

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

**WRIT PETITION NO. 286 OF 2017**

M/s. Daman Metalic Oxides

..Petitioner.

Vs

New India Assurance Co. Ltd

.. Respondent

Mr. Aniruddha A. Garge, Advocate for Petitioner.

Mr.H.G.Misar, Advocate for Respondent.

**CORAM : R.G.KETKAR,J.**

**DATE : 16/01/2017**

**PC:**

1. Heard Mr.Aniruddha Garge, learned counsel for the petitioner and Mr. H.G.Misar, learned counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff', has challenged the Judgment and order dated 28.11.2016 passed by the learned Judge, City Civil Court, Gr. Bombay in Notice of Motion No.4006 of 2016 in Suit No. 7903 of 2000. By that order, the learned Judge partly allowed the Notice of Motion taken out by the respondent, hereinafter referred to as 'defendant', and permitted the defendant to lead secondary evidence in respect of the Survey Report of V.D.Ajmeera and medical papers issued by Evershine General Hospital. The learned trial Judge rejected the prayer for permission to lead secondary evidence in respect of other documents.

3. The defendant filed Notice of Motion seeking permission to lead secondary evidence in respect of the following documents:-

- (i) Survey Report of V.D.Ajmeera.
- (ii) First Information Report.
- (iii) Medical papers issued by Evershine General Hospital.
- (iv) The papers and proceedings of Criminal Case No. 4320/1996 before the IInd Judicial Magistrate FC Vasai.
- (v) Insurance Policy Containing Terms and Conditions.
- (vi) Any other relevant documents.

In support of this Motion, the defendant filed affidavit of Ms Indira Ramakrishnan, Assistant Manager of New India Assurance Co Ltd having its office at Divisional Office, Moti Mahal, 6<sup>th</sup> Floor, Jamshedji Tata Road, Churchgate, Mumbai 400 020. In paragraph 2, it was stated thus:

“2. I say that the fire broke out in the office of defendant corporation in May 2010, due to which the original records of the subject suit in the matter is lost in the fire. Hence, the defendant is not in a position to produce the original documents before this Hon'ble Court.”

The plaintiff resisted that Motion by filing affidavit in reply of Ramchandraprasad Bansal, partner of the plaintiff. In paragraphs 3 and 4, it was contended that no inspection relating to the alleged Fire Brigade Report was given by advocate for defendant as regards destruction of originals in the alleged fire which allegedly broke in May, 2010 at the Divisional Office premises. This necessitated the plaintiff's Advocate to send registered post A.D. letter recording therein that no inspection of the alleged fire brigade report was given. It is, therefore, legitimate for the plaintiff to presume that the defendant does not have any such

alleged fire brigade report in their possession to prove their bonafides, entitling them to lead secondary evidence. Along with that affidavit, photocopy of the letter addressed by the plaintiff's Advocate along with A.D.Slips and A.D.Card duly received by their Advocate were enclosed. It was further contended that from the information gathered by the plaintiff, Division office of Division 111400 had caught fire and, therefore, it was required to be shifted opposite Inox Theater at Nariman Point where it is situate presently whereas the policy that was taken out by the plaintiff pertains to Division Office 111800 which still continues in the old premises till date.

4. In support of this petition, Mr.Garge submitted that the learned trial Judge has not dealt with the case made out by the plaintiff in paragraphs 3 and 4 of the affidavit in reply. He has taken me through the impugned order and in particular paragraph 5 onwards. In paragraph 5, the learned trial Judge referred to the decisions which were in fact cited by the plaintiff and not by the defendant. The learned trial Judge observed that the judgments referred in paragraph 5 were relied by the defendant. He further submitted that the defendant has not made out case under Section 65(c) of the Indian Evidence Act, 1872, (for short,'Act'). The learned trial Judge was, therefore, not justified in permitting the defendant to lead secondary evidence in respect of the survey report of V.D.Ajmeera and medical

papers issued by Evershine General Hospital.

5. On the other hand, Mr. Misar supported the impugned order. He has invited my attention to paragraph 10 of the impugned order and submitted that the defendant has placed on record the documents showing the lodging report of fire with the Fire Brigade and thus has complied the requirement laid down under section 65(c) of the Act.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the learned trial Judge has partly allowed the Motion. As far as the case made out by the defendant is concerned, the defendant has specifically contended that fire broke out in the office of the defendant Corporation in May 2010 due to which the original records of the subject matter was lost in the fire. The defendant is not in a position to produce the original documents. In reply opposing this Motion, the plaintiff has contended that the Division Office of the Division 111400 had caught fire as per the information gathered by the plaintiff and, therefore, that office was required to be shifted opposite Inox Theatre at Nariman Point, where it is situate presently and the policy that was taken out by the plaintiff pertains to Division Office 111800 which still continues in the old premises till date. However, no material is produced in support of the averments made in paragraph 4 of the affidavit in

reply. The plaintiff has not substantiated gathering of information as regards the averments made in paragraph 4 of the reply. As against this, the defendant has filed documents showing the lodging report of fire with the Fire Brigade. Even in the reply filed by the plaintiff, it is not disputed that the fire had taken place. The plaintiff has also not denied the averments made in paragraph 2 as regards taking of fire in the office of the defendant-corporation. In view thereof, the learned trial Judge has rightly observed that the plaintiff has failed to point out any material on record that the defendant intentionally suppressed the production of the original documents. The learned trial Judge further observed that the survey report and medical papers are required to be produced on record for the decision of the real question in controversy between the parties and no prejudice will be caused to the plaintiff if permission to lead secondary evidence in respect of Survey Report of V.D.Ajmeera and the medical papers of Evershine General Hospital is granted. The learned trial Judge has also observed that for seeking permission to lead secondary evidence, filing of such fire report is sufficient enough to conclude that original documents were lost and destroyed in the fire.

7. For the reasons recorded in paragraph 10 of 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. It is, however, expressly made clear that where a decree is appealed from 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 memorandum of appeal as contemplated by Section 105(1) of C.P.C. Liberty to the parties to apply for expeditious disposal of the suit. If such application is filed, the learned trial Judge will pass appropriate order.

(R.G.KETKAR, J.)