

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

WRIT PETITION NO. 9249 OF 2024

Sarika Pratap Shirke and anr.

}Petitioners

: Versus :

Gopal P. Shirole and Ors.

}....Respondents

Mr. Veerendra Tuljapurkar, *Senior Advocate i/by. Mr. Shailendra Kanetkar, for the Petitioners.*

Mr. Vishal Kanade, *i/by. Mr. Satish Lad, for Respondent Nos.1 to 5.*

Coram : SANDEEP V. MARNE, J.

Dated : 15 July 2024.

P.C. :

1) The challenge in the present petition is to the order dated 31st October 2023 passed by the 6th Additional Judge, Small Causes Court and Joint Civil Judge Senior Division, Pune on application at Exhibit-208 filed by the Plaintiff-Respondent under the provisions of Order 26 of the Civil Procedure Code, 1908 for appointment of Court Commissioner, for comparing the documents sought to be filed on record in Devnagari script with the document available with the Sub-Registrar, Haveli-2, Pune which is in Modi script.

2) I have heard Mr. Tuljapurkar, the learned Senior Advocate appearing for the Petitioners and Mr. Kanade, the learned counsel appearing for the Respondents.

3) After having considered the submissions canvassed by the learned counsel appearing for the parties, it is seen that the document which is numbered as 383A/1879 is a document in Modi script. The Plaintiff/Respondent wants to rely upon the said document. However, what the Plaintiff is seeking to rely upon as of today, is a document which is claimed to be the translation of the said document in Marathi language. It appears that the Plaintiff filed application at Exhibit-203 for leading secondary evidence by producing translated document of the document bearing No.383A/1879. However, the said application at Exhibit-203 was not pressed by the Plaintiff on 10 October 2023. Instead an application at Exhibit-208 was filed for the purpose of appointment of Court Commissioner under Order 26 of the Code for undertaking the exercise of determining correctness of translation.

4) According to Mr. Tulzapurkar, when the application at Exhibit-203 for leading secondary evidence in respect of the document in Modi script is not pressed by the Plaintiffs, there is no question of appointment of Court Commissioner for comparing the said document in Modi script with the document sought to be produced by the Plaintiff which is in Devnagari script. I do find substance in the submissions of Mr. Tulzapurkar. As of today, there is no request by Plaintiffs to lead secondary evidence in respect of document at Serial No.383A/1879. On account of withdrawal of the application at Exhibit-203, it appears that

the Plaintiffs do not even desire to rely upon the concerned document as the application for leading secondary evidence is withdrawn. Mr. Kanade would however submit that Plaintiffs do desire to rely upon the document in question. If that is the case, in my view, the Plaintiffs will have to renew their request for leading secondary evidence in respect of the document in question. While deciding the application for leading secondary evidence, if the Court finds it prudent that an enquiry first needs to be conducted about the genuineness of the document in Devnagari script produced by the Plaintiffs by comparing the same with the document in Modi script, the Court will obviously exercise necessary powers under Order 26 for appointment of Court Commissioner. However, in absence of any request on the part of the Plaintiffs to lead secondary evidence in respect of the concerned document, in my view, the order directing appointment of Court Commissioner for comparison of the two documents was clearly uncalled for.

5) In my view, therefore the Plaintiffs needs to be given an opportunity to renew their request for leading secondary evidence in respect of the document in question. If the Court is of the view, after considering opposition to the application by Defendants, that permission could be granted to lead secondary evidence in respect of the document in question, it can mark the said document as Exhibit. At the time of decision of the suit, if the Court finds it necessary to compare the said document with the original document in Modi script, the Court can obviously exercise power under Order 26 and direct appointment of Court Commissioner. On the other hand, if there is a dispute between the parties about the existence and correctness of the document in

Marathi/Devnagari sought to be produced by the Plaintiffs and if the Court finds it necessary to first conduct an enquiry into the correctness of the translation sought to be produced by the Plaintiffs, at that stage also, the Court can appoint Commissioner for comparison of the two documents.

6) Accordingly, the order dated 31 October 2023 passed on application at Exhibit-203 is set aside. Plaintiffs will be at liberty to file a fresh application seeking permission of the Court for leading secondary evidence in respect of the document at Serial no.383A/1879. As observed above, the Court will be at liberty to exercise powers under Order 26 for appointment of Court Commissioner either during the course of decision of such application or at the stage of decision of the suit as may be felt necessary. With the above directions, the Writ Petition is **disposed of**.

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[SANDEEP V. MARNE, J.]