

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9429 OF 2016

M/s. Aditya Developers
Represented by its Partners .. Petitioner
vs.
M/s. Max New York Life
Insurance Company Ltd. and anr. .. Respondents

Ms Manjiri S. Parasnis for the Petitioner.
Mr. S.S. Redij for the Respondents.

CORAM : M. S. SONAK, J.
DATE : 23 AUGUST 2017.

P.C. :-

- 1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

- 2] The petitioner-original plaintiff challenges the order dated 23rd March 2016 made by learned Trial Judge dismissing the petitioner's application at Exhibit-25 for leading secondary evidence in respect of the Leave and Licence Agreement dated 24th January 2009.

- 3] There is really no dispute that the Leave and Licence Agreement dated 24th January 2009 was never signed by the respondents - defendants. This is evident from the petitioner's pleadings in paragraph 5 of the plaint, which reads thus:

“5] The Plaintiff state and submits that thereafter as per request of the Defendants, Leave and License Agreement dated 24.01.2009 was signed and executed by the Plaintiff on stamp of Rs.100/- and was forwarded to the Defendant for their execution. However, the Defendant did not sign the said stamped Agreement and did not returned the same till today. Since January 2009 till today the Defendants has not paid any license fee to the Plaintiff and instead had detained the suit premises till 15.12.2009, without any reason and rhyme. The unfinished furniture work was lying unattended by the Defendants.”

4] In response to the aforesaid pleadings at paragraph 5 of the
plaint, the respondents at paragraph 8 of the written statement have
pleaded as follows:

“8) In response to the contents of Para 5, this Defendant would like to state that the Plaintiff is trying to mislead this Hon'ble Court. The Plaintiff had forwarded a Draft of Leave and License Agreement bearing a date of 24.01.2009 to this Defendant. However, it is not true to the say that this Defendant has retained the said Agreement. This Defendant had never signed the said Agreement as the terms stated therein were not acceptable to this Defendant. It is denied that this Defendant has detained the suit property since January 2009 or any other date. This Defendant states that since no agreement of whatsoever nature was signed and executed by this Defendant with the Plaintiff on 24, 01.2009, there is no liability cast up this Defendant to pay any alleged License fee to the Plaintiff for any alleged period as this Defendant is not in possession of the suit property. Since the Defendant never signed on the alleged Leave and License Agreement dated 24.01.2009, it is not bound to any of the contractual terms and conditions and is not obligated to perform any such conditions so mentioned in the alleged Leave and License Agreement. This Defendant states that the Plaintiff is trying to force upon this Defendant the document which was never executed or agreed to be executed by this Defendant.”

5] The contentions of the learned counsel for the parties are required to be appreciated in light of the aforesaid pleadings, from which, neither of the parties, at least at the present stage, can renege.

6] Ms Parasnis, learned counsel for the petitioner, submits that from the aforesaid pleadings it is quite clear that the petitioner had forwarded the Leave and Licence Agreement dated 24th January 2009 to the respondents, after the petitioner duly signed and executed the same. She points out there is a positive averment in paragraph 5 of the plaint that such document was never returned by the respondents to the petitioner. She points out that the respondents, in para 8 of their written statement, have admitted that a draft of Leave and Licence Agreement bearing dated 24th January 2009 had indeed been forwarded by the petitioner to the respondents. She submits that on the basis of vague pleadings in para 8 of the written statement that such document was not retained by the respondents, the respondents cannot resist the plea of the petitioner to lead secondary evidence in relation to Leave and Licence Agreement dated 24th January 2009. She submits that in case the document were to be indeed returned, the petitioner, would

have produced the same as primary evidence, rather than seek leave to lead secondary evidence. She submits that this case is clearly covered under Section 65(a) of the Indian Evidence Act, 1872 and there is failure on the part of learned Trial Judge to exercise jurisdiction by way of denying leave to lead secondary evidence.

7] Mr. S.S. Redij, learned counsel for the respondents, submits that there is no admission that the draft of Leave and Licence Agreement dated 24th January 2009 was ever retained by the respondents. On the contrary, the pleadings indicate that the said document was never retained by the respondents, by which, it implies that the same was duly returned to the petitioner. Mr. Redij further submits that since, even according to the petitioner such Leave and Licence Agreement was never signed by any of the respondents, such document, can never amount to proof of terms and conditions of any alleged leave and licence. He submits that secondary evidence can be lead in respect of a document which is otherwise admissible in evidence. He submits that some alleged draft of Leave and Licence Agreement, even inherently is inadmissible in evidence. Therefore, there is no question of leading any secondary evidence in respect of a document, which is even otherwise

inadmissible in evidence.

8] Mr. Redij also points out that learned Trial Judge, had earlier, by order dated 28th November 2015 rejected yet another attempt on the part of the petitioner in relation to the Agreement dated 24th January 2009 by taking out Exhibit-22 and invoking the provisions of Order 12 Rule 8 of the Code of Civil Procedure. He points out that even in the said order, it is clearly recorded that the document in question is not in possession of the respondents. For these reasons, Mr. Redij submits that there is absolutely no jurisdictional error in the impugned order, which may therefore, not be interfered with.

9] In paragraph 8 of the written statement, the respondents clearly admitted that the petitioner had forwarded a draft of Leave and Licence Agreement bearing date of 24th January 2009 to the respondents. In response to the categorical pleadings in para 5 of the plaint, such Agreement was never returned by the respondents to the petitioner, there is no specific denial. The denial, if at all, is evasive, inasmuch as the respondents have stated that it is not true to say that they had retained the said Agreement. In such circumstances, applying the test of preponderance of probabilities

and further taking into consideration the expression used in Section 65(a) of the Indian Evidence Act, leave to lead secondary evidence was required to be granted to the petitioner. Section 65(a) of the Indian Evidence Act *inter alia* provides that secondary evidence may be given of the existence, condition or contents of a document when the original is shown “*or appears to be in the possession or power*” of a person against whom a document is sought to be proved.

10] At the stage of deciding whether leave is to be granted for leading secondary evidence, it is sufficient, if it appears to the Court that the document in question is in the possession or power of the person against whom the document is sought to be proved. Apart from the evasive denial, Ms Parasnis is right in her submission that the petitioner, has nothing to gain by claiming that the Agreement dated 24th January 2009, which bears the petitioner signature is not in the petitioner's possession and thereafter, to produce the same as primary evidence.

11] The circumstance that the leave is liable to be granted to lead secondary evidence does not mean or should not be construed to mean, any reflection upon the evidentiary value of the document in

question. No doubt, the evidentiary value will have to be decided at the appropriate stage and merely because leave is required to be granted to lead secondary evidence does not mean that the document in question is required to be read and construed as some Agreement entered into between the parties or some Agreement reflecting the terms and conditions of any alleged contracts by and between the parties. All these matters will have to be decided at the appropriate stage by learned Trial Judge. Accordingly, all objections and contentions in this regard are specifically kept open.

12] The order dated 28th November 2015 whilst refusing to take action in terms of Order 12 Rule 8 of the CPC specifically grants liberty to the petitioner to prove the contents of the plaint as also document relied upon by adducing independent evidence. The expression “*independent evidence*”, in the present context, would include both primary as well as secondary evidence, provided ofcourse a case is made out for leading secondary evidence. There is nothing in the order dated 28th November 2015, which either precludes the petitioner for applying to lead secondary evidence, provided ofcourse, a case in terms of Section 65 of the Evidence Act is made out for the purpose.

13] Accordingly, the impugned order dated 23rd March 2016 is set aside. The petitioner's application at Exhibit-25 is made absolute in terms of prayer clause "8.a." of the application (Exhibit-25), which reads thus:

"8.a. Permission may kindly be granted to lead secondary evidence of above mentioned Leave and License Agreement dt.24.1.2009 filed at Sr.No.5 below Exhibit.3."

14] However, it is clarified that the evidentiary value shall be determined by the learned Trial Judge, at the appropriate stage and further all contentions and objections of all parties in this regard are specifically kept open.

15] Rule is made absolute in the aforesaid terms. There shall, however, be no order as to costs.

16] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)