

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 746 OF 2016

EL SHADDAI CHARITABLE TRUST, REP.
HEREIN BY ITS CONSTITUTED P.O.A.
MR. GODFREY MACHADO AND ANR.,

... Petitioners

Versus

MR. SANTOSH LOBO AND 8 ORS.,

... Respondents

Mr. Parag S. Rao, Advocate for the petitioners.

Mr. Joseph Vaz, Advocate for the respondent no.1.

Coram:- C. V. BHADANG, J.

Date:- 10th August, 2016

P.C.

The challenge in this petition is to the order dated 11/07/2016, by which the document marked 'X' along with 3 plans and the document marked 'Y' with one plan are marked as Exhs.178 and 179 respectively. This was during the course of the evidence of PW2 Prazares Gonsalves, who is a former Government Surveyor and has produced the report dated 22/06/2012 along with 3 plans, which according to the said witness, has been prepared on the basis of Total Station Survey Instrument which records the measurement electronically. The witness has stated that the said contents were transferred to the Computer and the plan produced along with report, is a Computer generated copy. There is another report along with a plan, which is dated 17/04/2016, which this witness has prepared on the basis of Laser Distance Meter. It is the evidence of this witness

that the documents were electronically generated by using an Auto-CAD Software.

2. An objection was raised on behalf of the petitioners to the documents based on Section 65B of the Evidence Act, on the ground that in the absence of certificate as required under the said provisions, the documents cannot be admitted in evidence.

3. The learned Trial Court has observed that the survey was conducted by PW2 and he has personally operated the instruments and has prepared the report. Thus the two reports have been marked as Exhs.178 and 179.

4. On behalf of the petitioners, reliance is placed on the decision of the Supreme Court in the case of ANWAR P. V. VS. P. K. BASHEER AND OTHERS; (2014)10 SCC 473 and HARESH @ HARSH PRABHAKAR PATIL AND OTHERS; 2015 BCI 211. The learned Counsel submits that there is no consideration on the aspect of compliance with Section 65B of the Evidence Act while the Court permitted the documents to be marked as Exhibits.

5. On the contrary, it is submitted by Shri Vaz, the learned Counsel for the first respondent that PW2 is a Former Government Surveyor, who has personally conducted the survey, used the instruments and has drawn the report. The learned Counsel points out that the said

witness has been extensively cross-examined on behalf of the petitioners and the trial of the suit has proceeded further, in which one witness of the defendants is also examined. He, therefore, submits that the objection is belated. The learned Counsel has placed reliance on the decision of this Court in the case of ARK SHIPPING CO. LTD VS. GRT SHIPMANAGEMENT PVT. LTD; 2007(6) BOM C R 311, in order to submit that the documents have rightly been exhibited in view of the evidence led by PW2.

6. Section 2(t) of Information Technology Act defines 'electronic record', to mean any data, record or data generated, image or sound stored, received or sent in electronic form or micro film or computer general micro fiche. Section 65B of the Evidence Act, inter alia, provides that where any information contained in electronic record "which is printed on paper" stored, recorded or copied in optical or magnetic media, produced by computer, shall be deemed to be a 'document', provided the conditions mentioned in the said Section are satisfied. The conditions are enumerated under sub-section (2) of Section 65B, while subsection (4) of Section 65B provides for a certificate. It, prima facie, appears from the evidence of PW2 that the initial first report is based on Total Station Survey Instrument, while the later was made by Laser Distance Meter. The contents were transferred to a Computer and processed by using the Auto-CAD Software, and a print out was taken, which is produced before the Court. In such circumstances, in my considered view, it would be

appropriate that the issue of proof of these documents, in view of the provisions of Section 65B of the Evidence Act is left open, to be decided by the Trial Court, in accordance with law. It is now well settled that mere marking of document as an Exhibit does not tantamount to its proof and the Court can always look into this aspect while considering whether the document can be said to be proved in accordance with law.

7. In such circumstances, keeping the point of proof of the document in the context of compliance of Section 65B of the Evidence Act open, the petition is disposed of.

8. It is made clear that this Court has not expressed any opinion on the rival contentions of the parties.

C. V. BHADANG, J.

SMA