

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3252 OF 2017**

Cheryl Samthaney & anr.

... Petitioners

Vs.

Aslam Yusuf Jafrani & Ors.

... Respondents

Mr.Denzil D'mello with Ms.G.P. Sonawane, Austin Fernandes for
the Petitioners

Mr.Kunal Mehta with Mr.Suraj Iyer i/b Ganesh & Co. for
Respondent Nos.1 & 2

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: APRIL 19, 2017**

P.C. :

1. In this petition filed under Article 227 of the Constitution of India, the petitioners, who are the original defendant Nos.2 and 3, have challenged the order dated 18.1.2017 (partly) and the orders dated 1.2.2017 and 9.3.2017 passed by the learned Judge, City Civil Court at Bombay in Suit No.9301 of 1994. Evidence of four witnesses of the plaintiffs was recorded in the High Court suit. Subsequently, the suit was decreed ex-parte on 22.9.2009 by the High Court. Thereafter, the said order of ex-parte decree was set aside on 14.11.2011 by the High Court on an application made by the present petitioners. Thereafter, the suit was transferred to the City Civil Court due to the enhancement of the pecuniary

jurisdiction of the City Civil Court and it was numbered afresh as Suit No.9301 of 1994. Then, the City Civil Court recorded further evidence and evidence of the defendants was closed in March, 2015. Thereafter, it was pointed out by the original plaintiffs that a bunch of documents was produced by the PW2 i.e., one police officer, namely, Shri K.K. Parmar. It was also pointed out that some documents were produced by the plaintiffs at the recording of evidence of the police officer and also recording of evidence of the other witnesses by the Court Commissioner in the High Court. It was submitted that as per the erstwhile practice in the Bombay High Court, the documents which were produced before the Court Commissioner were not marked by the Commissioner and if there were some objections, they were recorded and subsequently, the documents were exhibited by the Court itself. However, in this matter, somehow, the documents were not exhibited till both the parties tendered their evidence and closed their evidence. However, the documents were produced before the Court and, therefore, the learned Judge of the City Civil Court had to do the necessary exercise of looking into the documents considering its admissibility and thereby to exhibit the documents. The learned Judge by his order dated 18.1.2017 has called the parties to deny

the documents out of 69 documents, which were produced by PW2 Parmar. By order dated 18.1.2017, the learned Judge exhibited the admitted documents from 54 to 65. The fact of documents i.e., the bills of interior work of the suit premises were produced by one witness Khalid Ahmed i.e., PW5. However, the said witness did not attend the Court and was not available for cross-examination. However, the documents were produced through him and all these documents, which are the bills of interior work allegedly of the suit premises, were marked at exhibit 66 collectively. Therefore, the said order is challenged by the petitioners.

2. In the second order dated 1.2.2017 again, the learned Judge exhibited some documents i.e., exhibit 68 collectively i.e., the bills of pest control as they were produced earlier by PW1 during the cross-examination and in the examination in chief, which was recorded before the Commissioner. Thereafter, he also marked some documents at exhibits 69, 70 and 71 i.e., power of attorney and DHL courier receipts. That order is also under challenge.

3. The plaintiffs made application under section 151 of the Civil Procedure Code for issuance of witness summons to the Senior

Police Inspector of Bandra police station, as earlier bunch of documents was produced earlier by PW2 Parmar below exhibit 53. So, in order to prove these documents, the application for witness summons was made. The petitioners i.e., the original defendants, challenged this application. However, the learned Judge has issued the summons to give evidence in respect of the documents which were produced alongwith list No.53.

4. The learned Counsel for the petitioners has submitted that the learned Judge has not considered the provisions of the Indian Evidence Act i.e., a document needs to be proved through the author of the document. He submitted that the original plaintiffs have not stepped into witness box. The evidence is tendered through a power of attorney holder of the plaintiffs, which is not reliable. He further submitted that the bills of pest control, interior work cannot be exhibited. He further submitted that the evidence of PW5 Khalid Ahmed, who produced the bills, which are marked at exhibit 66 collectively, was not made available for the petitioners for cross-examination. The learned Counsel further submitted that the witness Parmar was also not available who produced the documents which are enlisted below exhibit 53. Moreover, the

Senior Police Inspector or the police officer of Bandra Police Station, who was summoned, is not a competent witness to give evidence in respect of the documents below exhibit 53. He further submitted that his main contention to oppose this application and exhibition of documents is that if these documents are exhibited, his right to cross-examine the witnesses on those documents is not available as he has closed his evidence. He submits that the plaintiffs and defendants have closed their evidence and the matter is now for final hearing and at this stage, how the plaintiffs can be permitted to reopen their evidence and summons fresh witness to fill up the lacunae that they realised.

5. The learned Counsel for the respondent i.e., the original plaintiffs, has submitted that the plaintiffs through their power of attorney and also through his witnesses, has tendered these documents. These documents were already produced before the Court and they were taken on record by the Commissioner at the time of recording of the evidence, though they could not be exhibited by the Court Commissioner and were remained to be exhibited by the learned trial Judge when the suit was pending in the High Court. It is further submitted that in the evidence of the

plaintiffs through the power of attorney for the plaintiffs, he has stated about the fact of pest control of the suit flat and about the receipt of the bills. He has further submitted that in the cross-examination, he pointed out the relevant paragraphs in the examination-in-chief and in the cross-examination, in respect of interior work of the suit flat, which was done by a professional firm owned by Khalid Ahmed and his partner and thus, the learned Counsel further submitted that the bills are produced as the cross-examination was there, the bills were produced through PW5.

6. He further submitted that the police officer K.K. Parmar was called as witness to produce the documents on 22.9.1997 and at the time of recording of his evidence before the Court Commissioner, the Commissioner recorded that the witness can be recalled for exhibition of these documents. The Commissioner observed that the witness be called to produce the documents and he will be called whenever his evidence is necessary in the present case. The learned Counsel submits that pursuant to this order, this witness is called.

7. I have heard the learned Counsel for both the parties extensively. Perused the relevant documents, the three orders

under challenge passed by the learned Judge of the City Civil Court. It appears that in the evidence of the power of attorney of the plaintiffs, he has stated about the pest control of the suit premises so also about the interior work of the suit premises. In the cross-examination, he has been questioned about the interior work of the suit premises and also about the bills of the interior work. He has also stated that he was in possession of some bills and some bills are with PW5 Khalid Ahmed. Thus, a foundation is laid down by the plaintiffs in the plaint in examination in chief of or in the cross-examination and, therefore, the learned trial Judge has rightly exhibited the documents. The documents of interior work would not have been allowed if there would not have been any foundation in the examination-in-chief or there would not have been any cross-examination on that point regarding the bills to the power of attorney of the plaintiffs, however, it is not the case. It is made clear that the evidence of witness Khalid Ahmed who has produced the documents cannot be read in evidence as he was not cross-examined. .

8. The objection raised by the learned Counsel for the petitioners that the police officer PW2 Parmar is not available

today and any other officer should have been called earlier, carries substance and the plaintiff ought to have pointed out to the Court that though these documents are produced, they remained to be exhibited. The fact of production of documents by the witnesses also cannot be ignored. The plaintiff has taken care of calling the witnesses and getting the documents produced. However, because of a peculiar procedure adopted in the recording of evidence by the Court Commissioner in the High Court that he is precluded from exhibiting the documents, these documents inadvertently remained to be exhibited and, therefore, the documents are placed before the parties and the defendants have admitted some of those documents and they are exhibited. The documents which are referred to in the cross-examination and examination-in-chief are required to be exhibited and the learned Judge has passed a correct order in respect of exhibiting the documents. So also, in respect of remaining documents which were produced under exhibit 53, the plaintiffs want to exhibit few documents which are described in the prayer in the application made under section 151 of the Civil Procedure Code which is marked at exhibit 82. The orders passed by the learned trial Judge thus cannot be faulted with. However, it is necessary to make it

clear in the interest of both the parties, especially the defendants that though the document is proved and admitted and exhibited in the evidence, it does not mean that the Judge has relied on its credibility. It is always open for the petitioners to argue on the authenticity or genuineness of these documents and contents therein at the time of arguments. So also, the documents which the plaintiffs want to prove and admitted through the police officer, the petitioners have every right to take objection at the time of cross-examination of the said witness and the learned trial Judge may admit and exhibit some of the documents or all the documents or may not admit and exhibit some documents as per the provisions of Evidence Act. The contents of those documents can be challenged at the time of arguments as it is a matter of appreciation of evidence. The evidence of PW5 Khalid Ahmed cannot be read in evidence as he was not cross-examined.

9. With the above observations, I dismiss the petition.

(MRIDULA BHATKAR, J.)