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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3349 OF 2015

Kirti Manor Properties and Hotels Pvt.Ltd. ... Petitioner

Vs.

M/s.Hi Tek Engineers ... Respondent

Mr.K.R.Bulchandani a/w Mr.Anoop Sharma & Mr.Amit Nikam i/b
Mr.S.M.Kazi, Advocates for Petitioner.

Mr.M.S.Divekar i/b M/s.Divekar & Co., Advocate for Respondent.

CORAM : R. G. KETKAR, J.

DATE : 03rd AUGUST, 2015

P.C. :

. Heard Mr.K.R.Bulchandani, learned Counsel for the petitioner and Mr.M.S.Divekar, learned Counsel for the respondent at length. Rule. Mr.Divekar waives service. At the request and by consent of the parties, rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, original defendant has challenged the order dated 25/02/2015 passed by the learned trial Judge, City Civil Court at Greater Bombay during the course of further examination in chief of D.W.1 – Pradeep S.Kanagali. In paragraph 13, the learned trial Judge has held thus :

“Now I am shown visiting card at serial no. 14 of list of documents. (The adv of the plff objects to this visiting card being exhibited as the witness is not the author of the document. The adv for the deft give my attention to Section 3

of Indian Evidence Act, wherein the word “documents” has been define r/w Sec 62 explanation 2 r/w Sec 64 of the Indian Evidence Act. He submits that this is the primary evidence and so should be exhibited. I observed that the visiting card has not been exhibited by my predecessor on the ground that the witness is not the author of the document, also as per order of the Hon"ble High Court dated 30.09.14 the Hon'ble High Court had allowed the defendant to make submission as regards the admissibility and evidential value of the visiting card and the plff to oppose the submissions of the deft. In my view though as per Sec 62 explanation 2 this card has been made by printing process and each such card is primary evidence of the contents of the rest but the witness since not being the author or the owner of the card is not in a position to prove the contents of the card. Hence, not exhibited. ”

3. In support of this Petition, Mr.Bulchandani submitted that in the written statement filed on behalf of the defendant and in particular in paragraphs 5, 9 & 23, defendant has specifically referred to Mr.Sunil V.Dekate. In paragraph 5, it is contended that defendant had discussion with the plaintiff through Sunil V. Dekate who was a classmate of defendant's Director Pradeep S.Kanagali and who was also known to the plaintiff. In paragraph 9, it is contended that Pooja ceremony was held at the site on Dassara in 1994 on the suggestion of Sunil V. Dekate. In paragraph 23, it is asserted that defendant had discussion with the plaintiff through Sunil V. Dekhate, common friend of defendant and plaintiff.

4. Mr.Bulchandani submitted that D.W.1- Pradeep S.Kanagali filed affidavit in lieu of examination-in-chief on 05/04/2014. In paragraph 10 of that affidavit, it is stated that he immediately contacted Mr.Sunil Dekate, Technical Director of M/s.

Hi Tek Engineers. He submitted that on behalf of plaintiff- PW.1 Sunil Bapurao Bhosale was examined. In paragraph 51, he deposed that their group concerns are Hitek Engineers, Hitek Mixing system, Recherche Hitek Engineers Pvt.Ltd. He was shown visiting card of Sunil Dekate showing him as a Technical Director of Recherche Hitek Engineers Pvt.Ltd. He deposed that said Sunil Dekate was not working with him.

5. Mr. Bulchandani submitted that in pursuance of the order dated 30/09/2014 passed by this Court in Writ Petition No. 5445 of 2014 (Coram : R.M.Savant, J.), the defendant filed additional affidavit in lieu of examination in chief of D.W.1 Pradeep Kanagali. In paragraph 12, defendant relied upon original visiting card of Sunil Dekate, a Technical Director of Recherche Hitek Engineers Pvt.Ltd, sister concern of plaintiff. He repeated and reiterated the contents of paragraph 10 of the earlier affidavit dated 05/04/2014 as if the contents thereof are traversed therein. He submitted that the learned trial Judge ought to have marked that visiting card as exhibit. However, the learned trial Judge declined to mark it as exhibit on the ground that witness D.W.1 is not the author of the visiting card.

6. On the other hand, Mr.Divekar supported the impugned order. He submitted that the defendant has not proved the contents of the said visiting card. The witness examined on behalf of the

defendant merely produced the visiting card. He submitted that in fact, P.W.1-Sunil Bapurao Bhosale deposed in paragraph 51 that Sunil Dekate was not working as a Technical Director with Recherche Hitek Engineers Pvt.Ltd.

7. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, short question is whether the trial Judge was justified in refusing to mark document at serial No. 14 visiting card as exhibit. Perusal of the impugned order shows that D.W.1 was shown visiting card at serial no. 14 of list of documents. The learned advocate for the plaintiff objected to exhibition of that visiting card as the witness is not the author of the document. The learned trial Judge after referring the order dated 30/09/2014 passed by this Court held that as the visiting card is made by printing process. In view of Section 62 Explanation 2 of the Indian Evidence Act, 1872, the said card is primary evidence. The learned trial Judge, however, held that as the witness is not the author or the owner of the card, he is not in a position to prove the contents of card. Hence, the visiting card was not exhibited.

8. In my opinion, the learned trial Judge was not justified in not exhibiting the document. Mr. Bulchandani submitted that defendant has proved the contents of the visiting card. Mr.Divekar countered this submission and submitted that defendant has not

proved the contents thereof. In view of decision of Full Bench of this Court in the case of *Hemendra Rasiklal Ghia Vs Subodh Mody*, 2008 (6) Mh.L.J. 886 and in particular paragraphs 71 to 77 thereof, the learned trial Judge ought to have marked visiting card as exhibit subject to proof of contents of the said document. The learned trial Judge was also not justified at this stage to record the finding that the witness has not proved the contents thereof. The learned trial Judge after marking the document as exhibit has to consider whether the defendant has proved the said card while deciding the main Suit. In view thereof, the impugned order cannot be sustained and is required to be modified. Hence, following order.

- i) The order refusing to mark visiting card as exhibit is set aside and the learned trial Judge shall mark this document as exhibit subject to proof of contents of the same.
- ii) While deciding the Suit, the learned trial Judge will consider whether the defendant has proved the contents of the same as also whether Sunil Dekate was working as a Technical Director of the plaintiff or was in any way associated with the plaintiff. All the contentions in that regard are expressly kept open.

9. Rule is made absolute in the above terms with no order as to costs.

(R. G. KETKAR, J.)