

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9632 OF 2019

Gulam Mustafa Khan Gulam
Dastgir Khan

...Petitioner

Versus

Saleha Begum Akhtar Khan And Others

...Respondents

Mr. A.S. Gandhi h/f. Mr. Punit Mehta, Advocate for the petitioner.
Mr. Mujtaba Gulam Mustafa, for Respondent No. 1, 2A to 2E and
3.

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 12th SEPTEMBER, 2022

ORDER :

1. The petitioner is aggrieved by the order passed by learned 6th Joint Civil Judge, Senior Division, Aurangabad, below Exhibit-82, in Special Civil Suit No. 266/2013.

2. The petitioner is defendant in the suit filed by respondents for partition and separate possession of the suit property.

3. Presently, the plaintiff is in the witness box and his cross examination is in progress. At this stage, application

Exhibit-82 is filed by the defendant/petitioner seeking permission to lead secondary evidence regarding partition deed dated 30.01.1995. In the said application it is contended that, it is averred in the written statement that partition has already taken place and the photocopy of the partition deed dated 30.01.1995 is filed on record and the original document was given to revenue authority for effecting mutation entry. Since the original document is not available, photocopy is filed, which is taken from original document. It is further contended that the revenue authorities are not ready to give anything in writing in respect of original document, as the mutation entry is taken long back. As the original document cannot come before the Court, the defendant may be permitted to lead secondary evidence in respect of partition deed as he has to confront the said document to the plaintiff during cross examination.

4. The Trial Court has rejected the application by placing reliance on the decision in *Shri Suresh S/o Shrikrushna Pandharipande Vs. Parag S/o Pandharipande* [2016 (2) All MR 563] and *Kartik Gangadhar Bhat Vs. Nirmala Namdev Wagh and another* [Writ Petition No. 11151 of 2017].

5. I have duly considered the rival submissions of the learned advocate for the petitioner and the learned advocate for the respondents. Perused the writ petition, grounds raised therein and the documents filed along with writ petition.

6. After perusing the record and hearing the parties, this Court is of the opinion that there is no reason to interfere in the impugned order passed by the Trial Court. The Trial Court has rightly relied on the ratio in Suresh Pandharipande (supra) and Kartik Bhat (supra). In Suresh Pandharipande (supra), it is held that, *'to lead secondary evidence two things are required to be established firstly, there must be evidence of existence of original document and secondly, there must be evidence of their loss and said two things cannot be proved unless party is permitted to enter witness box or examine witness and subjected to cross-examination.'*

7. In the present case, the defendant is yet to enter the witness box and lead evidence. The defendant will have to lead evidence about existence of partition deed dated 30.01.1995 and its loss by entering into the witness box and by examining the witness from the revenue department. Unless the defendant and

his witness is cross examined, the fact of existence of original document and loss of it cannot be said to be proved. That stage is yet to arrive as the plaintiff is in the witness box and his cross examination is in progress. Therefore, Trial Court has rightly rejected the application filed by the defendant to lead secondary evidence. No case is made out by the petitioner to interfere in the impugned order, which is a reasoned order.

8. The petitioner/defendant is at liberty to lead evidence about existence of original document and its loss by entering into witness box and by examining the witness of revenue department. After leading such evidence the petitioner is entitled to revive his prayer for leading secondary evidence. If such prayer is made by the petitioner at that stage, the same shall be considered by the Trial Court on its own merit. In case the Trial Court grants prayer of the petitioner to lead secondary evidence, and exhibits the partition deed, then the petitioner will be entitled to seek recalling of the plaintiff for further cross examination, so as to confront the exhibited partition deed to the plaintiff. With this liberty, the writ petition is disposed of.

[NITIN B. SURYAWANSHI, J.]