

Anand

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

WRIT PETITION NO. 5845 OF 2019

Aatif Anwar Arif Anwar Khan .Petitioner

Vs.

Rizwan Aslam Mulani & anr. .Respondents

Mr. S. M. Railkar, Advocate, for the Petitioner

Mr. T. D. Deshmukh, Advocate, for the Respondent Nos. 1 & 2

CORAM : REVATI MOHITE DERE, J.

DATE : 02.03.2020

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. Heard learned counsel for the parties.

2. By this Petition, the Petitioner has impugned the order dated 01.11.2018 passed by the learned Judge Jt. C. J. S. D., Pune below Exh. 48 in Special Civil Suit No. 1421 of 2013, by which the Respondents' (Original Defendants) Application permitting them to lead the secondary evidence was allowed.

3. Learned counsel for the Petitioner (Original Plaintiff) submits that there is non-compliance of provisions of section 65 of the Indian Evidence Act. He submits that the document in question i. e. the notarized affidavit dated 11.08.2012 could not have been in possession

of the Petitioner, inasmuch as, the same was in favour of the Respondents (Original Defendants).

4. Learned counsel for the Respondents opposes the Petition. He submitted that no interference is warranted in the impugned order.

5. Perused the papers as well as the impugned order. The Petitioner is the Original Plaintiff and the Respondents are the Original Defendants. The Petitioner had filed a suit, being Special Civil Suit No. 1421 of 2013 as against the Respondents (Original Defendants) in the Court of the learned C. J. S. D., Pune, for a declaration that the Agreement dated 09.06.2010 executed by the Petitioner in favour of the Respondents with respect to the suit flat stands cancelled as well as for a direction to the Respondents to handover vacant and physical possession of the suit flat to the Petitioner and for a direction to pay monthly compensation for illegally occupying the said suit flat. The Petitioner also sought an injunction as against the Respondents restraining them from creating any third party interest and parting with possession of the suit flat. The Respondents (Original Defendants) appeared in the said suit and denied the contentions of the Petitioner. According to the Respondents, their possession of the suit flat was lawful and that the Petitioner had received the entire consideration for

the suit flat. The Respondents also stated that they had executed a notarized affidavit dated 11.08.2012, accepting the said facts and as such, stated that the Petitioner was not entitled to any of the reliefs sought. The trial Court framed issues and parties were directed to lead their evidence. It appears that the Petitioner filed his evidence and in his Affidavit, specifically dealt with the notarized Affidavit dated 11.08.2012. The Petitioner was cross examined on the said aspect i. e. the notarized Affidavit and the Petitioner denied the execution of the said fact. It appears that thereafter, the Respondents (Original Defendants) sent a notice dated 10.07.2018 to the Petitioner calling upon him to produce the Affidavit dated 11.08.2012. The said notice was replied to by the Petitioner, wherein the Petitioner again denied execution of the said Affidavit. Pursuant thereto, the Respondents (Original Defendants) filed an Application (Exh. 48) and prayed therein for permission to lead the secondary evidence with respect to the notarized Affidavit. The learned trial Judge was pleased to allow the said Application and as such, directed the Respondents (Original Defendants) to adduce secondary evidence in respect of the said document i. e. the notarized Affidavit. It is pertinent to note that the Petitioner (Original Plaintiff) had denied the execution of the Affidavit allegedly executed between the Petitioner and the Respondents (Original Defendants) to show that the Petitioner had received consideration for the suit flat. It appears that pursuant thereto,

in view of Petitioner's denial of the existence of the said Affidavit, the Respondents (Original Defendants) issued a notice asking the Petitioner to produce the said document. After the Petitioner replied to the said notice and denied the existence and possession of the said notarized Affidavit, the Respondents (Original Defendants) filed the aforesaid Application and sought permission to lead secondary evidence with respect to the said document. The Respondents (Original Defendants) have complied with the requirements of section 65 of the Evidence Act. The trial Court has rightly given an opportunity to the Respondents (Original Defendants) to adduce secondary evidence with respect to the said document. Needless to state, that it is always open for the Petitioner to cross-examine the Respondents (Original Defendants) on this document.

5. Having regard to the aforesaid, no infirmity can be found in the impugned order. Accordingly, the Petition is dismissed. All contentions of all parties are kept open. The learned trial Judge to decide the suit on its own merits uninfluenced by the observations made in this order.

6. Accordingly, the Petition is disposed of.

(REVATI MOHITE DERE, J.)