

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1042 OF 2014

Bank of India	...	Appellants
Vs.		
Mrs. Ruksana M Siddiqui & Ors.	...	Respondents

O A Das, Adv. for Appellant Bank of India.
Mr. S Shamim, Adv. i/b. Shamim & Co. for respondent Nos.1 & 2.

CORAM : MRS. ROSHAN DALVI, J.
DATE : 15th September, 2015.

P.C. :

1. Rule. Returnable forthwith.
2. The appeal is against the order of the Bombay City Civil Court dated 22nd August, 2014 relating to the leading of secondary evidence of the original documents which was the primary evidence of the plaintiff. The plaintiff is a bank. The plaintiff had given a loan. The suit is for recovery of the loan. The recovery of the loan would be proved by certain documents. The documents are cash credit hypothecation, promissory notes and certain guarantees.
3. The plaintiff has misplaced the documents. The plaintiff has shown in the application how, when and where they were misplaced and how they were sought to be traced upon search but not found. Consequently oral evidence is sought to be led to prove the copies of the documents as secondary evidence.
4. The evidence is sought to be led under Section 63 (2) &

(3) because the plaintiff relied upon the copies of the original documents made by mechanical process as stated by the plaintiff and compared with the original documents.

5. Though not required to take out any application by way of Chamber Summons, the plaintiff took out an application because of the wrong practise followed in district Courts and Bombay City Civil Court for leading secondary evidence. Though the plaintiff showed the order of this Court that no such application is required and that secondary evidence has to be led and which would be considered whilst appreciating evidence as held therein, the application was taken out and has been considered and dismissed. The plaintiff has challenged the dismissal. The dismissal is on the ground that the statement of the plaintiff's advocate is "not in total conformity with sub Section 2 & 3 of Section 63 of the Indian Evidence Act". Hence it is found to be devoid of any merit. The application is only for seeking permission of the Court for taking secondary evidence on record. The application is not for appreciation of the secondary evidence. The secondary evidence is the legal right of every party in every proceedings. A party has to lead the secondary evidence. If secondary evidence is found to be insufficient and devoid of merit, it cannot be considered. A party cannot be disallowed from leading the secondary evidence itself. That would tantamount to appreciating the evidence before it is led.

6. Section 63 (2) & (3) of the Act shows what is secondary evidence. Section 65 shows cases in which secondary evidence may be given and how it is given. The plaintiff has shown what is the secondary evidence with the copies of its original documents. The

plaintiff has sought to lead secondary evidence under Section 65(b) of the Act. That is because the defendants have admitted the writing that is executed. That is the admission of the documents itself. Hence it is a case of leading secondary evidence. This is all that was to be seen in application for permission to lead secondary evidence.

7. Counsel on behalf of the plaintiff has shown the actual admission of the defendants in the written statement. That is in paragraph 11 of the written statement. The case of the defendants is that their signatures were taken on blank printed writing and / or documents without filling the details which appears to be filled in the handwriting of bank employee later on. However, the case is that the initials of the defendants were obtained in the margin. Hence the defendants have disputed the correctness of the documents. This is after admitting the execution of the documents themselves in the aforesaid manner. The execution of the documents being admitted in paragraph 11 of the written statement, the case squarely falls under Section 65(3) of the Act. The secondary evidence which is to be led is of the copies of the original documents. Hence case has been made out to lead secondary evidence and what is secondary evidence has been shown. This is a clear case for allowing secondary evidence. This should have been allowed by leading the secondary evidence itself without any such application and once the evidence is led it could have been appreciated.

8. The learned Judge has made a fundamental error and this is despite the order of the High Court that such futile exercise should not be made. The learned Judge has proceeded to see how the oral evidence of the plaintiff will stand the test of the secondary evidence

without allowing the plaintiff to lead it and without allowing the plaintiff to be cross examined thereon.

9. The affidavit in support of the application, filed nevertheless, itself shows a clear case of secondary evidence being made out. However, if upon cross examination or otherwise the learned Judge does not find that that evidence would stand the test of secondary evidence, the evidence may be rejected whilst appreciating it as whole and the case on merits would be considered.

10. The affidavit in reply of the defendants, also filed nevertheless, shows the argument about how the statements of the plaintiff are opposed and which also could have been considered only whilst appreciating the evidence as a whole.

11. It may be mentioned that counsel on behalf of the defendants sought to show the Court themselves the case of leading secondary evidence under Section 65 (b) of the Act upon showing that he has not admitted the execution of the documents. He took Court through paragraph 10, 11 and 12 of the written statement. In paragraph 10 the case is that the documents are without consideration. In paragraph 11, as aforesaid, the execution of the documents is admitted but the correctness of the documents is disputed. In paragraph 12 the execution of continuing guarantees dated 27th October, 1986 is denied but later in paragraph 12 the signatures of defendant No.2 are stated to be on blank printed papers which shows the admission of the execution of these documents also.

12. Hence seen from all angles the impugned order is

incorrect. It would be most incorrect not to allow the plaintiff to lead secondary evidence and to proceed with the trial hastily.

13. The impugned order dated 22nd August, 2014 is, therefore, set aside. The learned Judge shall allow the plaintiff to lead the secondary evidence and consider it on merits.

14. Appeal from Order is disposed of accordingly.

(ROSHAN DALVI, J.)

C E R T I F I C A T E

Certified to be true and correct copy of the original signed order.