

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 1537 OF 2016

Nav-Swaroop Co-op. Hsg. Soc. Ltd.	...Petitioner
<i>Versus</i>	
M/s. Pradeep Construction	...Respondent

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Mr.Satyajeet Joshi a/w. Sandeep Mahadik i/b. Abhishek
Wailwaikar i/b. Wailwaikar Law Asso., for the Petitioner.
Mr.Bhavik Manek a/w. Mr. V.N. Ajikumar, Advocate for the
Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 04th JANUARY, 2017

P.C.

1. Heard Mr.Satyajeet Joshi, learned Counsel for the
petitioner and Mr.Bhavik Manek, learned Counsel for the
respondent, at length.

2. Rule. Mr.Manek waives service. Having regard to the
controversy raised in the 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.

3. By this Petition under Article 227 of the Constitution of
India, the petitioner, hereinafter referred to as the 'defendant',

has challenged the judgment and order 28.10.2015 passed by the learned Judge, City Civil Court, Dindoshi, Goregaon in Notice of Motion No.2443/2015 in S.C. Suit No.5111/2004. By that order, the learned trial Judge has allowed the Notice of Motion taken out by the respondent, hereinafter referred to as the 'plaintiff', in terms of prayer clause (a). The learned trial Judge has permitted the plaintiff to lead secondary evidence in respect of documents at Sr. Nos.4 to 6, 8, 9, 11, 12, 15, 16 and 23 to 25 produced along with the list at Exh-4. under the provisions of Sections 63 and 65 of the Indian Evidence Act, 1872 (for short, 'Act').

4. The learned Counsel for the parties fairly stated that the controversy in the present petition is in respect of documents at Sr. Nos.5, 8, 11 and 23 to 25. As far as document at Sr. No.26 is concerned, it is a non-cognizable complaint lodged by Subhash Datar, an employee of the plaintiff. By the impugned order, the learned trial Judge has permitted the plaintiff to call the original N.C. from the concerned police station and prove said document by comparing photo-copy with the original N.C. which is in the custody of the concerned police.

5. As far as document at Sr. No.5 is concerned, it is a certificate dated 11.6.2001 issued by the Honorary Secretary of the defendant Society. The defendant society has disputed the authenticity of the said document. Mr. Joshi submitted that the plaintiff has not referred to these documents in the plaint as also did not refer these documents in the list of documents annexed to the plaint. He has taken me through the agreement entered into between the parties and submitted that the defendant society never agreed to give the plaintiff flat admeasuring 1200 square feet on the third floor and also enroll the plaintiff as member of the society. In paragraph-14 of the affidavit of examination-in-chief, the plaintiff has totally made out a new case contrary to the pleadings which is not permissible. The learned trial Judge has however not considered this aspect.

6. As far as document at Sr. No.8 is concerned, it is a letter dated 3.4.2001 purportedly addressed by the Honorary Secretary of the defendant society to Ashok P. Solanki. The defendant has contended that said document is also a forged and fabricated document and the same was denied by the defendant society. The learned trial Judge, however, allowed the

plaintiff to lead secondary evidence on the ground that the document is in the custody of the defendant. Mr. Joshi submitted that the learned trial Judge has not considered the case of the defendant in their reply and in particular paragraph-7 thereof.

7. As far as document at Sr. No.11 is concerned, it is a letter dated 22.8.2001 purportedly addressed by the defendant society to the Deputy Registrar of Co-operative Societies, K-East Ward. Mr. Joshi submitted that the plaintiff may be given liberty to summon the concerned officer from the office of Deputy Registrar, Co-operative Societies for proving the contents of this document.

8. On the other hand Mr. Manek submitted that as far as the documents at Sr. Nos.23 to 25 are concerned, the plaintiff will issue notice under Order XII Rule 8 of C.P.C. for production of these documents. As far as document at Sr. No.11 is concerned, the plaintiff will apply to the trial Court for issuing witness summons to the officer attached to office of the Deputy Registrar, Co-operative Societies, K-East Ward. In addition, the plaintiff will also include this document in notice under Order

XII Rule 8 of C.P.C.

9. As far as documents at Sr. No.5 & 8 are concerned, Mr. Manek submitted that the learned trial Judge may be directed to decide this aspect afresh.

10. Hence, by consent of parties, the petition is disposed of in following terms:

- i. As far as document at Sr. No.11 is concerned, namely, letter dated 22.8.2001, the plaintiff is at liberty to apply to the trial Court for issuing witness summons to the officer attached to the office of the Deputy Registrar, Co-operative Societies, K-East Ward. In addition, the plaintiff is at liberty to include this document in the notice to be given under Order XII Rule 8 of C.P.C.
- ii. As far as document at Sr. No.26 is concerned, the plaintiff is at liberty to call for the original N.C. from the concerned police station and prove the same by comparing photo-copy with the original N.C. in the custody of the concerned police station.
- iii. As far as documents at Sr. No.23 to 25 are concerned,

the plaintiff is at liberty to issue notice to the defendant under Order XII Rule 8 of C.P.C. calling upon the defendant society to produce these documents. The defendant is at liberty to deal with this notice in accordance with law.

- iv. The impugned order, except in respect of the documents at Sr. No.5 & 8, stands substituted by this order.
- v. As far as documents at Sr. No.5 & 8 are concerned, the learned trial Judge will decide the same afresh. All contentions of the parties on merits are kept open.
- vi. Rule is partly made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)