

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.10881 OF 2015

Shri. Madhavan Pillai

.. Petitioner

Versus

Shri. Aktar Hasan Rizvi

.. Respondent

Mr. P V. Nichani, for the Petitioner.

**Mr. Vishal Kanade a/w Mr. Mahesh Mishra i/by Mr. Ravi Thankaian,
for the Respondent.**

CORAM : R.M. SAVANT, J.

DATE : 3rd DECEMBER, 2015

PC.

1. The Writ Jurisdiction of this Court is invoked against the order dated 13.08.2015 passed by the Learned Judge of the Small Causes Court, Mumbai, by which order the application Exh.33 to file additional affidavit of evidence filed by the Petitioner herein came to be rejected. The Petitioner is an obstructionist to the execution of the decree passed in RAE Suit No.316/846 of 1998 which decree is one for eviction in favour of the Respondent herein. The Petitioner herein i.e. obstructionist was permitted to lead evidence pursuant to which he has filed his affidavit of evidence in which he has relied upon as many as 28 documents. Out of the said 28 documents which are mentioned in Exh.14 filed by the Petitioner, 11

documents have not been marked as exhibits. The same are at Sr. Nos.2, 3, 4, 5, 6, 7, 8, 9, 10, 19 and 26 of the said list Exh.14.

2. The document at Sr. No.2 is not marked as exhibit in view of the fact that the witness is not a party and signatory to the said Leave and Licence Agreement dated 25.01.1972. The document at Sr. No.3 has not been exhibited since it is a photocopy. The objection taken on behalf of the decree holder is that the said document has got no relevancy in the instant Obstructionist Notice. The document at Sr. No.4 has not been exhibited as the witness is neither the author of the said document nor the said document is written in the hand writing of the witness and hence, she is not the witness who can prove the said document. The documents at Sr. Nos.5 to 9 have not been exhibited for the reasons as explained at Sr. No.4. In so far as document at Sr. No.10 is concerned, the same has not been exhibited because the same is a xerox copy. The document at Sr. No.19 has not been exhibited as the Plaintiff does not admit the said document and the witness is neither author of the said document nor the signatory. The document at Sr. No.26 is not exhibited because the same is a photocopy.

3. The Trial Court has rejected the said application Exh.33 on the ground that the Petitioner could have given a notice to the other side

in respect of admission and denial of documents and thereafter led evidence. The Trial Court has further observed that the course propounded by the Applicant i.e. Petitioner herein cannot be permitted as would amount to abuse of the process of law. The Trial Court has lastly observed that the Petitioner can get the said documents proved through the evidence of another witness.

4. Now, coming to the document at Sr. No.2, the Petitioner can follow the course of action as propounded by the Trial Court as he is not a party to the said document. In so far as document at Sr. No.3 is concerned, the same being a xerox copy, the Petitioner can apply for leading secondary evidence of the said document. In so far as documents at Sr. Nos.4 to 9 are concerned, since admittedly the Petitioner is not the author of the said document nor the contents of the said documents are in the handwriting of the witness, the Petitioner would have to lead evidence of the person who is in a position to depose so as to prove them. In so far as the document at Sr. No.10 is concerned, since the same is a xerox copy, the Petitioner would be entitled to lead secondary evidence. In so far as document at Sr. No.19 is concerned, the Petitioner would have to lead evidence of the concerned person so as to prove the same as the said document is relating to the co-operative society and in so far as document at Sr. No.26 is concerned, the Petitioner would have to lead secondary

evidence in respect of the said document as the same is xerox copy.

5. In so far as leading of secondary evidence, the Petitioner would have to follow the course of action as propounded by Section 65 of the Evidence Act. Any application filed by the Petitioner for leading secondary evidence would be tried on its own merits and in accordance with law, uninfluenced by the impugned order. Hence, without interfering with the impugned order, but subject to what has been stated hereinabove, the above Writ Petition is disposed of.

[R.M. SAVANT, J]