

WRIT PETITION NO.2680 OF 2015

Versus

1 of 8

Mumbai-400 020.	]
4. Mumbai Cricket Association	]
having its registered office at	]
Wankhede Stadium, 'D' Road,	]
Churchgate, Mumbai-400 020.	].. Respondents

Mr. Mayur Khandeparkar a/w Mr. S. N. Fadia, for the Petitioners.

Mr. V. Mannadiar a/w Mr. Vishal Phad i/b Mannadiar & Co., for the Respondent Nos.1 & 2.

Mrs. Trupti Shetty, Ms. Pooja Shah a/w Mr. Nushit Tanna i/by M/s. Dhruve Liladhar & Co., for the Respondent No.3.

CORAM : R.M. SAVANT, J.

DATE : 28th SEPTEMBER, 2015

ORAL JUDGMENT

1. At the outset the Learned Counsel appearing on behalf of the Petitioners seeks deletion of the Respondent No.4 from the array of Respondents as in the context of the challenge raised in the above Petition. The Respondent No.4 is only a formal party. The Respondent No.4 is accordingly allowed to be deleted at the risk of the Petitioners.

2. Rule, considering the challenge raised in the above Petition made returnable forthwith and heard.

3. The order dated 19.09.2014 passed by the Learned Judge of the City Civil Court, Mumbai, rejecting the Chamber Summons No.2653 of 2013 filed by the Petitioners for leading secondary evidence in respect of

five documents which are annexed to the affidavit in support of the Chamber Summons is taken exception to by way of the above Petition.

4. It is not necessary to burden this order with unnecessary details considering the challenge raised in the above Petition. Suffice it would be to state that the Petitioners herein who are the Defendant Nos.2 and 3 to the suit in question had sought leave to lead secondary evidence in respect of the five documents which have been annexed to the affidavit in support of the Chamber Summons. The suit in question has been filed by the Respondent Nos.1 and 2 which suit revolves around the membership of the Respondent No.3 Club. It is not necessary to dilate further on the said aspect. The application for leading secondary evidence in respect of the said five documents has been rejected by the Trial Court by the impugned order. However, the reasons if any, if it can be said so, can be found only in paragraph 14 of the impugned order. The reasons revolve around the fact that the Defendants except their bare words have not satisfied as regards the loss of the original documents by producing any cogent and convincing evidence and that there is also no prima-facie evidence to show that the documents annexed with the Chamber Summons were prepared and compared with the mechanical process. Out of the four documents, it is required to be noted that the document which is Annexure-3 to the affidavit in support, the Plaintiffs have admitted the

existence of the said document and therefore the said document has been admitted by the Plaintiffs. In so far as the document at Annexure-5 to the affidavit in support i.e. letter dated 19.12.2005 addressed by the Administration Executive of the Respondent No.3 to M/s. DMCC Sports Club. It seems that on notice being issued the Defendant No.3 had produced office copy of the same before the Trial Court. Hence, in so far as the other three documents are concerned, the same a contentious issue between the parties. In so far as leading of secondary evidence is concerned, it is controlled by Section 63 and Section 65 of the Indian Evidence Act. Section 63 posits what is secondary evidence and in terms of clause (2) thereof contemplates copies made from the original by mechanical process as one of the methods by which a document can be produced and in respect of the permission can be sought to lead secondary evidence. In so far as Section 65 is concerned, the same postulates the eventualities in which secondary evidence can be allowed to be led, one of the eventualities contemplated is clause (c) which covers the cases where the original of the document has been lost.

5. In so far as the instant application i.e. Chamber Summons No.2653 of 2013 is concerned, an affidavit in support to the said Chamber Summons has been filed by one Dilip Trimbak Gokhale who is the Company Secretary of the Defendant No.2 and Chairman of the Defendant

No.3. Paragraph 8 of the said affidavit in support is relevant for the purposes of the present Petition and is therefore reproduced herein for the sake of ready reference :-

“8. I say that, inspite of diligent search being cause, I am unable to trace the office copies of the said letters dated 27th October, 2005 and the same are lost. I say that, I had taken photocopies of the said letters dated 27th October, 2005, which is a mechanical process and compared the photocopies with the original letters dated 27th October, 2005 and the same are accurate and identical. The photocopies of the said letters dated 27th October, 2005 are annexed hereto and marked as **Annexures 1 to 4.**”

6. Hence, vide paragraph 8 the affiant has sought to lay a foundation for being permitted to lead secondary evidence as he has stated that inspite of diligent search the copies could not be traced. He has further stated that he has taken photocopies of the said letters dated 27th October, 2005 by a mechanical process and compared them with the original. The Trial Court as indicated above has rejected the application on the two grounds which have been adverted to herein above in the instant order.

7. Heard the Learned Counsel for the parties. The Learned Counsel Mr. Mayur Khandeparkar would submit that in the light of the averment appearing in paragraph 8 of the affidavit in support, case for being permitted to lead secondary evidence by the Defendant Nos.2 and 3 was made out.

8. Per contra, Mr. V. Mannadiar the Learned Counsel appearing for the original Plaintiffs i.e. Respondent Nos.1 and 2 sought to raise contentions as regards genuineness and authenticity of the three documents which are in contention. The Learned Counsel would contend that it is the case of the Plaintiffs that the said documents are got up documents. The Learned Counsel would contend that unless a case of preparing documents by mechanical process from the original is made out, permission to lead secondary evidence cannot be granted.

9. Having heard the Learned Counsel for the parties, I have considered the rival contentions. As indicated above, in paragraph 8 of the affidavit in support a foundation has been laid by the Defendant Nos.2 and 3 for being permitted to lead secondary evidence. The affiant Dilip Trimbak Gokhale has stated in the said affidavit in support that inspite of diligent search the documents could not be traced. He has further stated that he had taken photocopies of the said letters dated 27th October, 2005 which is a mechanical process and compared the photocopies with the original letters dated 27th October, 2005. In my view, the affiant having stated so, the Trial Court has erred in rejecting the application on the ground that the Defendants have not produced any cogent and convincing evidence to show the loss of the documents. The said case of the Defendant Nos.2 and 3 as mentioned in paragraph 8 can always be tested

by the Plaintiffs in the cross-examination of the witness who would seek to prove the documents by secondary evidence, but the Court cannot be judgmental at the stage of considering the application to lead secondary evidence. It is required to be noted that the existence of Annexure-3 has been accepted by the Plaintiffs. In so far as the letter dated 19.12.2005 of the Respondent No.3 herein is concerned, the office copy from the file has been produced by the Respondent No.3. In my view, therefore, having regard to the well settled principles which are governing Section 65 of the Evidence Act i.e. eventualities in which secondary evidence can be led, the impugned order rejecting the application for leading secondary evidence passed by the Trial Court cannot be sustained. It would have to be accordingly set aside and is accordingly set aside. The Chamber Summons would stand allowed. The Defendant Nos.2 and 3 would be entitled to lead secondary evidence in respect of the documents in question which are not admitted by the Plaintiffs. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties left to bear their respective costs.

[R.M. SAVANT, J]

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment/Order.