

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9213 OF 2016

Suresh Fatichand Hinduja ... Petitioner
Vs.
Harish Kishinchand Chandani ... Respondent

Ms Kavita Arvind Shah for Petitioner.
Mr. Harish K. Chandani, Respondent in person.

CORAM : R. G. KETKAR, J.
DATE : DECEMBER 16, 2016

P.C. :

Heard Ms Shah, learned Counsel for petitioner and Mr. Chandani, respondent in person at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant', has challenged the judgment and order dated 18.07.2016 passed by the learned Judge, City Civil Court, Greater Bombay below exhibit-32 in Short Cause Suit No.7160 of 2004. By that order, the learned trial Judge has rejected the application made by the defendant for production of the electronic record containing audio recording of conversation between plaintiff and defendant from the defendant's mobile No.9820030111 and plaintiff's mobile No.9029631207 as provided under Section 65-A of the Indian Evidence Act, 1872 (for short 'Act').

3. In support of this Petition, Ms Shah has raised four contentions. In the first place, she submitted that plaintiff has served copy of the reply dated 18.07.2016 to the application exhibit-32 filed by the defendant at 11.30 a.m. on 18.07.2016. The learned trial Judge decided the application exhibit-32 on the same day. In other words, defendant did not get sufficient opportunity to deal with the reply of the plaintiff.

Secondly, she submitted that the learned trial Judge was not justified in going into the aspect of relevancy when the stage was for admission / denial of the documents. She has invited my attention to application exhibit-32 as also the affidavit of examination-in-chief of the defendant and in particular paragraph 15 wherein defendant has set out the conversation that took place between the parties on 29.06.2014 on their respective mobile numbers. She also invited my attention to the reply filed by the plaintiff to the application exhibit-32. Plaintiff did not deny that mobile No.9029631207 belongs to him. The learned trial Judge, however, while rejecting the application observed in paragraph 10 that no documentary evidence is placed on record by the defendant to show that the said mobile number belongs to the plaintiff. She, therefore, submitted that the impugned order deserves to be set aside.

4. On the other hand, respondent in person has supported the impugned order. He submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

5. I have considered the rival submissions advanced by the parties. I have also perused the material on record. With the assistance of Ms Shah, I have gone through the transcription produced by the defendant and which is duly verified by the Assistant Registrar of the Court. Defendant has taken out application exhibit-32 to establish that the plaintiff has instituted Suit not for recovery of any amount but with a view to recovering the original agreement. According to the defendant, plaintiff has admitted in the telephonic conversation that the Suit is instituted only for recovery of the original agreement. In view thereof, I have gone through the transcript produced on record, which is at pages 173 to 177. Perusal of this transcript prima facie does not indicate that plaintiff admitted filing of the Suit only for recovery of the original agreement. Learned trial Judge has considered Section 22-A of the Act

and observed that oral admission as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question. The learned trial Judge further observed that the admission must be unqualified, unambiguous and in clear terms. In paragraph 7, the learned trial Judge has recorded that plaintiff has denied the genuineness of the electronic record and claimed that the so called voice under the electronic record is not his voice. The learned trial Judge, therefore, observed that unless there is certification of the expert about the voice identification and the genuineness of the electronic record, such electronic record cannot be considered as evidence. The learned trial Judge further observed in paragraph 8 that perusal of the transcription of the electronic record nowhere reflects the unqualified, unambiguous and clear admission by the plaintiff, as contended by the defendant. The learned trial Judge, therefore, held that the conversation is not relevant as to the fact in issue involved in the case. The Suit is instituted for recovery of amount of Rs.8,10,000/-. Nowhere in the written statement or in pleadings or even during cross-examination of the plaintiff, it is brought on record that the Suit is filed merely to recover the original agreement.

6. For the reasons recorded by the learned trial Judge in the impugned order, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, 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 proposed proceedings as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)