

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 284 OF 2017**

M/s Narmada Estates Pvt Ltd

..Petitioner

Vs

The State of Maharashtra and
Ors.

.. Respondents

Mr. Madhav J. Jamdar, Advocate for Petitioner.

Mr. Sachin Kankal, A.G.P for Respondents no. 1 to 4.

CORAM : R.G.KETKAR,J.

DATE : 12/01/2017

PC:

1. Heard Mr.Madhav Jamdar, learned counsel for the petitioner and Mr. Sachin Kankal, learned A.G.P for respondents no. 1 to 4 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff' , has challenged the Judgment and order dated 6.10.2016 passed by the learned 6th Jt. Civil Judge, Sr. Dn., Pune below Exhibit 156 in Spl. Civil Suit No.2090 of 1996. By that order, the learned trial Judge allowed the application made by defendants no.1 to 4 for leading secondary evidence in respect of documents filed at serial no. 2,3 and 4 of list of document at Exhibit 159.

3. In support of this petition, Mr. Jamdar submitted that on behalf of defendants no.1 to 4 Dr. Bhalchandra Manikrao Donglikar, Superintendent, Regional Mental Hospital, Pune filed evidence affidavit dated 16.9.2016. In paragraphs 5 and 6, he

made reference to rent receipt issued by the plaintiff to the defendant-department. In paragraph 6, he referred to the letter issued by the defendants to police for providing protection. He also referred to the letter dated 25.9.1989 addressed to P.M.C Fire Brigade. He submitted that however in paragraphs 5 and 6 no reference is made to production of either original documents or even photocopies. He relied upon Section 63(2) of the Indian Evidence Act, 1872 and in particular illustration (b), which is to the following effect.

“63. Secondary evidence.—Secondary evidence means and includes—

(1) Certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of documents as against the parties who did not execute them;

(5) Oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

(a) xx xxx

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.”

4. He has taken me through the application at Exhibit 156 made by defendants no.1 to 4 and in particular paragraph 1.

Defendants no.1 to 4 contended that the documents at serial no. 2, 3 and 4 of list Exhibit-159 are photo-copies of original documents. Original documents are misplaced in some other files at the time of shifting of office and are not traceable. He submitted that no statement is made that the photocopies are compared with the original and it is not shown that the copy was made by a copying machine from the original. In other words, Illustration (b) to Section 63(2) is not complied by the defendants. The learned trial Judge was, therefore, not justified in allowing the application.

5. On the other hand, Mr. Kankal supported the impugned order.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. In paragraph 6 of the impugned order, the learned trial Judge has observed that the issues involved in the present suit pertain to the period from 1978 to 1995. In the application, defendants no. 1 to 4 contended that because of shifting of the Office, original documents were misplaced. Defendants no. 1 to 4 are various Government officials and are transferred due to exigencies of service and, therefore, the reason given in the application that the originals are misplaced or lost while shifting cannot be said as false. In paragraph 7, the learned trial Judge observed that as regards existence of the

documents, plaintiff can cross-examine the witness. In view thereof and for the reasons recorded in paragraphs 6 and 7 in the impugned order, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, 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 appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)