

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

WRIT PETITION No.6304 OF 2017

Smt.Sitabai Dharmaraj Dhivare

... Petitioner

Vs.

Shri Ashok Lalchand Jain & Ors.

... Respondents

Mr.A.R. Pitale for the Petitioner

Mr.Amey Deshpande i/b J.D. Khairnar for the Respondents

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 4, 2018**

P.C. :

1. Rule. By consent of the parties, Rule made returnable forthwith and heard finally.
2. In this petition, the order dated 16.2.2017 passed by the learned Civil Judge, Senior Division, Malegaon, below exhibit 58 in Special Civil Suit No.31 of 2014, preferred by the plaintiffs, allowing the application seeking permission to adduce secondary evidence, is challenged.
3. The plaintiffs are purchasers, who have filed the suit for specific performance in respect of the suit land against the

petitioners, who are defendant No.1 and Defendant No.2, who is her son. It is the case of the plaintiffs that they had entered into agreement of sale with defendant No.2, the son of the petitioner/defendant No.1. It is the case of the plaintiffs that defendant No.1 is the owner of the suit land and has executed the power of attorney in favour of her son i.e., defendant No.2, pursuant to which defendant No.2 has entered into agreement of sale of the suit land with the plaintiffs. Therefore, according to the plaintiffs, the said original power of attorney is an important and material document which should come on record. The said document is not in their custody. As per the contentions of defendant No.1 and defendant No.2 in the written statement, the said document is not in existence and, therefore, they are not in possession of the said document. The plaintiffs have, therefore, sought permission of the trial Court to produce a photocopy of the document which is in their custody. The said application is allowed and hence, this Writ Petition.

4. Learned Counsel for the petitioner/defendant No.1 has submitted that defendant No.1 has never given any power of attorney in favour of her son in respect of the transaction, transfer,

sale of the suit land. The said document i.e., the so called power of attorney does not exist at all. The learned Counsel submitted that unless the execution and existence of the document is proved by the plaintiffs, no foundation is laid by the plaintiffs to produce the said document. Therefore, the order passed by the learned Judge of the trial Court in respect of the secondary evidence is to be set aside.

5. The learned Counsel further submitted that the trial Court ought to have appreciated the bonafides of the petitioner, who herself wants the notary as a witness, before whom the so called document was executed.

6. The learned Counsel for the respondents supported the order of the trial Court.

7. Considered the submissions of the learned Counsel; perused the plaint so also the impugned order. As per the case of the plaintiff, his entire transaction is based on the power of attorney issued by the petitioner/defendant No.1 who is the owner of the suit land in favour of her son i.e., defendant No.2. It is submitted that he does not have the original power of attorney. Considering

the nature of the suit and the pleadings and the transaction involved, the foundation is laid by the plaintiff to tender secondary evidence and it is rightly allowed. The submissions of the learned Counsel for the petitioner that he wants to lead evidence of the notary and also the hand-writing expert in order to falsify the execution and existence of the alleged power of attorney can be considered by the trial Court, if such application is moved by the petitioner at appropriate stage.

8. Rule is discharged accordingly.

(MRIDULA BHATKAR, J.)