



N THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 242 OF 2024

Jyoti Rajendra Notawale,
Aged : 48 Years, Occp. : Home-maker,
R/o. Namuna, Amravati,
Tah. & Distt. Amravati.

... **PETITIONER**

...**VERSUS**...

Ankit Ganesh Agrawal,
Aged : 28 Years, Occp. : Business,
R/o. Laxmi Vihar, Shilangan Road,
Amravati, Tah. & Distt. Amravati.

... **RESPONDENT**

Mr. U. J. Deshpande, Advocate for the Petitioner.
Mr. S. D. Bhende, Advocate for Respondent.

CORAM : MRS. VRUSHALI V. JOSHI, J.
JUDGMENT RESERVED ON : 11.06.2025.
JUDGMENT PRONOUNCED ON : 13.06.2025

JUDGMENT :

1. **Rule.** Rule is made returnable forthwith. Heard finally by consent of learned Counsel appearing for the parties.

2. The challenge in this petition is to the order dated 30.10.2023 passed below Exhibit-12 in Special Civil Suit No.7/2019 by the 10th Joint Civil Judge Senior Division, Amravati. By the said order the Civil Judge Senior Division has allowed the application filed by the respondent i.e. original plaintiff to lead secondary evidence on the basis of photocopy of the Agreement to Sell dated 13.07.2017. The plaintiff i.e. respondent in this

petition has filed the suit for Specific Performance of Contract or in the alternative for Refund of Consideration with Interest against the defendant on the basis of the Agreement to Sell i.e. mentioned as 'Sthawar Malachi Bharana va Taba Pawti'. As per said document, the defendant agreed to sell her house for the consideration of Rs.17,51,000/- and entire amount was paid by the plaintiff out of which he paid Rs.9,30,000/- by RTGS and Rs.8,21,000/- in cash.

3. The plaintiff has led the evidence by filing the affidavit of examination-in-chief and deposed on oath that he has already filed original copy of alleged agreement to sell and possession receipt dated 13.07.2017 on record. Thereafter, again he has filed application on 05.12.2019 to lead secondary evidence of the said agreement to sell cum possession receipt dated 13.07.2017 by contending therein that he filed true copy of that documents along with the plaint and original thereof, which was in his custody, was not filed on record to avoid tampering. He took the search for the original agreement to sell at his home as well as in his office along with that of his Counsel, but he could not find the original and therefore, filed the application to lead secondary evidence.

4. It is submitted that the secondary evidence can be led only on true copy and not on photocopy if the original copy is brought on record in the form of secondary evidence. The Trial Court has allowed the said application and permitted the respondent i.e. defendant to lead secondary

evidence of the agreement to sell. Being aggrieved by the said order, the petitioner has filed this petition.

5. The respondent has opposed the petition by stating that inadvertently he has mentioned about filing of original of the agreement. Thereafter, he has filed another affidavit and clarified the things. The petitioner will get the opportunity to cross-examine the witnesses and no prejudice will be caused to the petitioner. The respondent has paid huge amount. The alternate prayer is also made for refund of the said amount. The respondent has no document other than the said Sale deed to prove his case. Hence, prayed for dismissal of the petition.

6. On perusal of the record it appears that, the plaintiff has filed the civil suit on the basis of the document, which was xerox copy. He has stated that he was under impression that it is original. The petitioner has filed on record the preliminary objection raised by him stating that the document is not registered, and on the basis of the unregistered document, he cannot claim possession and impounding of the document cannot be done on a xerox copy, it must be original one.

7. In support of his argument, the petitioner has relied on the judgment of the Hon'ble Apex Court in the case of ***Hariom Agrawal Vs. Prakash Chand Malviya*** reported in ***2007(8) SCC 514*** wherein it is observed as under :

“8. It is clear from the decisions of this Court and a plain reading of Section 33, 35 and 2(14) of the Act that an instrument which is not duly stamped can be impounded and when the required fee and penalty has been paid for such instrument it can be taken in evidence under Section 35 of the Stamp Act. Section 33 or 35 are not concerned with any copy of the instrument and party can only be allowed to rely on the document which is an instrument within the meaning of Section 2(14). There is no scope for the inclusion of the copy of the document for the purposes of the Indian Stamp Act. Law is now no doubt well settled that copy of the instrument cannot be validated by impounding and this cannot be admitted as secondary evidence under the Indian Stamp Act, 1899.”

8. The Hon’ble Apex Court in the case of ***H. Siddiqui (D) by Lrs. Vs. A. Ramalingam*** reported in ***2011(4) SCC 240***, has made observations regarding the provisions of Section 65 of the Evidence Act, 1872, which read as under.

“10. Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

9. The learned Counsel for the petitioner has also relied on the judgment of the Hon'ble Apex Court in the case of ***Ram Suresh Singh Vs. Prabhat Singh Alias Chhotu Singh*** reported in ***(2009) 6 SCC 681***, wherein it is read as under :

“We may not consider the certificate granted by the Principal of the latter school as only a xerox copy thereof was filed inasmuch as the original having not been produced, the same was inadmissible in evidence.”

10. The respondent has earlier stated that he was under impression that he has filed original documents on record. Thereafter, on affidavit he has stated that to avoid any tampering, he has not filed the original but thereafter, he found that the original is not traceable though he has taken the efforts to search it and, therefore, has filed another affidavit on record which was allowed by the Trial Court, in which he has stated that though he has inadvertently mentioned in his earlier affidavit that he has filed the original, the original is not filed and on the basis of the xerox of the said document, he has filed the civil suit but the said document is not traceable. The plaintiff has relied on the statement made by the petitioner i.e. the defendant. While giving reply to the application filed by the plaintiff, it is admitted by the defendant that there was transaction regarding money lending, which was already completed and the plaintiff has torn the said document at that time. The specific statement is made by the defendant in his reply that the agreement to sell is torn by the plaintiff in his presence.

Taking support of this statement and as the plaintiff i.e. respondent is having opportunity to cross-examine the witnesses and to lead evidence, the Trial Court has allowed the application.

11. While passing the order, the Trial Court has relied on Section 63(1),(2) and (3) of the Indian Evidence Act, 1872.

Section 63 - Secondary evidence – *Secondary evidence means and includes -*

- (1) certified copies given under the provisions hereinafter contained;*
- (2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;*
- (3) copies made from or compared with the original.*

12. On perusal of sub- section (2) of Section 63, it appears that the copies made from the original by mechanical process which in themselves ensure the accuracy of the copy and copies compared with such copies. There is no comparison, there is no any verification of said xerox copy with the original. It is not verified by any Competent Authority. Though the xerox copy is made from the original by mechanical process, it is not compared. Therefore, on the basis of the provisions of Section 63(2) and (3), the secondary evidence cannot be granted in this case.

13. In view of the above observations, order passed by the learned Trial Court by allowing the application to lead the secondary evidence deserves to be set aside. Hence, the petition is allowed.

14. The order dated 30.10.2023 passed by the Court of 10th Joint Civil Judge Senior Division, Amravati in Special Civil Suit No.7/2019 is hereby quashed and set aside.

15. Rule is made absolute in aforesaid terms. No costs.

(MRS. VRUSHALI V. JOSHI, J.)