

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION 831 OF 2018

Shri Mahaveer Babu Sangave ... Petitioner

Versus

Shri Balaso Mhadgonda Patil and Ors. ... Respondents

Mr. Kiran C. Shirguppe for the Petitioner.

None for the Respondents.

CORAM : ROHIT B. DEO, J.

DATE : 20th JUNE, 2022

P.C. :-

. The petitioner is the defendant in Regular Civil Suit 152 of 2010 which is instituted by the plaintiff for redemption of mortgage of the suit property.

2. Perusal of the plaint reveals that in paragraph 2, there is a specific averment that mortgage dated 24th May, 1995 was executed and registered at serial 2116 of 1995. The petitioner-defendant has not disputed the execution of the document dated 24th May, 1995 which according to the plaintiff is a mortgage deed. While the defendant is construing the document dated 24th May, 1995 as a complete deed of conveyance, the fact of the matter is that the execution and registration of document is not in dispute. This is apparent from plain reading of paragraph 10 of the written statement. During the course of the trial, the plaintiff moved an application dated 14th December, 2015 seeking a direction to the defendant to produce the document dated 24th May,

1995. This application is preferred on the premise that the plaintiff has already placed on record certified copy of the document and that the defendant is not willing to produce the original.

3. The order rendered by the learned Trial Judge on 5th April, 2016 records that the defendant submitted his reply on the application preferred by the plaintiff seeking production of documents. The said reply is however not placed on record of the petition and learned counsel for the petitioner is insisting that as a fact the defendant did not submit any reply. Be that as it may, the learned Trial Judge noted that while direction to produce the original document cannot be issued, the plaintiff would be entitled to seek permission to adduce the secondary evidence.

4. Pursuant to the order dated 5th April, 2016, the plaintiff preferred an application seeking permission to adduce secondary evidence on the premise that although it is the burden and the responsibility of the defendant to produce the original document on record, he is not willing to do so and therefore the plaintiff be permitted to adduce the secondary evidence to prove the certified copy. The defendant did not file his reply and the averments in exhibit 53 went unrebutted. The learned Trial Judge allowed the application and permitted the plaintiff to adduce secondary evidence, vide order dated 27th January, 2017. The defendant applied for review which application is rejected. Aggrieved, the defendant is invoking writ jurisdiction.

5. The short submission is that in the teeth of the provisions of Section 66 of the Indian Evidence Act, 1872 (for short 'Act'), the plaintiff could not have been permitted to adduce the secondary

evidence of the certified copy of the document dated 24th May, 1995.

6. Section 66 of the Act reads thus :-

“66. Rules as to notice to produce.— *Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, 1[or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:*

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:

- (1) when the document to be proved is itself a notice;*
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;*
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;*
- (4) when the adverse party or his agent has the original in Court;*
- (5) when the adverse party or his agent has admitted the loss of the document;*
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.”*

7. It is apparent that there is no inflexible rule that secondary evidence of the contents of the documents referred to in Clause (a) of Section 65 of the Act shall not be given unless notice under Section 66 of the Act is issued. In certain situations, such notice may be wholly unnecessary and some of the situations are enumerated in the statutory provision itself. Illustratively, Section 66(2) of the Act provides that when from the nature of the case, adverse party must know that he will be required to produce the document, notice is not necessary. In the factual matrix, the document is not in dispute. While the plaintiff is

seeking redemption of mortgage, according to the defendant, the document cannot be understood or interpreted as a mortgage deed and is a complete conveyance. In this view of the matter, the defendant was aware that he would be required to produce the document. Significantly, the possession of the original document is not denied. At any rate, nothing is brought to my notice suggesting that the defendant denied the possession of the document. I see no reason to interfere in writ jurisdiction. The petition is dismissed.

8. The Trial Judge is requested to expedite the suit.

9. Needless to observe the admissibility of the document and its probative value shall be addressed by the Trial Court at an appropriate stage.

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[ROHIT B. DEO, J.]