

ORDER PASSED BELOW EXH.206.

This is an application filed by the defendant Nos.7 and 8 (also Nos.4-A & 4-B being legal heirs of deceased defendant No.4) seeking permission to adduce secondary evidence under section 63 and 65 of the Indian Evidence Act.

2. According to the defendant Nos.7 and 8, on 24/10/2008 deceased defendant No.4 has executed registered Will in their favour. After death of defendant No.4, the defendant Nos.7 and 8 have claimed ownership and declaration regarding the suit property by filing of counter claim. The defendant Nos. 7 and 8 have already filed the photocopy of the registered Will bearing No.529/2008 dated 24/10/2008. Today, along with separate application the defendants have filed certified copy of the said Will on record. Said certified copy of will was with the deceased defendant No.4. The defendants have found said certified copy in the luggage of defendant No.4. Said certified copy is dated 28/11/2008 and taken by deceased defendant No.4 only. Defendants are not aware where the original Will is. The defendants have taken search of said original Will but they did not find it with deceased defendant No.4.

3. It is necessary for the defendant Nos. 7 and 8 to lead secondary evidence in respect of said certified copy of Will. If permission is granted then no prejudice would be caused to the other side and they will get opportunity to cross-examine the witness on that point. Hence, defendant Nos.7 and 8 prayed that they may be allowed to lead secondary evidence in respect of the certified copy of Will No. 529/2008 dated 24/10/2008.

4. Plaintiff resisted the application by filing say at Exh.209. According to the plaintiff, the defendants have already submitted their evidence affidavit on record. It was not contended by defendants that the original Will is not in their possession. After a long gap the defendants have come with the story that the documents is not in their possession. There are no satisfactory reasons to allow the application. The grounds mentioned does not fall under the parameters Section 63 and 65 of the Indian Evidence Act.

5. The defendants have filed present application just to prolong the matter. Application is devoid of merit. Lastly, plaintiff prayed the application may kindly be rejected with costs of Rs.5000/-.

6. Heard learned counsel Shri A. E. Joshi for the defendant Nos.7 and 8. He has vehemently argued that, after death of their mother i.e. original defendant No.4, the defendant Nos.7 and 8 have taken search of the original Will but they only found certified copy of the said Will. The original Will is not traceable. Therefore, defendants have filed present application seeking permission to lead secondary evidence in respect of said Will. If permission is not granted then the defendants will suffer irreparable loss. Lastly, prayed that the application may kindly be allowed.

7. *Per-contra*, learned counsel for the plaintiff Shri K. G. Mutyalwar has vehemently argued that, the defendants have not pleaded about the lost of original Will. At belated stage, the

defendants have filed present application. Hence, he prayed that the application may kindly be rejected with costs.

8. Learned counsel for the plaintiff has relied on the judgment of Hon'ble Bombay High Court in the case of **Pandurang Laxman Mandekar ..Vs.. Vyankatesh Balaji Deosthan, reported in 2009 C.J.(Bom)1091, wherein it is observed that,**

In the written statement, there is no pleading that the original Will has been lost or that even a copy thereof is not available- Neither of the witnesses of defendants in their evidence say that the Will is lost or that even copy thereof is not available- Defendant No.4 has not produced the original Will nor copy thereof on record- Since there is no pleading or evidence or loss of original, the secondary evidence is also not admissible.

9. In the case cited *supra*, even copy of the Will was not filed on record. In the present case the defendant Nos.7 and 8 have initially filed photocopy of the said Will and later on filed its certified copy on record. Therefore, it is respectfully held that the facts and circumstances in the present case and the case cited *supra* are different, hence it is not applicable to the case in hand.

10. Section 65 (c) of the Indian Evidence Act, provides that when the original documents has been destroyed or lost, the secondary evidence of that document may be given. The defendant No.7 has filed his affidavit below present application, in support of the contents of the application. No justifiable reason is put forth by plaintiff to disbelieve on oath submission of the defendant No.7. Considering ground of defendants that the original Will is not traceable, it would be just to allow the defendants to lead secondary

evidence regarding certified copy of the Will No.529/2008 dated 24/10/2008. No prejudice would cause to the plaintiff if application is allowed.

11. It is also necessary to keep in mind that, initially the defendants have filed copy of the said Will and later on filed its certified copy along with present application. Therefore, delay is causing for adjudication of the matter finally. Therefore, it is necessary to allow the application by imposing costs on the defendants. Considering all aspects of the matter and interest of the justice following order is passed.

ORDER

- 1) Application (Exh.206) is hereby allowed subject to costs of Rs.300/-(Rupees Three Hundred only), payable to the plaintiff.
- 2) Defendant Nos.7 and 8 (also 4-A and 4-B) are permitted to lead secondary evidence in respect of the certified copy of the Will-deed No. 529/2008 dated 24/10/2008 filed along with list Exh.208.
- 3) Costs in cause.

Date : 27-10-2023.

(Dr. T. N. Quadri)
Civil Judge (Sr. Dn.),
Kelapur.