IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.1151 OF 2016

1 Smt. Hemlatabai Ravikant Darne alias Hemalatabai Kamotim Timblo, Major in age, married, residing at 121, Summerville, 12th floor, Near Mahalaxmi Temple, Bhulabhai Desai Road, Mumbai 400026.

2 Dr. Raviknat Dattaram Darne, Son of Dattaram Darne, major in age, married, residing at 121, Summerville, 12th floor, near Mahalaxmi Temple, Bhulabhai Dessai road, Mumbai 400026, through his attorney the petitioner no.1, by virtue of the power of attorney dated 18.8.2001 executed before the Notary N.R. Gupta at Mumbai. .... Petitioners

V/s

1 Mr. Prakash Gurudas Timblo, son of Gurudas Timblo, major in age, married, residing at Timblo House, Aquem, Alto Margao Goa.

2 Smt. Deepa alias Lata Prakash Timblo, major in age, married, residing at Timblo house, Aquem, Alto, Margao Goa.

3 Mrs. Radha alias Mina Satish Timblo, major in age, widow of late Satish Timblo, Residing at 69, near Dr. Prabhudessai Eye

Hospital, Aquem, Alto Margao,
Goa.

4 Mr. Balaji Kamat Timblo alias Chetan Satish Timblo, son of late Mr. Satish Gurudas Timblo, bachelor, businessman residing at 69, near Dr. Prabhudessai Eye Hospital, Aquem, Alto Margao, Goa.

5 Mr. Rohan Satish Timblo, son of late Mr. Satish Gurudas Timblo, major in age, married, residing at 69, near Dr. Prabhudessai Eye Hospital, Aquem, Alto Margao, Goa.

6 Mr. Surendra alias Tejan Satish Timblo, son of late Mr. Satish Gurudas Timblo, Bachelor, residing at 69, near Dr. Prabhudessai Eye Hospital, Aquem, Alto Margao, Goa.

7 Smt. Priamvada Deepak Pai alias Priamvada Kamotim Timblo, Daughter of Gurudas Timblo, Major in age, residing at 11516, 22 Avenue S. Burnsville, Minnesota, 55337, U.S.A.

8 Mr. Deepak Pai, Major in age, married, residing at the above mentioned address.

9 Corporation Bank Ltd., Margao Branch, Margao, Salcete Goa. .... Respondents

Shri J.E. Coelho Pereira, Senior Advocate with Shri Vinod Korgaonkar, Advocate for the Petitioners.
Shri V. Dhond, Senior Advocate with Shri D. Pangam and Shri S.P. Munj, Advocates for the Respondents.

CORAM : C.V. BHADANG, J.

Reserved on : 14th MARCH, 2017

Pronounced on : 16th MARCH, 2017

JUDGMENT :

Rule, returnable forthwith. The learned Counsel appearing for the respondents waives service. Heard finally by consent of parties.

2. The challenge in this petition is to the order dated 31/08/2016 by which an application (Exhibit 173) filed by the petitioners for permission to take the document (D-20) on record as secondary evidence, has been dismissed by the learned Trial Court.

3. The brief facts necessary for the disposal of the petition may be stated thus:

That the petitioners have filed Special Civil Suit No.102/2001 before the learned Senior Civil Judge at Margao for a declaration that the judgment and order dated 15/03/2000 in Inventory Proceedings No.72/1998 approving the partition, is null and void and for a direction to reopen the Inventory Proceedings. The petitioners are also seeking a declaration that the application carrying the oval seal on its front part on

Exhibit-82 allegedly made by Ms. Radha Timblo is a forged and fabricated document.

4. It appears that the learned Trial Court had summoned Ms. Delia Dias, the Chief Manager of the Corporation Bank, Margao (hereinafter referred to as 'Bank') as a Court witness who was examined on 12/01/2011 purportedly under Section 165 of the Evidence Act, 1872. The said witness stated that “Advocate Shridhar Ram Prabhu Chodankar 'may be' one of the panel members of the Bank in the year 2002”. The witness was shown Vakalatnama (14-D) of Advocate Chodankar as representing the Bank and the witness agreed that the seal appearing on the said Vakalatnama is of the Corporation Bank, Margao, however she could not identify the signature of the Manager who signed the same. In so far as the material controversy involved in this petition is concerned, the witness was shown xerox copies of two applications (D-20) in the file and she stated that the said xerox copies were produced in the Court on 23/07/2004 by Advocate Chodankar on behalf of the Bank. The witness also admitted letter dated 23/07/2008 (69-D) sent to the Bank.

5. The witness stated that as per letter dated 23/07/2008, two original applications (which are now admitted in evidence at Exhibit 82) were produced by the Bank. The witness was thereafter asked to explain the discrepancy between the xerox copy of the said application (in respect of

Radha Timblo) which is at D-20 and the original of the said application which is at Exhibit 82. The witness stated that the handwriting is different, the signature of the applicant is different as also the seal differs.

6. The petitioners filed application (Exhibit 173) to 'confirm', that documents (D-20) are taken on record as Exhibit, in evidence or alternatively to take them on record as secondary evidence.

7. The learned Trial Court by an order dated 19/07/2014 allowed the application as under:

ORDER

> Heard both side ld. Counsel. Document marked as Ex. D/20 herein is hereby allowed to produce with leave by this Hon'ble Court for reasons stated in the present application by the Ld. Counsel for the plaintiff. The document at D/20 is treated as secondary evidence. Hence, Application is allowed.

8. Feeling aggrieved, the respondents challenged the same before this Court in Writ Petition No.848/2015. This Court partly allowed the petition on 29/06/2016 mainly on the ground that the order was unreasoned and the application Exhibit 173 was sent back to the Trial Court for deciding it afresh in accordance with law after hearing the parties. The learned Trial Court by the impugned order has dismissed

the application, which brings the petitioners to this Court.

9. I have heard Shri J.E. Coelho Pereira, the learned Senior Counsel for the petitioners and Shri Dhond, the learned Senior Counsel for the contesting respondents no.1 & 2. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned orders passed.

10. It is submitted by Shri Pereira, the learned Senior Counsel for the petitioners that the Trial Court was in error in dismissing the application on the ground that the foundational fact for permitting the secondary evidence to be led as contemplated under Section 65 of the Indian Evidence Act, 1872 (The Evidence Act, for short) has not been established. The learned Senior Counsel pointed out that Ms. Delia Dias, the Officer from the Bank who was examined as a Court witness had admitted that the copies (D-20) were produced by Advocate Chodankar on behalf of the Bank. She had further admitted that the original of the xerox copies (D-20) are not available in the Bank. It is submitted that in such circumstances it was apparent that the original of the xerox copies were not available with the Bank and the copies (D-20) having been produced from proper custody, should have been namely that of the Bank permitted to be produced as secondary evidence. The learned Senior Counsel has extensively taken me through the

observations and the reasoning articulated by the learned Trial Court in order to submit that the Trial Court was not justified in placing reliance on the so called admission of PW1 in which the PW1 had confirmed that both the applications at Exhibit 82 were the same which she verified in the Bank. It is submitted that this cannot be an admission which would preclude the petitioners to seek permission to produce the document D-20 as secondary evidence.

11. The learned Senior Counsel pointed out that the petitioners have since amended the plaint arraying the Bank as a party defendant and alleging fraud to which the Bank is also a party. The learned Senior Counsel has also referred to the order dated 2/12/2010 passed by the learned Trial Court by which the learned Trial Court had thought it fit to examine Ms. Delia Dias as a Court witness to 'clarify the discrepancy', between the document (D-20) and the one at Exhibit 82 (colly). In the submission of the learned Senior Counsel for the petitioners this would be sufficient to normally exhibit the document D-20 or in the alternative to permit it to be produced by way of secondary evidence. The learned Senior Counsel has taken me through the observations in para 26 of the impugned order, in order to claim that the Trial Court has observed that Exhibit 82 is a fabricated document.

12. On behalf of the petitioners reliance is placed on the decision of

the Hon'ble Supreme Court in the case of ***Rakesh Mohindra V/s. Anita Beri & Ors.*** in ***2015 Law Suit (SC) 1110***. The learned Senior Counsel points out that at this stage the petitioners are seeking merely the production of the document as a secondary evidence which will be subject to its proof and appropriate probative value to be attached, which can be gone into at the trial. Reliance is also placed on the decision of this Court in the case of ***Vincente Da Costa V/s. Pee Dourado in 2014 Law Suit (Bom) 172.***

13. On the contrary, it is submitted by Shri Dhond, the learned Senior Counsel for the respondents no.1 & 2 that grant of leave to produce secondary evidence presupposes that the original of that document exists which (for any of the reasons as enumerated in Section 65 of the Evidence Act) cannot be produced before the Court. It is submitted that PW1 has clearly admitted that the original of the documents at Exhibit 82 (colly) were seen by her when she had visited the Bank. In other words, PW1 never claims to have seen the originals of which the document (D-20) is a xerox copy. It is thus submitted that the existence of the original (of which the document D-20 is a xerox copy) is not at all established and, as such, the learned Trial Court was justified in coming to the conclusion that the foundational fact for permitting production of the document as secondary evidence is not established.

14. The learned Senior Counsel has placed reliance on the decision of this Court in the case of ***Bank of Baroda V/s. Moti Industries & Ors.*** in ***2008 (6) Bom.C.R. 659*** in order to submit that unless the original of the document is seen by the party seeking production of secondary evidence, no permission for such production, can be granted. In short, it is submitted that unless and until it is shown that the original of the document (of which a copy is sought to be produced as a secondary evidence) is proved to be in existence, leave to produce secondary evidence cannot be granted.

15. The learned Senior Counsel has referred to the application (Exhibit 12) filed by the petitioners on 8/12/2001 seeking an ex-parte order for inspection of the records of the Bank, by the superintendent of the Court. The learned Senior Counsel points out that in the reply filed by the respondents to the said application, the respondents have alleged manipulation by the petitioners with the connivance of the Bank. It is submitted that the Court did not grant an ex-parte relief on that application, but issued notice to the Bank. The order sheet dated 23/07/2002 shows that Advocate Chodankar for the Bank had agreed to give the xerox copies and the matter was fixed on 12/08/2002. However, prior to that on 25/07/2002, Advocate Chodankar produced the copies. In short, it is pointed out that the original document was never inspected

by an independent Officer namely the Superintendent of the Court.

16. In so far as the observations in para 26 of the impugned order are concerned, the learned Senior Counsel, points out that in the said paragraph the Court has recorded the submissions of the petitioners and there is no finding as such recorded therein. For this purpose, the learned Senior Counsel has referred to the written arguments filed on behalf of the petitioners on 18/08/2016 in order to show that the contents of para 26 are verbatim reproduction of paras 15 & 16 of the written arguments.

17. It is submitted that the petitioners would get an opportunity to cross-examine the witnesses on behalf of the respondents and, as such, no prejudice whatsoever is caused by the impugned order.

18. I have carefully considered the rival circumstances and the submissions made. In short, according to the petitioners the Bank had issued two demand drafts in the sum of Rs.5,000/- favouring Advocate Caetano Faleiro. These drafts were issued allegedly on an application being made by the respondent no.3 (defendant no.3) and petitioner no.1. According to the petitioners they never engaged services of Advocate Caetano Faleiro to represent them in the Inventory Proceedings and the Vakalatnama in his favour was given by the plaintiffs to respondent no.1

in relation to some other matter which Vakalatnama was misused. When the respondents filed written statement in the suit the petitioners it was learnt that according to the respondents a certified copy of the Inventory Proceedings along with the bill was sent by Advocate Caetano Faleiro to the petitioners and the petitioners had paid the said bill of Rs.5,000/- by pay order/demand draft. The petitioners are disputing the application made to the Bank for issuance of the demand draft. According to the petitioners, the application for obtaining the pay order/demand draft on which the name of "Lata Ravikant Darne" is shown as applicant and which application is signed as "LDarne" is a forged document. The entire dispute in the present petition revolves around the aforesaid contention on behalf of the petitioners.

19. It is a matter of record that the petitioners amended the plaint in July, 2012 by introduction of paras 20(a) to 20(j) disputing that they never applied for issuance of the demand draft/pay order.

20. The petitioners had filed an application (Exhibit 12) on 12/12/2001 for a direction for inspection of the documents of the Bank by the Superintendent of the Court. In reply to that application filed by the respondents, it was claimed that it is the petitioners who have manipulated and manufactured false documents in collusion with the Bank. It can thus be seen that both the parties are attributing fabrication

of the documents with the connivance of the Bank to each other. The Bank has since been arrayed as defendant no.9 in the suit.

21. Be that as it may, the Trial Court issued notice to the Bank on the basis of the application (Exhibit-12). On 23/07/2002 Advocate Chodankar on behalf of the Bank agreed to give xerox copies of the document, which were accordingly produced on 25/07/2002 which are marked D-20. The Bank obviously did not produce the originals but only produced the xerox copies. The Trial Court by an order dated 15/04/2013 directed the Superintendent of the Court to inspect the file of the Bank to independently obtain xerox copies thereof. Subsequently, vide application (Exhibit 54-D) dated 8/07/2007, the petitioners served the summons to the Margao Branch of the Bank to produce the said two original applications, which application was granted on 26/03/2010. In pursuance thereof the Bank produced such originals under a covering letter dated 23/07/2008 which is at Exhibit 69. It is further a matter of record that these originals were referred by PW1, during her evidence on 17/02/2009 and they are marked as Exhibit C-82(colly).

22. On 18/10/2010 the petitioners filed an application purportedly under Section 151 of CPC for re-examination of PW1 to produce the copies of the applications originally submitted by the Bank. The Trial Court by an order dated 2/12/2010 dismissed the application, however

issued summons to the Bank Manager of the Bank "to explain the discrepancy in the two pay orders sent by them to the Court." The learned Trial Court in para 10 of the order dated 2/12/2010 observed thus:

> 10. This Court cannot however remain a silent spectator to the serious allegations made by the plaintiff regarding the fabrication of the document by a nationalized bank namely Corporation Bank. People, transact business in the nationalized bank, having full faith in them. It would result in injustice to them, if this faith imposed by them in the bank is not adhered too. It is alleged by the plaintiffs that in the original of the second application for pay order (exhibit 82 colly) the handwriting thereon is different from the handwriting found in the first application (exhibit D-20), the signatures differ and the seal of the bank is also different. I have therefore minutely perused both the applications for pay-orders. In the pay-order-slip forming part of exhibit 82 colly., the handwriting of the name appearing in the column 'IN FAVOUR OF' differs from the handwriting appearing in the column of the xerox copy (exhibit 20). The handwriting as well as the signature appearing under the heading "name and address of the applicant" and "applicant's signature", in the pay-order-slip forming part of exhibit 82 colly., (second slip) differs from the handwriting appearing in the pay-slip at exhibit D-20. In the pay-slip forming part of exhibit 82 colly., there is a round seal of the bank whereas on the Xerox copy forming

> part of exhibit 20 the seal is square. Even the signatures appearing on the reverse of the applications of the pay order slip differs."

23. Accordingly, Ms. Delia Dias was examined as a Court witness on 12/01/2011 in which she admitted the letter dated 23/07/2008 (Exhibit 69-D) and also the production of the copies (D-20) on 23/07/2004 by Advocate Chodankar, who appeared for the Bank. Both these documents namely at D-20 and Exhibit 82 were referred to Ms. Delia Dias and she was asked to explain the discrepancy to which she answered thus:

> "I say that the handwriting is different, the signature of the applicant is different and the seal is also different. I add and say that the originals are produced from the bank record and I do not have the records of the xerox copies."

It is thereafter that the petitioners filed an application Exhibit 173 which has been discussed by the learned trial Court by the impugned order.

24. The learned Trial Court has dismissed the application on the grounds that : (i) When the original applications are produced at Exhibit 82 which are referred to by the PW1 and admitted to be the same documents which she had seen during her visit to the Bank, there is no occasion for allowing production of secondary evidence, and (ii) The petitioners have not established the foundational fact namely the

existence of the original and of it being lost, which are the necessary prerequisites.

25. Before going to consider the rival contentions, it would be necessary to mention that although the learned Trial Court has made reference to Section 65-B of the Evidence Act, the said Section does not apply in this case as it pertains to admissibility of electronic records. I am conscious of the fact that mere mentioning of wrong provision would not be decisive. However, it is necessary to note the said fact only to put the record straight.

26. The prayer of the petitioner for production of the secondary evidence is relatable to Section 65(c) of the Evidence Act which says that the secondary evidence may be given of the existence, condition, or contents of a document when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason, not arising from its own default or neglect, produce it in reasonable time. It can thus be seen that under Section 65(c) it has to be shown that the original has been either destroyed or lost or when the party offering evidence of its contents cannot nor any other reason, not arising from its own default or neglect, produce it in reasonable time. Section 63 of the Evidence Act defines secondary evidence, which means and includes, copies made from the original by mechanical

process, which in itself ensures the accuracy of the copy, and copies compared with such copies. In the present case, the document Exhibit D-20 is a photocopy which can be said to be a copy made by mechanical processes which in itself ensures accuracy of the copy. The document D-20 has been admitted by the Court witness Ms. Delia Dias to be produced before the Court by Advocate Chodankar, who was representing the Bank. It has also come in the evidence of Ms. Delia Dias that the original of the document at D-20 is not available with the Bank. If that be so, it follows that the original (which was otherwise not in the custody or control of the petitioners) is either lost or is not available. Thus the reasoning articulated by the learned Trial Court that the foundational fact is not established, to my mind, cannot be accepted. It is also not possible to accept that because Exhibit C-82 is produced and admitted in evidence on record, copy thereof cannot be permitted to be produced as a secondary evidence. This is because the document at D-20 is not the copy of Exhibit C-82. Ms. Delia Dias has admitted in categorical terms and the Trial Court in para 11 of the order dated 2/12/2010 has observed that there is visible discrepancy in the document at D-20 and the one at Exhibit C-82. Thus, this cannot be a case where a copy of the same document is sought to be produced as a secondary evidence of which original is on record. For this reason, I do not find that the impugned order can be sustained.

27. In the case of ***Rakesh Mohindra*** (supra) the learned Trial Court had allowed the appellant/defendant to prove a letter of disclaimer by way of secondary evidence for which purposes the defendant summoned the record of GLR from the office of DEO, Ambala who was said to be the custodian of the record. On the basis of the evidence of the concerned official to produce the record available in the said office, the Trial Court allowed the application and admitted the letter of disclaimer to be used as secondary evidence, which order was set aside by the High Court. The Trial Court while allowing the application had observed thus:

> "The photocopy Ext.DW-2/B has come from the custody of DEO Ambala and the applicant has been able to comply with the provision of Section 65 of the Indian Evidence Act as it has come in evidence that the original document i.e. letter of disclaimer Ext.DW-2/B was handed over by the applicant to DEO Ambala. In view of the aforesaid this court is satisfied that the original document stands misplaced and the applicant is allowed to lead secondary evidence with respect to the document Ext.DW-2/B as envisaged under Section 65(c) of the Indian Evidence Act and both these issues are decided in favour of the applicants and against the respondents."

The Hon'ble Apex Court while restoring the order of the Trial Court has inter alia held that if party wishes to lead the secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. The Hon'ble Supreme Court has further held that it is equally well settled that mere admission of a document in evidence or marking of exhibit, does not dispense with its proof, which is otherwise required to be done in accordance with law.

28. In my considered view, once the document D-20 was produced by the Bank and it was referred to the General Manager of the Bank who was examined as a Court witness who stated that the original of D-20 is not available with the Bank, the Trial Court ought to have allowed the application for leading secondary evidence subject to the proof of the documents and its probative value to be considered at the trial of the suit.

29. In so far as the observations in para 26 of the impugned order are concerned, I am constrained to note that they are not clearly intelligible to know whether the Trial Court is recording the submissions on behalf of the petitioners or they are findings recorded. However, as I find that

the contents of para 26 are practically verbatim reproduction of paras 15 & 16 of the written arguments filed by the petitioners it is not possible to accept that they are findings. This however does not have any bearing on the final relief to be granted in this petition. I have made a brief reference to this aspect as it was argued by the learned Counsel for the parties.

30. The decision in the case of ***Bank of Baroda*** (supra) relied upon by the respondents, in my humble opinion is distinguishable. In that case the plaintiff, Bank of Baroda had filed a suit for recovery of the outstanding dues in which the Bank had produced certain documents. The question for determination (question B) was whether in the facts and circumstances of the case, the evidence tendered by the Bank in the form of typed copies or photocopies of the documents are admissible as legal evidence? A perusal of paras 25 onwards would show that the prior permission of the Court is for producing secondary evidence was not obtained and, as such, there was no evidence of the existence of the original documents or the documents being lost. Furthermore, the entire correspondence between the parties which was filed on record was merely typed copies without carrying any signatures. It is true that some of the documents were under copies, however there was no evidence to show that at any time in the past original copies of such

documents were in existence and they were lost. Nobody had deposed with respect to the fact of having seen and compared original document with the copy produced. In the present case, Ms. Delia Dias who is a Court witness admits that the document D-20 is produced at the instance of the Bank and their originals are not available with the bank. For this reasons the decision in the case of ***Bank of Baroda*** (supra) cannot come to the aid of the respondents.

31. In the result, the petition is allowed. The impugned order is hereby set aside. The application for permission to produce the document D-20 as a secondary evidence is allowed. It is however made clear that this shall be subject to its proof and probative value in accordance with law. Rule is made absolute in the aforesaid terms with no order as to costs.

C.V. BHADNAG, J.