

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.12786 OF 2017

(Deepak s/o Balaji Kokadwar Vs. Manoj s/o Bhavarlalji Rajotiya and others)

Mr.M.P.Kale, Advocate for the petitioner.

Mr.S.S.Rathi, Advocate for respondent No.1, 2-1 to 2-5.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 04/06/2018

PER COURT :

1. The petitioner is aggrieved by the order dated 06/07/2017 by which application Exh.31 filed by him as a plaintiff in RCS No.24/2015 seeking leave to lead secondary evidence with regard to the sale deed and the mortgage deed, has been rejected.

2. The learned Advocate for the petitioner has strenuously criticized the impugned order by relying upon the 7 grounds for challenge formulated by him in the memo of the petition. Contention is that the original sale deed with regard to the suit property House No.772 and which was registered with the Registrar on 31/05/1984, was lost by the petitioner/plaintiff during the renovation of his house. So also, the purported original mortgage deed is said to be in the custody of Jintur Urban Co. Operative Bank Limited, Jintur. The plaintiff would prefer to lead secondary evidence with reference to the

said original mortgage deed. It is further canvassed that if the plaintiff is not permitted to lead secondary evidence, he would lose a valuable right of defending his property which has already been auctioned by the concerned Bank on account of non payment of the loan dues by the borrower.

3. Learned Advocate appearing on behalf of all the respondents submits that these respondents are auction purchasers in the auction held On 16/03/2001. They are in possession of the said property and the plaintiff who is the original owner of the suit house, has preferred RCS No.24/2015 which is after 14 years of having purchased the house property and having enjoyed its peaceful possession. He further adds that after application Exh.31 was filed by the petitioner praying for leave to lead secondary evidence, the auction purchasers have submitted their say vide Exh.34 and have specifically pointed out that application Exh.30 was filed for the same purpose and which was unconditionally withdrawn by the plaintiff. No leave to file a fresh application was sought on 06/04/2017 when Exh.30 was withdrawn.

4. It appears from the record that Exh.31 was filed by the petitioner on 06/04/2017 when the earlier application Exh.30 was

withdrawn. The Trial Court has, therefore, recorded that Exh.30 was withdrawn voluntarily. Yet, the Trial Court has considered Exh.31 on its merits and has rejected the said application by the impugned order.

5. It requires no debate that the factum of loss of an original document will have to be pleaded in the plaint if the said loss has occurred prior to the institution of the suit. If the said loss has occurred after the institution of the suit, then the applicant has to establish as to why the original document was not produced alongwith the plaint and which were the circumstances in which the loss of the document has occurred. I do not find any such statement either in the plaint or even in application Exh.31. There are no pleadings in Exh.31 as to what was the date or the period during which the plaintiff lost the original sale deed. What is stated is that the internal painting work was undertaken by the plaintiff after which the document has been lost. No date or period has been mentioned to indicate when the painting work was undertaken.

6. In so far as the mortgage deed is concerned, the bank has auctioned the suit property on the basis of the said deed vide which loan is said to have been sanctioned to the original borrower. The

plaintiff claims to be the guarantor and further claims that the suit property House No.772 owned by him was never mortgaged to the Bank in his capacity of being a guarantor to the original borrower who is not arrayed by the petitioner before the Trial Court.

7. In the above backdrop, the Trial Court has taken care of the interest of this petitioner by observing in paragraph No.11 of the impugned order that the petitioner/plaintiff would be at liberty to produce the original mortgage deed in the proceedings by taking appropriate steps for securing the production of the said document. I do not find that the conclusion of the Trial Court could be faulted as the existence of the original mortgage deed with the concerned Bank being admitted, the petitioner cannot be permitted to lead secondary evidence.

8. Considering the above and in view of the remedy available to the petitioner to have the original mortgage deed produced to support his contention that House No.772 owned by him was never mortgaged, this petition need not be entertained. The same is, therefore, dismissed.

(Ravindra V.Ghuge, J.)