

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6207 OF 2016**

Shri Tukaram Shridhar Bhat

..Petitioner.

Vs

Erach Boman Khavar and Ors

.. Respondents

Mr. N.V.Walawalkar, Senior Advocate, i/b Uday M. Mahajan,
Advocate for Petitioner.

Mr. Nainesh Amin, Advocate for Respondent no.1.

CORAM :	R.G.KETKAR,J.
RESERVED ON :	23/09/2016
PRONOUNCED ON:	05/10/2016.

ORDER:

1. Heard Mr. N.V.Walawalkar, learned Senior Counsel for the petitioner and Mr. Nainesh Amin, learned counsel for respondent no.1 at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant no.3', has challenged the order dated 11.2.2016 passed by the learned Judge presiding over Court Room No. 19 of the Court of Small Causes at Mumbai below Exhibit 54 in T.E.Suit No.111/127 of 2006 regarding admissibility of documents of plaintiff's witness no.1. The objections were raised by defendant no.3 as regards admissibility of documents sought to be tendered in affidavit of examination-in-chief of PW 1.

3. Rule. Mr. Amin waives service for respondent no.1. As defendant no.3 is the only contesting party who has raised objections, notice on respondents no.2 and 3, being defendant no.1 and 2 respectively, is dispensed with. Having regard to the controversy between the parties and at the request and by consent of parties, rule is made returnable forthwith and petition is taken up for final hearing.

4. Respondent no.1, hereinafter referred to as 'plaintiff', has instituted suit against respondents no.2 and 3, hereinafter referred to as 'defendants no.1 and 2 respectively' and petitioner/defendant no.3, for recovery of possession of flat no.12A on the second floor and Garage no.1 on the ground floor of a building known as New Sagar Darshan Co-operative Housing Society Ltd, situate at 81/82, Bhulabhai Desai Road (Warden Road), Mumbai 400 026 (for short, 'suit premises'). Plaintiff came with the case that by agreement of leave and licence dated 17.6.1975, the plaintiff had allowed M/s Poysha Industrial Company Limited, defendant no.2, to occupy the suit premises. The paid-up share capital of defendant no.2 is more than one crore and consequently defendant no.2 is not entitled to protection of rent act in view of under section 3(1)(b) of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). Plaintiff came with the case that defendant no.2 started claiming to be

tenant in respect of the suit premises. The plaintiff had instituted R.A.E. Suit No. 901/2695 of 1990 invoking ground of reasonable bonafide requirement. Defendant no.3 is impleaded as one of the party-defendant. Plaintiff has also referred to order dated 9.1.1998 passed by this Court in Company Petition No. 201 of 1994 ordering winding up of defendant no.2.

5. Defendant no.3 filed written statement dated 20.1.2010 resisting the suit. Defendant no.3 contended that defendant no.2 became deemed tenant on 1.2.1973. Till in or about the year end of 1974, the suit premises were occupied by one S.A.Venkatraman. He has vacated the same at the end of 1974 after which the suit premises were lying vacant. Prior to 1974, defendant no.3 was occupying flat no.8 on 8th floor in the building known as "Sky Scrapper", situate at Bhulabhai Desai Road, Mumbai, as deemed tenant. Defendant no.3 is occupying the suit premises as a lawful sub tenant.

6. On the basis of pleadings of the parties, the learned trial Judge framed the necessary issues. The plaintiff filed affidavit of evidence dated 15.3.2015. Defendant no.3 filed detailed objections dated 5.4.2015 objecting to documents filed by the plaintiff along with affidavit of evidence. By the impugned order, the learned trial Judge has marked documents as exhibits at Sr.No. 1,3,4,5,6,7,8 and 9. Documents at sr.no.10 and 12 being

photocopies were not exhibited and were marked as Article "X" Collectively for identification. It is against this order, defendant no.3 has instituted the present petition.

7. PW 1 filed original share certificate at sr.no. 1. The learned trial Judge marked that document as Exhibit -56 on the ground that it came from proper custody and has been duly referred to in the evidence of PW 1. The defendants can cross examine PW 1 on that document. Mr. Walawalkar submitted that in the share certificate there is no reference to suit premises, namely, flat no.12A and garage no.1 or flat no.13 or garage no.17. The share certificate issued by the society has to be proved from the records of the society after examining the original records. The plaintiff did not rely upon the said share certificate. The said document is beyond the pleadings and therefore the share certificate is required to be marked as Article for identification and proof.

8. PW 1 produced original Bills, Receipt and Ledger Account of the suit premises at sr.no.3. The learned trial Judge marked them as Exhibit-57 Collectively on the ground that they have come from proper custody. They have been duly referred to in the evidence by PW 1. The defendants can cross examine PW 1 on that document. Mr.Walawalkar submitted that Bill No.13 dated 1.1.2014 and Receipt No. 2818 dated 2.7.2014 are for the period

1.4.2014 to 30.6.2014. These documents are after institution of the suit. The plaintiff has not amended the plaint so as to rely upon these documents and consequently they cannot be received in evidence. The plaintiff did not file affidavit of evidence for relying upon these documents. It is not the plaintiff's case that Flat no.12A and 13 are one and the same and likewise garage no.1 and garage no.17 are one and the same. Document produced at sr.no.3 has to be marked as article for identification and to be proved in accordance with Indian Evidence Act, 1872 (for short, 'Act'). Bill dated 1.1.2014 contains hand written portion and interpolations. The handwritten portion has to be proved according to the law of evidence. The affidavit of evidence in respect of handwritten portion as also contents is silent. The signature of the concerned person is also not identified. The said has to be marked as article for identification and is required to be proved according to law under the Act.

9. As far as Receipt no.2818 dated 2.7.2014 is concerned, it contains handwritten portion which has to be proved. Even in this receipt whether it is in respect of Flat no.12A and G-17 is also not clearly specified. The plaint refers to garage no.1 and not 17. Thus, the receipt is beyond the pleadings and has to be marked as article for identification.

10. As far as the ledger account is concerned, it is a secondary

evidence. Unless the original ledger account is produced and leave of the court is obtained, the said document cannot be marked as an exhibit. The authenticity of the ledger account cannot be presumed as it does not bear signature of any of the office bearers of the society nor the rubber stamp of the society is affixed. It is also not on the letter-head of the society. The ledger account has to be marked as an article for identification and is required to be proved according to the law under the Act.

11. Documents at sr. no.4 are the letters dated 7.5.1981 and 4.2.1985 addressed by defendant no.2 to father of the plaintiff. These letters are not referred in the plaint or in the list of documents annexed to the plaint. There are no affidavit of documents till date. The letters cannot be exhibited unless author of the said documents are examined. These letters are private documents. The affidavit of evidence is silent regarding the contents of these documents. These documents therefore cannot be marked as exhibits and are required to be marked as articles.

12. Mr. Walawalkar submitted that the plaintiff has produced certified true copy of last Annual Return of defendant no.2 at sr.no.6. He submitted that along with the plaint, the plaintiff had filed the Annual Return of defendant no.2 being certified true copy on a stamp paper bearing no. A 22 1086 dated 8.6.2005 for

showing paid-up share capital of defendant no.2 as on 28.6.1996. However, that is not produced in the evidence. The annual return is on a Stamp bearing no. OX342313 issued on 15.4.2010 for a different period. Thus, the document produced along with the affidavit is obtained during pendency of the suit. The document is not referred in the pleading and the list of documents and is beyond the pleadings. No affidavit of documents are filed even till today. No leave of the Court is sought to rely upon the documents obtained during the pendency of the suit and, therefore, the said document cannot be received in evidence. Even otherwise, the plaintiff has not produced entire document.

13. Mr. Walawalkar submitted that PW 1 produced original carbon copy of affidavit-in-reply signed by Mr. B.L.meena, Official Liquidator in R.A.E. Suit No. 228/336 of 2001 at sr.no.7. The plaintiff has not produced original affidavit-in-reply. No procedure is followed by leading a secondary evidence. The said document cannot be exhibited unless author is examined as plaintiff's witness.

14. As far as documents at sr.no.8 and 9 are concerned, the plaintiff has produced authenticated true copy of order passed by this Court in Company Petition No.720 of 2006 and certified copy of order passed by the Apex court in S.L.P (Civil) No.25369

of 2010. These are orders passed during pendency of the suit. Unless and until the pleadings are amended in terms of the said orders, as also the list of documents annexed to the plaint are consequently amended, these documents cannot be taken on record and marked exhibits. These documents are not forming part and parcel of pleadings. That apart, no affidavit of documents are filed.

15. In support of his submissions, Mr. Walawalkar relied upon:-

- (i) M/s K.T.Kubal & Co Vs. Mujibur Rehman Haji Israr Alam siddiqui, Writ Petition No. 10400 of 2013 decided by (Coram: Anoop V. Mohta, J.) on 20.11.2013; as also
- (ii) Hemendra Rasiklal Ghia Vs. Subodh Mody, 2008 (6) Mh.L.J. 886 (FB).

16. On the other hand, Mr. Amin supported the impugned order. Mr. Amin has taken me through the affidavit of evidence filed by PW 1 and submitted that the learned trial Judge rightly marked these documents as exhibits. In so far as document at sr. no. 7, i.e. original carbon copy of affidavit in reply signed by Mr. B.L.Meena, is concerned, he submitted that though it is a carbon copy, original signature of Mr. B.L.Meena appears on that affidavit. It has been duly referred to in the evidence of PW 1. The learned trial Judge was, therefore, justified in observing that the defendants can cross examine PW 1 on this document. In any

case, he submitted that as it is a carbon copy, he will follow the procedure for leading secondary evidence. Mr. Amin relied upon the decision of this Court in Prabha P. Shenai Vs. Venkatesh Construction & Earch Movers Co., Writ Petition (ST) No 25390 of 2014 (Coram: R.M.Savant, J.). He, therefore, submitted that no case is made out for interfering with the impugned orders.

17. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As far as document at sr.no.1 is concerned, PW 1 has stated in the affidavit that upon the demise of his father on 2.1.2002, the suit premises is transferred in the names of his mother Ms Humayun Boman Irani, brother Parvez Boman Khaver. His mother Humayun and brother Parvez have expired and thereafter on his application and after completing necessary formalities, his name has been added by the society as its members in the share certificate. The plaintiff has become sole owner of the suit premises. It is further stated that the said flat is identified in the society's records as Flat no.12A as also Flat no.13, similarly, garage no. 1 as garage no.17. Flat no.12A and Flat no.13 is one and the same. Likewise, garage no.1 and garage no. 17 is one and the same. It is not in dispute that PW 1 has produced original share certificate. Perusal of the share certificate shows entries in favour of Humayun Irani and Parvez

Khaver on 13.1.2003 and thereafter in the name of the plaintiff on 31.5.2005. The learned trial Judge has marked documents as Exhibit 56 on the ground that it is original share certificate coming from proper custody. It is duly referred in the evidence of PW 1 and that defendants can cross examine PW 1 on that document. In view thereof, I do not find that the learned trial Judge has committed any error in marking these documents as exhibits.

18. As far as documents at sr.no.3 are concerned, PW 1 has produced original Bills and Receipt. As far as ledger account is concerned, Mr. Amin submitted that it is computerized statement and, therefore, does not bear signature of office bearers of the society as also seal. The learned trial Judge has marked these documents at Exhibit-57 Collectively on the ground that they are coming from proper custody and have been referred to in the evidence of PW 1. The defendants can cross examine PW 1 on these documents. PW 1 has produced original bills and receipt as also computerized statement. I do not find that the learned trial Judge has committed any error in marking these documents as Exhibit 57 Collectively. It is needless to state that the plaintiff will have to prove the contents of these documents.

19. PW 1 has produced original letters dated 7.5.1981 and 4.2.1985. The learned trial Judge has marked these documents

at Exhibit-58 Collectively on the ground that they are 30 years old and have been duly referred to in the evidence of PW 1. The defendants can cross examined PW 1 on that document. As PW 1 has produced original letters, I do not find that the learned trial Judge has committed any error in marking these documents as Exhibit 58 Collectively.

20. PW 1 has produced certified true copy of last Annual Return of defendant no.2. It bears seal and signature of the concerned authority. The learned trial Judge has marked these documents at Exhibit 60. Mr. Walawalkar submitted that it is incomplete annual return of defendant no.2. Mr. Amin submitted that PW 1 has produced only relevant portion of the Annual Return for substantiating his case that paid-up share capital of defendant no.2 exceeds Rs. One Crore. In view thereof, I do not find that the learned trial Judge has committed any error in marking last Annual Return of defendant no.2 at Exhibit 60.

21. As far as document at sr.no.7, namely, carbon coy of affidavit in reply signed by Mr. B.L.Meena is concerned admittedly it is a carbon copy and not original copy of the affidavit in reply of Mr B.L.Meena. In view thereof, the learned trial Judge was not justified in marking this document as Exhibit-61. The learned trial Judge ought to have marked this document as Article and the plaintiff ought to follow procedure for leading the secondary

evidence. To this extent, the impugned order deserves to be modified accordingly.

22. PW 1 has produced authenticated true copy of order passed in Company Petition No. 720 of 2006 and certified copy of order passed in S.L.P (Civil) No. 25369 of 2010. The learned trial Judge has marked these documents at Exhibit-62 Collectively on the ground that they are Court records and have come from proper custody. In view thereof, I do not find that the learned trial Judge has committed any error in marking these documents as Exhibit-62 Collectively.

23. Mr. Walawalkar relied upon order dated 20.11.93 passed by the learned Single Judge of this Court in M/s K.T. Kabul & Co., (supra). In that case, by one line order the learned trial Judge had marked the document as Exhibit. In view of peculiar facts obtaining in that case, this Court set aside the order on the ground that the provisions of C.P.C. were not followed by the learned trial Judge. In my opinion, the said decision is not applicable to the facts of the present case.

24. Mr. Walawalkar relied upon Full Bench decision of this Court in the case of Hemendra Rasiklal Ghia (supra). In paragraph 35, the Full Bench extracted the questions which fell for determination. In paragraph 71, the Full Bench broadly classified documents into three classes, namely, (i) that objection to the

document which is sought to be provided is itself insufficiently stamp and the objection relates to deficiency of stamp duty of the document; (ii) where the objection does not dispute admissibility of document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient; and (iii) the objection that the document which is sought to be proved is ab initio inadmissible in evidence.

25. The Full Bench dealt with first category in paragraphs 72 and 73, second category in paragraphs 74 and 75 and third category in paragraph 76 and 78. In paragraph 89, the Full Bench observed that the different cases will have different facts. Each case must be dealt with on its own facts. No straitjacket formula can be evolved. The C.P.C. has been amended from time to time in order to meet the changing situations. In paragraph 92, Full Bench answered question-A as under:

“92. In view of the above analysis of the statutory provisions and our discussion, we, accordingly, articulate our conclusions as follows:

Answer to Question-A:

As already noticed, (i) objection to the document sought to be produced relating to the deficiency of stamp duty must be taken when the document is tendered in evidence and such objection must be judicially determined before it is marked as exhibit;

(ii) Objection relating to the proof of document of which admissibility is not in dispute must be taken and judicially determined when it is marked as exhibit;

(iii) Objection to the document which in itself is inadmissible in evidence can be admitted at any stage of the suit reserving decision on question until final judgment in the case.”

26. Mr. Walawalkar submitted that the present case is covered by clause (iii), extracted herein above. Perusal of clause (iii) extracted herein above shows that objection to the document which in itself is inadmissible in evidence can be admitted at any stage of the suit reserving decision on question until final judgment in the case. In my opinion, it cannot be said that the documents marked as exhibits by the learned trial Judge are inadmissible in evidence. In any case, it is settled principle of law that mere marking of documents as exhibits does not amount to proof of its contents. Even though the documents are marked as exhibits, the plaintiff will have to prove the contents thereof. In view thereof, reliance placed on Full Bench decision by Mr. Walawalkar does not advance the case of defendant no.3.

27. Mr. Amin relied upon the decision of this Court in Prabha P. Shenai (supra). In that case, the question that fell for consideration was whether the documents which were exhibited can be de-exhibited. In my opinion, defendant no.3 has challenged the order itself by which certain documents are marked as exhibits. In view thereof, the said decision is not applicable to the present case.

28. In the light of the aforesaid discussion, Petition partly succeeds. The plaintiff will lead secondary evidence in respect of document at sr.no.7, namely, carbon copy of affidavit in reply of Mr B.L.Meena. To that extent the impugned order is modified. Rest of the order is upheld. Rule is partly made absolute in the aforesaid terms with no order as to costs.

Parties to act on the authenticated copy of this order.

(R.G.ketkar, J.)