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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.9550 OF 2017

MALOJI SANGRAM SOLUNKE
VERSUS
BALIKABAI VISHWAMBHAR SOLANKE AND OTHERS

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Mr R. P. Adgaonkar, Advocate for petitioner;
Ms M. S. Mhase, Advocate h/f Mr Lex Aquila, Advocate for
respondent Nos.1 to 5

CORAM : SMT. BHARATI DANGRE, J.

DATE : 13th January, 2022

PER COURT:

1. Heard the learned for the petitioner and the learned Counsel for the respondents.

The petitioner is aggrieved by the order passed below Exh.130 in Regular Civil Suit No.09/2013, thereby granting application filed by the plaintiff to adduce secondary evidence in respect of a correction deed bearing Document No.1279/72, of which a certified copy has already been produced on record.

Pertaining to note that, in the suit filed by the plaintiff seeking declaration regarding Land Survey No.85/A, admeasuring 7 Acres 10 Gunthas, the present petitioner was impleaded as

(2)

defendant No.7. The defendant No.1 in the said suit was proceeded ex-parte with the other defendants including the present petitioner, who was impleaded as respondent No.7 and is the subsequent purchaser from defendant No.1, has contested the suit.

The plaintiffs moved an application below Exh.130 by invoking Section 65 of the Evidence Act, stating therein that the original document of the correction deed is in custody of defendant No.1 and since defendant No.1 is unwilling to produce the same, the plaintiff may be permitted to produce the said document by way of secondary evidence.

2. The application was opposed by the defendants including present petitioner on the ground that the parameters of leading secondary evidence are not complied with and in specific the learned Counsel for the defendants submit that the necessity of issuing notice to produce the documents before leading secondary evidence as contemplated under Section 66 of the Indian Evidence Act, 1872, has not been adhered to.

(3)

3. The learned Counsel for the respondents, original plaintiffs, placed reliance on a decision of this Court in case of Karthik Gangadhar Bhat Vs. Nirmala Namdeo Wagh, delivered by this Court on 03/11/2017, which has been upheld by the Hon'ble Apex Court, which has unequivocally held that the requirements as contemplated under Section 65 of making an application to lead secondary evidence, is not imperative and if the foundation is led to that effect, even at the time when the witnesses in the box, secondary evidence can be permitted to be lead.

4. The learned Counsel for the respondents, however, rely upon proviso appended to Section 66 of the Evidence Act, which carve out an exception of issuance of notice to produce a document, before the secondary evidence can be permitted to be led and by inviting attention to sub-clause 2 of the proviso, which is in form of exception, which provide that when, from the nature of the case the adverse party must note that he will be required to produce the documents, in such a case, the mandatory requirement of notice to be given under Section 66 is done away.

5. The learned Counsel would submit that from the very beginning, the case of the defendants is that, no such documents

(4)

were in existence, as pleaded in the written statement filed before the Court. The said document in respect of which the secondary evidence is sought to be lead is a public document and is of the year 1972. In the wake of the fact that the defendants have denied the existence of the said document, which include the present petitioner who is defendant No.7 to the suit, the learned Judge has rightly granted permission to lead secondary evidence, the said document being a public document and since, there is a wholesome denial about the said document, from all the defendants opposing the claim.

In the wake of the above, the impugned order cannot be said to suffer from any legal infirmity and is therefore upheld, necessarily writ petition is dismissed.

(SMT. BHARATI DANGRE, J.)

sjk