

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 3371 OF 2017

Mohammed Arif Shafeeq Ahmed Patel ... Petitioner
Vs.
M/s. Fazalbhoy Bhojabhai & Co. & Ors. ... Respondents

Mr. G.S. Godbole i/b. Shivani S. Samel, Advocate for the petitioner.
Mr. Rohit D. Joshi, Advocate for respondent nos. 2/1, 2/2, 2/3, 3 & 4.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **4th April, 2017.**

P.C.:

Rule. Rule made returnable forthwith. By consent, Writ Petition is heard finally and disposed of at the stage of admission.

2. This Writ Petition is directed against the order dated 2nd March, 2017 passed by the learned Civil Judge Senior Division, Panvel below Exhibit 179 in Special Civil Suit No. 180 of 2008. The Application was moved by the respondents/defendants under section 65 of the Indian Evidence Act for seeking permission to lead secondary evidence. The said secondary evidence was required to be tendered in respect of disputed Power of Attorney. The execution of Power of Attorney is contended by the defendants, i.e., respondents nos. 1 to 4 and hence the execution of such Power of

Attorney and a letter of the advocate is denied by the petitioner/plaintiff. The said Power of Attorney and the letter, according to the defendants, were in custody of the petitioner/plaintiff which is also denied by the plaintiff. Therefore, the respondents/defendants sought permission from the Court to lead secondary evidence placing on record that they are not in custody of the original documents. The said application was contested by the petitioner/plaintiff, however, it was allowed by the impugned order passed by learned Civil Judge Senior Division, Panvel.

3. The learned counsel for the petitioner/original plaintiff has submitted that the said Power of Attorney and letter is disputed by the petitioner and that is not in the custody of the petitioner. He further submitted that the Application seeking permission to lead secondary evidence ought to have been made earlier but this Application was moved at very late stage, i.e., after completion of recording of the evidence of the petitioner/plaintiff. He further submitted that thus, the petitioner would not get opportunity to put up its case and denied the existence of those documents, as his evidence is over. He further submitted that his application which is marked as Exhibit 172 for leading evidence by way of rebuttal in

respect of issue nos. 5, 6 & 7 whether burden is placed on the defendants is kept pending and it is also required to be considered.

4. The learned counsel for the respondents supported the order of the learned Civil Judge Senior Division, Panvel.

5. Perused the Application Exhibit 179 moved by the respondents/defendants for leading secondary evidence. The defendants/respondents have completed the execution and existence of the letter of advocate and power of attorney executed by the defendants in favour of the plaintiff, therefore, they have moved an Application under section 65 of the Indian Evidence Act. It is also placed on record that the said document is not in custody of the defendants and therefore, permission is rightly granted by the trial Court to lead secondary evidence, as the foundation is laid by the defendants. After going through the order, I do not find any illegality in the order. Therefore, Writ Petition is dismissed. Though the plaintiff's evidence is over, the defendants affidavit-in-chief is also filed and now the defendant is going to step in the box who is going to be cross-examined by the plaintiff, the plaintiff has fair opportunity to contradict the witness on the said document and can demolish his

evidence of the witness in respect of the said power of attorney and the letter. It is a settled position in law that questions put up by the plaintiff pertaining to those two documents are not to be taken as admissions given by the plaintiff in the cross-examination in respect of the existence of the documents, as that fact is denied by the plaintiff earlier. However, it is made clear that the trial Court to decide the Application Exhibit 172 at the proper stage so that no prejudice is to be caused to the plaintiff and fair opportunity to be given to him to rebut the evidence of the defendants.

6. With this, Writ Petition is disposed of.

(MRIDULA BHATKAR, J.)