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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3326 OF 2016

Ramkrushna Babhurao Jadhav	...	Petitioner
V/s.		
Vijay Keshavrao Chinchkar	...	Respondents

Mr. Dilip Bodake, for the Petitioner.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 27th MARCH, 2018.

P.C. :

- 1] Heard learned counsel for the petitioner .
- 2] By this petition, filed under Article 227 of the Constitution of India, the petitioner is challenging the order dated 30.7.2013, passed below Exh.112, the order dated 18.03.2015 passed below Exh.129 and the order dated 11.12.2015 passed below exh.136, in R.C.S. NO.53 of 2002, by Civil Judge Junior Division, Wai, District:Satara.
- 3] By the order dated 31.7.2013, below exh.112, the learned trial Court has rejected the application made by the petitioner seeking direction to respondent to produce the original mortgage deed.

4] By order dated 18.3.2015, below Exh.129, the trial Court has rejected the application made by the petitioner for leading secondary evidence in the form of certified copy of the mortgage deed.

5] By the order dated 11.12.2015, below Exh.136, the trial Court has rejected the Review Application filed by the petitioner seeking review of the order dated 18.3.2015. Hence the instant the Writ Petition.

6] On 17.1.2017, when the Writ Petition was taken up for consideration by this Court, notice was issued to the respondent with a specific intimation that subject to the time constraint and convenience of the Court, the petition will be disposed of finally at the stage of admission. Notice was also further to indicate that despite service, if respondent fails to appear, the Court will decide the petition on its own merits. Accordingly till the next date ad-interim order in terms of prayer clause (c) was granted.

7] The office endorsement shows that the notice was duly issued and served on the respondent. However, nobody has appeared on behalf of respondent, as can be seen from the order passed by this court on 21st March, 2017. In view thereof, the petition was listed for admission on 11.04.2017.

8] Thereafter also, respondent has failed to remain present and as a result thereof, now the writ petition is taken up for final

disposal, considering that pursuant to the order of passed by this Court in the Writ Petition, the hearing of the suit is prolonged and the suit is filed by the petitioner himself.

9] The petitioner has sought the cancellation of two mortgage deeds dated 1.1.1993 and 1.1.1994. When the suit came up for hearing, the petitioner has filed specific application at Exh.112 stating that the original mortgage deeds are in possession of the respondent-defendant and the respondent should be directed to produce the same. Respondent denied being in possession of the said documents. Hence, the trial Court, has on 31.7.2013, passed order below Exh.112 as follows :--

“Heard learned counsel for parties. The defendant denied possession of documents. Hence application is filed”.

10] In view thereof, the petitioner has filed application at Exh.114, for issuance of witness summons to the Sub Registrar, Wai for production of original mortgage deed. It was allowed and accordingly Summons was issued and served on the Sub-Registrar. However, he has filed report at Exh.116 stating that the original mortgage deed is sent to the Talathi of village Bopegaon, to hand over the document to the respondent.

11] In view of the said report, the petitioner has filed an application at Exh.117 for issuance of Summons to the Talathi, Bopegaon, for production of the original mortgage deed. The said application was also allowed and summons was issued to the Talathi, Bopegaon. He has filed report that he took the search of the original mortgage deed, but it was not found and hence, he is unable to produce the same. The trial Court has merely passed order on the said report as, "seen and filed", directing the petitioner to proceed further.

12] In view thereof, the petitioner has filed application at Exh.129 for permitting him to rely upon the certified copy of mortgage deed, produced by the Sub Registrar as secondary evidence. Respondent opposed the said application and the trial Court has rejected the same on the ground that notice as required to be given under Section 65 of the Evidence Act to the respondent for production of the original document, is not given and hence requisite condition was not satisfied.

13] However, as rightly submitted by the learned counsel for the petitioner that the earlier application was given by the petitioner directing respondent to produce the original mortgage deeds and respondent denying the same, to be in his possession, therefore, notice was given to the respondent for production of the original, but

he has denied that he is in possession of the original.

14] As a result thereof, whatever steps were required to be taken for production of the original document, the petitioner has taken, even the notice served on the Sub Registrar and he submitted report that the said document has been handed over to the Talathi Bopegaon. Accordingly Summons was sent to Talathi, Bopegaon, he has staged that he took search of mortgage deed, but it was not found. Having done all these efforts, the petitioner was left with no option but to rely upon the certified copy of the mortgage deed.

15] In my considered opinion having regard to the facts which are stated above, the trial Court has committed an error in rejecting the said application. Even though it was brought to the notice of the trial Court that the defendant was given notice to produce original, but he has denied the possession, the trial Court has rejected even review application.

16] Thus, the petitioner has complied with all the requisite conditions for relying upon the secondary evidence. In view thereof, great prejudice is being caused to the petitioner, his entire suit being based for cancellation of mortgage deed, by not allowing the petitioner's application to lead secondary evidence. Hence, the impugned order passed by the trial Court is required to be quashed and set aside.

17] Accordingly writ petition is allowed.

18] The impugned order passed by the trial Court is quashed and set aside. As a result, the petitioner's application at Exh.129 is allowed for permitting him to adduce secondary evidence.

[DR.SHALINI PHANSALKAR-JOSHI, J.]