

Mr. Vijay Vaidya i/b. Ashoka Law Firm for Petitioners.
Mr. Nirav Shale a/w. Mr. Anuj Jaiswal i/b. Little & Co. for Respondents.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 22, 2017

Heard Mr. Vaidya, learned Counsel for petitioners and Mr. Shale, learned Counsel for respondents at length.

3. In support of this Petition, Mr. Vaidya submitted that plaintiffs have instituted Suit inter alia praying for declaration that the 18 bills

issued by the defendants in respect of installation No.I.P.-137 at plaintiffs' factory at plot No.21, M.S.S.I.D.C. are not legal and / or valid and create no liability upon the plaintiffs to pay the same; for quashing and setting aside these 18 bills issued by the defendants among other prayers.

4. Defendants resisted the Suit by filing written statement. Along with the written statement, defendants filed list of documents on which they would rely. The list of documents included - (i) Flying Squad Report dated 23.03.1993; (ii) Meter Testing Report dated 09.09.1995 among other documents. He submitted that on behalf of the defendants, Laxman Sheshrao Rathod filed affidavit in lieu of examination-in-chief under Order XVIII, Rule 4 of C.P.C. In paragraph 7, he stated that he is producing the copy of the Inspection Report as exhibit. Defendants are not having the original copy of the said report and they are making application to lead secondary evidence. In paragraph 9, the said witness referred to the Testing Report dated 09.09.1995.

5. Defendants thereafter took out Notice of Motion seeking permission to lead secondary evidence on the basis of photocopies of the documents referred to and relied upon in the written statement and for marking them as exhibits and reading them in evidence. In support of the Motion, Laxman Rathod made affidavit. In paragraph 3, it is contended that as per the procedure prescribed in the Original Side Rules, parties have to submit typed copies of the original documents. In paragraph 4 of that affidavit, he stated that defendants collected original documents and same were typed out and the photocopies of the same were referred to and relied upon by the defendants in the written statement and the same came to be filed before the Hon'ble High Court. The original documents were thereafter returned to the defendants

accordingly. He submitted that the learned trial Judge was not justified in allowing the Motion as no foundation was laid for leading secondary evidence. Defendants have not established existence of these documents and that photocopies are made from the originals. They have also not accounted for loss of original documents. In support of this submission, he relied upon the decision of the Apex Court in the case of ***J. Yashoda Vs. K. Shobha Rani, (2007) 5 SCC 730***, and in particular, paragraph 9 thereof and decision of this Court (Coram: S. B. Shukre, J.) in ***Kailash Satyanarayan Khandal Vs. Vijaykumar Satnarayan Khandal and others, Writ Petition No.11232 of 2016*** decided on 18.01.2017, and in particular paragraph 6 thereof.

6. On the other hand, Mr. Shale invited my attention to paragraphs 5(a) to 5(e) of the written statement also list of documents. He submitted that the Meter Testing Certificate dated 09.09.2015 was received by plaintiffs' representative.

7. 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, in the written statement, and in particular in paragraph 5(a), defendants have specifically referred to the inspection carried out by Flying Squad Unit Palghar on 20.03.1993 and defendants craved leave to refer to and rely upon the said report. In paragraph 5(e), defendants have referred to inspection of plaintiffs' factory on 09.09.1995 and also craved leave to refer to and rely upon the Testing Report dated 09.09.1995. In the list of documents on which defendants intend to rely, these documents are specifically referred at serial No.1 and 4. In the affidavit in support of Motion in paragraph 3, it is stated that as per the procedure prescribed in the Original Side Rules applicable to the High Court, Bombay, parties have to submit typed

copies of the original documents. In paragraph 4, it is asserted that defendants collected original documents and the same were typed out and the photocopies of the same were referred to and relied by the defendants in the written statement and the same came to be filed before the Hon'ble High Court. The original documents were returned to the defendants accordingly. In paragraph 5, defendants have stated that at the relevant time, the documents were in possession of the defendants. Defendant is a Government Organization. In paragraph 6, it is asserted that inspite of diligent efforts on the part of the defendants, the same are not traceable, and therefore, application is made for leading secondary evidence.

8. Mr. Vaidya relied upon the decision of the Apex Court in **J. Yashoda** (*supra*). In paragraph 9 of that report, the Apex Court referred to Sections 63 and 65 of the Indian Evidence Act, 1872 (for short 'Act'), and it was observed that in order to enable a party to produce secondary evidence, it is necessary for the party to prove existence and execution of the original document. Section 65 permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.

9. In the present case, defendants have already referred to these documents in the written statement and more particularly, in paragraphs 5(a) and 5(e). In the list of documents at serial No.1 and 4 also, these documents are specifically referred. I have already referred to the contents of the affidavit in support of the Notice of Motion and

particularly paragraphs 3 to 6. Perusal of the Meter Testing Certificate dated 09.09.1995 also prima facie shows that the copy of that Certificate was received by the plaintiffs' representative. In view thereof, it has to be held that defendants have satisfied the requirements laid down in Section 65 by establishing existence of the said documents as also the fact that they are misplaced by the defendants.

10. Mr. Vaidya also relied upon paragraph 6 of the decision of this Court in **Kailash Satyanarayan Khandal** (*supra*). In that case, on facts, this Court found that respondents did not comply with the mandate of sub-sections (2) and (3) of Section 63 of the Act. He has also relied upon the decision of the Apex Court in **J. Yashoda** (*supra*). In that case, High Court of Andhra Pradesh set aside trial Court's order taking documents exhibits B-1 to B-8 as secondary evidence. The High Court found that the original documents were not available with the parties. Since the documents were the photocopies, there was no possibility of the documents being compared with the originals. In the present case, defendants have established the existence of original documents. They have also made out case of non-tracing of original documents. In view thereof, decisions relied by Mr. Vaidya do not advance the case of the plaintiffs.

11. In view of the above discussion, I do not find that the learned trial Judge has committed any error in allowing the Motion and permitting defendants to lead secondary evidence in respect of report made by the Flying Squad on 20.03.1993 as also the Meter Testing Certificate dated 09.09.1995. As far as the third document namely, order dated 18.02.1997 is concerned that is the order passed by this Court. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

Needless to observe that even if the defendants are permitted to lead secondary evidence, they will have to prove the contents of the said documents.

12. It is also 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 memorandum of the proceedings as contemplated by Section 105(1) of C.P.C. Order accordingly.

(R. G. KETKAR, J.)

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