

Shahnaz G. Foujdar ... Petitioner
vs.
Savita Ravi Mutgekar ... Respondent

Mr. R. N. Sanghavi, for the Petitioner.
Mr. Salil V. Ray, for the Respondent.

DATE : MARCH 14, 2019

1. Heard Mr. R. N. Sanghavi, the learned counsel for the petitioner.

2. The challenge in this petition is to the order dated 23rd April, 2014 by which learned trial Judge has tentatively permitted the plaintiff to lead secondary evidence in respect of agreement dated 1st March, 2008 with liberty to the parties to prove existence / non-existence of alleged agreement.

3. Mr. Saghavi, the learned counsel for the petitioner submits that the only leave could have been granted and the plaintiff was duty bound to produce original agreement, in case such an

agreement really exists as contended by the plaintiff. Mr. Saghavi submits that, this Court, in case of **Ganpat Pandurang Ghongade & Ors. Vs. Nivrutti Pandurang Ghongade**, reported in **2008(5) Mh.L.J. 153** has held that no secondary evidence can be led unless there is evidence on record to show that the original was not available. He also relies on **Smt. J. Yashoda Vs. Smt. K. Shobha Rani**, reported in **AIR 2007 SC 1721** to submit that best evidence has to be produced, and unless the conditions set out under Section 65 of the Indian Evidence Act are fulfilled, no secondary evidence can be permitted.

4. In the present case, the plaintiff has not only contended that the original is not in his possession, but also further specifically alleged that the original is in the possession of the defendant. The plaintiff has given notice to the defendant to produce the original. In these circumstances, the learned Trial Judge has made the impugned order. The learned Trial Judge, has only tentatively permitted the plaintiff to lead secondary evidence but reserved liberty to the parties to prove existence / non-existence of the alleged agreement. This means that all the options available to the petitioner are expressly

kept open. From the nature of the impugned order, it is quite clear that the petitioner herein is also at liberty to lead evidence or to elicit answers from the plaintiff in the course of cross-examination as to the fate of the alleged original agreement. Thus construed, it cannot be said that there is any jurisdictional error in the making of the impugned order.

5. In **Ganpat Ghongade (supra)**, this Court was considering a second appeal and the issue was whether secondary evidence could have been led without there being any evidence on record to show that the original was not available. This Court, noted that the Trial Court had already recorded finding that the original agreement was in possession of the respondent. The facts in **Ganpat Ghongade (supra)** are therefore quite distinct from the facts in the present case.

6. In **Smt. J. Yashoda (supra)**, the Hon'ble Apex Court has again stated that it is the duty of the parties to the litigation to produce best evidence, therefore, if the original is available, then, the same has to be produced. In the present case, it is not case of the petitioner that the original of the agreement is available with the plaintiff but the plaintiff is avoiding production of the same.

Therefore, the factual situation in the present case is quite different from the factual situation in **Smt. J. Yashoda (supra)**.

7. From the aforesaid, it is clear that there is no case to interfere with the impugned order.

8. This petition is liable to be dismissed and is hereby dismissed. There shall be no order as to costs.

Sd/-
(M. S. SONAK, J.)