her husband in the year 2001 the petitioner had started the repairing work of her house by demolishing some portion which was in dilapidated condition. At that time the bag containing some original documents including the aforesaid Will had lost.”

This application was allowed by the Court.

The present respondent No.1/ defendant had filed Regular Civil Suit No. 435 of 2007 in which an application was filed seeking permission to lead secondary evidence in respect of the Will alleged to have been executed on 6th December, 1999. The relevant averments in this application were as follows :

“1) That the aforesaid case is fixed for evidence. That the plaintiff has filed the documents as per list in original. But unfortunately, the original “Will” dated 06/12/1999 has been destroyed in an accident of fire in the year 2002 which had caught in the house of the plaintiff. The original “Will” is therefore not available with the plaintiff so as to produce in the Court.”

In Special Civil Suit No. 770 of 2008 (i.e. present civil suit), defendant Nos. 1 and 2 had filed application (Exh.86). In paragraph 2 of this application following averments were made :

“2. That during the pendency of the suit No.435/06-07, filed by the Defendant No.1, against the defendants 3 to 7, the defendants no.3 to 7, while shifting from the house of the defendants 1 and 2 i.e. the suit house had taken all the original papers of suit property will made by Shantabai, consent letter will made by Ishanrao and etc. with them.”

After the plaintiff filed reply to this application (Exh.86) the defendant Nos.1 and 2 did not press the application and then filed application (Exh.93) seeking permission to lead secondary evidence in respect of the Will in question on the ground that the original is destroyed in the fire.

8. The above facts show that the case tried to be made out by the defendant Nos. 1 and 2 for seeking permission to lead secondary evidence is not genuine and the reason/explanation given by them does not inspire confidence. The failure on the part of the learned trial Judge to appreciate these aspects properly vitiates the order passed by him.

Hence, the following order :

- i) The order passed on the application (Exh.97) is set aside and the application (Exh. 97) filed by the defendant Nos. 3 to 7 is dismissed.
- ii) The order passed by the trial Court on the application (Exh.93) is set aside and the application (Exh.93) filed by the defendant Nos. 1 and 2 is dismissed.

- iii) As the civil suit is of 2008, the trial Court is directed to dispose it till 30th September, 2017.

Rule is made absolute in the above terms. In the circumstances, the parties to bear their own costs.

CAW NOS. 213/2017 & 343/2017.

The applicants are seeking permission to file additional documents and to lead secondary evidence. The documents are considered at the time of hearing. No further orders are required on the applications.

The civil applications are **disposed**.

JUDGE

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