

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8485 OF 2015
IN
NOTICE OF MOTION NO.2103 OF 2015
IN
B.C.C.C.SUIT NO.7469 OF 1983**

Bhavana Mahesh Vora & Ors.

..Petitioners

Vs.

**The Board of Trustees of
the Port of Bombay & Ors.**

..Respondents

**Mr. K. Y. Mandlik a/w Ms Priyanka Kothari and Ms Niloofer S I/b
M/s.Hooseini Doctor & Co. for the Petitioners**

Mr. Vishal Talsania i/b M/s. Motiwalla & Co. for the Respondent No.1

CORAM : R. M. SAVANT, J.

DATE : 27th AUGUST, 2015

P.C.

1 The Writ Jurisdiction of this Court is invoked against the order dated 4-8-2015, passed by the Learned Judge of the Civil Civil Court, Greater Mumbai, by which order, the above Notice of Motion filed by the Petitioners for permission to lead secondary evidence in respect of the probate dated 13-12-1969 which is a document at Sr. No.10 of the list of documents filed by the Petitioners who are the original Plaintiffs. The Petitioners have produced a xerox copy of the certified copy of the said probate which certified copy was issued by this Court. The Trial Court has rejected the application on the ground that the Petitioners/Plaintiffs could have obtained certified copy of the said probate from this Court and that the material placed on record on behalf of the

Plaintiff that they have taken efforts to that effect is not satisfactory.

2 In the said context, it is required to be noted that the Petitioners have applied for a certified copy of the said probate to be furnished to them to the Learned Prothonotary and Senior Master of this Court on 25-3-2015 and have also made the deposit for the said certified copy on 26-3-2015. Since the certified copy was not received pursuant to the application dated 25-3-2015, a second application was made on 21-4-2015 by the Plaintiffs by again making the deposit as required. However, the certified copy has not been received by the Plaintiffs and according to the the Learned Counsel for the Petitioners there is no reply received from the office of the Learned Prothonotary and Senior Master. The Plaintiffs had also applied to the Small Causes Court where in it seems that a certified copy was filed by one of the Defendants, not being the Defendants represented by the Learned Counsel Mr. Talsania in Suit No.L.E. & C Suit No.354/479 of 1978. The said application seems to have been made on 30-6-2015, however the registry of the Small Causes Court has informed the Constituted Attorney of the Plaintiffs that the record has been destroyed as per the Civil Manual and that now only A and B file is lying. Hence the attempt of the Plaintiffs to get the certified copy from the Small Causes Court also turned futile.

3 In the light of the aforesaid facts where the Plaintiffs have made

an application to this Court and which application can be said to be pending as no response is received by the Plaintiffs, in my view, the Trial Court ought not to have proceeded with the hearing of the above Notice of Motion and ought to have given an opportunity to the Plaintiffs to get a certified copy from this Court. The Trial Court could have proceeded on the basis of the reply that would have been received by the Plaintiffs from this Court. In my view, the Trial Court had erred in observing that the material placed by the Plaintiffs that they have taken efforts to that effect is not satisfactory. The Plaintiffs could have only applied for a certified copy which as the record discloses they have done. In my view therefore, the impugned order would have to be quashed and set aside and is accordingly quashed and set aside and the above Notice of Motion is restored to file. The above Petition is disposed of by issuing the following directions:

- (i) On the Notice of Motion being restored to file, the same not to be proceeded with for a period of 8 weeks from date.
- (ii) The Petitioners/Plaintiffs to address a reminder to the Learned Prothonotary and Senior Master in respect of the applications which they have already made to this court for a certified copy of the said probate. On a reply being received from the office of the Learned Prothonotary and Senior Master the Plaintiffs to place the same before the Trial Court immediately on its receipt.

(iii) It is contingent upon the reply that is received that the Trial Court would consider the Notice of Motion filed by the Plaintiffs for leading secondary evidence.

(iv) The Suit also would be proceeded with on the basis of the reply that would be received by the Plaintiffs from the office of the Learned Prothonotary and Senior Master of this Court.

4 With the aforesaid directions the above Writ Petition is disposed of.

5 The parties to act upon an ordinary copy of this order duly authenticated by the Court Shirestedar.

[R.M.SAVANT, J]