

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

28 WRIT PETITION NO.1143 OF 2023

MATHURABAI GOVINDA GAWALI
VERSUS
BEBIBAI RAMESH LAAD AND OTHERS

Mr. Deshmukh Saud A.N., Advocate for the Petitioner.

CORAM : SHARMILA U. DESHMUKH, J.
DATED : FEBRUARY 03, 2023.

PER COURT :

1. Heard.

2. By this petition, the challenge is to the order dated 12th April, 2022 passed in RCA No.159 of 2016, allowing the production of additional evidence at the appellate stage. Petitioner is the original plaintiff in RCS No.36 of 2011, which was instituted for declaration and recovery of possession of the suit land. It is the contention of the defendants in the written statement that they had purchased suit land from the father of the plaintiff and defendant No.6 for valuable consideration prior to 60 years and since then the suit land is in possession of the defendant no.1.

3. RCS No.36 of 2011 came to be decreed by the judgment and decree dated 28.04.2016 as against which the Regular Civil Appeal No.159 of 2016 is preferred. In the RCA, an

application was filed under Order 41 Rule 27 for producing the agreement of sale which was executed between the father of the plaintiff and the father of the defendant no.2.

4. Heard learned counsel for the Petitioner.

5. Learned counsel for the Petitioner submits that in the written statement there was no reference to this document and at the appellate stage the same cannot be permitted to be produced. He would further submit that after the Appellate Court permitted the document to be produced on record, an application has now been moved for exhibiting the said document. He further urged that the document does not create any right in the suit property as the same is not a sale deed but an agreement of sale.

6. Considering the submissions of the learned counsel for the petitioner.

7. It is the contention of the defendant before the Trial Court that they had purchased this property from the father of the plaintiff no.1 prior to 60 years and since then, the property is in their possession. In the application under Order 41 Rule 27, the defendants contend that during the pendency of the proceedings before the trial Court, the said document could not be found and as such was not produced before the trial Court, and that upon finding the document, the application has been preferred.

8. Considering the provisions of Order 41 Rule 27, the parties seeking to produce the additional evidence at the appellate stage is required to establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not after exercise of due diligence be produced by him at the time when the decree appealed against was passed. In the present case, the document sought to be produced is in consonance with contention of the Defendant in written statement. The application clearly states that the said document could not be found and appears probable, considering that the document is an old document. As such, in my view, the requirement of provisions of Order 41 Rule 27 have been complied with and no interference is warranted in the impugned order dated 12.04.2022.

9. The Petitioner is at liberty to raise objections to the application preferred for exhibiting the said document at the appellate stage which objection will be considered by the Appellate Court in accordance with the law and its own merits.

10. Writ Petition stands dismissed with liberty as above.

(SHARMILA U. DESHMUKH, J.)