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IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO.593 OF 2018

WITH

CIVIL APPLICATION NO.10026 OF 2018

WITH

CIVIL APPLICATION NO.9840 OF 2019

Govindprasad s/o Badrinarayan Toshniwal,
Age 65 years, Occu. Agriculture ,
R/o Parasnagar, Nanded,
Taluka and District Nanded ... PETITIONER

VERSUS

1. Gangaprasad s/o Badrinarayan Toshniwal,
Age 67 years, Occu. Agriculture,
R/o Shahar Peth, Vasmat,
Tq. Vasmat, District Nanded.
2. Ashok s/o Badrinarayan Toshniwal,
(died), through L.Rs.
- 2-A) Kanhaiya s/o Ashok Toshniwal,
Age 26 years, Occu. Business,
R/o Sai Samarth Trading Company,
Mondha, Vasmat, Tq. Vasmat,
District Hingoli
- 2-B) Mayuri w/o Rajkumar Malpani,
Age 24 years, Occu. Household,
R/o Shani Mandir, Main Market,
Beed.
3. Shakuntala w/o Gopaldas Tapadiya,
Age 60 years, Occu. Household,
R/o Nava Mondha, Hingoli,
Taluka and District Hingoli ... RESPONDENTS

((2))

.....
Shri A.B. Dhongade, Advocate for petitioner
Shri Y.K. Delmade, Advocate for respondent No.1.
Shri Shri S.N. Lovekar, Advocate for respondent No.2
.....

CORAM : R.G. AVACHAT, J.

Date of reserving judgment : 28th August, 2019

Date of pronouncing judgment : 20th September, 2019

J U D G M E N T :

Civil Application No.10026/2018 for bringing on record legal representatives of deceased respondent No.2 is allowed. Delay condoned. Legal representatives of deceased respondent No.2 be brought on record.

2. Rule. Rule returnable forthwith and heard finally with the consent of learned counsel appearing for the parties.

3. The challenge in this petition is to the order dated 21/9/2017, passed by Civil Judge, Junior Division, Aundha (N), District Hingoli on the application Exh.58 in Regular Civil Suit No.34/2014. By the impugned order, the application of the petitioner/ plaintiff, moved for seeking permission to lead secondary evidence came to be rejected.

4. Perused the impugned order. The petitioner and the respondents are the siblings. On the death of their father, a memorandum of partition is stated to have been executed on 30/3/1992 in respect of the family properties. A copy of the memorandum of partition is on record. Petitioner/ plaintiff filed a Suit (Regular Civil Suit No.34/2014) for declaration of his title to the property that came to his share in the alleged partition and consequential relief for injunction.

5. The petitioner, therefore, preferred application Exh.42 to take on record a photo copy of the memorandum of partition, as a secondary evidence. The Trial Court rejected the said application. The petitioner preferred the Writ Petition, being Writ Petition No.5639/2016, taking exception to the order rejecting application. Learned Single Judge was pleased to dispose of the said Writ Petition with the following order :

1. Learned counsel for petitioner, on instructions, states that efforts for procuring original of the document in respect of which secondary evidence is sought to be led under Exhibit -42 would be made, including possibility of placing on record an affidavit by legal heirs of deceased Biharilalji Kabra.

2. If that be so, instead of passing any order in

respect of impugned order, situation can be met with by allowing the petitioner to make requisite efforts as expected by trial Court and thereupon, petitioner would be at liberty to make application afresh without getting impeded by the impugned order, keeping the contentions open.

3.”

6. The petitioner/ plaintiff thereafter preferred application Exh.58, contending therein that affidavit of the son of Biharilal Kabra is produced in support of the application. A photo copy of the memorandum of partition be, therefore, accepted as a secondary evidence.

7. The Trial Court again rejected the application with following observations :

5. For adducing secondary evidence the provision as contemplated under Section 65 and 66 of Evidence Act is required to be satisfied. But, perusing the contention of this application, no such requirement has been pleaded such as, it has been lost or cannot be found after due diligence as well as the documents ought to be produced is out of reach of plaintiff. Plaintiff also failed to contend in this application the custodian of document and the possibility of possession of document is also absence. Attempt to trace out document is also missing in this application. However, the document ought to be proved

by way of of secondary evidence is unregistered document. Therefore, is required to be proved in terms of Section 63 r.w. 65 of Evidence Act. But, plaintiff failed to satisfy legal requirements. Hence, for aforesaid reasons application does not deserve to be allowed. Therefore, for aforesaid reasons I pass the following order :

ORDER

1. Application is hereby rejected.
2. Costs to cause in suit."

8. Biharilal Kabra was the common ancestor. He was survived by three sons and a daughter. The record indicates that a document in the nature of memorandum of partition was executed between the heirs of Badrinarayan (petitioner and respondents). There is also some record to indicate that, effect of the alleged partition has been reflected in the Municipal record. Be that as it may, the Trial Court shall not be influenced by these observations.

9. The fact remains that the prayer in the application Exh.58 is to the effect that the petitioner/ plaintiff be permitted to produce on record a photo copy of memorandum of partition, allegedly executed on 30/3/1992. An affidavit of Sanjeev Biharilal

Kabra was filed in support of the application. The affidavit of Sanjeev Biharilal Kabra records that on 30/3/1992, a memorandum of partition was executed. The original document was in the custody of his father Biharilal Kabra. Photo copies of the original were given to rest of the parties to the document. The memorandum of partition has been acted upon. A dispute has now arisen over agricultural land. The petitioner/ plaintiff Govindprasad, therefore, approached him and asked for original of the memorandum of partition. Biharilal passed away in December 2001. The original document was in the custody of Biharilal. He (Sanjeev) took search for the original document. He, however, could not locate it.

10. As such, the affidavit filed in support of the application indicates that, the petitioner/ plaintiff informed the Court that the original document has thus been lost. He, therefore, be permitted to lead secondary evidence of the original document.

11. Since the affidavit was in support of the application, the Trial Court ought not to have insisted or observed that the application is silent to plead requirement to lead secondary evidence in terms of Section 65/ 66 of the Evidence Act. What

were the expectations of the Trial Court have all been, in fact, satisfied by the affidavit filed in support of the application. The Trial Court should not have been too technical. It should have allowed the application Exh.58. Since the Trial Court rejected the application in spite of the grounds having been made out in the affidavit filed in support of the application, the Writ Petition deserves to be allowed.

12. In the result, the Writ Petition is allowed. The impugned order is set aside. Application Exh.58 is allowed. Rule made absolute.

13. In view of disposal of the Writ Petition, Civil Application No.9840/2019 stands disposed of.

(R.G. AVACHAT)
JUDGE

fmp/-