

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8418 OF 2016

Maqsood Ali Shaukat Ali Khan and others ... Petitioners
Vs.
Jagdish Ramsharan Agarwal and another ... Respondents

Mr. Y. R. Mishra for Petitioners.

Mr. S. P. Kanuga, Senior Advocate i/b. Mr. Anupam R. Sharma for
Respondent No.1.

Mr. P. M. Bhagat for Respondent No.2.

CORAM : R. G. KETKAR, J.

DATE : MARCH 08, 2017

P.C. :

Heard Mr. Mishra, learned Counsel for petitioner, Mr. Kanuga, learned Senior Counsel for the respondent No.1 and Mr. Bhagat, learned Counsel for respondent No.2 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants No.1 and 3 to 8', have challenged the order dated 03.11.2015 below exhibit-17 as also the judgment and order dated 23.02.2016 below exhibits-45 and 46 passed by the learned Judge, City Civil Court at Dindoshi (Borivali Division), Goregaon, Mumbai in S.C.Suit No.2612 of 2013. By order dated 03.11.2015 below exhibit-17, the learned trial Judge in so far as the present Petition is concerned, marked document No.6 along with list of documents at exhibit-17, original passbook of Bank of India in the name of R. R. Agarwal and T. R. Agarwal as an exhibit. By order dated 23.02.2016, the learned trial Judge partly allowed applications exhibits 45 and 46 made by the defendants. In so far as the present controversy raised in the Petition is concerned, the prayer of the defendants not to exhibit the document at Sr.No.6 i.e. original passbook was rejected.

3. In support of this Petition, Mr. Mishra raised following contentions:

- a. respondent No.1, hereinafter referred to as 'plaintiff', has neither referred to nor relied upon the passbook in the plaint. He also did not refer to this document in the list of documents attached to the plaint;
- b. the passbook is not either of the plaintiff or of the defendants but is of a third party, namely Ramprasad Radhelal Agarwal and Tikamdas Ramprasad Agarwal;
- c. the passbook is also not coming from the proper custody;
- d. plaintiff has not complied provisions of Section 4 of the Bankers' Books Evidence Act, 1891 (for short 'Act');
- e. plaintiff is also neither legal representative nor having any connection with Ramprasad R. Agarwal and Tikamdas R. Agarwal;

4. He, therefore, submitted that the learned trial Judge was not justified in marking passbook as an exhibit.

5. On the other hand, Mr. Kanuga supported the impugned order. He submitted that in paragraph 4 of the plaint, plaintiff has referred to MOU dated 29.08.1988. He invited my attention to paragraph 9 of affidavit of examination in chief of plaintiff, Jagdish R. Agarwal under Order XVIII, Rule 4 of C.P.C., and in particular paragraph 9 thereof. In paragraph 9, it is stated that late Ramprasad Radhelal Agarwal had paid towards his share and contribution amount, for purchase of plots of land from the F. E. Dinshaw Trust in terms of the said MOU dated 29.08.1988 by his two Account Payee Cheque/s of Rs.50,544.25/- realized sometimes in September, 1987 and of Rs.25,000/- realized on 31.10.1989, both drawn on Bank of India, Malad (East) Branch, Joint Account of late Ramprasad

Radheylal Agarwal and Tikamdas Ramprasad Agarwal, in favour of Mr. Shoukatali Bage Khan. It is further stated that plaintiff has the custody of the Bank of India, Malad East Branch Passbook of late Ramprasad Radheylal Agarwal and Tikamdas Ramprasad Agarwal, joint holders of S.B. Account No.9066, reflecting the entries of two realized account payee cheque/s in the name of Mr. Shoukatali Bage Khan, as the said Bank of India Pass Book, upon the purchase of the suit properties, was handed over to me by my vendors i.e. the heirs and legal representatives of late Ramprasad Radheylal Agarwal. He has produced Bank of India's original passbook and prayed for marking it as exhibit in evidence. He, therefore, submitted that the learned trial Judge was justified in marking passbook as exhibit.

6. I have considered the rival submissions advanced by the learned Counsel appearing of the parties. I have also perused the material on record. Perusal of order dated 03.11.2015 shows that along with the affidavit of examination-in-chief, P.W.1 has filed list of documents exhibit-17. The controversy in this Petition is in respect of document at Sr.No.6, namely, original passbook of Bank of India in the name of Ramprasad Radheylal Agarwal and Tikamdas R. Agarwal. Mr. Mishra was unable to show that plaintiff did not produce original passbook. He submitted that plaintiff has neither referred to nor relied upon passbook in the plaint. Even no reference is made in the list of documents. The passbook is of third party namely Ramprasad Radheylal Agarwal and Tikamdas R. Agarwal and neither of the plaintiff nor of the defendant and it is also not coming from the proper custody. I do not find any merit in this submission. Perusal of paragraph 9 of the affidavit in examination-in-chief deals with this aspect. Mr. Mishra also relied upon Section 4 of the Act. In this regard, it is necessary to consider Sections 62 and 63 of the Indian Evidence Act, 1872. Section 62 defines the

expression 'primary evidence' to mean the document itself produced for the inspection of record. Section 63 lays down what is the secondary evidence means and includes. Section 63(1) lays down that secondary evidence means and includes certified copies given under the provisions hereinafter contained. In the present case, plaintiffs have produced original passbook i.e. primary evidence. Mere marking the document as exhibit does not amount to proof of contents of the documents. In view thereof, the reliance placed by Mr. Mishra on Section 4 of the Act does not advance the case of the petitioners. Whether the plaintiffs have proved contents of the passbook is for the trial Court to decide after considering the material on record. Presently, we are concerned with marking of original passbook as an exhibit. A perusal of the order dated 23.02.2016 shows that the learned trial Judge has considered the submissions in paragraph 3 of the impugned order and has observed that as the plaintiff has produced original passbook, it is required to be marked as exhibit. For the reasons recorded in paragraphs 4 and 5 of the impugned order, I do not find that the learned trial Judge has committed any error in respect of passbook. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. Needless to observe that plaintiff will have to prove the contents of passbook.

7. It is made clear that where a decree is challenged by the petitioners, 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.

(R. G. KETKAR, J.)