

Vasant Vitthal Gundekar	...	Petitioner
Vs.		
Smt. Savita Avinash Pansare & Ors.	...	Respondents

CORAM : M. S. SONAK, J.

DATE : MARCH 14, 2019

ORAL JUDGMENT:

1. Rule. Rule is made returnable forthwith. By consent, petition is taken up for final hearing.
2. Heard Ms. Rekha Musale, the learned counsel for the petitioner.
3. The challenge in this petition is to the order dated 15/10/2018 by which the learned Trial Judge has permitted the original plaintiff to lead secondary evidence in respect of contents of the original will dated 9/6/2004.
4. Ms. Musale, the learned counsel for the petitioner submits

that, in this case, there is no proper evidence produced on record produced by the plaintiff to show that the original registered will dated 9/6/2004 is not in his possession or that the same is lost. She submits that since the will is registered, the plaintiff was duty bound to call Sub-Registrar to produce the will. Even this has not been done. She submits that in these circumstances, leave to produce secondary evidence ought not to have been granted. She relies judgment in **Parsa Singh Vs. Smt. Prakash Kaur & Ors.** reported in **AIR 1976 Punjab & Haryana, 235** in order to support of her contentions.

5. Ms. Musle also refers to the provisions of the Evidence Act to submit that it is the primary duty of the plaintiff, who relies upon the will, to produce the original will. She submits that in the plaint, the plaintiff has avered that on the basis of the will, the plaintiff applied for corrections in property records. She submits that from this it is clear that it is the plaintiff who is in possession of the original will. She submits that in any case, it is for the plaintiff to show where the original will is or explain the circumstances in which such a will is allegedly lost. For all these reasons Ms. Musale submits that impugned order needs to be interfered with.

6. Having considered the contentions raised by the learned counsel for the Petitioner and upon perusal of record, I am, unable to accept the contentions raised by her. In this case, the record indicates that the plaintiff has time and again tried to asserted that it is the petitioner or in any case the defendant No.1 who was in possession of the original will. The plaintiff has even taken out an application at Exhibit 121 under Order 11 Rule 7 of the Civil Procedure Code for directions to defendant No.1 to produce the original will. However, his application was resisted by defendant No.1 by stating that such original will is not in his possession.

7. Learned Trial Judge has noted the efforts made by the plaintiff, in relation to the production of the original will. The learned Trial Judge has also considered the law laid down by the Hon'ble Supreme Court in the case of - (i) **The Roman Catholic Mission Vs. The State of Madras & Anr. reported in AIR 1996 SC. 1457**; (ii) **Smt. J. Yashoda Vs. Smt. K. Shobha Rani reported in AIR 2007 SC 1721**; and (iii) **Chandigarh Housing Board Vs. Devinder Singh & Anr. reported in AIR 2007 SC 1723**, in the matter of production of secondary evidence and on such basis, permitted the plaintiff to lead

secondary evidence. The learned Trial Judge also taken into consideration the decision made by this Court on the issue.

8. The ruling in **Parsa Singh (supra)**, in fact, lays down that an original will, even after registration, does not become a public document and remains a private document. This ruling lays down that a certified copy of the will is admissible only for proving contents of the original and it is not sufficient to dispense with the production and proof of the original will. This decision further lays down that secondary evidence can be produced only when it is established that the original will is lost. There can obviously be no dispute with the proposition laid down.

9. In the present case, learned Trial Judge has noted that there is ample evidence on record to establish that the plaintiff, despite efforts being made is not in a position to produce the original registered will. In fact, it is the categorical case of the plaintiff that the possession of the original registered will was with the defendant No.1 and therefore, the plaintiff did make efforts to require the production of the original will through defendant No.1. However, the defendant No.1 is obviously, not interested in co-operation and it is

on this basis that the learned Trial Judge has permitted the plaintiff to lead secondary evidence. There is no jurisdictional error in the view taken by the learned Trial Judge.

10. Accordingly, this petition is liable to be dismissed and is hereby dismissed. Rule is discharged. There shall be no order as to cost.

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