

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

WRIT PETITION NO. 7249 OF 2016

Mrs.Suman Vijay Mahabaleshwarkar

(Since deceased) through her LRs.

1A. Deepak Vijay Mahabaleshwarkar & Anr. ... Petitioners
V/s.

Manohar Balkrishna Mahabaleshwarkar

(Since deceased) through LRs.

1A. Smt.Mangala Manohar

Mahabaleshwarkar & Ors. ... Respondents

- Mr.S.N. Chandrachood for the Petitioners.
- Mr.Venkatesh A. Shastry a/w. Mr.M.S. Athalye for Respondent No.2.2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 5th FEBRUARY, 2018.

P.C. :

1] Heard learned counsel for both the parties.

2] By this Writ Petition filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 29th February 2016 passed by the 3rd Jt. Civil Judge Senior Division, Satara, below Exhibit-249 in Special Civil Suit No. 191 of 2002.

3] The Application at Exhibit-249 was filed by the present Petitioners for leading secondary evidence under Section 65(c) of the

Indian Evidence Act, 1872 (for short, "*the Evidence Act*") in respect of the Will dated 22nd February 1987 of late Balkrishna Sadashiv Mahabaleshwarkar. It is submitted that the proof of the said Will is necessary, as the essential issue to that effect is also framed by the trial Court and the burden of proof thereof lies on the Petitioners. It is submitted that the genuineness of the Will can be proved only by production of the original Will and hence, as the original is in possession of Plaintiff No.2, the Petitioner has given notice to him to produce the said Will. Plaintiff No.2 has not replied the same and therefore, the Petitioner has requested the trial Court to allow him to adduce the secondary evidence. The trial Court rejected the said application which was initially filed under Section 65(a) of the Evidence Act vide Exhibit-191. The Petitioner preferred Writ Petition bearing W.P.(Stamp) No.26458 of 2014 against the said order and this Court has disposed off the same on 11th March 2015, giving liberty to the Petitioner to file the application under Section 65(c) of the Evidence Act. Accordingly, the Petitioner has filed the present application at Exhibit-249 under Section 65(c) of the Evidence Act. The trial Court, however, rejected the said application for the reasons stated in the impugned order and this order of the trial Court is challenged in this Writ Petition.

4] However, as rightly submitted by learned counsel for the Respondents, no fault can be found in the impugned order of the trial Court, as the Petitioner himself is not sure about the custody of the original Will. It is pertinent to note that in the Written Statement which he has filed before the trial Court and also in the say given to the application made by the Respondent, he has categorically stated that at the time of making the Will, late Balkrishna Mahabaleshwarkar has prepared six copies. On each and every copy late Balkrishna Mahabaleshwarkar has signed and the said copies are also signed by the attesting witnesses on the same date; the said Will was notarized and registered with Advocate R.V. Bhokare. Along with the Will, there is also a medical certificate of fitness issued by Dr.Dhananjay Sathe. The Notary has also issued the Certificate that the Will was duly registered. Thereafter, the copy of the said Will bearing the signatures of the deceased and the attesting witnesses was given to each of the son of deceased Balkrishna Mahabaleshwarkar and the person by name Wadekar, who was present there.

5] A specific averment was made therefore in the written statement and the say that as per Section 62 of the Evidence Act, all of these six copies of the Will are original and one of the copy which was

available with the Petitioner, he has produced it in the Court. Even in evidence before the trial Court, the Petitioner has stated that the copy of the Will, which he has produced, is the original. Therefore, as a matter of fact, if the Petitioner was considering that the copy of the Will, which he has produced and according to him, the signature of the deceased and also of the attesting witnesses thereon are original, then there was no question of his saying that the original is with Plaintiff No.2 in his locker and Plaintiff No.2 has not produced the same, despite the notice. His case to that effect as made out in the earlier application Exhibit-192, already came to be rejected.

6] Therefore, the Petitioner has come under Clause 65(c) of the Evidence Act. However, in order to bring his case under Section 65(c) of the Evidence Act, first he has to prove that the original Will has been in his custody and it has been destroyed or lost or he cannot, for any other reason, not arising from his own default or neglect, produce it in reasonable time.

7] Here in the case, as per the averment made in the written statement and the evidence, he has produced the original Will itself. Then, the question does not arrive of Plaintiff No.2 having the original Will and therefore, his application under Section 65(a) came to be

rejected. Now once he comes with a case that the original Will is with Plaintiff No.2, then he cannot say that original has been destroyed or lost. In order to prove this essential ingredient of Clause 2 of Section 65(c) of the Evidence Act, the Petitioner has to prove that for no default or neglect on his part, he cannot produce it in reasonable time.

8] In this respect, the impugned order passed by the trial Court clearly goes to show that the trial Court has categorically held that the Petitioner has failed to prove this foundation that he could not produce the original Will despite exercise of due diligence and for no negligence or default on his part. The trial Court has considered the various judgments produced before it and found that there must be factual foundation to lead secondary evidence and the factual foundation for leading secondary evidence under Clause 2 of Section 65 (c) was to show that in the absence of any negligence or default on his part, the Petitioner could not produce it in reasonable time.

9] The entire application of the Petitioner on this material aspect is conspicuously silent. The trial Court has also considered that since 2002 till present, no explanation is offered by the Petitioner as to why he could not produce the original Will. As observed by the trial Court, since 2002 to 2014 that is upto giving of notice under Section

66 of the Evidence Act to the Plaintiff No.2, the Petitioner did not account for this long delay. Conversely, he kept on taking the inconsistent stands; at one stage, saying that whatever Will he has produced on record is the original Will; at another stage, saying that, the original Will is kept in the locker of Plaintiff No.2 and he is not producing the same and at third stage, he is saying that, the original Will was produced before the City Survey Officer and on that basis entries were also made. However, as rightly pointed out by learned counsel for the Respondent, the endorsement on the document which was produced before the City Survey Officer as the Will, shows that it was the copy of the Will. Therefore, again the original was not produced before the City Survey Officer also. It shows that the Petitioner does not know what is the exact stand he has to take. If he is saying that he has produced the original Will, then the question does not arise of his seeking permission of the Court for adducing secondary evidence, saying that the original Will is in the locker of Plaintiff No.2 and he has not produced it. If he wants to come under Section 65(c) of the Evidence Act, then he has to prove that there was no negligence or default on his part in producing the same, indicating the steps he has taken for production of the document. As a matter of fact, Section 65(c) will be applicable only when the original document

is in possession of the party, who wants to produce it but on account of his default or neglect, it has been destroyed or lost and therefore, he now wants to seek permission for leading secondary evidence. Here in the case, according to the Petitioner, the original Will was in possession of Plaintiff No.2. Hence, no question arose of the said original being lost or destroyed from the custody of the Petitioner. Thus, the very application filed under Section 65(c) was misconceived and hence, the trial Court has rightly rejected the same.

10] The reliance placed by learned counsel for the Petitioner on the judgment of this Court in the case of *Karthik Gangadhar Bhat vs. Nirmala Namdeo Wagh & Anr., Writ Petition No.11151 of 2017, dated 3rd November 2017 (Coram: G.S. Patel, J.)*, is also misplaced, because in the said authority it is held that normally there is no necessity of making such application seeking permission of the Court for production of secondary evidence. However, so far as the application under Section 65(c) is concerned, it is categorically held in paragraph No.11 that, “when such application under Section 65(c) is concerned, where the original is lost, the party seeking to adduce secondary evidence must depose that the original is lost and must also depose to the other conditions set out in that sub-clause, viz., that he is not guilty of default or neglect”. Thus, in this case, the Petitioner

should have deposed about the original Will being in his custody and it is lost or destroyed. However, if according to him, the document produced by himself is itself the original Will, then there is no question of producing secondary evidence. However, if according to him, the original Will was in the locker of Plaintiff No.2 then also, he cannot say that the original Will was destroyed or lost while it was in his custody. He has also not deposed anything to that effect and as observed by the trial Court from 2002 to 2014, he has not stated a single word about the original Will being in his custody or has lost or destroyed or and it was not on account of his negligence. He is all along making out case that original Will was in the custody of Plaintiff No.2. In such situation, the Petitioner has to suffer for his own fault and cannot contend that Respondent is trying to scuttle the evidence.

11] The impugned order, therefore, passed by the trial Court being just, legal and correct; no interference is warranted therein.

12] Writ Petition, accordingly, stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]