



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

WRIT PETITION NO. 4450 OF 2022

- 1) Vilas s/o Mahadeo Barate
age : 43 years, Occ : Cultivator
- 2) Vanita wd/o Kailash Barate
age : 32 years, Occ : Household
- 3) Ku. Chakuli d/o Kailash Barate
age : Minor
- 4) Yogesh s/o Kailash Barate
3 & 4 minors through natural
guardian mother petitioner No.2
All R/o Alsna, Tahsil Shegaon,
District Buldhana

.. Petitioners
(Original Defendants)

Versus

Sau. Varsha w/o Subhash Fundkar
age : 35 years Occ : Household
R/o Saundala, Tahsil Telhara
District Akola

.. Respondent
(Original Plaintiff)

 Mr. Ashok Tathod, Advocate for petitioner.
 None appear for the respondent.

CORAM : ABHAY J. MANTRI, J.

DATE : FEBRUARY 26, 2025

ORAL JUDGMENT

Heard learned counsel for the petitioners. None appeared
 for the respondent, though served.

(2) The petitioners are challenging the order dated 24/01/2022 passed by the learned Civil Judge Junior Division, Shegaon (for short- '*the Judge*'), below Exh. 99, in Regular Civil Suit No.24/2015 (for short-'*RCS*'), thereby rejected the application for permitting the petitioners/original defendants to lead secondary evidence.

Brief facts of the case are as under :-

(3) The respondent is the original plaintiff who has filed suit for partition, separate possession, and a permanent injunction against petitioners/ defendants. During the pendency of the suit, petitioners/ defendants moved an application for permitting them to lead secondary evidence in support of their defence, as the original Exchange Deed was in the custody of Razakkhan Sulemankhan, which he had lost and, therefore, the same could not be available to produce on record. The petitioners filed an application along with a certified copy of the registered Exchange Deed seeking to permit them to lead secondary evidence to prove the same.

The respondent resisted the application.

(4) After considering the record and submissions, the learned Trial Court observed that "*the petitioners/defendants had not laid the foundation to permit them to lead secondary evidence and rejected the*

application." Aggrieved by this, the petitioners moved this petition.

(5) Learned counsel for the petitioners vehemently contended that the learned Trial Court has erred in rejecting the application on the ground that no foundation has been laid by the petitioners. He drew my attention to the affidavit of evidence filed by defendant No.1. He submitted that the original Exchange Deed was in the custody of Mr. Razakkhan, one of the parties to the said Exchange Deed. Razakkhan had filed an affidavit before the Trial Court stating that "*the original Exchange Deed was in his possession; however, the same was lost. He could not trace out the same.*" Therefore, he submitted that based on the said affidavit, the petitioners had laid the foundation for leading secondary evidence. However, the learned Trial Court has not considered the facts in its proper perspective and has rejected the application.

(6) To buttress his submission, he has relied upon the decision of the Hon'ble Apex Court in ***Jagmail Singh and another vs. Karamjit Singh and others reported*** in ***AIR 2020 Supreme Court 2319*** and pointed out para 16 of the said decision.

(7) I have appreciated the submissions of learned counsel for the petitioners and perused the record and impugned order.

(8) It appears from the record that despite service of the notice on the respondent, she chose to remain absent. Thereafter, again, a fresh notice was issued to the respondent.

(9) At the outset, it appears that the defendants in para 10 of the written statement have categorically stated that "*the petitioner No.1 with his father and brother Kailas had acquired the suit property by Exchange Deed dated 11/07/1980, registered on 15/07/1980. Based on the said Exchange Deed, petitioner No.1 and his father got ownership as well as possessory rights over the suit property, and their names were recorded in the revenue record.*" The said averment itself shows that the petitioners are claiming their right based on the Exchange Deed dated 11/07/1980.

(10) To prove the said Exchange Deed, they examined petitioner No.1, Vilas Mahadeo Barate. They also filed an application to seek permission to lead secondary evidence to prove the said Exchange Deed. To substantiate that the original Exchange Deed had been lost,

he had filed an affidavit of Mr.Razakkhan, a party in the Exchange Deed, on record, who has categorically stated that "*the Exchange Deed was executed between him and petitioner No.1 and his father and brother. The said original Exchange Deed was in his custody. However, it was misplaced. He searched for it but could not find it.*" Therefore, the petitioners moved the application Exh.99.

(11) The said application was opposed by the plaintiff on the grounds that the defendants have not made a statement regarding the custody of the original Exchange Deed and loss of it in their written statement; thus, the foundation to lead secondary evidence was not laid. Considering the said objection, the learned Judge passed the impugned order, holding that the petitioners failed to lay the foundation to lead secondary evidence. It reveals that the learned Judge has not considered the affidavit filed by Mr. Razakkhan, wherein he has categorically stated that the original Exchange Deed was in his custody, which was lost. Despite the said affidavit, the learned Judge has observed that Razakkhan has yet to be examined and, therefore, has not considered his affidavit.

(12) A bare perusal of Section 65 of the Indian Evidence Act makes it clear that secondary evidence may be given regarding the existence, condition or contents of a document when the original is shown or appears to be in possession of the other party or the same was lost. Similarly, it is a settled position of law that secondary evidence to the admitted foundational evidence has to be given as to the reason why the original evidence has not been furnished.

(13) During the course of argument, learned counsel for the petitioners tendered across the bar a xerox copy of the Exchange Deed dated 11/07/1980 (registered on 15.07.1980) before the Court; the same is taken on record and marked as 'X' for identification. Bare perusal of the said document it seems that the Exchange Deed was executed between Razakkhan as party No.1 and Mahadeo Baliram Barate and his two sons Kailas and Vilas were party No.2. The said Exchange Deed was registered one and certified copy of the same was obtained by the parties, therefore, to prove the said Exchange Deed, the defendants moved the application Exh 99.

(14) In the written statement, the defendants categorically stated that the Exchange Deed was executed between Vilas and Kailas

S/o's Mahadeo Barate and Razakkhan. Based on the said Exchange Deed, the defendants claim their right over the suit property. The affidavit filed by Razakkhan has also demonstrated that the original Exchange Deed was in his custody, and the same was misplaced by him, and he could not find the same despite a lot of searches taken by him. The averments in the Razakkhan's affidavit show that petitioners have laid a foundation to lead secondary evidence. Thus, the learned Judge ought to have given an opportunity to lead secondary evidence. However, the learned Judge has not considered the said fact and committed a grave error of law in rejecting the application without properly evaluating the material produced before him, i.e., the existence of the 'Exchange Deed' remains unestablished on record and thereby denied an opportunity to the petitioners to produce secondary evidence. As a result, the findings recorded by the learned Judge appear contrary to the facts on record, as well as the settled position of law. Based on the said findings, the impugned order cannot be sustained. Hence, the same is liable to be quashed and set aside.

(15) Needless to clarify, merely the admission in evidence and making an exhibit of a document does not prove it automatically unless the same has been proved in accordance with the law.

(16) In the wake of the above and the observations made in the decision of **Jagmail Singh** (supra), in my view, if the petitioners/defendants are permitted to lead secondary evidence, it would not cause prejudice to the other side. On the contrary, permitting the petitioners to lead secondary evidence would give them an opportunity to produce available evidence on record to substantiate their case, and it would help to determine the real controversy between the parties.

(17) In the background above, the petition is allowed in terms of prayer clauses (i) and (iii). No costs. Inform the learned trial Court accordingly.

[ABHAY J. MANTRI, J.]

KOLHE