

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITIONS NO. 7200 OF 2016, 7201 OF 2016 & 7202
OF 2016**

Betty Eateries Private Limited
and Ors

..Petitioners.

Vs

Indrajeet Singh Bagga and Ors

.. Respondents

Mr. H.S. Shreepad Murthy i/b Mr. Abhishek Patil, Advocate for
Petitioners.

Mr. Niranjan Pandit i/b Abdetaiyeb Motiwala, Advocates for
Respondents no.1 and 2.

CORAM : R.G.KETKAR,J.

DATE : 27/06/2016

PC:

1. Heard Mr. H.S.Shreepad Murthy, learned counsel for the petitioners and Mr. Niranjan Pandit, learned counsel for respondents no.1 and 2 in all petitions at length. Rule. Mr. Pandit waives service on behalf of the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and Petitions are taken up finally.

2. By these Petitions under Article 227 of the Constitution of India, the petitioner, herein after referred to as 'defendant no.1', has challenged the orders dated 5.1.2016 passed by the learned Judge presiding over Court Room no.38 of the Court of Small Causes at Mumbai in L.E.& C. Suits No. 63/81 of 2011, 64/82 of 2011 and 65/83 of 2011 regarding admissibility of documents

filed by the defendants.

3. As the common questions of law and facts are raised in these petitions, the same can conveniently be disposed of by this common order. For appreciating the controversy raised between the parties, facts from Writ Petition No. 7201 of 2016 are taken into consideration.

4. The petitioners filed affidavit in lieu of examination-in-chief of D.W. 1. Along with that affidavit, he also filed documents at Sr. Nos. 1 to 16 vide list at Exh.31. The respondents, hereinafter referred to as 'plaintiffs', filed their Say at Exh.32 and objected to exhibiting the documents on the ground that documents at Sr. Nos 1 and 2, namely, Memoranda of Understanding (MOUs) dated 7.6.2005 were not produced. They are not signed by the parties or witness who have led evidence to prove the same. Hence, the MOUs produced at Sr. Nos 1 and 2 cannot be exhibited.

5. As far as document at Sr. No.3 is concerned, the plaintiffs contended that it is not the certified copy of plaint and it purports to be ordinary photocopy and, therefore, the same cannot be exhibited. As far as the documents at sr. nos 4 to 16 are concerned, the plaintiffs contended that they are not referred to or relied upon by the defendants in the written statement. They are also not relevant for deciding the controversy raised in the suits. The statements are not certified as true copies by the

concerned Bank. The documents are not proved in accordance with law. No evidence is led about the signature and contents of the documents. Witness is not author of the document. The negatives or electronic image or chips are not produced. Being secondary evidence, the photographs are not admissible in evidence.

6. By the impugned order, the learned trial Judge marked documents at Sr. Nos. 5 to 8 as exhibits. As far as document at Sr. No.3, namely copy of the plaint in suit No. 1106 of 2007 is concerned, the learned trial Judge marked it as Article-Y-2 as it was a photocopy. Mr. Murthy submits that he will file appropriate proceedings for leading secondary evidence and will produce certified copy of the plaint in that suit. Mr. Murthy has not pressed his challenge in respect of documents at Sr. Nos. 12 to 16 and submitted that he will agitate this issue as and when occasion arises. In view thereof, controversy remains only in respect of documents at Sr. Nos. 1,2, 4 and 9 to 11.

7. As far as the documents at sr.nos.1 and 2 are concerned, they are copies of MOUs dated 7.6.2005. It is not in dispute that pursuant to order dated 29.9.2015 ,witness summons was issued to Advocate P.D.Gandhi, calling upon him to produce original of these MOUs. Accordingly, original was produced on record. There is dispute between the parties as regards copy produced by the

defendants. In view thereof, learned counsel for the parties have initialed on the agreed copies of MOUs at Sr. Nos. 1 and 2 by plaintiff no.1 and defendant no.2. Mr.Pandit assures that the plaintiffs will produce the copies of MOUs dated 7.6.2015 duly initialed by plaintiff no.1 and defendant no.2 in the trial Court so as to enable the learned trial Judge to mark them as exhibits. In view thereof, the controversy as far as documents at sr. nos. 1 and 2 are concerned, does not survive.

8. As far as document at Sr. No.4, namely, original three statements of accounts in the handwriting of plaintiff no.2 is concerned, Mr. Murthy invited my attention to the written statement filed on behalf of the defendants and in particular paragraph 4(e) thereof. The relevant portion of paragraph 4(e) of the written statement reads thus:

“The cumulative effect and the total amount given up by these defendants have been admitted by the plaintiffs as per their own calculations which I crave leave to refer and rely upon.”

Mr. Murthy invited my attention to the affidavit in examination-in-chief of defendant no.2 and in particular paragraph 10. The relevant portion of paragraph 10 reads thus:

“ The statement of a settlement of accounts was prepared in between the family members. Plaintiff no.2 has checked the statement in his own handwriting and has also prepared handwritten statement by using pencil.”

9. The learned trial Judge did not mark these statements as

exhibits but marked them as Article-Y-3 (1 to 3) on the ground that evidence of D.W.1 is not sufficient to prove the contents of the documents.

10. Mr. Murthy submitted that these are the original statements and, therefore, the learned trial Judge ought to have marked these as exhibits subject to proof of the contents of these documents.

11. On the other hand, Mr. Pandit submitted that perusal of the statements shows that they are allegedly in the name of plaintiff no.1-I.S.Bagga. In paragraph 10, defendant no.2 deposed that it is in the handwriting of plaintiff no.2. He, therefore, submitted that the learned trial Judge was justified in not marking these statements as exhibits. I do not find merit in this submission. The learned trial Judge did not mark them as exhibits on the ground that the evidence of D.W. 1 is not sufficient to prove the contents of the documents. Perusal of the portion of the written statement as also evidence of defendant no.2, extracted herein above, shows that it is the case of the defendants that the calculations are made by the plaintiffs. In view thereof, these statements shall be marked as exhibits subject to proof of the contents thereof. In my opinion, the learned trial Judge was not justified in marking them as Article-Y-3 (1 to 3) on the ground that the evidence of D.W. 1 is not sufficient to prove the contents of the documents.

The learned trial Judge failed to appreciate that this is not a stage of proving the contents of the documents. In view thereof, the learned trial Judge shall mark these statements as exhibits subject to proof of the contents thereof including handwriting of plaintiff no.1 or plaintiff no.2.

12. As far as the document at sr. no.9 is concerned, Mr. Murthy submitted that in paragraph 10(e) of the written statement, defendants asserted thus:

“These defendants submit that there was also further liability payable to the builders where business of “SLICE OF LIME” is carried on. The said liability is cleared by these defendants.”

13. Mr. Murthy invited my attention to the evidence of D.W. 2 and in particular paragraph 10(f) which is to the following effect:

“These defendants also paid an amount of Rs.10,94,000/- to M/s Deepak Builders Private Limited for the purpose of regularization of basement where the business of SLICE OF LIME is being conducted”

Mr. Murthy invited my attention to receipt issued by Deepak Builders Pvt. Ltd confirming that they have received from Trilok Singh Ajmani (HUF) aggregate sum of Rs. 19 lacs by various cheques for regularization of the basement known as Slice of Lime, being the business conducted by the aforesaid in the said premises. He submitted that the original receipt is produced by the defendants. The learned trial Judge marked this receipt as Article-Y-4 on the ground that the defendants have to examine

appropriate witness to prove this document.

14. Mr. Pandit supported this part of the order on the ground that in the examination in chief defendant no. 2 deposed that they have paid amount of Rs.10,94,000/-, but the receipt is in respect of 19 lacs. It is, however, material to note that that is not a ground on which the learned trial Judge refused to mark the document as exhibit. It is also not in dispute that the defendants have produced original receipt form M/s Deepka Builders Pvt Ltd. In my opinion, the learned trial Judge should have marked this document as exhibit subject to proof of the contents of the same.

15. As far as documents at sr.no.10 and 11 are concerned, the defendants have produced original certified copy of the agreements which are marked as Article-Y-5 and Article-Y-6. Mr Murthy submitted that under the MOUs dated 7.6.2015 this property was allotted to the plaintiffs who in turn sold the same by these agreements. As the defendants have produced original certified copies, the learned trial Judge ought to have marked them as exhibits subject to proof of the contents of the same. Mr. Pandit submitted that the defendants have to examine party to the said agreements to prove the contents thereof. In my opinion, once the original certified copies are produced by the defendants, the learned trial Judge ought to have marked them as exhibits subject to proof of the contents thereof. Hence, the

impugned order is modified in the following terms:

- (i) As far as documents at Sr. Nos 1 and 2 are concerned, parties have tendered copies of MOUs dated 7.6.2015 which are duly initialed by plaintiff no.1 and defendant no.2 and Advocates herein. Mr Pandit assures that he will produce these MOUs in the trial Court for marking them as exhibits.
- (ii) As far as documents at Sr. No.3 is concerned, statement made by Mr. Murthy that he will follow due process of law for leading secondary evidence by producing certified copy of the plaint in Suit No. 1106 of 2007, is recorded.
- (iii) As far as original three statements at Sr No.4 are concerned, the learned trial Judge will mark them as exhibits subject to proof of the contents thereof.
- (iv) As far as document at Sr. No.9 is concerned, the learned trial Judge will mark the receipt as exhibit subject to proof of the contents thereof.
- (v) As far documents at Sr. Nos. 10 and 11, viz. original certified copies of the agreements are concerned, the same shall be marked as exhibits subject to proof of the contents thereof.
- (vi) As far as documents at sr. nos 12 to 16 are concerned, statement of Mr. Murthy that at this stage the defendants are not pressing their challenge, is recorded subject to clarification that all contentions of the parties in that regard are kept open.

(vii) Rule is partly made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)