



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

WRIT PETITION NO. 5998 OF 2023

Sanjay S/o Madhukarrao Bhiwapurkar, **PETITIONER**
Aged about 58 years, Occ. : private,
R/o Jogithana Peth, Umred,
Tah. Umred, Dist. Nagpur

VERSUS

- 1 Subhash s/o Madhukarrao Bhiwapurkar, **RESPONDENTS**
Aged about 61 years, Occ. Retired,
R/o Plot No. 54, Dharampeth Society,
Jayprakash Nagar, Khamla, Nagpur,
Dist. Nagpur
- 2 Raju s/o Madhukarrao Bhiwapurkar,
Aged about 51 years, Occ. Service,
R/o Qtr. No. 21/A, Type-3, Sector-4 of
Chanda Ordinance Factory, Bhadrawati,
Tah. Bhadrawati, Dist. Cahndrapur

Mr. Sanjay Patrikar, Advocate for petitioner
Mr. P.V. Thakre, Advocate for Respondents

CORAM : BHARAT P. DESHPANDE, J.

DATE : 14th MARCH, 2024

ORAL JUDGMENT

Rule. Rule is made returnable forthwith. Heard
finally with consent.

2. The short issue involved in the present petition is rejection of application filed by the petitioner / plaintiff for permission to lead secondary evidence. By the impugned order dated 05/06/2023, the learned trial Court rejected the said application, which is challenged in the present proceedings.

3. Mr. Patrikar, learned counsel for the petitioner would submit that the plaintiff by filing application on affidavit sought permission from the learned trial Court to lead secondary evidence as the plaintiff lost all original documents during transit. Even the police complaint was lodged to that effect. However, the learned trial Court by disbelieving the said affidavit virtually prevented the plaintiff from establishing his case in suit.

4. The learned counsel for the respondents would submit that the application filed by the petitioner is itself contrary and there was no question of police directing him to file affidavit before the Executive Magistrate, Umred. He submits that the plaintiff by delaying tactics is avoiding to step into the witness box and prove his case. He submits that the learned trial Court has considered these aspects and passed appropriate order which needs no interference.

5. In the case of **Karthik Gangadhar Bhat Vs. Nirmala Namdeo Wagh and another** reported in **2018(1) Mh.L.J. 726**, the learned Single Judge of this Court (Coram : G.S. Patel, J.) discussed in detail about the application for leading secondary evidence. It is clearly observed that even an application for permission to lead secondary evidence is neither necessary nor desirable. It is always been for the parties to lead evidence, which includes primary or secondary evidence before the Court without filing any such application. It is for the Court to decide whether to accept the secondary evidence or not for the purpose of proving the case of the respective parties.

6. First of all, the learned trial Court has completely ignored the above proposition laid down by this Court and the fact that the application was filed by the petitioner supported by an affidavit stating that he lost all the necessary documents in original while in transit. A police complaint was also lodged to that effect. With these material on record and the fact that such application is neither necessary nor desirable, there was no question of rejecting it. The petitioner / plaintiff is entitled to produce either preliminary or secondary evidence during

recording of testimony and it is for the Court to accept it or otherwise in accordance with law. Similarly, the Court, if required to accept the secondary evidence, must satisfy itself that the original is lost or misplaced and cannot be produced before the Court. In view of the above observations the impugned order needs interference as it is passed by ignoring the settled proposition of law.

7. The impugned order is quashed and set aside. The petitioner / plaintiff is permitted to lead secondary evidence, however, it is made clear that it is for the learned trial Court to decide whether to accept such secondary evidence on the satisfaction that originals are lost or misplaced. Similarly, the respondents / defendants are also entitled to cross-examine the plaintiff on this aspect.

8. The petition is allowed in the above terms. No costs.

9. Rule is made absolute in the above terms.

(BHARAT P. DESHPANDE, J.)

MP Deshpande