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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3517 OF 2017

Rukmini Pandurang Deshmukh
and others ... Petitioners.

V/s.

Ganpat Nivruti Mahadik
and ors ... Respondents

Mr. Rahul S. Kadam, for petitioners
Mr. Yogesh Patil, for respondent No.1.
Mr. Prasad P. Kulkarni for respondent Nos. 2 & 3.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 3rdMAY, 2018.

P.C. :

1] Heard learned counsel for the petitioners and respondents.

2] By this writ petition, filed under Article 227 of the Constitution of India, the petitioners are challenging the order dated 15.12.2016, passed by the Civil Judge Senior Division, Malshiras, below the application at Exh.37 in Special Civil Suit No.6 of 2015.

3] Application at Exh.37 was filed by the respondents, who are plaintiffs before the trial Court, seeking permission to lead secondary evidence in respect of agreement of sale dated 25.12.2014. It was submitted that the said suit was filed by the respondents for

specific performance of this agreement of sale dated 25.12.2014, which was executed by the respondent No.1, who is the father of the petitioners, for consideration of Rs.55 lacs. It was submitted that the original agreement of sale was in the custody of petitioner No.5. However, respondent No.1 has obtained the same for seeking necessary permission for execution of the sale deed from the the Sub Divisional officer, Malshiras. Thereafter he has avoided to return the said agreement and the petitioners have, therefore, given notice to respondent on 6.1.2016, for production of the said agreement. However, respondent No.1 has contended that it is not in his possession. In view thereof, the petitioners were constrained to file this application for permission to lead secondary evidence in the form of photocopy of the agreement of sale, which he has obtained from the Notary.

4] This application was strongly resisted by the respondents, contending that in the plaint it was nowhere stated that the original agreement of sale was with the respondent No.1. For the first time, this contention is taken up and therefore, it being an after thought, the trial Court should not grant permission for leading the secondary evidence.

5] The trial Court has accepted the contention of the respondent No.1, by observing that the fact that the original

agreement was with respondent No.1, was not pleaded in the plaint. Moreover, it was not stated by the petitioners from where the photocopy of the agreement came into their possession. There is no endorsement that the photocopy is true copy and hence the trial Court held that the permission for leading secondary evidence cannot be granted.

6] However, in my considered opinion, merely because in the plaint it is not stated that the original document is with the respondent No.1, such permission to lead secondary evidence cannot be denied to the petitioners outrightly, especially when the petitioners have given notice to respondent No.1to produce the said document. As per the case of petitioners, the document was taken by respondent No.1 for seeking necessary permission from S.D.O. Malshiras, for the purpose of executing the sale deed. Respondent No.1 being the father of the petitioners, said fact cannot be disbelieved.

7] Now the petitioners have also complied with the requisite condition of issuing notice to respondents to produce the original document, which respondent No.1 has denied being in possession thereof. In such situation, in order to advance substantive cause of justice, it would be just and proper to allow the petitioners to produce the secondary evidence in the form of photocopy of the agreement of sale which the petitioners claim to have obtained from the Notary, as

it was notarized when executed.

8] As regards the admissibility, legality, validity and evidential value of the said document, all these questions need to be expressly kept open to be considered by the trial Court at its appropriate stage. So far as, permission to lead secondary evidence is concerned, such permission needs to be granted.

9] Accordingly the Writ Petition is allowed.

10] The impugned order passed by the trial Court below Exh.37, is set aside and the said application is allowed. The petitioners are permitted to lead secondary evidence in respect of this agreement of sale.

11] All the contentions raised by respective parties are expressly kept open to be decided by the trial Court at its appropriate stage in accordance with law.

[DR.SHALINI PHANSALKAR-JOSHI, J.]