

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD.

WRIT PETITION NO. 8412 OF 2014

KASHINATH POPAT MAKASARE. .. **PETITIONER.**

VERSUS

GANGABAI BANSILAL NETKAR
AND OTHERS. .. **RESPONDENTS.**

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Advocate for Petitioner : Mr.Waramaa B.R.

Advocate for Respondent Nos.1 to 3: Mr.Brahme Shailesh P.

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CORAM : V.L. ACHLIYA, J.

Dated: 16th April, 2018.

PER COURT :-

By this petition filed under Article 227 of the Constitution of India, the petitioner has challenged the order dated 17th April, 2014 passed by the C.J.S.D., Parola, District Jalgaon in RCS No.2/2006. By the impugned order, the learned Judge of the trial Court refused to admit the Will and deed of relinquishment in

evidence and exhibit the same.

2. Mr. B.R. Warmaa, learned Counsel for the petitioner assailed the order with contention that the order passed is *per se* illegal and passed in an arbitrary manner.

3. By referring the provisions of section 68 of the Indian Evidence Act, the learned Counsel pointed out that if the document is required by law to be attested, it is to be proved in a manner provided u/s 68 of the Evidence Act i.e. through summoning the attesting witness. It is submitted that in order to prove the Will and deed of relinquishment, petitioner – defendant has examined his witness Subhash Dharma Mohite (D.W.2). In his evidence in examination-in-chief filed in the form of affidavit, the witness has categorically deposed as to the execution of the document by the executor in his presence and further identified the thumb impression of the testator of the will as well as his own signature and further the thumb impression of the executor of the deed of relinquishment and his own

signature as the attesting witness. He has also identified the signature of other attesting witness. It is contended that the fact deposed by the DW-2 sufficiently proves the execution of the documents as required u/s 68 of the Indian Evidence Act. It is further submitted the original documents are tendered in court and, therefore, by leading the primary evidence, the petitioner – defendant has proved the documents. It is contended that though the petitioner has complied with the requirement of section 68 of the Indian Evidence Act, the trial Court has refused to mark the documents as exhibits by taking a view that the documents are disputed documents and unless the persons who have scribed the document are examined, the same cannot be marked as exhibit. It is contended that the reasons and findings recorded by the trial Court are perverse and unsustainable in law.

4. On the other hand, learned Counsel for the respondents supported the order passed by the trial Court. He submits that the evidence as adduced by the

petitioner – defendant is not sufficient to prove the contents of the documents.

5. Having appreciated the submissions advanced in the light of order passed, I am of the view that the order passed by the trial Court needs to be set aside and the trial Court needs to be directed to hear the parties and then pass the fresh order.

6. As provided u/s 61 of the Indian Evidence Act (for short, 'said Act') the contents of the documents can be proved by producing primary or secondary evidence. Section 62 of the said Act provides the meaning of primary evidence and means the documents itself produced for the inspection of the court. Section 63 of the said Act provides meaning of secondary evidence. Section 64 of the said Act provides that for proving the documents by primary evidence, the documents must be proved by primary evidence except the cases referred in section 65 of the said Act.

7. It appears that the that both the original documents i.e. Will and deed of relinquishment are produced before the Court and both the documents are registered documents. Section 68 of the Evidence Act provides the procedure to be followed where proof of execution of document required by law to be attested. Section 68 of Evidence Act reads as under:

“68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

8. Thus, in order to prove the documents which requires by law to be attested the party seeking to use such documents in evidence has to examine one of the attesting witnesses to prove its execution so as to use such documents in evidence. In the instant case, the Witness No.2 for defendant is examined as attesting witness to both the documents i.e. Will and deed of relinquishment. He has deposed as to execution of documents by executant in his presence and also identified their thumb impressions and identified his signature and signature of other attesting witnesses.

9. Perusal of the copy of the deposition produced on record raises certain doubts as regards procedure adopted by the trial Court in recording evidence. In the instant case, the fact is not in dispute that the judgment and decree to be passed in the matter can be challenged by way of appeal. Rule 5 of Order XVIII of the Code of Civil Procedure provides the manner in which the evidence shall be taken in appealable cases. Rule 5 of Order XVIII reads as under:

“5. How evidence shall be taken in appealable cases.- In cases in which an appeal is allowed, the evidence of each witness shall be,-

(a) taken down in the language of the Court, -

(i) in writing by, or in the presence and under the personal direction and superintendence of, the Judge, or

(ii) from the dictation of the Judge directly on a typewriter; or

(b) if the Judge, for reasons to be recorded, so directs, recorded mechanically in the language of the Court in the presence of the Judge.”

10. Thus, in appealable cases though the examination-in-chief can be filed in the form of affidavit as contemplated under Rule 4 of Order XVIII, still to accept such affidavit as evidence by way of examination-in-chief, the deponent has to step into the witness box and affirm the contents of the affidavit as well as his signature. Only on stepping into the witness box and affirmation of contents and the signature on affidavit, such examination-in-chief filed in the nature of affidavit becomes evidence to be read in the proceeding. In this context, the reference can be made to the decision of the this Court in the case of

Anantrao s/o Krishnaji Kulkarni vs Vaishali w/o***Renukadas Vaidya***¹ wherein in para 17, the Court

held as under:

“17. On close scrutiny of the judgment of the Apex Court in the matter of Shaikh Salim Haji Abdul Khayumsab vs. Kumar and others, reported in 2006(1) Mh.L.J. (S.C.) 178 = 2006 (1) SCC 46, I do not find that Rule 4 or 5 of Order XVIII had fallen for consideration of the Apex Court, nor the judgment of this Court in F.D.C. Ltd. (supra) was cited before the Apex Court, nor same has been considered. The reference to the judgment of Shaikh Salim (supra) by the learned Single Judge appears to be an inadvertent mistake. Learned Senior Counsel appearing for the appellant is justified in contending, placing reliance on the judgment of the Apex Court in the matter of Ameer Trading Corporation Ltd. (supra), that in appealable cases, the examination-in-chief of the witness is permissible to be produced in the form of affidavit and such affidavit cannot be ordered to form part of evidence unless deponent thereof enters the witness box and affirms that contents of the affidavit are as per his say and affidavit is under his signature. As has been observed by the Apex Court in the judgment cited supra, Rules 4 and 5 are required to be harmoniously construed and both the provisions are required to be given effect to and that Order XVIII, Rule 5 cannot be read as an exception to Order XVIII, Rule 4.”

11. Perusal of the copy of the deposition reveals that the procedure as contemplated under Rules 4 and 5 of Order XVIII of C.P.C. has not adhered, while dealing with the case. As provided under Order XVIII Rule 4 of C.P.C. if the examination-in-chief is tendered in the form of affidavit along with documents to be proved, the

1 2012(2) Mh.L.J. 61;

proof and admissibility of such documents which are filed along with affidavit is to be decided by the court before proceeding to record cross-examination. The Full Bench of this Court in the case of ***Hemendra Rasiklal Ghia vs Subodh Mody***², has laid down the guidelines to be adopted by the courts of law wherein, the examination-in-chief filed in the form of affidavit and the objection is raised as to admissibility of certain documents. In the instant case, exercise as required to be undertaken under Order XVIII, Rule 4 of C.P.C. appears to be not carried out. So also the procedure to be adopted in an appealable case as provided under Rule 5, Order XVIII of C.P.C. also appears to be not followed by the trial Court. It is pertinent to note that in the cross-examination both the documents i.e. Will as well as deed of relinquishment have been referred and not only this the witness was confronted with those documents. If both the documents are referred in cross-examination of witness, then the Court ought to have considered the effect while passing the impugned

2 2008(6)Mh.L.J. 886;

order. The purport of section 68 was also not taken into consideration by the trial Court.

12. In view of above, the order passed by the trial Court is not sustainable in law as passed without proper opportunity of hearing to parties and deciding the issue as to the admissibility of the documents in the light of the provisions of Indian Evidence Act as well as considering the effect of use of documents in cross-examination. I am, therefore, inclined to allow the petition and set aside the impugned order and remand the matter for taking decision by trial Court.

13. In the result, petition is allowed. The impugned order dated 17.4.2014 passed by C.J.J.D., Parola in RCS No.02/2006 is set aside. The case is remanded to the trial Court to hear the parties and then decide the matter afresh as to the admissibility of both the documents. Since the suit is pending for more than ten years, the trial Court is directed to expedite hearing of the suit and decide the suit, as expeditiously as

possible, preferably within six months from communication of the order.

Writ petition disposed of in above terms with no order as to costs.

(V.L. ACHLIYA, J.)

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