

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10558 OF 2013**

1 Om Health Centres Pvt Ltd.	)	
A company duly registered and	)	
incorporated under the provisions	)	
of the Companies Act, 1956, having its	)	
registered address at Om Chambers,	)	
Om Corner, Mumbai 400 036	)	
2 Mr. N. Prabhakar Rao	)	
Director of Om Health Centres Pvt Ltd.	)	
having his office at Om Chambers,	)	
Om corner, Mumbai 400 036	)	..Petitioners

Versus

1 Ratanshi Premji Charitable Trust	)	
a trust duly registered under the	)	
Bombay Public Trust, Act, 1950	)	
having its office at 1-4, Basement,	)	
Runwal Shopping Centre,	)	
Mulund (West) Mumbai 400 080	)	
2 Mr. Sandeep Makheecha	)	
Managing Trustee of Respondent No.1	)	
having his office at 1-4, Basement,	)	
Runwal Shopping Centre,	)	
Mulund (West) Mumbai 400 080	)	
3 Mr. Nikhil Makheecha	)	
Managing Trustee of Respondent No.1	)	
having his office at 1-4, Basement,	)	
Runwal Shopping Centre,	)	
Mulund (West) Mumbai 400 080	)	
4 Mr. Harish Panchal	)	
Trustee of Respondent No.1	)	
having his office at 1-4, Basement,	)	
Runwal Shopping Centre,	)	
Mulund (West) Mumbai 400 080	)	

5 Mr. Kishor Adiyal	)	
Trustee of Respondent No.1	)	
having his office at 1-4, Basement,	)	
Runwal Shopping Centre,	)	
Mulund (West) Mumbai 400 080	)	
6 Mrs. Snehal N. Makeecha	)	
Trustee of Respondent No.1	)	
having her office at 1-4, Basement,	)	
Runwal Shopping Centre,	)	
Mulund (West) Mumbai 400 080	)	..Respondents

Dr. Birendra Saraf with Mr. Ranbir Singh with Mr. Hiren Shah i/b M/s Prakash & Co. for the Petitioners

Mr. Sachin Mandlik and Mr. Pranav Sampat i/b Khaitan & Co. for the Respondent Nos.1, 3 to 6

**CORAM : R. M. SAVANT, J.
RESERVED ON: 16th JANUARY, 2015
PRONOUNCED ON: 4th FEBRUARY, 2015**

JUDGMENT

1 Rule, with the consent of the Learned Counsel for the parties made returnable forthwith and heard.

2 The Writ Jurisdiction of this Court under Article 227 of the Constitution of India, is invoked against the order dated 20-7-2013 passed by the Learned 7th Joint Civil Judge Senior Division, Thane by which order, the application Exhibit 53 filed by the Petitioners herein i.e. the original Plaintiffs to lead secondary evidence in respect of the agreement dated 5-4-2004, came to be rejected.

3 The facts necessary to be cited for adjudication of the above Petition can be stated thus:

 The Petitioners herein are the original Plaintiffs, whereas the Respondents are the original Defendants in the Suit in question. The Respondent No.1 is a public trust registered under the Bombay Public Trust Act, 1950. The Respondent Nos. 2 to 6 are the trustees amongst whom the Respondent No.2 was the Managing Trustee at the relevant time.

4 The Suit in question i.e. Special Civil Suit No.276 of 2007 has been filed by the Plaintiffs for specific performance of the said agreement dated 5-4-2004. The said agreement is the agreement for development entered into between the Plaintiffs and the Defendants for development of the lands owned by the Respondent No.1 trust. It is the case of the Plaintiffs that since a part of the consideration for the suit property was payable by way of share from development, the said agreement was termed as an agreement for development in partnership. It is however, the case of the Plaintiffs that a perusal of the terms of the agreement makes it apparent that the said agreement is in fact an agreement to sale the suit property and was according to the Plaintiffs always treated as such by the parties. In the plaint, the Plaintiffs have made averments as regards the payment of the consideration. It is on account of the fact that the Defendants inspite of the Plaintiffs requesting

them to finalise the matter in terms of the said agreement, that on the Defendants refusal to do so that the Suit in question for specific performance of the agreement came to be filed. In the Suit the Plaintiffs moved an application for interim reliefs. The Trial Court vide its order dated 21-7-2007 was pleased to grant injunction to the Plaintiffs thereby restraining the Defendants from transferring, alienating or encumbering or creating third party interest in respect of the Suit property.

5 The Defendants carried the matter in Appeal by filing Appeal From Order No.832 of 2007. The said Appeal From Order was disposed of by a Learned Single Judge of this Court (J.H.Bhatia, J.) as his Lordship then was by his order dated 13-2-2008. This Court modified the order passed by the Trial Court to the extent that the Defendants were restrained from alienating or creating third party interest and in case the Defendants intended to seek permission of the Charity Commissioner to transfer, alienate or create third party interest in the suit property. The Respondent trust was directed to give prior notice to the Defendants.

6 In the Suit, the Respondent No.2 who was the Managing Trustee at the relevant time filed his Written Statement. In the said Written Statement, the Defendant No.2 adverted to the writing executed between the Plaintiffs and the Defendants which was executed by him on behalf of the Defendants.

However, the Defendant No.2 denied that the said documents constituted an agreement to sale. Paragraph 3 of the Written Statement of the Defendant No.2 is material and is reproduced herein under:

“3. With reference to para No.4 of the Plaint, this Defendant submits that there was merely writing between this Defendant and the Plaintiff to develop the property of the Trust jointly as partners in partnership. The said partnership was not registered. It is submitted that if it is contention of the Plaintiff that there was an Agreement for Development in Partnership and as alleged litigation is arose out of contact. There is bar to file present suit for and on behalf of unregistered partnership firm, on that count the Suit of the Plaintiff is not maintainable. The plaintiff is not sure as to whether the alleged agreement is “Agreement for Sale” or Agreement of Partnership” for development of the suit property.”

7 The Defendant Nos.1, 3 and 4 also filed their Written Statement on 18-7-2007. However, in the said Written Statement, they denied the execution of the said agreement. It seems that thereafter on 17-12-2009 the Defendant Nos.1, 3, and 4 filed application for amendment of the Written Statement. The said amendment application came to be allowed pursuant to which the Defendant Nos.1, 3 and 4 amended their Written Statement. In paragraph (g) which was the paragraph inserted by way of the amendment, the Defendant Nos.1, 3 and 4 adverted to the fact that whilst the order of

status-quo was in force, the Defendant No.1 through its Managing Trustee Defendant No.2 entered into an agreement for development with the Plaintiff on 5-4-2004 in sheer violation of the said order of status-quo.

8 The Suit thereafter proceeded to trial and the Plaintiffs were required to file their affidavit of evidence. It is the case of the Plaintiffs that for preparation of the affidavit in lieu of Examination in chief, the employee of the Plaintiff No.1 Mr. Pradeep Vora was required to travel from the office of the Plaintiff No.1 to the office of the Plaintiffs lawyer one Mr. Ravi Kamat in Thane on 10-1-2013. It is their case that while Mr. Pradeep Vora was on his way from their office to the office of the lawyer at Thane, he was hit by motorcycle outside the office of the Plaintiff No.1 and the plastic bag containing various documents connected to the matter was scattered here and there on the road due to the collision between Mr. Vora and a motorcyclist. It is the case of the Plaintiffs that since Mr. Vora was dazed and in shock, he collected the papers lying around on the road and proceeded to the office of the lawyer. This according to the Plaintiffs was possible as Mr. Vora was not seriously injured or physically disabled in any way as a result of the collision with the motorcycle. It is their case that later on the said Mr. Vora realised that the crucial document being the original of the agreement dated 5-4-2004 was lost/misplaced as a result of the accident and the papers being scattered on the road. It is the their case that few days prior to the loss of the said document, the Plaintiffs

coincidentally had notarised a copy of the original agreement from a notary public, for the purposes of keeping a record with the Plaintiff No.1 as the original was required to be submitted / deposited before the Trial Court. The Plaintiffs accordingly filed the affidavit of evidence in the Trial Court. In view of the fact that the said document dated 5-4-2004 was not the original, the Plaintiffs sought to lead secondary evidence in respect of the said document. The Plaintiffs sought to seek permission to lead secondary evidence vide the said application Exhibit 53 for the reasons which have been mentioned herein above namely that the employee of the Plaintiff No.1 Mr. Vora had a collision with a motorcyclist and in the said process the original of the said agreement dated 5-4-2004 was lost. In the said application, it was the case of the Plaintiffs that there is a presumption that the notary public who has notarised the said agreement dated 5-4-2004 in his said capacity has verified the original and thereafter certified the copy thereof as a true copy and hence the notarised true copy becomes primary evidence.

8 It appears that though the incidence of the loss of the said document has taken place on 10-1-2013, the Plaintiff No.1 has intimated to the Malbar Hills Police Station of the loss of the said document on 10-1-2013 on account of the collision between the employee of the Plaintiff No.1 and the motorcyclist by way of an affidavit filed with the Malbar Hill Police Station only on 6-2-2013. The Malbar Hill Police Station has accordingly issued a

certificate on the same day itself i.e. 6-2-2013 in which certificate it has been recorded that Mr. Pradeep Vora called on the police station and reported loss of his document between M/s Om Health Centers Pvt Ltd. and Mr. Ratanshi Premji Charitable Trust dated 5-4-2004. It has further been recorded in the said certificate that the complaint of the said Mr. Pradeep Vora is kept on record as the original document is lost in the jurisdiction of the said police station.

9 The said application Exhibit 53 was opposed to on behalf of the Defendant Nos.1, 3 to 5. The said Defendants questioned the theory put up by the Plaintiffs as regards the loss of the said document on 10-1-2013. It is their case that the said document can be termed as a got up document or fabricated document. The Defendants also questioned that on the two intervening dates i.e. 11-1-2013 and 4-2-2013 i.e. prior to the application Exhibit 53 filed under Section 65 of the Indian Evidence Act. The Suit had appeared on board and the factum of the loss of the original was never pointed out to the Court. The Defendants therefore contended that the entire story is fabricated and cooked up story and is an after thought so as to make out a case for leading secondary evidence.

10 The Trial Court considered the said application Exhibit 53 and has by the impugned order dated 27-2-2013 rejected the said application. The Trial Court held that for the purpose of Section 65 the loss or destruction of the

original has to be proved. The Trial Court refused to accept the case of the Plaintiffs that the said document was lost on account of the collision between the employee of the Plaintiff No.1 Mr. Pradeep Vora and the motorcyclist. The Trial Court observed that though he had gone to the Advocate and it was found that the document dated 5-4-2004 was missing he had not lodged a report with the police station on the same day i.e. 10-1-2013. The Trial Court further observed that the report with the police station was lodged only on 6-2-2013 i.e. after a period of 26 days and that there is no explanation for the delay. The Trial Court also observed that though the employee of the Plaintiff No.1 met with an accident but no complaint was made to the police against the motorcyclist who had dashed against Mr. Pradeep Vora. This according to the Trial Court were the circumstances which did not inspire confidence. The Trial Court also raised a query as to why the original was not filed at the stage of Order XIII Rule 1 when a copy of the said original was notarised on 2-1-2013 meaning thereby that the Plaintiffs had the original in their possession at least on 2-1-2013. As indicated above the Trial Court accordingly by the impugned order dated 28-7-2013 has rejected the said application.

11 Heard the Learned Counsel for the parties.

12 The Learned Counsel appearing for the Petitioners Dr. Birendra Saraf would contend that the existence of the said agreement is not denied

either by the Defendant No.2 or by the Defendant Nos.1, 3 to 5, if one goes through the Written Statement filed by the said Defendants as also the amended Written Statement filed on behalf of the Defendant Nos.1, 3 to 5. The Learned Counsel would contend that the Trial Court had erred in rejecting the application in the light of the fact that the said document in original was lost. The Learned Counsel would contend that the Trial Court ought to have given an opportunity to the Plaintiffs to lead secondary evidence in respect of the said document dated 5-4-2004.

13 Per contra, the Learned Counsel appearing for the Respondent Nos.1, 3 to 6 Mr. Mandlik would contend that the story sought to be put up by the Plaintiffs for leading secondary evidence does not inspire confidence and it is a cooked up story. The Learned Counsel would contend that even to the Suit a typed copy of the agreement dated 5-4-2004 has been filed when the Plaintiffs could very well have filed the original or atleast a xerox copy of the original along with Suit. The Learned Counsel would contend that the manner in which the Plaintiff claimed that the said document has been lost does not inspire confidence. That there are too many loose ends in the case put up by the Plaintiffs in support of their contentions that the said document has been lost on account of the collision between the employee of the Plaintiff No.1 Mr. Pradeep Vora and the motorcyclist. The Learned Counsel would also contend that the complaint to the police station has been made on 6-2-2013 i.e. almost

after a period of 26 days after happening of the incident and it is therefore unbelievable that if the document which is of prime importance to the Plaintiffs is lost the Plaintiffs would complain after the said length of time.

14 Having heard the Learned Counsel for the parties I have considered the rival contentions. The issue that arise for consideration in the above Petition is as to whether the Plaintiffs are required to be granted permission to lead secondary evidence. The eventualities in which the secondary evidence can be led are mentioned in Section 65 of the Indian Evidence Act. In so far as the instant matter is concerned, the case of the Plaintiffs falls within clause (c) of Section 65 which is reproduced herein for sake of convenience :

65. Cases in which secondary evidence relating to documents may be given – Secondary evidence may be given of the existence, condition or contents of a document in the following cases :-

(a)

(b)

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

A reading of clause (c) applies when the original has been

destroyed or lost or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in reasonable time. It is in the context of clause (c) that the present matter would have to be considered. The Plaintiffs in the instant case were therefore required to lay a factual foundation for being entitled to lead secondary evidence in terms of the said clause (c).

15 The case of the Plaintiffs would therefore have to be considered in the said context. At the costs of repetition, it is required to be noted that it is the case of the Plaintiffs that for preparation of the affidavit in lieu of Examination in chief, the employee of the Plaintiff No.1 Mr. Pradeep Vora was required to travel from the office of the Plaintiff No.1 to the office of the Plaintiffs lawyer one Mr. Ravi Kamat in Thane on 10-1-2013. It is their case that while Mr. Pradeep Vora was on his way to the office of the lawyer at Thane, he was hit by a motorcycle outside the office of the Plaintiff No.1 and the plastic bag containing various documents connected to the matter was scattered here and there on the road due to the collision between Mr. Vora and a motorcyclist. It is their case that since Mr. Vora was only dazed and was not seriously injured or physically disabled in any way he collected the papers lying around on the road and proceeded to the office of the lawyer of the Plaintiffs. However he later realised that the crucial document being the original of the agreement dated 5-4-2004 was lost/misplaced as a result of the accident and the papers being scattered on the road. In so far as the loss of the said

document is concerned, it is required to be noted that in the application Exhibit 53, it has been stated in paragraph 2 that the loss of the said document was discovered by Mr. Pradeep Vora when he reached the office of their lawyer and found that the bag containing the document does not contain the original of the agreement dated 5-4-2004. Hence in so far as the application is concerned, the loss was discovered by the employee on reaching the Advocates office in Thane on the same day i.e. 10-1-2013. However, in the affidavit filed with the police in paragraph 4 it has been mentioned by Mr. Pradeep Vora that on 1-2-2013 when he along with the Director of the Plaintiff No.1 Mr. Prabhakar Rao visited the office of the Advocate Mr. Ravi Kamat that they were informed by the Advocate that the original of the agreement dated 5-4-2004 was lost. Hence the statement in the application Exhibit 53 and the statement in the affidavit filed with police are contrary to each other.

16 It is further required to be noted that the incident took place on 10-1-2013 and the case of the Plaintiffs being that the said Mr. Pradeep Vora was given a dash by the motorcyclist. Pertinently the complaint to the police was lodged only on 6-2-2013 and curiously by way of filing an affidavit before the police. In my view this is the second circumstance which creates a doubt as regards the case of the Plaintiffs for leading secondary evidence on account of the loss of the original of the agreement dated 5-4-2004. It is also required to be noted that the Plaintiffs are in the business of development of properties and construction. It is impossible to believe that the employee of the Plaintiffs

was carrying important documents which were required for prosecuting the Suit filed by the Plaintiffs in an open plastic bag. It is also required to be noted that the Plaintiffs have not supported their case by any corroborative evidence of any independent other person who was present on site when the accident took place which according to the Plaintiffs took place outside their office. It is also impossible to believe that though dash was given to the employee Mr. Pradeep Vora he did not take down the number of the motorcycle, as surely if the employee Mr. Pradeep Vora was felled down by the motorcycle surely a crowd must have gathered on site. The fact that the said incident was reported to the management of the Plaintiff No.1, is also conspicuously absent in the application Exhibit 53. It is also required to be noted that it is a too much of a coincidence that the document is lost on 10-1-2013 and a copy of the said document was got notarised before that on 2-1-2013. It is also curious that only the said document dated 5-4-2004 is lost. The Suit has been filed in the year 2007 and why the original of the said document was not filed along with the other documents therefore begs an answer. The notarisation of the said document therefore can only be attributed to the fact that the Plaintiffs probably desired to give authenticity to the said document as also corroborate their case that though original was lost they have a notarised copy. The fact that the Defendant No.2 has in the Written Statement pleaded that it was only a writing also cannot be lost sight of. It is also required to be noted that the Suit had come up before the Trial Court on two intervening dates, but the loss

of the said document was not informed to the Trial Court.

17 In my view, the aforesaid circumstances therefore raise a serious question as regards the Plaintiffs case of the loss of the said document. This is therefore not a case where a party has to come forward with a plain and simple case that the original has been lost on account of some reason and that permission to lead secondary evidence is therefore prayed for. This is a case where the Plaintiffs on the basis of the case which they have pleaded in the said application Exhibit 53 which appears to be scripted, want to lead secondary evidence. Hence the bonafides of the case of the Plaintiffs as pleaded is required to be considered by this Court and on such consideration this Court for the reasons mentioned hereinabove has come to a conclusion that the Plaintiffs have not accounted for the alleged loss of the original of the said document dated 5-4-2004. The factual foundation to lead secondary evidence therefore cannot be said to be laid by the Plaintiffs. The Plaintiffs therefore cannot be permitted to lead secondary evidence in respect of the said document as their case does not satisfy the requirements of Section 65 of the Indian Evidence Act. Hence no fault can be found with the impugned order passed by the Trial Court. The impugned order cannot be said to suffer from any illegality or infirmity for this Court to interfere in its Writ Jurisdiction. The Writ Petition is accordingly dismissed. Rule discharged with parties to bear their respective costs.

[R.M.SAVANT, J]