



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

WRIT PETITION NO. 7367 OF 2019

(Bhanudas s/o Devidas Patil ..vs.. Bhagwan s/o Devidas Patil)

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

Court's or Judge's orders

Mr. A.V. Bhide, Counsel for the petitioner,
none for the respondent.

CORAM : ABHAY J. MANTRI, J.

DATE : 13-12-2024

I heard Mr. A.V. Bhide, learned Counsel for the petitioner. Though served, none appears on behalf of the respondent.

2. By this petition, the petitioner/plaintiff is challenging the order dated 26-09-2019 passed by the learned Jt. Civil Judge, Junior Division, Shegaon, below Exhibit 83 in Regular Civil Suit No.3/2010, thereby rejected the application for grant of permission to lead secondary evidence to prove the Will dated 25-02-1993 and Relinquishment-deed dated 15-09-1995 executed by the sisters of the plaintiff in his favour.

3. Mr. A.V. Bhide, learned Counsel for the petitioner, vehemently contended that the trial Court, on the one hand, observed that no permission of a Court is required to lead the evidence of any kind, but the party has to lay a foundation for leading the same. Hence, he submitted that the said observation appears contrary to the facts on record and the settled provisions of law. Therefore, the same is liable to be set aside. Besides, he contended that both the original

documents are produced in the suit bearing Regular Civil Suit No.1/2007. The trial Court has rejected the petitioner's applications to club both the suits together and the application for calling the record of Regular Civil Suit No.1/2007. Therefore, he submitted that passing of the order by the learned Judge is illegal and liable to be set aside. Hence, he urged for allowing the petition.

4. I have perused the impugned order and gone through the record.

5. It appears that the sisters of the petitioner have filed Regular Civil Suit No.1/2007 against the petitioner and the respondent, claiming partition and separate possession of their shares in the property, which is pending. In the said suit, the petitioner has filed an original Will dated 25-02-1993, and a Relinquishment-deed dated 15-09-1995, which the sisters executed, and the said suit is pending.

6. Then, the petitioner filed suit for declaration and injunction against the respondent. During the pendency of the suit, the petitioner moved an application to consolidate both suits. The same came to be rejected on 14-03-2019. Therefore, he moved another application to call the record of Regular Civil Suit No.1/2007 to prove the said original Will and the Relinquishment-deed. However, the said application was rejected, observing that *“if the plaintiff wants to prove the said documents, he can apply to certified copies of the original documents and they can file the certified copies in the present case and therefore, no necessity to call the original record of the suit.”* It is pertinent to note that the

respondent/defendant filed his say to the said application and contended that the petitioner could apply to get certified copies of the original documents, and they can file the certified copies in the present case. After obtaining permission to lead secondary evidence, he can prove the said documents.

7. The petitioner is claiming his ownership and possessory right based on the Will dated 25-02-1993, and therefore, the burden is cast on him to prove the said Will as the other side has disputed the same. Since his earlier two applications were rejected, the petitioner, after obtaining the certified copies of those documents, moved the application to permit him to lead secondary evidence, which came to be rejected, holding that “there is no need to obtain the permission to lead the secondary evidence, so *the Court did not deem it fit to grant permission to the plaintiff to lead secondary evidence in respect of the Will, but it would be proper and justifiable for the party and their advocate to go through the ratio laid down in the case of Parasanbai to lead the evidence at the time of adducing their affidavit*”.

8. Considering the aforesaid discussion and facts on record, it reveals that the petitioner has filed the certified copies of the Will and Relinquishment-deed on record and sought permission to lead secondary evidence to prove the same. Therefore, as per Sections 62 and 65 of the Indian Evidence Act, the trial Court should have allowed the application as the petitioner intended to lead secondary evidence. Since the original documents were filed in another suit and are not available on record in this suit, both parties

are not disputing that the original Will and Relinquishment-deed are produced on record in another suit and the certified copies of those documents are filed on record. Therefore, in my view, the order passed by the trial Court observing that no permission of the Court is required to lead the secondary evidence does not mean that the application moved by the party has to be rejected. But the court ought to have granted the said permission.

9. Apart from the above, the Division Bench of this Court in *Shaikh Aftab Ahmed and another V/s Bhimrao S/o Sandu Waghmare and others, in WP 8442/2019*, while answering to the reference, has considered the dictum laid down in “Parsanbai’s and Karthik’s Case, of this Court as well as law laid down in “Danpat’s Case” by the Hon’ble Apex Court and held that *“A party may furnish secondary evidence and filing of an application seeking permission to lead secondary evidence would not be mandatory. However, an application for leading secondary evidence by a party is not precluded.”* In view of the above mandate, the order in question appears contrary, and therefore, the said finding cannot be sustained in the eyes of the law.

10. In the aforesaid background, I deem it appropriate to allow the present petition by setting aside the impugned order. *Moreover*, if permission to lead secondary evidence is granted to the petitioner, it would not cause prejudice to the respondent/defendant, but it would help to determine the real controversy between the parties at the threshold. Consequently, I proceed to pass the following order.

Thus, the petition is allowed. The impugned order dated 26-09-2019 passed by the learned Civil Judge, Junior Division, Shegaon, below Exhibit 83 in Regular Civil Suit No.3/2010, is hereby quashed and set aside. The application filed by the petitioner to permit him to lead secondary evidence is allowed. No order as to costs.

Inform the trial Court accordingly.

(ABHAY J. MANTRI, J.)

Adgokar