

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 13836 OF 2016

Mr. George Varughese

..Petitioner.

Vs

Maharashtra State Road
Transport Corporation

.. Respondent

Mr. D. Vyas a/w Radha Kapadia i/b M/s.Thakore Jariwala &
Associates, Advocate for Petitioner.

Mr. G.S. Hegde, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 06/01/2017

PC:

1. Heard Mr.D.Vyas, learned counsel for the petitioner and Mr. G.S.Hegde, learned counsel for the respondent at length. Rule. Mr. Hegde waives service for the respondent. Having regard to the narrow controversy raised in petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

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 29.8.2016 passed by the learned Judge, City Civil Court, Greater Bombay in Notice of Motion No. 272 of 2016 in Suit No. 8857 of 1994. By that order, the learned trial Judge dismissed the Notice of Motion taken out by the plaintiff for adducing secondary evidence. The learned

trial Judge gave liberty to the plaintiff to comply the provisions of Section 66 of the Indian Evidence Act, 1872 (for short, 'Act') and Order XI, Rule 14 and O.XIII of C.P.C, if so advised.

3. In support of this petition, Mr. Vyas has taken me through the affidavit in support of Notice of Motion made by Mr A.C.Mathew, Constituted Power of Attorney holder of the plaintiff as also Exhibit- A containing Schedule of documents in respect of which the plaintiff has sought permission to adduce secondary evidence. He has also invited my attention paragraphs 6,7,8 and 10 of the impugned order. He submitted that in the affidavit in support of the Motion, it is specifically averred that the typed copy of letter has been compared with the original letter by the plaintiff at the relevant time. However, in paragraph 6, the learned trial Judge has observed that 14 documents referred in Schedule at Exhibit-A annexed with the affidavit in support of notice of motion are typed copies which do not bear any endorsement either of person who typed it, compared it and attested it to be true and correct copy of the original. Neither there is any endorsement thereupon regarding the receipt/acknowledgement by the addressee nor there is any copy of the signature of the person issuing it or signed it. In paragraph 7, the learned trial Judge has observed that the secondary evidence means and includes copies made from or compared with the original. In paragraph 8, the learned trial Judge observed

that the documents relied by the plaintiff fall within the category of transcribed copy from copy, but without any endorsement or mention about its comparison with the original or about the comparison with the copy from which it has been transcribed with the original. He submitted that the learned trial Judge has not considered the averments made in the affidavit in support of notice of motion while recording findings in paragraphs 6,7 and 8 of the impugned order. As far as the findings recorded in paragraph 10 that the plaintiff did not make any efforts as contemplated by Section 66 of the Act for securing production of documents under Order 11, Rule 14 and 16 of C.P.C is concerned, he submitted that on 16.12.2015 the plaintiff has issued notice under Order XI, Rule 14 of C.P.C. The said fact was specifically averred in paragraph 4 of the affidavit in support of notice of motion and that the said notice was not replied by the defendants. However, the learned trial Judge has failed to consider this aspect and, therefore, gave liberty to the plaintiff to comply provisions of Order XI.

4. On the other hand, Mr. Hegde submitted that the defendant did not dispute receipt of notice dated 16.12.2015. However, the defendants are disputing existence of documents in respect of which the plaintiff wants to adduce secondary evidence. He invited my attention paragraph 2 of the affidavit of Dilip Gosavi, working as Store Officer. In paragraph 2, it is averred that the

plaintiff, inspite of knowing the fact that the copies of the said documents are not available with the defendant, mischievously issued a letter to the defendant calling upon him to produce the documents. The defendant has not received those letters and therefore they are not in possession and hence cannot be produced. He therefore submitted that the learned trial Judge was justified in dismissing the Motion.

5. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Perusal of the findings recorded by the learned trial Judge in paragraphs 6,7, and 8 shows that the learned trial Judge has not considered the assertions made in the affidavit in support of Motion. That part, it is not in dispute that the plaintiff issued notice dated 16.12.2015 under Order XI, Rule 16 of CPC calling upon the defendant to produce documents. The defendant has not replied the said notice. The learned trial Judge however observed in paragraph 10 that the plaintiff did not make any attempt for securing production of original documents or office copies thereof and in fact by clause (2) of operative part of order gave liberty to the plaintiff to comply the provisions of Section 66 of the Act and Order XI, Rule 14 and Order XIII of C.P.C. Thus, it clearly shows that the learned trial Judge has not considered the case of the plaintiff about compliance of the requirement of order XI, Rule 16. The learned trial Judge has also

not considered the assertions made by the plaintiff as regards comparison of typed documents with the original documents. In view thereof, the impugned order cannot be sustained and is liable to be set aside thereby restoring the Notice of Motion for deciding it afresh in the following order.

(i) Impugned order dated 29.8.2016 is quashed and set aside. Notice of Motion No. 272 of 2016 in Suit No.8857 of 1994 is restored to the file of the learned trial Judge.

(ii) The learned trial Judge will decide the said Motion afresh. All contentions of the parties on merits are expressly kept open.

(iii) Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)