

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9196 OF 2012

Shri Mahendra P. Selarka
& Another

.. Petitioners.

v/s.

Mr. Muzammal Y. Quereshi
& Another

.. Respondents.

Mr. Sagar Joshi, for the Petitioners.

Mr. Jitendra M. Patil, for Respondent No.1.

CORAM: M.S.SANKLECHA, J.

DATE : 25th SEPTEMBER, 2017.

P.C:-

This Petition under Article 227 of the Constitution of India, challenge the order dated 8th August, 2012 passed by the 4th Joint Civil Judge, Senior Division, Thane. By the impugned order, the application made by Petitioners herein (Original Defendant Nos. 2 & 3 before the Trial Court), was partly rejected. The impugned order allowed the application of Petitioners to the extent it re-calls/ set aside the 'No Cross Examination' order passed on 6th July, 2012 while it rejected application to de-exhibit of the documents tendered by the Respondent (Original Plaintiff) on 6th July, 2012.

2 On 10th October, 2012, this Court while issuing notice to the Respondents for admission also put the parties to notice that the Petition may be disposed of finally at the stage of admission. Further, pending admission, the order dated 8th August, 2012 was also stayed before the Trial Court.

3 The impugned order rejected the de-exhibiting of the documents on the ground that it is a settled position that once the document is exhibited, it cannot be de-exhibited.

4 The Petitioners' grievance to the impugned order is that on 6th July, 2012, when the Plaintiff had tendered certain documents in evidence, no notice of the documents proposed to be tendered by the Respondent – Original Plaintiff, was given to the Petitioner prior to it being tendered. Consequently, the Petitioner were not represented at the time when the documents were tendered in evidence. Some of the documents tendered, were in the nature of secondary evidence. This also without any application on the part of the Respondent for permission to tender the secondary evidence.

5 The above facts are not disputed by the Respondents.

6 Normally, the document is marked for the purpose of identification and it is subject to the proving of its contents at the hearing before the Trial Court. However, in the present facts, large number of documents were, secondary documents. The secondary evidence was tendered without any application on the part of the Respondent for permission to tender the same. The occasion to lead the secondary evidence would arise only when the party satisfies the Court that the conditions set out in Section 65 of the Indian Evidence Act, 1872 are met. This after hearing the objections of the other side. Therefore, although one cannot dispute the fact that once a document is exhibited, no occasion to de-exhibit it can arise, yet in the peculiar facts of this case the process of taking secondary evidence on record has been done arbitrarily. Further, the trial has not yet proceeded with further after the impugned order

dated 8th August, 2012. This in view of the stay of the order dated 8th August, 2012 by this Court on 10th October, 2012. Therefore, the process by which the documents were taken on record, without notice to the other side or even an application by the Respondent's to take secondary evidence would render the process bad, calling for interference in my supervisory jurisdiction under Article 227 of the Constitution of India.

7 In fact, the Full Bench of this Court in *Hemendra Rasiklal Ghia & Others v/s. Subodh Mody & Others 2008(6) Bom., C. R. 519* has held that mode of proving a document (in this case secondary evidence) must be objected to and ruled when the document is tendered in evidence. The secondary document has been taken on record without any application on the part of the Respondents to tender secondary evidence nor giving of notice to the Petitioner. Therefore, bad in law and in breach of the law settled by the Full Bench of this Court.

8 In the above view, the impugned order dated 8th August, 2012 is quashed and set aside.

9 Mr. Patil, learned Counsel appearing for the Respondent states that in fact, no application for taking its secondary evidence on record has been filed by the Respondent and he seeks liberty to do the same. Liberty as prayed for, granted.

10 The Trial court to consider the admissibility of the documents being tendered on behalf of the Respondents after hearing the Petitioner on its objection to the documents being taken on record.

11 **Petition disposed of** in the above terms. No order as to costs.

(M.S.SANKLECHA,J.)