

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO. 1183 OF 2015**

|                                            |   |                     |
|--------------------------------------------|---|---------------------|
| <b>Vardhaman Builders</b>                  | ) |                     |
| <b>A partnership firm duly registered</b>  | ) |                     |
| <b>Partnership Act, 1932 and carrying</b>  | ) |                     |
| <b>on business at 303, Commerce House,</b> | ) |                     |
| <b>Nagindas Master Road, Fort,</b>         | ) |                     |
| <b>Bombay 400 023</b>                      | ) | <b>..Petitioner</b> |

**Vs.**

|                                                 |   |
|-------------------------------------------------|---|
| <b>1 State Bank of India staff</b>              | ) |
| <b>Vaibhav Co-operative Housing Society</b>     | ) |
| <b>Limited, having its Registered office at</b> | ) |
| <b>Daulat Nagar, Road No.1, Borivali (E)</b>    | ) |
| <b>Mumbai 400 066</b>                           | ) |

|                                             |   |
|---------------------------------------------|---|
| <b>2 S. M. Pendse</b>                       | ) |
| <b>The Chairman of Defendant No.1 above</b> | ) |
| <b>having office at Daulat Nagar,</b>       | ) |
| <b>Road No.1, Borivali (E) )Mumbai -66</b>  | ) |

|                                              |   |
|----------------------------------------------|---|
| <b>3 M/s. Ahura Developers Pvt Ltd.</b>      | ) |
| <b>Having its registered office at</b>       | ) |
| <b>107, Fort Foundation, Bake House Lane</b> | ) |
| <b>Opp MSC Bank, Mumbai 400 023</b>          | ) |

**..Respondents**

**Mr. Deepak Lulia for the Petitioner**  
**Mr. G. S. Godbole with Mr. Dushyant Purkear i/b Mr. Zaver Mamniya for the Respondent No.1**  
**Mr. Gaurav Joshi Senior Advocate with Ms Neeta Jain for the Respondent No.3**

**CORAM : R. M. SAVANT, J.**  
**DATE : 6<sup>th</sup> FEBRUARY, 2015**

**ORAL JUDGMENT**

1           Rule. With the consent of the Learned Counsel for the parties made returnable forthwith and heard.

2           The Respondent No.1 who is the society is represented, notice on the Respondent No.2 who was the then Chairman of the society can therefore be waived.

3           The Writ Jurisdiction of this Court is invoked against the order dated 5-12-2014 passed by the Learned Judge of the City Civil Court, Greater Mumbai, by which order, the application for leading secondary evidence being Notice of Motion No.3862 of 2014, came to be rejected.

4           It is not necessary for this Court to burden this order with unnecessary details. Suffice it to state that the Notice of Motion was filed by the Plaintiff to lead secondary evidence in respect of four documents out of about 37 documents on which the Plaintiff relies in the Suit. The said four documents are at item Nos.1, 2, 3 and 17 in the list of 37 documents annexed to the letter dated 26-3-2014, of the Learned Counsel for the Plaintiff. They are as follows:

- (1) Public Notice dated 12-4-1983.
- (2) Letter dated 22-4-1983 of the Plaintiff
- (3) Terms and conditions of redevelopment of the said property
- (4) Letter dated 7-6-1984 of the Advocate of the Plaintiff.

5           The said documents are the documents which the Defendant Nos.1 and 2 and the Defendant No.3 have not admitted. There was an earlier round in as much as the Notice of Motion which was earlier filed by the Plaintiff being Notice of Motion No.2063 of 2014, for the same purpose was rejected by the Trial Court which rejection, the Plaintiff challenged by way of a Writ Petition No.8566 of 2014 in this Court. The said Writ Petition was allowed to be withdrawn as a statement was made that the Petitioner would withdraw the said Notice of Motion and would file a fresh application if liberty to the said effect was granted. This court had accordingly permitted the withdrawal of the said Petition with liberty to file a fresh application. It is pursuant thereto that the instant Notice of Motion No.3862 of 2014 came to be filed. The said Notice of Motion was opposed to on behalf of the Defendants by filing replies. On behalf of the Defendant No.1 the affidavit was filed by its Secretary Mr. Rajesh Ghanekar, where as the reply on behalf of the Defendant No.3 was filed by Mr. Sam Daruwala, the Director of the Defendant No.3. Suffice it to state that the Trial Court has rejected the said application on the ground that the prerequisites for leading secondary evidence in terms of Sections 63 and 65 of the Evidence Act have not been complied with by the Plaintiff. The Trial Court observed that without appropriate foundation, the Plaintiff tried to tender the said documents in evidence under the mode of secondary evidence. The Trial Court thereafter has gone on to observe in paragraph 10 that in none of the affidavits of the Plaintiff, it has been stated whether the Plaintiff is in a position

to examine the person or authority who are concerned with the said documents. The Trial Court lastly observed that without any efforts of the Plaintiff, the court would not endorse the documents even as secondary evidence. Hence at the stage of considering whether the Plaintiff is entitled to lead secondary evidence, the Trial Court has concluded about the admissibility of the said documents. This probably was in view of the fact that the Plaintiff in the instant Notice of Motion has prayed that it be allowed to lead secondary evidence of the said four documents and that the said documents be exhibited. It is trite that in so far as the applications made for leading secondary evidence are concerned, they have to be adjudicated on the touchstone of provisions of Sections 63 and 65 of the Evidence Act and the court is only required to consider whether the requirements as stipulated by the said provisions are fulfilled, the Court is obviously not required to go into at the said stage, the admissibility or whether the Plaintiff is in position to prove the said documents.

6            In the instant case, as indicated above, the secondary evidence is sought to be led of the four documents which have been culled out as above out of the 37 documents which the Plaintiff relies in the Suit. In so far as the document at Sr. No.1 is concerned, it is a public notice dated 12-4-1983 which has been allegedly issued by the Respondent No.1 society calling for applications for the proposed work of the society. The document at Sr.No.2 is the letter dated 22-4-1983 of the Plaintiff allegedly addressed to the

Respondent No.1 society pursuant to the said public notice. The document at Sr. No.3 are the terms and conditions formulated by the Respondent No.1 which are applicable to the redevelopment of the property of the society and the last document i.e. document at Sr. No.4 is the letter / notice dated 7-6-1984 addressed by the Advocate of the Plaintiff to the Registrar of Co-op Societies under the Maharashtra Co-operative Societies Act.

7           It is required to be noted that the Advocate for the Plaintiff vide his letter dated 26-3-2014 addressed to the Advocate of the Defendant No.1 called upon the Defendant No.1 through his Advocate to produce before the Trial Court the original documents / original copies of the documents mentioned in the list. The said notice was replied to by the Advocate of the Defendant No.1 that the documents have been lost and damaged and not available due to the 26-7-2005 floods. It is further stated in the said reply by the Advocate for the Defendant No.1 that he would be unable to produce the originals of the same. It is also required to be noted that in the Written Statement of the Defendant No.1, it seems that the existence of the said documents has not been specifically denied. However, the said fact is not required to be taken into consideration at this stage. The fact remains that in so far as the documents at Sr. Nos.1 and 3 are concerned, they are the documents of the society namely the notice issued by the society and the terms and conditions as formulated by the society on the basis of which

redevelopment would have to be carried out by the intending Applicant. In so far as the document at Sr. Nos.2 is concerned, the same is allegedly addressed by the partner of the Plaintiff to the society and Sr. No.4 is concerned, the same is addressed by the Advocate for the Plaintiff to the Registrar. Hence in so far as the aforesaid documents are concerned, the documents at Sr. No.1 and 3 are of the society and documents at Sr. Nos. 2 and 4 are of the Plaintiff. In my view in so far as the Sr. No.1 and 3 are concerned, there should be no difficulty in respect of the admissibility of the said documents subject to the same being proved, on the Plaintiff being given an opportunity to lead secondary evidence as the Defendant No.1 society has communicated its inability to produce the originals. In so far as the document at Sr. Nos. 2 and 4 are concerned, though the Plaintiff would be entitled to lead secondary evidence in respect of the said documents, notwithstanding the observations made in the impugned order namely that the said documents cannot be exhibited. In respect of the said two documents, the Plaintiff would be entitled to lead secondary evidence subject to both admissibility and proof of the said two documents.

8           In my view, the Trial Court has erred in expressing about the admissibility of the said documents at the stage of consideration of the application for secondary evidence. The Trial Court ought to have restrained itself from considering the Plaintiff's prayers that the said documents required to be exhibited in view of the fact that the stage as to whether the documents

are required to be exhibited or not, had not reached. Hence in so far as the said observations made by the Trial Court in paragraph 10 of the impugned order is concerned, the same would stand set aside in respect of all the four documents. The Plaintiff as indicated above would be entitled to lead secondary evidence in respect of all four documents subject to what has been stated hereinabove in respect of the documents at Sr. Nos.1 and 3 and the documents at Sr. Nos.2 and 4. In so far as whether the documents at Sr. Nos.1 and 3 stand proved, the contentions of the parties are kept open and in so far as the documents at Sr. Nos.2 and 4 are concerned, the contentions of the parties as regards both the admissibility and proof of the said documents, are kept open for being urged before the Trial Court. The impugned order is accordingly set aside. The Plaintiff would be at liberty to file additional affidavit of examination in chief. The same to be done within two weeks from date. If the same is not done, right to file the same to stand forfeited as the Suit is of the year 1984. Since the Suit is of the year 1984, the Trial Court may endeavor to dispose of the same expeditiously.

9           The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs of the Petition.

**[R.M.SAVANT, J]**