

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1155 OF 2013

Santhom Trust of Kalyan .. Petitioner.
V/s.
Baban P. Gaikwad & Others .. Respondents.

Mr. Rahul L. Nerlekar, for the Petitioner.

Mr. Anil Agarwal i/b. Mr. D. G. Kothari, for Respondent Nos.1 to 6.

Mr. Sandeep Salunkhe i/b. Mr. Manoj A. Naik, for Respondent Nos.7(a) to 7(d).

CORAM: G.S.KULKARNI,J.

DATE : 26th FEBRUARY, 2015.

PC:-

This Petition impugns an order dated 13th December, 2012 passed by the learned Civil Judge, Senior Division, Kalyan, rejecting an application filed by the Petitioner/ Plaintiff seeking to exhibit documents in its Civil Suit filed by it.

2 The Petitioner, which is a public trust has filed Special Civil Suit No.380 of 2013 before the Court of Civil Judge, Kalyan, inter alia, seeking specific performance of a Development Agreement dated 30th December, 2006. The Defendants/ Respondent Nos.1 to 6 (for short Respondents) have appeared in the said suit and filed their written statement. The suit is at the stage of evidence. Petitioner has filed affidavit in lieu of examination-in-chief of one Shri Davis Tharakan – Managing Trustee of the Plaintiff.

3 Learned Counsel appearing for the Petitioner has drawn my attention to the statements as made on behalf of the Petitioner in the affidavit of in lieu of examination in chief. On the basis of the affidavit of evidence, Mr. Dakvis Thamakaran offered himself for cross examination by the Respondents. After the commencement of the cross examination on 18th October, 2012, an application came to be moved on behalf of the Petitioner, seeking permission to exhibit the original documents referred in the affidavit of examination-in-chief. This application was contested by the Respondents on the ground that the cross examination had already commenced and two sittings of the same were over. The Respondents contended that ample time and opportunity was given to the Petitioner to prove the documents and get them exhibited.

4 The learned Trial Judge by the impugned order rejected the application of the Petitioner. The order reads thus:-

“ Read application. Perused say. Heard Shri Gautam & Kothari. After considering the evidence of PW with the help of documents on record, it is difficult to exhibit the documents as prayed by Plaintiff. Shri Gautam attracted attention of the Court towards para No.2 of W. S. stating that Defendant admitted the document and so document be exhibited. I considered said para & I gathered that there is no admission. So request is rejected.”

5 Mr. Nerlekar, learned Counsel appearing for the Petitioner in assailing the impugned order contends that the learned Trial Judge ought to have allowed the application of the Petitioner to exhibit the documents which were submitted in a list at Exhibit 41. He has drawn my attention to paragraph 2 of the written statement to show that the Respondents have not denied and have admitted the agreement dated 30th December,

2006, of which the Petitioner was seeking a specific performance. He has also drawn my attention to the relevant paragraphs in the affidavit of evidence filed on behalf of the Petitioner to show that the documents at serial Nos.3, 4 and 5 have been referred in paragraphs 5 and 6 of the affidavit of evidence.

6 Mr. Nerlekar, submits that document at serial No.1 is the original registered development agreement of which specific performance is sought by the Petitioner, he contends that the same is proved by the Petitioner. He submits that the same could not have been refused to be exhibited by the learned Trial Judge. As regards the other documents, he states that they are the original confirmation deed dated 15th January, 2007, a notice of the Petitioner and the Respondent's Advocate dated 27th August, 2008, document at serial No.5, is also a notice dated 17th September, 2008 addressed by the Petitioner to the Advocate of the Respondents. He, therefore, submits that the Plaintiffs have proved these documents. He submits that the learned Trial Judge ought to have given cogent reasons as to why these documents could not be exhibited.

7 On the other hand, learned Counsel appearing for Defendants/ Respondents Nos.1 to 6 submit that the learned Trial Judge has correctly rejected the application of the Petitioner as the same was filed when the cross examination of the Plaintiff's was in progress. He submits that affidavit of evidence lacks adequate description on the documents in question and, therefore, mere reference in the affidavit of evidence would not be sufficient for the Petitioner to succeed in their application in question to assume that the documents are proved. He has also drawn my attention to the discrepancy in the dates in respect of document at serial No.4 as made in the affidavit of evidence and the date

as mentioned in the list of documents at Exhibit 41. He states that document at serial No.4 which is notice dated 27th August, 2008 sent by the Petitioner's Advocate to the Respondent's Advocate has been described as 27th August, 2003. Mr. Nerlekar submits that it is a typographical error as the correct date has been mentioned in paragraph 6.

8 Having considered the rival submissions, it is clear that the suit filed by the Petitioner is for the specific performance of the Development Agreement dated 30th December, 2006 which is a registered document. The avements in the plaint and the affidavit of evidence shows that the Plaintiff's have set out their case to seek a specific performance on the basis of these documents. Further, in paragraph 2 of the Written Statement as filed on behalf of Respondent Nos.1 to 6, the Respondents have also dealt with the said agreement and according to the Petitioner have not denied the same.

9 As regards document at serial No.2, there is no reference in the affidavit of evidence filed on behalf of the Plaintiff. Mr. Nerlekar has fairly conceded that with regard to the document about which there is no reference in the affidavit of evidence namely documents at serial Nos.2, 6, 7, and 8, he would not press the same to be exhibited.

10 From the reply filed on behalf of the Respondents, it can be seen that the only objection which is raised is that the application was filed by the Petitioner during the cross examination of the Petitioner and that earlier opportunity was available to the Petitioner.

11 Learned Counsel for Respondent Nos.1 to 6 across the bar has pointed out that earlier on behalf of the Petitioner an application dated 4th August, 2011 came to filed along with the list of these documents

whereby the Petitioner had prayed that these documents be permitted to be produced. This was much before the Petitioner filing the application in question which is dated 18th October, 2012. The learned Trial Judge by an order permitted the production of these documents. Moreover, on production of these documents, Respondent Nos.1 to 6 did not admit these documents and hence the same were being proved by the Petitioner by their affidavit of evidence.

12 Be that as it may, it is quite apparent that the learned Trial Judge in passing the impugned order has not recorded a finding as to why these documents cannot be exhibited.

13 Taking into consideration the above facts, the impugned order dated 13th December, 2012 is set aside. It would be appropriate that the learned Trial Judge considers afresh the application dated 18th December, 2012 filed by the Petitioner in accordance with law and pass appropriate orders on the same within four weeks from today. Ordered accordingly. Needless to say that the Petitioner is not precluded from filing an appropriate affidavit of evidence.

14 Learned Counsel for Respondent No. 7 has submitted that Respondent No.7 is wrongly impleaded as party to the present Petition as he had expired prior to the filing of the suit. As Respondent No.7 is not a party to this suit, no orders are required to be passed in that regard in this Petition.

15 All contentions of the parties are expressly kept open.

Parties to act on an ordinary copy of this order duly authenticated by the Sheristedar of this Court.

(G.S.KULKARNI,J.)