

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 452 OF 2014

Gurudev Chaitan and Swaroop
Junglidas Maharaj Shikshan and
Seva Saunsta, Ingali

.. Petitioner

vs.

Suresh S. Dukale and ors.

.. Respondents

Mr. Surel S. Shah for the Petitioner.

Mr. Bhooshan Mandlik alongwith Mr. S.S. Patwardhan for
Respondent No.1.

CORAM : M. S. SONAK, J.

DATE : 21 JULY 2016.

P.C. :-

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith. Even otherwise, this Court, by its order dated 17 January 2014 had made it clear that this petition will be heard and disposed of finally, at the stage of admission.

2] The challenge in this petition is to the order dated 9 December 2013 made by the Deputy Charity Commissioner, Kolhapur rejecting the petitioner's application at Exhibit-26 for leave to lead secondary evidence in relation to the proceeding book dated 10 January 2005.

3] Mr. Surel Shah, learned counsel for the petitioner-society, has submitted that there is a difference between grant of leave to lead secondary evidence and the actual evidentiary value to be attached to such evidence. Mr. Shah submitted that the impugned order has confused the two aspects and thereby applied incorrect parameters in the matter of grant of leave to lead secondary evidence. Mr. Shah has further submitted that the document in question is already admitted in evidence in the very same proceedings at Exhibit-7. In these circumstances, leave to lead secondary evidence was required to be granted and the same has been incorrectly denied on the premise that the petitioner-society has not pleaded the precise date or circumstances in which the original has lost or lead any evidence on the aspect of such loss. Mr. Shah has submitted that the view taken by the Deputy Charity Commissioner is hyper-technical and pedantic therefore, warrants interference.

4] Learned counsel appearing for the respondent No.1 has defended the impugned order by submitting that what was attempted to be produced as secondary evidence is not even an authenticated certified copy but rather the same is a copy purported to be certified by the headmaster of the same society. Learned

counsel further submitted that neither any pleadings nor any proof to demonstrate the loss of the original documents. It is pointed out that Shri. Ashok @ Dayanand Maharaj, in his deposition has specifically stated that he is in a position to produce the original documents before the Court. This statement was made on 13 June 2013. In these circumstances, learned counsel for the respondent No.1 submitted that the onus was quite heavy upon the petitioner-society to demonstrate the actual loss, if indeed such loss is to be accepted for the purposes of grant of leave to lead secondary evidence.

5] The rival contentions now fall for determination.

6] The application made at Exhibit-26 merely seeks leave to lead secondary evidence on the basis that the original documents were lost or for that other reasons not arising out of the parties of its own difficulty or negligent, which disable such party to produce the original within a reasonable time. At this stage, there is no question of adverting to the issue of evidentiary value of the secondary evidence, which sought to be produced. Even after, leave is granted to produce secondary evidence, it is perfectly legitimate for the

Court to weigh such evidence and to decide upon evidentiary value thereof. Therefore, all issues with regard to the evidentiary value of secondary evidence, which was sought to be adduced could have been adverted to, at later stage. To this extent, the view taken in the impugned order, cannot be approved.

7] However, if the application made by the petitioner at Exhibit-26 is perused, it does appear that some further particulars in the matter of alleged loss of original were required to be stated and if the challenged, proved. The learned counsel for the respondent No.1 is right in his submission that the onus to establish loss was upon the petitioner-society, particularly in the light of statement made by Shri. Ashok @ Dayanand Maharaj on 13 June 2013, that he was in a position to produce the original. This, at least, *prima facie* means that the original was available as on 13 June 2013. If that be so, the petitioner-society was required to furnish further and better particulars with regard to their case that such document is lost or cannot be produced within reasonable time for reasons not attributable to itself. In the facts and circumstances of the present case, rather than non-suit the petitioner-society for this lapse, it would be appropriate if the impugned order is set aside and the

petitioner-society is granted liberty to make a fresh application for production of secondary evidence with regard to document, i.e., proceedings book dated 10 January 2005 by stating the requisite details. Mr. Shah, learned counsel for the petitioner-society states that such application would be made within two weeks from today. If such application is made within two weeks from today, the same shall be heard and disposed of, after afford of opportunity of hearing to all the parties within a period of four weeks thereafter. All contentions of all parties are kept open.

8] Rule is accordingly, made absolute to the aforesaid extent. There shall, however, be no order as to costs.

9] The parties to appear before the Deputy Charity Commissioner, Kolhapur on 4 August 2016 at 3.00 p.m. and produce an authenticated copy of this order.

10] All concerned to act on the authenticated copy of this order.

(M. S. SONAK, J.)