

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.9572 OF 2013**

NANDA ASHOK MORE

..PETITIONER

VERSUS

ANNASAHEB TRIMBAK NIKAM AND OTHERS ..RESPONDENTS

...

Mr. N. S. Tekale h/f Mr. D. P. Palodkar, Advocate
for the Petitioner.

Mr. P. K. Nikam, Advocate for Respondent No.1.

...

CORAM : S. V. GANGAPURWALA, J.

DATED : 14th JANUARY, 2022.

PER COURT:-

1. Heard Mr. Tekale, learned counsel holding for Mr. Palodkar, learned counsel for the petitioner and Mr. Nikam, learned counsel for respondent no.1.

2. The respondent nos.2 and 3 though served, none appears for respondent nos.2 and 3.

3. The application filed by the present respondent no.1 for adducing secondary evidence of agreement for re-conveyance is allowed. Aggrieved thereby, present petition.

4. The learned counsel for the petitioner submits that, Clause (c) of Section 65 of the Indian Evidence Act has to be established, before party is permitted to adduce secondary evidence. The Members of the Tanta Mukti say that they had

seen the originals and returned it. Whereas, the case of respondent no.1 is otherwise. The factum of loss of said document is not established. In view of that, Trial Court ought not to have allowed the application for adducing secondary evidence. The learned counsel relies on the judgment of the Division Bench of this Court in Writ Petition No.8442/2019 dated 22.09.2021 and the judgment of the Apex Court in case of **Dhanpat Vs. Sheo Ram (Deceased) through Lrs. and Others** reported in (2020) 16 SCC 209.

5. Mr. Nikam, learned counsel for respondents also relies on the same judgment and submits that, existence of original is established and the said factum has been rightly considered by the Trial Court.

6. The Division Bench of this Court in Writ Petition No.8442/2019 (supra) in paragraph no.87 observed thus:

87. In the case if the party concerned has referred to the background and the circumstances and facts necessitating leading secondary evidence, it appears that it would be able to lead secondary evidence without requiring permission from the court. Whether the facts, circumstances and background are available to the party concerned will have to be judged by the court with reference to the evidence on record in this regard. If the party fails to bring about such evidence, it is needless to say that evidence led on a document on such failed background, circumstances and facts, would not be

admissible and will have to be excluded from consideration. However, if the party is able to bring about evidence with regard to circumstances, background and facts, secondary evidence of the document would be admissible and would be considered by the court. In such a case, it appears, since there is reference to facts, circumstances and background, a repeat application referring to the same would not be a necessity and the case with reference to the same will have to be proved on evidence without which secondary evidence of a document would not be admissible.

7. The said judgment is delivered on reference made to it. It has been observed by the Division Bench of this Court that, whether the facts, circumstances and background are available to the party concerned will have to be judged by the court with reference to the evidence on record in this regard. If the party fails to bring about such evidence, it is needless to say that evidence led on a document on such failed background, circumstances and facts, would not be admissible and will have to be excluded from consideration.

8. The aforesaid stage is yet to arrive. It is for the Court at the time of final adjudication to consider whether the facts, circumstances and background are available to the parties concerned as is held by the Division Bench of this Court in the above referred case. In the said judgment, the Division Bench also relied on the judgment of the Apex Court in a case of **Dhanpat Vs. Sheo Ram (Deceased) through Lrs. and Others** (supra).

9. In view of that, no case for interference is made out. However, it is made clear that, it is for the Trial Court to consider at the time of final adjudication whether the facts, circumstances and background are made out by respondents and whether to consider that evidence in that regard.

10. Writ Petition is disposed of. No costs.

(S. V. GANGAPURWALA)
JUDGE