

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6007 OF 2010**

Shri Annasaheb (Anandrao)
Raoji Yadav,

Petitioner

Vs

1. Shri Dasrath Bhiku alias
Bhikubai Dhudhal, since
deceased, .. and Ors

.. Respondents

Mr. Rajesh S. Patil, Advocate for Petitioner.
None for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 09/03/2016

PC:

1. Heard Mr. Rajesh Patil, learned counsel for the petitioner.
2. By this Petition under article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 15.6.2010 passed by the learned Addl. Civil Judge, Jr. Dn., Saswad, below Exh.106 in Regular Civil Suit No.66 of 2005. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as 'plaintiff', for leading secondary evidence.
3. By order dated 5.8.2010, this Court issued Rule. As far as interim relief is concerned, Rule on interim relief was issued and in the meanwhile ad-interim relief in terms of prayer clause (b) was granted. By order dated 6.3.2014 in Civil Application No.585 of 2014, this Court directed listing the petition for final hearing in the week commencing from 24.3.2014. By order dated

17.6.2015, notice was issued to respondent no. 12. Liberty was also given to the petitioner to serve respondent no.12 privately by R.P.A.D, Speed Post, Courier and to file acknowledgments along with affidavit of service. In pursuance thereof, the petitioner has filed affidavit of service of respondent no.12 along with postal acknowledgments. Office remark shows that respondent no.12 is served. All the respondents are duly served. In view thereof and in view of order dated 6.3.2014, I have heard Mr. Patil at length. Despite service, none appears for the respondents.

4. Mr. Patil submitted that the plaintiff filed application dated 21.4.2010 Exh.106 under section 65 of the Indian Evidence Act, 1872 (for short, 'Act') for leading secondary by producing certified copy of sale deed dated 4.6.1973. He submitted that the plaintiff had produced photocopy of the sale deed along with list of documents at Exhibit 31. During the course of cross examination of defendants, it was agreed that they will produce original sale deed. However, the defendants did not produce original sale deed. In view thereof, the plaintiff filed application seeking permission to lead secondary evidence by producing certified copy of the sale deed. By the impugned order, the learned trial Judge rejected the application only on the ground that the plaintiff closed his evidence and cross examination of the defendants is almost nearing an end. As the plaintiff did not

make application under section 65 of the Act for leading secondary evidence after closing his evidence, he cannot be permitted to lead evidence as there is no such provision under the Act.

5. Mr Patil relied upon the decision of the Apex Court in the case of Billa Jagan Mohan Reddy Vs. Billa Sanjeeva Reddy, 1994 (4) SCC 659 as also Division Bench Judgment of this Court in the case of Shantibai K Vardhan Vs. Meera G Patel, 2009 (Supp) Bom C.R. 445. The Division Bench considered the decision of the Apex Court in the case of Bill Jagan Mohan Reddy (supra) as also provisions of Order VII, VIII, XIII, XVIII, Rule 17A, Order XLI, Rule 27 of C.P.C. Division Bench also considered decision of Calcutta High Court in the case of Kejriwal Enterprises Vs. General manager, Ordinance Factory, AIR 2004 Cal 225.

6. I have considered the submissions advanced by Mr. Patil. I have also perused the material on record. As noted earlier, the learned trial Judge rejected the application only on the ground that the plaintiff's evidence is over and cross examination of the defendants' witness is nearing an end. There is no provision under the Act by which the plaintiff can be allowed to lead evidence after closure of his evidence.

7. In the case of Billa Jagan Mohan Reddy (supra), the Apex Court has observed thus:

“Order XIII Rule 1 provides thus:

“1. Documentary evidence to be produced at or before settlement of issues -

(1) The parties or their pleaders shall produce, at or before the settlement of issues, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced. (2) The Court shall receive the documents so produced; Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.” It is clear from its bare reading that the parties or their counsel shall be required to produce all the documentary evidence in their possession or power which they intend to rely on to establish their right along with pleadings or before settlement of the issues. The Court is enjoined under Sub-rule (2) to receive such documents provided they are accompanied by an accurate list thereof prepared in the prescribed form. If they are not in the party's possession or custody, it shall be filed by the party along with an application to condone the delay in filing them. The explanation for delay is not as rigorous as one filed under Section 5 of the Limitation Act. These documents were not in the possession or custody of the appellant, but they have obtained certified copies from the revenue authorities and sought to be produced. It is undoubted that there is a delay in production of the said documents. But the trial court had stated that the application was filed at the stage of arguments, seeking to produce those documents and sought to rely upon the documents. **It is settled law that, if the documents are found to be relevant to decide the real issue in the controversy and when the Court felt that interest of justice requires that the documents may be received, exercising the power under Order 41, Rule 27 C.P.C. the appellate court would receive the documents and consider their effect thereof. When such is the position, when the documents are sought to be produced in the trial court, before the arguments are completed, normally they may be received; an opportunity given to prove them and rebuttal if any and their relevance and effect may have, be considered in deciding the issues arose in the controversy.** Under these circumstances, the trial court was not justified in refusing to condone the delay and to receive the documents. The High Court also committed the same error in not considering the effect in this behalf in

the right perspective. The orders are accordingly set aside and the delay in filing the documents is condoned. The Trial Court is directed to receive the documents, give an opportunity to the parties to prove the documents and if necessary, opportunity to the respondent to rebut the same and then dispose of the reference according to law.”

8. In the case of Shantibai K. Vardhan (supra), Division Bench, after considering the provisions of Order 13, Rule 1, has observed thus:-

“It is clear from its bare reading that the parties or their counsel shall be required to produce all the documentary evidence in their possession or power which they intend to rely on to establish their right along with pleadings or before settlement of the issues. The court is enjoined under Sub-rule (2) to receive such documents provided they are accompanied by an accurate list thereof prepared in the prescribed form. If they are not in the party's possession or custody, it shall be filed by the party along with an application to condone the delay in filing them. The explanation for delay is not as rigorous as one filed under Section 5 of the Limitation Act. These documents were not in the possession or custody of the appellants, but they have obtained certified copies from the Revenue Authorities and sought to be produced. It is undoubted that there is a delay in production of the said documents. But the trial court had stated that the application was filed at the stage of arguments, seeking to produce those documents and sought to rely upon the documents. It is settled law that, if the documents are found to be relevant to decide the real issue in the controversy, and when the court felt that interest of justice requires that the documents may be received, exercising the power under Order 41 Rule 27 CPC the appellate court would receive the documents and consider their effect thereof. When such is the position, when the documents are sought to be produced in the trial court, before the arguments are completed, normally they may be received; an opportunity given to prove them and rebuttal if any and their relevance and effect they may have, be considered in deciding the issues arising in the controversy. Under these circumstances, the trial court was not justified in refusing to condone the delay and to receive the documents. The High Court also committed the same error in not considering the effect in this behalf in the right

perspective. The orders are accordingly set aside and the delay in filing the documents is condoned. The trial court is directed to receive the documents, give an opportunity to the parties to prove the documents and if necessary, opportunity to the respondent to rebut the same and then dispose of the reference according to law."

9. If the tests laid down in the aforesaid decisions are applied to the facts of the present case, in my opinion, the learned trial Judge was not justified in rejecting the application. Hence, the following order.

(i) Impugned order dated 15.6.2010 passed by the learned trial Judge is quashed and set aside. Application Exhibit-106 stands allowed.

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

(R.G.KETKAR, J.)