

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9377 OF 2015

SHAIKH AKHTAR HAJI ISAMODDIN
VERSUS
SHAFIYODDIN SHAIKH AHMED AND OTHERS

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Advocate for Petitioner : Shri Raghuwanshi R.R.
h/f Shri Bachate Pralhad D.
Advocate for Respondents 1 & 2 : Shri Rane G.S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: November 27, 2018

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PER COURT :-

1. The petitioner / plaintiff is aggrieved by the order dated 23.1.2016, by which, the trial Court has rejected his application Exhibit 31, praying for permission to lead secondary evidence in Special Civil Suit No.16 of 2013.

2. I have considered the extensive submissions of the learned Advocates for the petitioner and on behalf of respondents 1 and 2, on 26.11.2018 and today as well.

3. Learned Advocate for the petitioner has strenuously contended that the impugned order has resulted in the rejection of Exhibit 31 since the trial Court has taken a technical view in the matter. The document at issue is an agreement to sell dated 28.12.2001. It is specifically

contended in the plaint that the said agreement has been signed by the parties. It is drawn on a Rs.100/- non-judicial stamp paper. It is specifically averred that the original agreement is with the defendants and the plaintiff has a photostat copy.

4. It is further pointed out that the defendants have entered their written statement. The said defendant Shafiyoddin has specifically stated in paragraph No.4 that the description about the document dated 28.12.2001 pertaining to the consideration amount for the said sale transaction and the amount paid as an advance, is correct. In paragraph No.5 of the written statement, it is denied that the defendants have the original of the agreement to sell. In paragraph No.7 it is stated that the plaintiff is not desirous of implementing the agreement to sell.

5. In the above backdrop, learned Advocate for the plaintiff submits that the photostat copy of the said agreement will have to be believed to be a copy of the original and permission to lead secondary evidence will have to be granted.

6. Learned Advocate for defendants 1 and 2 submits that they have specifically denied the custody of the original agreement. They have also averred that the photostat copy placed on record is a false document. Reliance is placed upon the following judgments:-

(i) *H.Siddiqui (dead) by L.Rs. Vs. A. Ramalingam [2011 (4) Mh.L.J. 88],*

(ii) *Sumati @ Asha Late Anil Subhedar Vs. Yahodhara Late Sunil Subhedar [2016 DGLS Bom 1141] and*

(iii) *Premala Kashinath Pande Vs. The Cooperative Oil Industries Ltd. - Writ Petition No.3958 of 2013 dated 21.11.2018.*

7. It requires no debate that permission to lead secondary evidence is not to be mechanically granted. Section 63 has to be read along with Section 65 of the Indian Evidence Act. There must be an averment about the custody of the original document and that the said original has been lost. There must also be an averment that the copy produced on record is a product of the same mechanical manufacturing process as is required under Section 63(2). Without these pleadings, a litigant cannot be permitted to produce a photostat copy claiming accuracy of the copy with the original.

8. In the instant case, the plaintiff has averred in the plaint that the original is retained by defendant No.1 and a photostat copy was retained by the plaintiff. The defendants have denied this contention and have averred that they do not have the original of the said agreement. Surprisingly, the plaintiff has taken a diagonally opposite

stand in application Exhibit 31, stating that the original agreement has been lost by the plaintiff and hence a photostat copy is produced. Such a conflicting stand would not generate confidence for the Court to pass an order under Section 65 presuming that the ingredients of Section 63 have been satisfied. On this legal ground, the order of the trial Court cannot be faulted.

9. However, this case has certain peculiar pleadings. The defendant has admitted that there was an agreement to sell dated 28.12.2001. The consideration of the agreement is also admitted. The amount already paid by the plaintiff to the defendants is also admitted. However, the copy of the agreement to sell placed on record has been denied. On preponderance on the principles of probability, it is unbelievable that the defendants never preserved a copy of the agreement or that they never cared to seek a copy of the agreement. Even if it is assumed that the plaintiff may have retained the original and has subsequently lost it, it cannot be believed that the defendants have never asked for a copy of the agreement. This conclusion is possible in view of the admission of the defendant Shafiyoddin in paragraph No.4 of the written statement. This would also lead to a conclusion that there was an agreement between the parties dated 28.12.2001.

10. On the basis of the above stated factors, though the plaintiff cannot be permitted to utilize the photostat copy placed on record for leading secondary evidence, the plaintiff can be permitted to lead evidence on the basis of the admissions given by the said defendant with regard to the existence of the agreement and the consideration terms. Needless to state, the plaintiff can be, therefore, permitted to take recourse to Section 63(5) and Section 65(b) for supporting his case of the existence of an agreement to sell.

10. With the above observations, this petition is disposed off.

(RAVINDRA V. GHUGE, J.)

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