

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

WRIT PETITION NO.12146 OF 2015

BABURAO TUKARAM PATARE
VERSUS
RADHAKISAN TUKARAM PATARE AND OTHERS

...

Advocate for the Petitioner : Shri Patni Pramod F.

Advocate for Respondents 1A to 1C : Ms.M.S. Mhase

...

CORAM: SMT. BHARATI H. DANGRE, J.

DATE :- 13th January, 2022

Per Court:

1. The petitioner/ plaintiff, who has filed the suit being RCS No.336/2006 for declaration of title, confirmation of possession and for injunction in respect of the suit property, is aggrieved by the order dated 05.08.2015 passed below Exhibit 146.

It is worth to mention, at this stage, that apart from RCS No.366/2006, there were suits filed between the parties being RCS No.111/1991, 59/1998 and 190/1999 and one of the matter went in appeal in RCA No.302/2001 and even reached upto this Court in the Second Appeal.

2. The impugned order came to be passed on the application

moved by the plaintiff on 23.08.2013 wherein, he requested to call for the records of Regular Civil Appeal No.302/2001 from the court of the learned District Judge, Aurangabad since he desired to rely upon the affidavits of his two brothers, namely, Sukhdev and Ashok. On an application made by him to obtain the certified copies of the affidavits, it was returned on the ground that the appeal is already disposed of and the records and proceedings therein, has been destroyed. He, therefore, sought certified copies of the record and proceeding depicting the destruction of part-D. Unable to succeed in this venture, he moved an application seeking permission to lead secondary evidence in respect of the affidavits alleged to have been tendered by Sukhdev and Ashok.

This application was strongly opposed by the original defendants by raising a plea that the application exhibit 146 is filed at the fag end of the trial, when the evidence of the plaintiff was already closed on 19.09.2011 and evidence of the defendants being over, the matter is fixed for final argument. Scathing attack was made on the plaintiff by submitting that the plaintiff is in the process of prolonging the matter and Sukhdev and Ashok had filed the affidavits in the proceedings before the Collector and RCS No.190/1999 and the plaintiff is intending to read these affidavits in evidence. The defendants strongly opposed the application by stating that since Ashok and Sukhdev are alive, in absence of their stepping into the witness box particularly when they were parties

to the suit and they refrained themselves from attending the proceedings, the prayer of secondary evidence being made qua the said affidavits, was opposed. It was also pleaded that the plaintiff did not prove the loss of documents as per Section 65 of the Evidence Act and therefore, secondary evidence cannot be permitted.

3. Upon consideration of the rival contentions, the learned Judge recorded that the plaintiff is praying for leading secondary evidence on the ground of loss of documents in the form of affidavits of two persons, namely, Sukhdev and Ashok, who are his brothers. The learned Judge took an exercise of perusing the documents filed by the plaintiff along with the list at Exhibit-149, which included the Roznama of RCA No.302/2001 and also certified copy of the Index of "D" file. The plaintiff has also placed on record the certified copy of the application moved in the proceedings in respect of the withdrawal of documents. On perusal of the index of D file reflecting disposal of the documents on 29.04.2004, the learned Judge had an opportunity to peruse the said documents, which included the affidavits filed at exhibits 7, 21, 17 and 18 along with exhibits. On perusal of the said documents, it is discerned that exhibits 16 and 18 are affidavits of the appellants and of the plaintiff himself. Exhibit-17 was recorded to be the affidavit of the plaintiff and Exhibit-16 was also his affidavit. On perusal of the Index of part-D file, which was destroyed, the learned Judge recorded the finding that there is nothing to show that

this D-file included the affidavits of Sukhdev and Ashok, which are claimed to have been destroyed.

In the wake of the aforesaid, since lost and destruction of documents as contemplated under Section 65 of the Evidence Act, was not proved, the learned Judge declined the relief of permitting the plaintiff to adduce secondary evidence.

4. On perusal of the impugned order, it is apparent that since the plaintiff has failed to prove the basic ingredients necessary for leading secondary evidence as contemplated under Section 65 of the Evidence Act being falling in clause C i.e. “when the original has been destroyed or lost” and particularly when he was exposed when the learned Judge himself perused the index part of D file, which was destroyed and which did not include the affidavits of Sukhdev and Ashok in respect of which the plaintiff was seeking permission to lead secondary evidence, the permission has been rightly rejected. Since the impugned order does not suffer from any legal infirmity and is based on factual background, it is upheld. The Writ Petition is dismissed.

5. Needless to state that while issuing notice in the present Writ Petition on 04.02.2016, the proceedings in RCS No.336/2006 are stayed. Since the Writ Petition is dismissed, the learned Trial Court shall make every endeavour to conclude the proceedings in RCS No.336/2006 within a time bound manner and in any case, within a period of six months from

today. Both the parties shall render their cooperation to the learned Judge in terminating the said proceedings.

kps

(SMT. BHARATI H. DANGRE, J.)