

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 5833 OF 2019

Shridhar Pandung Jaltade __ Vs. __ Gayatri Jayant Kshirsagar and ors

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. S.L.Kotwal, Advocate for petitioner
Mr. S.S.Ansari, Advocate for Respondent No.1
Mr. A.A.Choube, Advocate for Respondent No. 3

CORAM : AVINASH G. GHAROTE, J.

DATE : 25/01/2023

1] Heard Mr. Kotwal, learned counsel for the petitioner/original plaintiff, Mr Ansari, learned counsel for Respondent Nos.1 & 2/original Defendant No.1 and Mr. Choube, learned counsel for Respondent No.3/Original Defendant No.3.

2] The petition challenges the order dated 17.7.2019 passed below Exh.55, whereby an application for permission to lead secondary evidence in respect of Will dated 25.4.2003 registered with the Sub-Registrar of Documents, Nagpur, on the same date, has been granted.

3] Mr. Kotwal, learned counsel for the petitioner submits that there is no foundation laid, for the satisfaction of the requirement of Section 65(c) of the Evidence Act, as neither the pleadings nor the evidence of Respondent No. 1 indicates with sufficient clarity any accountability for the loss of the document and therefore,

the permission granted is required to be set aside and the application be dismissed. He further submits that in case the petition is required to be dismissed, then since the petitioner has not cross examined the defendant no.1/Respondent No.1, on the Will, necessary permission to cross examine on this ground, be granted.

4] Mr. Ansari, learned counsel for Respondent No.1 supports the impugned order and submits that the requirement of Section 65(c) of the Evidence Act has been satisfied on account of the statement as made in the application at Exh. 55 (pg.62).

5] Mr. Amit Choube, learned counsel for Respondent No.3 supports the contention of Mr. Kotwal, learned counsel for the petitioner. He places reliance upon **Benga Behera vrs. Braj Kishore Nanda, (2007) 9 SCC 728** (para 30) which holds that since loss of original Will was not satisfactorily proved, the permission for secondary evidence cannot be granted. Further reliance is also placed upon **Shri Mahalaxmi Shikshan Samiti vrs Manikrao Krishnarao Dessai, 2022 (1) Mh.L.J 262** (para 26) which holds that secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the Court that it was not in his possession or control and he has done what could be done to procure the production of it. He further places reliance upon **Deccan Paper Mill**

vrs. Mahavir (2021) 4 SCC 786 (para 22), **State of Rajasthan vrs. Khemraj and ors, 2000 AIR SCW 1806**, in support of his contention.

6] The factual background in the instant case is that a Will was executed by one Pandurang Jaltade, the father of the petitioner and the respondents on 25.4.2003. Not only is this Will executed, it is also registered with the Sub-Registrar of Documents, Nagpur on 25.4.2003. A mention of this Will has been made in the plaint in SCS No. 641/2014 filed by the present petitioner in para 8, where under the Respondent No.1 is claimed to have raised a plea in the notice dated 12.9.2007 claiming the execution of the Will and the bequest made therein in her favour. SCS No. 67/2016 has been filed by the Respondent No.1 against the present petitioner for declaration of ownership in respect of the suit property which is on the basis of the Will dated 25.4.2003. Thus the validity of the Will executed by Pandurang is the bone of contention in both the suits. The certified copy of the Will dated 25.4.2003 was filed along with the plaint below Exh.4 when SCS No.67/2016 was filed, which is not disputed. Both the suits are being decided together. When the matter went into evidence, the Defendant No.1 Gayatri Kshirsagar entered into the witness box in SCS No. 641/2014 and her further examination in chief was also recorded, in which a mention regarding the Will of Pandurang Balkrushna

Jaltade point was made in para 1 of her further chief. Since the document was not exhibited, the cross examination at the hands of the plaintiff did not obviously touch the execution of the Will. Thereafter an application came to be filed at Exh. 55 for adducing secondary evidence in respect of Will dated 25.4.2003 on the ground that the certified copy was already on record and the original Will deed was misplaced. Though the same was opposed, the learned Trial Court by the order below Exh. 55 dated 17.7.2019 has granted the requisite permission.

7] In **Sumati & ors Vrs Yashodhara & ors (W.P.No. 5984 of 2015, Decided on 16.09.2016) (MANU/MH/1825/2016)**, the requisites which constitute the foundational facts for seeking secondary evidence under Section 65(c) of the Evidence Act have been enunciated as; (a) the original document is in existence and has been executed by its executants, (b) it has been lost or destroyed or cannot be produced in reasonable time for any other reason not arising from own default or neglect of the party seeking to lead secondary evidence and (c) the copy is the true copy of the original. In the instant case, since the Will dated 25.4.2003 is a registered document and what has been placed on record is a certified copy thereof, the foundational requirement as enumerated in (a) and (c) above duly stands satisfied.

The only question which requires consideration is the non production of the original on account of its loss.

8] In the application below Exh. 55 it has been categorically stated that the original was misplaced. A perusal of the pleadings either in SCS No. 641/2014 or in SCS No. 67/2016 would indicate that there is no averment which attributes the Will to have ever come into the possession of the beneficiary i.e. the present petitioner, though knowledge about the same stands attributed to the petitioner. Thus mere attributing knowledge of the existence of the Will cannot be held to mean that the original was placed in possession of the Respondent No.1/beneficiary. The requirement of accounting for its loss or misplacement, would naturally stem from a position being brought on record regarding the document being in custody of a particular party, who then would be liable to account for its loss or misplacement. In the instant case, since there is nothing on record to indicate that the document was ever given in the custody of the Respondent No.1/beneficiary, it is difficult to hold that the Respondent No.1/beneficiary is responsible to account for its loss.

9] No doubt, in the impugned order, it has been held that the record of the Will which is a private document, on account of its being maintained with the Sub-Registrar's Office in which it is registered and

therefore falls within the meaning of public document under Section 74 of the Evidence Act, the same obviously is a position which is incorrect in law, for what has been sought to be produced on record is not a certified copy of the entry in the index register, but the certified copy of the document itself. However, it is equally true that the certified copy of the original document which is registered has been placed on record.

10] In **Shri Mahalaxmi** (supra), what has been held is that secondary evidence of an ordinary document is admissible only and only when the party is desirous of admitting it has proved before the Court that it is not in its possession and control and he has done what could be done to procure the production of it. The same was in the factual background of the documents which were collectively marked as Exh. C (collectively), which were the minutes of the meeting held on 28.11.2007 of the society and therefore, were documents which were not registered with the Sub-Registrar or for that matter with any authority in law as required to have possession of the same. In the instant case, there is no dispute that the Will dated 25.04.2003 is a document which is registered with the Sub-Registrar of Documents.

11] In **Benga Behra** (supra), it has been held that secondary evidence was admissible only when loss of the original was satisfactorily proved, which again

would depend upon the factuality of the custody of the Will.

12] In **Deccan Paper Mill** (supra), it has been held that public records kept in any state of private documents are public documents, but private documents of which records are kept are not in themselves private documents, considering which the certified copy of the 'Will' cannot be termed as a public document.

13] All that **Khemraj** (supra) states is that the application under Section 65(c) of the Evidence Act should be on affidavit and should give full details of the loss. What is material to note is that in **Khemraj** (supra) itself the Hon'ble Apex Court held the above defects to be curable and had granted permission to file a fresh application. This has also to be construed in light of what has been held in **Karthik Gangadhar Bhat vrs. Nirmala Namdeo Wagh and anr**, 2018 (1) Mh.L.J. 726 and **Dhanpat vrs. Sheo Ram through L.Rs and ors**, (2020) 16 SCC 209, that an application under Section 65 of the Evidence Act may not be necessary if sufficient foundation therefor has been laid in the pleadings or in evidence.

14] The question therefore of loss of the original, necessarily has to be construed in light of the position as reflected from the document itself as well as the averments in the proceedings as to the custody of the

document. In the instant case, since there is no material on record to indicate that the Respondent No.1 was ever placed in custody or possession of the document, the requirement for explaining regarding its loss could not have been saddled upon her. That being the position, I do not see any reason to interfere in the impugned order which permits secondary evidence to be led in respect of the Will dated 25.4.2003. The petition is therefore dismissed. No cost.

15] It is however made clear that as the permission to lead secondary evidence has since been granted after the cross examination of DW-1, the plaintiff/Petitioner shall be entitled to further cross examine the DW-1 in respect of the Will, its execution, its proof, its contents and all other requirements of law.

JUDGE

Rvjalit