

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4283 OF 2015

The Cotton Corporation of India Limited ... Petitioner
Vs.
The Bhavani Mills Limited ... Respondent

Mr. Vishal Kanade a/w. Mr. Uday Mahajan and Mr. Thatte i/b. M/s. Divekar & Co. for Petitioner.
Mr. Vivek R. Walawalkar a/w. Mr. Siddharth Ingule a/w. Ms Karishma Shirke i/b. Gordhandas & Fozdar for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 20, 2016

P.C. :

Heard Mr. Kanade, learned Counsel for petitioner and Mr. Walawalkar, learned Counsel for respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as plaintiff, has challenged the judgment and order dated 23.03.2015 passed by the learned Judge, City Civil Court, Greater Bombay in Notice of Motion No.1003 of 2015 in Suit No.7443 of 1980 (High Court Suit No.1555 of 1980). By that order, the learned trial Judge allowed the Motion taken out by the respondent, hereinafter referred to as defendant, seeking permission to lead secondary evidence in respect of the documents namely, (i) letter dated 01.04.1977, (ii) telegram dated 22.03.1978 and (iii) letter dated 24.07.1980 (for short "said documents").

3. Mr. Kanade submitted that plaintiff has instituted Suit for recovery of Rs.15,02,259.88/- with interest thereon @ 20% p.a. on quarterly rest basis from the date of the Suit till judgment and thereafter @ 6% p.a. till payment. Defendant resisted the Suit by filing written

statement dated 11.07.1981. Along with the written statement, they annexed typed copies of the said documents. On the said documents, no endorsement was made by the defendant's Advocate that the copies were made from or compared with the original as contemplated by Section 63(3) of the Indian Evidence Act, 1872 (for short 'Act') or that the copies were made after comparing with office copies of the said documents as contemplated by Section 63(2) thereof.

4. Mr. Kanade submitted that defendant filed Notice of Motion seeking permission to lead secondary evidence of the said documents. In support of the Motion, affidavit of Mr. Y. Anand Kumar, Managing Director of the defendant was made on 09.03.2015. In paragraph 5, it is asserted that he has witnessed the progress and / or development in respect of the suit transaction from close proximity. He was present at the time when notice dated 01.04.1977 was being addressed to the defendant's clearing agent namely M/s. Pilmen Agents Pvt. Ltd., Cochin. In paragraph 6, it is averred that when the telegram dated 22.03.1978 was being wired to the plaintiff, he was present at that time. His father had sent the said telegram and had taken the second copy of the said telegram from the concerned Post Office.

5. In paragraph 7, it is averred that on 24.07.1980, he accompanied his father to his father's Advocate's office. His father gave instructions to his Advocate Mr. D. Kothandaramaswamy to reply to the plaintiff's Advocate notice dated 26.04.1980. He stated that the said notice was prepared as per the instruction given by his father in his presence. The said documents were prepared in his presence. The plaintiff has denied existence and contents of the said documents. It is stated that due to passage of time, office copies of the said documents are misplaced. As plaintiff has denied existence of the said documents, question of giving

notice to produce the said documents to the plaintiff does not arise.

6. Plaintiff filed reply dated 11.03.2015 contending inter alia that the said documents are not genuine as the defendant did not even make any suggestion about the said documents to the plaintiff's witness during his cross-examination. When the plaintiff in their plaint and evidence made no reference to the said documents, they did not receive the said documents at relevant time. It is further asserted that the documents are not existent. The said documents along with the affidavit of evidence of Mr. Y. Anand Kumar do not constitute either preliminary evidence or secondary evidence as contemplated under the relevant provisions of the Act, and therefore, the application leading secondary evidence does not relate, hence, not maintainable and Motion is liable to be dismissed. It is further contended that though the defendant cross-examined the plaintiff's witness extensively before the Commissioner by putting approximately 128 questions, defendant did not cross examine the plaintiff in respect of the said documents in respect of which the defendant is now filing additional evidence. By the impugned order, the learned trial Judge allowed the Motion.

7. In the impugned order, the learned trial Judge held that under Section 63(5) of the Act, oral accounts of the contents of the document can be given by the same person, who has himself seen it. He also relied upon Section 65(c) and Section 104, and in particular, illustration (b) to contend that when a person wishes to prove, by a secondary evidence, the contents of a lost document, he must prove that the said document has been lost. In other words, he submitted that defendant has not proved that the said documents are lost. Defendant did not contend that these documents were compared with office copy maintained by the defendant. The typed copies produced by the defendant do not fall

within Section 63 of the Act as they are neither preliminary nor secondary evidence. The affiant also does not state that he has seen the office copies of the said documents. He relied upon the decision of this Court in the case of **Bank of India Vs. M/s. Allibhoy Mohammed, 2008 (4) ALL MR 808**, and in particular paragraphs 27 to 31.

8. On the other hand, Mr. Walavalkar supported the impugned order. He submitted that defendant cannot be shut out at this stage to produce the said documents. The learned trial Judge has not marked the said documents and all these questions can be gone into during the cross-examination of the defendant's witness. He also relied upon the decision of this Court in **Vishvanath Vs. Rahibai, AIR 1931 Bombay 105** to contend that the question whether secondary evidence in any given case is rightly admitted is one which is proper to be decided by the Judge of the first instance and depends very much on his discretion and his conclusion should not be overruled except in a very clear case of miscarriage. He submitted that the learned trial Judge has exercised discretion and no case is made out to interfere with the impugned order on the ground that it amounts to a very clear case of miscarriage.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute and is a matter of record that defendant has filed written statement on 11.07.1981 and along with the written statement, they have annexed the typed copies of the said documents. Defendant has filed Motion for permission to lead secondary evidence and in paragraph 7 of the Motion, it is stated that due to the passage of time, defendant has misplaced the office copies of the said documents. Perusal of the oral evidence of the plaintiff's witness Mr. V. Munikrishnan and in particular cross-examination, shows that question

No.80 related to letter dated 01.04.1977. Question No.80 and answer thereof reads thus,

“Q.80. Would it be correct to say that the Defendant made an arrangement of clearing agent through M/s. Pilmen Agents Pvt. Ltd.?”

A. I am not aware of the same.”

10. Question No.89 related to telegram dated 22.03.1978. Question No.89 and answer thereof reads thus,

“Q.89. I put it to you that by telegram dated 22.03.1978, the Defendant intimated the Plaintiff that the goods were of inferior quality and further the Plaintiffs were asked to settle the quality dispute before the Defendant could lift the consignment?”

A. (The witness has answer this question after going through the compilation of Plaintiff's documents). The Plaintiff has not received any such telegram from the Defendant.”

11. Question No.97 related to letter dated 24.07.1980. Question No.97 and answer thereof reads thus,

“Q.97 I put it to you that your Notice dated 26.04.1980 was replied by Defendant's Advocate letter dated 24.07.1980 which was duly received by your Advocate?”

A. I am not aware.”

12. Thus, perusal of cross-examination of Mr. V. Munikrishnan clearly shows that he was confronted with the said documents. It is material to note that the said witness was discharged after the cross-examination was completed and no questions were asked in re-examination. Mr. Kanade submitted that since there was no ambiguity in his evidence, no questions were asked in re-examination.

13. In this regard, it is material to note the reply filed by the plaintiff while opposing the Notice of Motion. In reply, plaintiff specifically asserted that “the said documents are non-existent and are not genuine.

Defendant did not cross-examine the plaintiff's witness in respect of the said documents”, which is prima facie contrary to the evidence of the plaintiff's witness. In fact, plaintiff's witness was confronted with the said documents as is evident from questions No.80, 89 and 97. The plaintiff's witness did not say that the said documents are non-existent or that they are not genuine. It, therefore, cannot be said that the said documents were not in existence as contended by the plaintiff's witness. While allowing the Motion, the learned trial Judge has recorded a finding that since beginning and from pleadings, defendants are claiming existence of the said documents and defendant has every right to lead evidence in rebuttal to the evidence of the plaintiff. Plaintiff has every right to cross-examine the defendant and no serious prejudice will be caused to the plaintiff, if the secondary evidence is allowed.

14. In the case of **Vishvanath** (*supra*), Division Bench of this Court has observed that the discretion exercised by the Court of first instance, should not be interfered with except in a very clear case of miscarriage.

15. Mr. Kanade relied upon the decision of **Bank of India** (*supra*). In that case, the learned Single Judge of this Court has observed in paragraph 27 thus,

“27. ... The loss of original document must be shown in order to lead secondary evidence. Secondary evidence of the document can be allowed to be lead only where original is proved to have existed but was lost or misplaced. ... The person giving oral evidence who accounts for the contents must have himself seen the original document and not a mere copy. "Seen" here will obviously mean "read". A person who proposes to testify the contents of a document, either by copy or otherwise, must have read it. The contents of private documents may be proved as secondary evidence by any witness who has in fact read them. The secondary evidence is required to be proved in the same manner in which primary evidence.”

16. Paragraphs 5 to 7 of the affidavit dated 09.03.2015 of Mr. Y.

Anand Kumar, in my opinion, clearly make out a case for permitting defendant to lead secondary evidence. Reliance placed by Mr. Kanade on the decision of **Bank of India** (*supra*), therefore, does not advance the case of the plaintiff.

17. In the light of the aforesaid discussion, I do not find that the plaintiff has made out a very clear case of miscarriage in permitting defendant to lead secondary evidence. It cannot be said that the learned trial Judge has exercised the discretion arbitrarily and capriciously. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. However, it is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) C.P.C.

18. It is needless to observe that the findings recorded and the observations made herein are only for the purpose of finding out the correctness of the impugned order. All contentions of the parties on merits are expressly kept open. Order accordingly.

(R. G. KETKAR, J.)

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