

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

WRIT PETITION NO. 3882 OF 2016

Chandrakant Dayal Vasant and ..Petitioners.
Ors.

Vs

Chandiram Kakumal .. Respondents
Bajaj, deceased through legal
heirs and Anr.

Mr. Neerav Merchant a/w Ishwar Ahuja i/b Thakordas &
Madgavkar for Petitioners.

Mr. Rohit D.Joshi, Advocate for Respondent no.1(b).

CORAM : R.G.KETKAR,J.
DATE : 24/02/2017

PC:

1. Not on Board. At the request of Mr.Merchant, taken up for admission. Heard Mr. Neerav Merchant, learned counsel for the petitioners and Mr. Rohit Joshi, learned counsel for respondent no.1(b), at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as defendants, have challenged the Judgment and order dated 11.8.2015 passed by the learned Judge, City Civil Court, Mumbai in Notice of Motion No.2204 of 2015 in S.C.Suit No. 104 of 1990. By that order, the learned trial Judge allowed the Motion taken out by respondent no.1, hereinafter referred to as 'plaintiff', and permitted him to lead secondary evidence under Section 65 of the Indian Evidence

Act, 1872 (for short, 'Act') in respect of agreement dated 27.7.1981.

3. In support of this petition, Mr. Merchant raised following contentions:

1. Plaintiff has not established that any efforts were made for searching original document and
2. Plaintiff has also not made out case of loss of original document.

In support of the first proposition, he relied upon the decision of this Court in Yeshwant Rambhau Chondhe Vs Vilas Bapurao Shinde, 2007 (5) Bom C.R. 335, and in particular following portions of paragraph 15:

“The said judgments inter alia lay down a proposition that if original of the documents is not produced but copy thereof is tendered, the party producing it has to give credible explanation by way of evidence of the efforts made about to trace the original. This would be an aspect of the foundation being laid for not producing the original and producing the certified copies thereof.”

As far as second submission is concerned, he relied upon decision of the apex Court in J. Yashoda V K. Shobha Rani, AIR 2007 Supreme Court 1721 to contend 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. He submitted that in the present case, the plaintiff has not fulfilled the conditions laid down in Section 65 of the Act before seeking permission to lead secondary evidence. He, therefore

submitted that the learned trial Judge was not justified in allowing the impugned order.

4. On the other hand, Mr. Joshi supported the impugned. He invited my attention to the assertions made in paragraph 5 of the plaint wherein (1) reference is made to the writing dated 27.7.1981 and true copy is annexed at Exhibit-A, (2) list of documents on which the plaintiff relies and more particularly item no.1, (3) written statement filed by defendants no.1 and 3 and in particular paragraph 9(c) and 9(d) to contend that defendants no. 1 and 3 admitted that negotiations were finalized in or about 27.7.1981 and the arrangement was recorded in the letter of allotment dated 27.7.1981, Exhibit-A to the plaint. In other words, he submitted that the defendants have admitted existence and execution of writing dated 27.7.1981. He invited my attention to paragraph 5 of the affidavit in support of the Notice of Motion wherein it is averred that plaintiff no.1 was all along looking after the matter. He expired on 21.3.1994. As per instructions of his advocate, the plaintiff tried to search original agreement/letter dated 27.7.1981, however, he could not find the same. In the absence of plaintiff no.1 who was looking after the matter, present legal heir is unable to trace the original letter. He is also not in a position to place on record original copy of the letter as it is misplaced. He submitted that the plaintiff has also explained efforts made for searching original document. He,

therefore, submitted that no case is made out for interfering with the impugned order.

5. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. It is evident that along with the plaint itself, the plaintiff has annexed true copy of writing dated 27.7.1981 at Exhibit A to the plaint. Perusal of paragraphs 9(c) and 9(d) of the written statement of defendants no.1 and 3 also shows that they admitted existence as also execution of writing dated 27.7.1981. The learned trial Judge has considered this aspect in paragraph 7 of the impugned order.

6. In the case of J. Yashoda (*supra*), the Apex Court has held 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. Under Section 64, documents are to be proved by primary evidence. Section 65, however, permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned in it. 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. Applying the tests laid down in the above case

to the facts of the present case, I am satisfied that plaintiff has fulfilled the conditions stipulated in Section 65 of the Act. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. 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.

(R.G.KETKAR, J.)