

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

WRIT PETITION NO.10051 OF 2018

Ramesh Ramchandra Patil and Anr. .. Petitioners

V/s.

Subhash Ganapati Patil and Ors. .. Respondents

Mr.Saurabh Oka for the petitioner

Mr.Gajanan M. Savagave for the respondent no.1

CORAM: K.K. TATED, J.

DATED : JANUARY 4, 2019

P.C. :

1 Heard.

2 The learned counsel for the Petitioner submits that Respondent nos.2 and 3 are formal parties. Therefore, it is not necessary to issue notice to them.

3 By consent, matter is taken on board for final disposal at the stage of admission itself.

4 By this petition under Article 227 of the Constitution of India, the Petitioner original defendant nos.1 and 2 challenges the order dated 09.07.2018 passed by Joint Civil Judge, Senior Division, Jaysingpur below Exhibit-46 in Regular Civil Suit No. 43 of 2016 directing them to produce original affidavit dated 21.10.2014 executed by them before the Executive Magistrate,

Shirol.

5 It is the case of the Petitioner that original affidavit dated 21.10.2014 is not in their possession. He further submits that even Trial Court recorded in impugned order dated 09.07.2018 that original document may not be with defendant nos.1 and 2. He further submits that even Petitioner in Petition on solemn affirmation in paragraph 9 and 10 specifically stated that original affidavit dated 21.10.2014 is not in their possession. He submits that therefore, it is impossible for the Petitioner to comply the order dated 09.07.2018 passed by Trial Court. On the basis of these submissions, the learned counsel for the Petitioner submits that impugned order dated 09.07.2018 is required to be set aside.

6 On the other hand, the learned counsel for the Respondent no.1 submits that execution of the said document is not denied by the Petitioner. Therefore, they are duty bound to produce original document in the Trial Court. He submits that these facts are considered by the Trial Court at the time of passing impugned order dated 09.07.2018. Hence, there is no substance in the present Writ Petition and same is required to be dismissed.

7 Heard.

8 It is to be noted that in the present proceedings, Respondent original plaintiff filed Application below Exhibit-46 in Regular Civil Suit No. 43 of 2016 for direction against the Petitioner to produce original affidavit dated 21.10.2014 executed by them before the Executive Court, Shirol. Admittedly, before

the Trial Court as well as before this court, Petitioner specifically stated on solemn affirmation that original affidavit dated 21.10.2014 is not in their possession. If said document is not in their possession, there is no question of directing them to produce the same. In view of these facts, I am of the opinion that Petitioner has made out a case for allowing the present Writ Petition.

9 It is made clear that Respondent original plaintiff can take out appropriate proceeding if he so desires for secondary evidence for placing on record photo copy of affidavit dated 21.10.2014 executed by Petitioner before the Executive Magistrate, Shirol. That Application be decided by court below on its own merits. Hence, following order is passed:

- a) Order dated 09.07.2018 passed by Joint Civil Judge, Senior Division, Jaysingpur below Exhibit- 46 in Regular Civil Suit No. 43 of 2016 is set aside.
- b) Liberty granted to the Respondent original plaintiff to take out appropriate proceeding for secondary evidence, if they so desire, and that Application be decided on its own merits after hearing both the sides.
- c) Writ Petition is allowed accordingly.
- d) No order as to costs.

(K.K. TATED, J.)