

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3822 OF 2016

Parasmal Kanayalal Chhajed ... Petitioner
Vs.
M/s. Wandrekar Enterprises and others ... Respondents

WITH
WRIT PETITION NO.3683 OF 2016

Zumberlal B.Chhajed (decd) hence deleted
through LRs ... Petitioners
Vs.
M/s. Wandrekar Enterprises and others ... Respondents

WITH
WRIT PETITION NO.3684 OF 2016

Subhash Uttamchand Khinwasara ... Petitioners
Vs.
M/s. Wandrekar Enterprises and others ... Respondents

Mr. S. Shamim i/b. Shamim and Company for Petitioners.
Mr. Roop Manohar Vasudeo for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : DECEMBER 06, 2016

P.C. :

Not on Board. By consent of the parties, taken up in the production Board.

2. Heard Mr. Shamim, learned Counsel for petitioners and Mr. Vasudeo, learned Counsel for respondent No.1.

3. These Petitions challenge the order passed in different Suits by which the application made by the plaintiff under Section 65 of the Indian Evidence Act, 1872 (for short 'Act') for leading secondary evidence is rejected. Plaintiff wants to lead secondary evidence in respect of the letters dated 29.01.1974 and 05.04.1977. It is the case of

the plaintiff that letter dated 29.01.1974 is addressed by the defendant No.1 to the defendant No.2. Letter dated 05.04.1977 is addressed by S. H. Dossal and Company to defendant No.2. Mr. Shamim invited my attention to the evidence recorded before the Commissioner in Suit No.1432 of 1979 filed on the Original Side of this Court and in particular questions No.34 and 35, which are to the following effect:

“Shown letter dated 29th January, 1974 addressed by Defendant No.1 to Defendant No.2 (Exhibit P-3).

Q.34 Did you address this letter to Defendant No.2?

Ans. Yes.

Shown letter dated 5th April, 1977 from S. H. Dossal & Co. to Defendant No.2 (Exhibit P-4).

Q.35 This letter is addressed by your lawyer?

Ans. Yes.

”

4. He submitted that plaintiff filed application for leading secondary evidence as these letters were produced in Suit No.1432 of 1979. In fact, basically Suits in these Petitions and Suit No.1432 of 1979 were instituted on the Original Side of this Court. They were ordered to be tried together. However, after the transfer of the Suits in the City Civil Court, recording of evidence in Suit No.1432 of 1979 is over and the present Suits are for recording of the evidence. It is in that context, plaintiff filed application for leading secondary evidence of these two letters, which is rejected by the impugned order. The learned trial Judge rejected the application on the ground that plaintiff failed to comply the mandatory provisions of Section 65 of the Act, and therefore, he is not entitled to lead secondary evidence. The learned trial Judge observed that though plaintiff stated in his evidence that he had issued notice to the defendant No.2 to produce the letters, he has not placed copy of that notice on record.

5. On the other hand, Mr. Vasudeo submitted that Suits are instituted in the year 1979 and plaintiffs are delaying the trial and are moving at

the last moment. He further submitted that in fact plaintiffs have not produced the evidence recorded before the Commissioner in Suit No.1432 of 1979 and is annexed here for the first time. He further states that letters dated 29.01.1974 and 05.04.1977 are not forming part of record of Suit No.1432 of 1979.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. I have already extracted questions No.34 and 35. By these questions, witness of defendant No.1 was asked whether letter dated 29.01.1974 was addressed by the defendant No.1 to the defendant No.2. Witness admitted that the letter is addressed by defendant No.1 to the defendant No.2 and is marked as exhibit P-3. Witness of defendant No.1 further admitted that letter dated 05.04.1977 from S. H. Dossal & Co. is addressed by the Lawyer to the defendant No.2. That letter is marked as exhibit P-4.

7. In my opinion, the learned trial Judge instead of going into the technicalities of leading secondary evidence, should have called for the record of Suit No.1432 of 1979 wherein these letters are marked as exhibits P-3 and P-4. In view thereof, the learned trial Judge shall call for record and proceedings of Suit No.1432 of 1979 for the limited purpose of taking on record letters dated 29.01.1974 and 05.04.1977 at exhibits P-3 and P-4 respectively. The learned trial Judge will ensure that copies of these letters are placed on record and supplied to the parties and thereafter may transmit the record if it is deemed fit and proper.

8. Mr. Vasudeo submitted that these letters are not the same letters and are not relevant in the present Suits. I need not go into this

contention. All contentions of defendant No.1 in that regard are kept open. Hence, the impugned orders are modified by directing the trial Court to call for record and proceedings of Suit No.1432 of 1979 and in particular letters dated 29.01.1974 at exhibit P-3 and letter dated 05.04.1977 at exhibit P-4 and thereafter proceeded with the Suit. All contentions of the parties in that regard are expressly kept open. In case the record of Suit No.1432 of 1979 is not available, the trial Court shall immediately submit the report in that regard to this Court. Petitions are disposed of accordingly. All the parties, including the trial Court, to act upon the authenticated copy of this order.

(R. G. KETKAR, J.)

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