



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 6288 OF 2016

Balaji Kashinath Devangre
VERSUS
Yamunabai Mahadurao Husnure And Others

Mr. S. M. Vibhute, Advocate for Petitioner
Mr. A. S. Bayas, Advocate for Respondent No. 1
Mr. K. N. Lokhande, AGP for State

CORAM : R. M. JOSHI, J.

DATE : 22 July, 2025

PER COURT :-

1. By consent of both sides heard finally.
2. This petition takes exception to the order passed below Exhibit 358 in Regular Civil Suit No. 245/2003 dated 16.04.2016 whereby the Application filed by Original Defendant No. 11 for leading secondary evidence to prove the execution of agreement dated 30.11.1978 came to be rejected by the Trial Court.
3. The respondent/original plaintiff filed suit for partition and declaration. Defendant No. 11 filed written statement raising plea with regard to the execution of the agreement to sale dated 30.11.1978. The said contention of Defendant No. 11 came to be resisted by plaintiff as well as Defendant No.4.

In this backdrop, Application Exhibit 354 was filed by Defendant No. 11 seeking direction to Defendant No. 5 to produce original agreement to sale dated 30.11.1978. Trial Court by order dated 18.03.2016 issued direction to Defendant No. 5 to produce original agreement. Defendant No. 5 filed pursis at Exhibit 357 stating that in spite of search, the original agreement is not found and hence cannot be produced. In the light of this fact, Application Exhibit 358 came to be moved for permitting the Defendant No. 11 to lead secondary evidence to prove the execution of the said agreement.

4. Learned Trial Court rejected the said application on the ground that the Defendant No. 11 has examined himself as the witness and that after this agreement of sale, sale deed is executed and therefore, Defendant No. 11 can prove the said sale deed by proper evidence.

5. Learned counsel for the petitioner submits that once there is no dispute about the fact that the original document is executed and it is in the custody of the Defendant No. 5 and he has filed produced the same before the Court, foundation has been laid in order to make an application for proving the execution thereof by secondary evidence. As such according to him the order impugned cannot sustain.

6. Learned counsel for plaintiff/respondent has relied upon the judgment of Hon'ble Supreme Court in case of ***J. Yashoda versus K. Shobha Rani (2007) 5 SCC 730*** in order to contend that since the conditions required by Section 65 are not complied with, question of permitting leading of secondary evidence does not arise.

7. The record indicates that the existence of the agreement dated 30.11.1978 executed by the Defendant No. 5 in favour of the plaintiff is not in dispute. Defendant No. 11 moved the application filed below Exhibit 354 directing Defendant No. 5 to produce original agreement before the Trial Court. It was accordingly directed to be produced by order dated 18.03.2016. In response to the said order, Defendant No. 5 has filed pursis below Exhibit 357 stating that the original agreement dated 30.11.1978 is not found and hence cannot be produced. These facts clearly indicate that the existence and execution of the original document of agreement to sale dated 30.11.1978 is not in dispute and its custody too with Defendant No. 5. Defendant No. 11 has contended that such agreement is executed which has been disputed by Defendant No. 5 and plaintiff and, therefore, certainly an issue involved in the suit about execution of document and its contents.

8. Once, the foundation is laid that the document in question is

executed and existed, and it is in custody of other side, the secondary evidence will have to be permitted to be led, when it is established before the Court that the said original document cannot be produced before the Court. This has been substantiated by pursis Exhibit 357 filed by Defendant No. 5.

9. Once, it is held that document is relevant for the decision of the case and it existed and in custody of the person other than the one who seeks leave of secondary evidence, there was no other option for Trial Court but to allow the application. The order passed by the Trial Court, therefore, is without considering the provisions of Section 63 and 65 of the Indian Evidence Act, 1872 and also ignoring the relevant facts on record.

10. Hence, petition stands allowed. Impugned order set aside. Application Exhibit 358 stands allowed.

(R. M. JOSHI, J.)

bsj