

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11519 OF 2019

- 1) Bhagunath s/o Rabhaji Jejurkar,
Age 77 years, Occ. Agriculture,
R/o. Astagaon, Tq. Rahata,
Dist. Aurangabad.
- 2) Raosaheb s/o Rabhaji Jejurkar (died
Through L.Rs.)
- 2A) Ashok s/o Raosaheb Jejurkar,
Age 47 years, Occ. Agriculture,
R/o. Niwara Housing Society,
Market Yard Road, Kopergaon,
Tq. Kopergaon, Dist. Ahmednagar.

... **Petitioners.**
(Orig. Defts. No. 1 & 2A)

VERSUS

- 1) Sonyabapu s/o Rabhaji Jejurkar,
Age 60 years, Occ. Agriculture,
R/o. Astagaon, Tq. Rahata,
Dist. Ahmednagar.
- 2) Houshiram s/o Raosaheb Jejurkar,
Age 37 years, Occ. Agriculture.
- 3) Parvatibai w/o Raosaheb Jejurkar,
Age 70 years, Occ. Agriculture,
Both r/o. Astagaon Tq. Rahata,
Dist. Ahmednagar.

... Orig. Plaintiff.

... **Respondents.**
(Respondents No. 2 & 3 are
orig. defts No. 2B & 2C)

...

Advocate for the Petitioners : Mr. Gandhi Amol S.
Advocate for the Respondents : Mr. R.A. Tambe.

CORAM : MANGESH S. PATIL, J.
DATE : 15.11.2021.

ORAL JUDGMENT :

Heard. Rule. The rule is made returnable forthwith. With the

consent of both the sides the matter is heard finally at the stage of admission.

2. The petitioners are the original defendants in a suit for injunction filed by the respondent No. 1. By issuing a notice under Order XII Rule 8 of the Code of Civil Procedure they called upon the respondent No. 1 to produce a document dated 06.05.2003 which according to them was an agreement for effecting partition of the suit property. Since the respondent No. 1 failed to produce the document the petitioners submitted an application (Exh. 43) under Section 65 of the Indian Evidence Act seeking leave of the Court to lead secondary evidence in respect of that document. By the impugned order his request has been rejected on the ground that it was a suit for injunction simplicitor and there was no whisper in the written statement in respect of existence of the document.

3. The petitioners had called upon the respondent No. 1 to produce the document dated 06.05.2003 by serving him a notice under Order XII Rule 8 of the Code of Civil Procedure (Exh. 41). He having failed to produce the document the application (Exh. 43) was filed on which the impugned order was passed. The learned Judge has rejected the application on two counts. Firstly, on the ground that there is no whisper about existence of any such document in the written statement. Secondly, on the ground that the document was not relevant for deciding the suit which was for injunction simplicitor.

4. As can be seen from the copy of the written statement, in paragraph No. 12 there is a reference to a document, though mentioned to be dated 09.05.2003 allegedly executed before a Notary touching the arrangement to be made between the parties in respect of the suit property. Therefore, the observation and conclusion of the learned Judge that there is no whisper about this document in the written statement, is perverse.

5. As far as relevance of the document is concerned, *ex facie*, the learned

Judge does not indicate in so many words as to how the document would be irrelevant, more so in the light of the pleadings in paragraph no. 12 of the written statement.

6. Besides, in what way the document would be helpful for a party is a matter which is better left to be decided by the party itself and the issue cannot be prejudged unless it has a tendency to cause prejudice to the other side. Even before a document is produced the learned Judge has apparently referred to the contents and has jumped to the conclusion that the contents would be irrelevant.

7. The learned advocate Mr. Tambe points out that according to his instructions still the trial has not commenced and the stage was not ripe to submit any application, by the petitioners, who are the defendants in the suit, to seek any permission to lead secondary evidence.

8. Needless to state that the petitioners would want to confront a copy of the document to the respondent No. 1 who is the plaintiff who would be beginning the hearing. In any case, unless the petitioners are permitted to lead secondary evidence in respect of the document they will not be able to confront it to the respondent No. 1 during the latter's cross-examination.

9. In view of the above, the Writ Petition is allowed. The impugned order is quashed and set aside. The Trial Court shall now allow the application (Exh. 43).

10. Rule is made absolute in above terms.

(MANGESH S. PATIL, J.)

mkd/-