

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

WRIT PETITION NO.10797 OF 2019

SUDHA PRABHAKAR SANE
VERSUS
SUNITA MOHAN KORDE AND OTHERS

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Advocate for the Petitioner : Shri Milind M. Joshi
Advocate for Respondent 1 : Shri Chetan T. Jadhav
Advocate for Respondent 2 : Shri N.K. Kakade

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 16th December, 2019

Per Court:

1 This matter was heard for a considerable time. I have perused the petition paper book and the detailed affidavit in reply filed on record. I find that the eight documents mentioned in the impugned order dated 27.02.2019 passed by the Trial Court below exhibit 129 in Special Civil Suit No.411/2011, are purportedly such documents which may have nexus with the case and the plaintiff claims to have brought on record certain foundational pleadings which, according to the plaintiff, would indicate that these documents are in the custody of defendant no.1. The possibility that they may be even with defendant no.2 cannot be ruled out. There are no pleadings by any side that these documents are lost or destroyed.

2 I find that the Trial Court was not properly assisted when it decided exhibit 129. The law is settled on secondary evidence and more so, in view of the judgment delivered by this Court in the matter of *Shaikh Aftab Ahmed s/o Shaikh Akhlaque Ahmed and another vs. Bhimrao Sandu Waghmare and others*, Writ Petition No.8442/2019 (Aurangabad Bench) decided on 01.10.2019. It is no longer res-integra that it is the duty of the litigant to produce primary evidence. Only if it is found from the foundational pleadings and on the basis of such evidence that may have come on record after the lodging of the suit that the original is lost or destroyed, that the application for seeking leave to lead secondary evidence can be entertained.

3 It appears that the Trial Court has relied upon the law laid down in *Parasanbai Dhanraj Jain and others vs. Sunanda Madhukar Jadhav, 2017 (6) ALL MR 877* (Civil Revision Application No.82/2016), wherein, this Court, at the Principal Seat had concluded that no application for leading secondary evidence is necessary and as such, no permission of the Court is required. The judgment delivered by this Court on 01.10.2019 in the matter of *Shaikh Aftab Ahmed (supra)* would indicate that the view taken in *Parasanbai Jain (supra)* is not to be followed. Admittedly, no notice for production of documents was filed by the plaintiff.

4 The learned advocate for respondent no.1/ plaintiff submits

that the plaintiff would now prefer a specific application by way of a notice for production of documents and indicate from such application, the existence of eight documents, their nexus with the pending case and exclusivity of the custody of the said documents.

5 In view of the above, this Writ Petition is allowed. The impugned order dated 27.02.2019 is quashed and set aside. The application exhibit 129 stands rejected.

6 The plaintiff would be at liberty to file an application by way of notice for production of documents as noted above and the Trial Court shall deal with the said application in accordance with law. Needless to state, the quashing of the impugned order would not be an impediment for the plaintiff to move an application for leading secondary evidence in the light of the ***Shaikh Aftab Ahmed case (supra)*** in the event, the first defendant or any of the defendants are disinclined to produce the documents, if ordered by the Trial Court to do so. So also, the doctrine of adverse inference is also left open for the Trial Court to deal with.