

Learned counsel for plaintiff files memo with documents. Learned counsel for defendants is also present. Heard both side.

ORDERS ON ADMISSIBILITY OF DOCUMENT

The PW-1 has sought for production of photocopy of a document dtd: 10.06.1995 which is named as "ಜುಬಾನೆ ಹಿಸ್ಸಾ ಯಾನೆ ಪಾಲುಪಾರಿಕತ್ತು". Since the said document is photocopy, this Court has posted the case for hearing on admissibility of said document.

2. Heard both side and also perused the materials available on record.

3. Learned counsel for plaintiff submits that the present suit is filed seeking permanent injunction with respect to the suit schedule properties which is acquired by the plaintiff under Jubane Hisse dtd: 30.04.2001 reduced into writing on 30.04.2002. The defendants are the brothers of plaintiff's father and there was a partition of the joint family properties between the father of plaintiff, his grand father, grand mother and defendants vide palupatti dtd: 10.06.1985 under which the defendant No.1 has got land in Sy.No.416/3 formed out of old Sy.No.285. But the defendant No.1 has illegally got the phodi of land in Sy.No.416 including the house constructed by the plaintiff's father in

Sy.No.285. The original palupatti dtd: 10.06.1985 is in the custody of defendants and though the plaintiff had issued notice under Order 12 Rule 8 of CPC calling the defendants to produce the said document, they have made reply that the said document is not in their custody and they do not know about the Jubana. Therefore, the photocopy of the said palupatti dtd: 10.06.1985 being secondary evidence requires to be marked in evidence on behalf of the plaintiff.

4. On the other hand learned counsel for defendants has submitted that the defendants have no knowledge about the said document and the same is not in their custody. In this regard the defendants have also submitted their reply to the notice issued by the plaintiff.

5. It is the specific case of the plaintiff that there was a partition among the family members of plaintiff's father vide palupatti dtd: 10.06.1985 under which the defendant No.1 has got land in Sy.No.416/3 formed out of old Sy.No.285. But the defendant No.1 has illegally got the phodi of land in Sy.No.416 including the house constructed by the plaintiff's father in Sy.No.285. This is a suit for bare injunction with respect to the properties on an assertion

that the plaintiff has acquired the said properties through Jubane Hisse dtd: 30.04.2001. Record discloses that on 26.05.2023, the plaintiff has issued notice addressed to the defendant counsel seeking production of original palupatti dtd: 10.06.1985 and for the said notice the learned counsel for defendant has submitted his reply stating that the said document is not in the custody of defendant.

6. It is relevant here to refer the decision of our Hon'ble High Court in the case of **Avalappa V/s Krishnappa** reported in **ILR 1988 Kar 3347**, wherein the Honble High Court has held that in order to lead secondary evidence, the conditions prescribed under Section 65 of Evidence Act has to be complied and there should be proper foundation.

7. It is also relevant here to refer another decision of our Hon'ble High Court in the case of **Gafarsab Sati Gafar Sab Vs Ameer Ahamed** reported in **ILR 2006 KAR 169** wherein it is held that the party is not expected to file any application to lead secondary evidence but he has to lay proper foundation for not producing the primary evidence which should be accounted satisfactorily and has to make out

the reason set out in Section 65 of Indian Evidence Act.

8. Herein the present case, the plaintiff has sought for laying secondary evidence of the palupatti dtd; 10.06.1985 stating that the original is within the custody of the defendants. Learned counsel for the plaintiff has brought to the notice of this Court the document named as Ahavalu thkthe, wherein the defendant No.1 himself has referred to the Jubane hisse of the year 1985. Further the mutation extract pertaining to Sy.No.280 does also depicts that the same is made pursuant to the Jubane hisse. As per Sec.63 of Indian Evidence Act, the copy made from original by mechanical process which in themselves ensure the accuracy of copy compared with such copy is secondary evidence. The document now sought for production is a photocopy which is made through a mechanical process and therefore requires to be considered as secondary evidence.

9. As held in the decisions referred supra, it is no doubt that the party can lead secondary evidence of a document subject to he laying foundation for such secondary evidence and making out reasons under Sec.65 of Indian

Evidence Act. Herein the present case, the plaintiff contends that the original document is in the custody of defendants and even though they were called to produce the said original, they have claimed that the original is not in their custody. Sec.65(a) of Indian Evidence Act provides that the secondary evidence relating to the documents may be given when the original is shown or appears to be in possession or power of any person legally bound to produce it and such persons fails to produce such document even on a notice. Herein the present case, that the defendant No.1 at the time of seeking land grant has made reference to the Jubane hisse of the year 1985 and the mutation entry in the name of defendant No.1 is also based on the said Jubane hisse. Even though the plaintiff has issued notice, the defendants have put forward their reply stating that the said document is not within their knowledge and custody. Therefore, the plaintiff has made out reason as required under Section 65 of Indian Evidence Act and the document sought for production being secondary evidence of the original is no doubt admissible in evidence. Hence, the following;

ORDER

O.S.126/2019

The photocopy of the document dtd:
10.06.1995 named as "ಜುಬಾನೆ ಹಿಸ್ಸಾ ಯಾನೆ
ಪಾಲುಪಾರಿಕತ್ತು" is admissible in evidence.

For further chief examination of
PW-1 by: 03.11.2023.

Sd/-

Addl. Civil Judge & JMFC.,
Mudidgere.