

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION*

***APPEAL FROM ORDER NO. 861 OF 2013
Along with
Civil Application No.1248 of 2013***

Vilas Pandurang Chile
(Since deceased through LR's).

... Appellant

V/s.

Krishnat Rajaram Chile
(Since deceased through Lrs)

(a) Smt. Shewanta Krishnat
Chile & ors.

... Respondents.

Mr.Chetan Patil, for the Appellant / Applicant.

Mr.R.V.Pai a/w A.R.Pai i/b Mr.Kedar Lad, for Respondent Nos.1-A, 1-B,
3, 4, 5, 6, 9, 10.

***Coram : N.M. Jamdar, J.
Friday 10 June, 2016.***

Oral Order :-

By this Appeal, the Appellant challenges the Judgment and Order passed by the District Judge, Kolhapur dated 31 January 2013 setting aside the Judgment and Decree in Regular Civil Suit No.78 of 2003 dated 25 September 2009 passed by Civil Judge Junior Division, Panhala and remanding the proceedings to the learned Civil Judge.

2 The Suit bearing No.78 of 2003 was filed by the Respondents for specific performance of an agreement stated to be entered into between the parties on 2 May 1975. In this suit an application was made by

Respondents under Section 65 of the Indian Evidence Act, 1872 for permission to lead secondary evidence which was rejected by the learned Civil Judge, by order dated 10 August 2007. Thereafter the suit proceeded and the learned Civil Judge by his Judgment and Decree dated 25 September 2009 dismissed the suit. Appeal No.23 of 2010 was filed by the Respondents in the District Court, Kolhapur. The learned District Judge, came to the conclusion that the application for leading secondary evidence taken out by the Respondents was wrongly rejected by the learned Civil Judge which caused substantial prejudice to the Respondents and therefore, the Judgment and Decree cannot be sustained and accordingly remanded the proceedings to the learned Civil Judge.

3 Mr.Chetan Patil, the learned counsel for the Appellant submitted that the order passed by the learned District Judge is completely erroneous and contrary to the provisions of Section 65 of the Act. He submitted that the learned Civil Judge had considered all the aspects while rejecting the application of the Respondents as well as by dismissing the suit. He submitted that the draft of the document is bereft of any particulars and its existence is not proved by the Respondents. He submitted that the theory of the Respondents that document was lost from the possession of the Talathi also could not be accepted as the said Talathi was not examined. He submitted that ingredients of Section 65 as expounded by the Apex Court in the case of *H.Siddiqui (dead) by LRs. vs. A.Ramalingam* -[2011(4) Mh.L.J. pg.88], were not present and therefore, the learned trial Judge was right in rejecting the application and dismissing the suit. He submitted that when there was no foundation laid

by the Respondents, the learned District Judge could not have remanded the proceedings to the trial Court. Mr.R.V.Pai, the learned counsel for the Respondents on the other hand submitted that, the person who executed the agreement has been examined, the Kotwal of the concerned area was examined and he accepted that documents were given to his office which he forwarded to Talathi and therefore, existence of the document was proved and therefore, the learned District Judge was right in remanding the suit. He also submitted that the Appeal from order which challenges an order of remand must conform to the ingredients of section 100 of the Code of Civil Procedure, since it is an appeal from a final order.

4 I have considered the submissions. The Apex Court has in case of *H.Siddiqui* laid down as under -

'10. Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide: The Roman Catholic Mission and Anr. v. The State of Madras and Anr. : AIR 1966 SC 1457; State of Rajasthan and Ors. v.

Khemraj and Ors. ; Life Insurance Corporation of India and Anr. v. Ram Pal Singh Bisen : (2010) 4 SCC 491; and M. Chandra v. M. Thangamuthu and Anr. : (2010) 9 SCC 712.'

The criteria laid down by the Apex Court is clear.

5. The suit for specific performance filed by the Respondents was based entirely on the document. By not allowing the Respondents to lead secondary evidence, the entire foundation of the Respondents case has been taken away and therefore, in cases such as the present one, the permission to lead secondary evidence assumes substantial importance. The learned District Judge has noted that the Respondents examined one Gajanan who was working as a Kotwal and he deposed that on 9 April 1990 one of the Respondents made an application along with the documents which he accepted and handed over to concerned Talathi. The witness summons was issued to Talathi. The Talathi replied stating that documents could not be found. It was stated that the document in question was annexed to the application. The Appellants had admitted in the cross-examination that the agreement was executed. One Balwant, who was examined, was stated to be present at the time of execution. Therefore sufficient evidence was led by the Respondents regarding the existence of the documents. The conclusion reached by learned District Judge that the requirement of Section 65 were met therefore cannot be stated to be perverse. Whether the evidence so led by the Respondents is to be accepted or not is a completely different matter, but by not allowing the Respondents to lead secondary evidence in these circumstances, the entire claim of the Respondents has been nullified. The learned District Judge therefore was not in error in remanding the proceedings to the trial

Court for reconsideration and granting permission to the Respondents to lead secondary evidence. Since I have found that challenge raised by the Appellant is not sustainable on merits, the larger question raised by Mr.Pai regarding the applicability of Section 100 of the Act, need not be gone into.

6. It is clarified that the liberty given by learned District Judge, to lead additional evidence is *qua* only the document in question. The learned District Judge had directed the learned Civil Judge to decide the matter as far as possible within period of six months. The same time limit will apply from the date the writ of this Court reaches the Civil Court registry to communicate the order forthwith. The learned Civil Judge, to take necessary steps. All contentions of the parties on merits are kept open.

7. The Appeal from Order is accordingly dismissed. The Civil Application also stands disposed of.

(N.M. Jamdar, J.)