



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

913 WRIT PETITION NO. 6958 OF 2018

Gulmohammad Dostmohammad Pathan
& others

....Petitioners

VERSUS

Halimabegum Sattarkha Pathan

.....Respondent

.....

Mr. I. D. Maniyar, Advocate for the Petitioners.

Ms. U. S. Bhosale, Advocate for the Respondent.

CORAM : R. M. JOSHI, J.

DATE : 26th NOVEMBER, 2024.

PER COURT :

1. This Petition takes exception to the order passed below Exhibit 37 in Regular Civil Suit No. 211/2015 whereby Plaintiff was allowed to adduce secondary evidence in respect of document of partition which took place on 29.04.2013 in respect of the suit property.

2. Petitioners are Defendants in the said suit. It is the contention of Defendants that in the plaint there is no mention about document of partition being with them. In the suit, an application came to be filed vide Exhibit 28 seeking directions against the Defendants to produce the document in question before the Court.

Though an order came to be passed thereon on 05.12.2016 and Defendant No. 1 was directed to submit document as claimed for, subsequent orders more particularly order dated 24.04.2017 shows that the Trial Court has permitted the Defendant to file say on application Exhibit 28. It is thus clear that said application is still to be decided by the Trial Court. In the light of these facts, application Exhibit 37 came to be moved by Plaintiff seeking permission adduce secondary evidence in respect of the document in question.

3. Learned counsel for the Petitioners/original Defendants submits that for want of notice under Section 66 of the Evidence act, the Plaintiff could not have been permitted to adduce secondary evidence. He also took exception to the impugned order on the ground that application Exhibit 28 moved by Plaintiff for seeking direction against Defendants to produce document in question is still pending for decision before the Trial Court. The sum and substance of his contention is that unless provisions of Section 65 and 66 of Evidence Act are complied with, question of Court permitting plaintiff to adduce secondary evidence does not arise.

4. Learned counsel for Respondent/original Plaintiff supported the impugned order. It is her contention that merely because formal notice is not issued as contemplated by Section 66 of the Evidence Act, order impugned cannot be interfered with. She relies upon judgment of Hon'ble Supreme Court in case of Jagmail Singh and another vs. Karamjit Singh and others, **(2020) 5 Supreme Court Cases 178**.

5. Record indicates that in the pleadings, Plaintiff has not stated that the Defendants are having document in question in their custody. Admittedly, no notice under Section 66 of the Evidence Act is issued for production of said document. Further, application Exhibit 25 seeking direction against Defendants to produce document is still pending consideration before the Trial Court. At this stage, it could be said that there is no foundation laid by Plaintiff to adduce secondary evidence.

6. Learned Trial Court has observed that in view of written statement vide Exhibit 25, it is claimed by Defendants that partition deed is not registered document and hence, it has no legal value. Though such statement is made in the written statement, the same

cannot be construed as admission on the part of the Defendants that they are in possession of the document in question. This seems to be the error committed by the Trial Court while appreciating pleadings of the parties. In the above circumstances, impugned order cannot sustain.

7. In view of above, Petition stands allowed. Impugned order passed below Exhibit 37 is set aside. Application Exhibit 37 is dismissed. It is however clarified that it would be open for the Plaintiff to adduce secondary evidence in accordance with law.

(R. M. JOSHI)
Judge

dwb