

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.13953 OF 2019

KAILASH SATYANARAYAN KHANDAL
VERSUS
VIJAYKUMAR SATNARAYAN KHANDAL AND OTHERS

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Advocate for Petitioner : Shri Gangakhedkar S.S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: November 20, 2019
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PER COURT :-

1. Leave to correct the description of the respondents.
2. The petitioner / original defendant No.3 in Special Civil Suit No.70 of 2011, is aggrieved by the orders dated 21.12.2017 and 19.9.2019, by which, the petitioner has been directed to proceed to cross examine the Notary below his affidavit in lieu of examination-in-chief, Exhibit 91, so as to decide as to whether the photostat copy produced before the Court with regard to the family arrangement dated 16.2.2011, can be entertained as secondary evidence.
3. The learned Advocate for the petitioner has strenuously criticized the impugned orders. He submits that the family arrangement document dated 16.2.2011 is not before the Court in original form. A photostat copy is produced by the plaintiff, who has

moved Exhibit 101 seeking permission to lead secondary evidence. This cannot be permitted. If the existence of the original is in question and not proved, the photostat copy can never be a part of the secondary evidence. He relies upon the twelve grounds formulated in the memo of the petition.

4. Having considered the submissions of the learned Advocate and having gone through the petition paper book, I find that this Court has decided the issue as to what would amount to a secondary evidence and in what circumstances, permission can be granted for leading secondary evidence, in the matter of Shaikh Aftab Ahmed Vs. Gazi Subair Ahmed, vide judgment dated 1.10.2019, delivered in Writ Petition No.8442 of 2019. This Court has differed from the view taken by the learned Single Judge at the Principal Seat in the matters of Parsanbai Dhanraj Jain and others Vs. Sunanda Madhukar Jadhav [2017 (6) All MR 877] and Karthik Gangadhar Bhat Vs. Nirmala Namdeo Wagh and oanother - Writ Petition No.11151 of 2017, dated 3.11.2017, wherein, the view taken was that no litigant is required to seek permission of the Court or even file an application for leading secondary evidence and a litigant can straight away step into the witness box and lead secondary evidence.

5. This Court has concluded in Shaikh Aftab (supra) that

foundational pleadings for establishing the existence of a document, which is either lost or destroyed and the document, sought to be introduced as a secondary evidence, should have been prepared on the basis of the original document from the same manufacturing process.

6. I find that an unreported judgment of this Court dated 18.1.2017, delivered in Writ Petition No.11232 of 2016 at Aurangabad in the matter of Kailash Satyanarayan Khandal Vs. Vijaykumar Satyanarayan Khandal and others, was cited before the trial Court, which has recorded the conclusions of this Court in paragraph No.6, while passing the impugned order dated 21.12.2017. I find that the learned Judge has rightly considered the position of law and has kept application Exhibit 101 pending by directing the parties to lead evidence to prove the existence of the original family arrangement dated 16.2.2011, so as to consider the said evidence and then decide whether the original was in existence and whether the photostat copy could be taken in secondary evidence.

7. In view of the above, this petition being devoid of merits, is dismissed.

8. As the judgment of this Court dated 1.10.2019 has been circulated to all the trial Courts in Maharashtra, the trial Court in this matter would consider the same while deciding application Exhibit 101.

(RAVINDRA V. GHUGE, J.)

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