

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11575 OF 2017**

Farouk Merwan Irani	...Petitioner
<i>Versus</i>	
Abbas Ali Talebi & Ors	...Respondents

Mr JP Sen, Senior Advocate, a/w Ms Kavita A Shah, *for the Petitioner.*

CORAM: G.S. PATEL, J
DATED: 23rd November 2017

PC:-

1. Heard Mr Sen for the Petitioner. The Affidavit of service is taken on file.

2. **Rule**, returnable forthwith.

3. By an order of 8th February 2017, the Trial Court hearing RAE&R Suit No.230/458 of 1998 rejected the Petitioner's application to mark in evidence several documents. The reason this is of some consequence is that these documents bear the signature of the 1st Defendant, the 1st Respondent to the Petition, Abbas Ali Talebi. The documents were listed at serial nos.2, 4, 5, 6 and 9. By an order of 5th August 2016 the Court allowed the Plaintiffs to examine Defendant

No.1 to prove these documents because it was he who had signed them and his signature was necessary to prove the documents. It is clarified that this is true of documents at serial nos.2, 4, 5 and 6 but not the documents at serial no.9 which is a set of photographs taken by the Plaintiff.

4. The oddity in this matter is that the 1st Defendant was simply unavailable. He completely removed himself from this litigation. The Plaintiff attempted to serve him through his Advocate, who reported to Court that he did not know the 1st Defendant's address or whereabouts. The 1st Defendant had apparently given a power of attorney to Defendant No.4. He, too, said that he did not know the name of his principal, the 1st Defendant. Consequently, relying on Section 32 of the Indian Evidence Act and, in particular, Sections 32(5) and 32(6), and Section 90, the Petitioner-Plaintiff urged that the documents ought to now be marked in evidence. The author of the documents could not be produced. His presence could not be secured. Indeed, it was uncertain whether the 1st Defendant was alive.

5. For some reason, the Court seems to have taken the view that evidence ought to have been led in regard to the unavailability of the 1st Defendant and it was necessary to establish that the documents was more than 30 years old. The age of the documents was surely obvious from the documents itself. As to evidence being required to show the absence of the 1st Defendant, I am quite unable to see what more the Plaintiff could possibly have done. It is not as if they sought to have the documents marked in evidence without an attempt to give a notice to the 1st Defendant.

6. The Court relied upon a previous order dated 29th August 2015 made on an application at Exhibit-152 by which the Plaintiffs were permitted to lead limited evidence of witnesses to prove documents not earlier marked in evidence. On the basis that these documents at serial nos.2, 4, 5, 6 and 9 had not been marked on that date, the Trial Court concluded that to allow them now into evidence amounted to an impermissible review. This is also incorrect. Both orders granted liberty to the Plaintiff, and it was that liberty that was being exercised.

7. Having regard to these facts, the order will need to be set aside and rule will need to be made absolute immediately. I will however grant liberty to the 1st Defendant, should he chose to appear at any stage, to apply to this Court for a modification or recall of this order, or, at his option to urge before the Trial Court that the documents marked in evidence at serial nos.2, 4, 5 and 6 do not carry sufficient evidentiary value. As regards the documents at serial no.9, this being a set of photographs taken by the Plaintiff, the Plaintiff will be at liberty to lead additional evidence sufficient to prove these documents.

8. The Trial Court will act on an authenticated copy of the order and will not take any further steps in the trial until this stage of the evidence is complete, i.e., the marking of the document at Sr No.9 is considered. As regards the documents at serial no.2, 4, 5 and 6, the Trial Court will assign these appropriate exhibit numbers in its trial record.

9. Rule is made absolute in these terms and subject to these conditions and qualifications.

10. There will be no order as to costs.

(G. S. PATEL, J.)