

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

902 WRIT PETITION NO. 3896 OF 2017

POONAM RAJIV KHANNA AND ANOTHER
VERSUS
PREMNARAYAN SUNDARLAL VIJAYVARGIYA AND ANOTHER

...
Advocate for Petitioners : Mr. S. M. Godsay
Advocate for Respondent No.1 : Mr. R. F. Totla

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CORAM : V.K. JADHAV, J.
Dated: February 24, 2018

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PER COURT :-

1. By consent of the parties, heard finally at admission stage.

2. By this writ petition, the petitioners-original defendant Nos. 1 and 2 have challenged the order dated 07.01.2017 passed by the learned Civil Judge (Senior Division), Aurangabad below Exh. 77 in Special Civil Suit No. 496 of 2011.

3. Brief facts giving rise to the present writ petition are as follows :

(a) Respondent No.1/original plaintiff has instituted a

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Special Civil Suit No. 496 of 2011 for specific performance of contract in respect of suit property and for cancellation of deed of cancellation. The present petitioners have strongly resisted the said suit by filing written statement. Respondent No.1 / original plaintiff has filed an application Exh.77 seeking permission to lead secondary evidence in the kind of receipts, alleged to have been executed by the petitioner / original defendant no.2 while accepting the part of the consideration amount. It has been contended in the said application that the original receipts are in the custody of petitioner/defendant no.2 and the respondent no.1 / plaintiff has specifically pleaded this fact in the plaint. It has been pointed out to the court that the petitioner / defendant no.2 was under cross-examination and as such, the plaintiff wants to confront the photo copies of the receipts alleged to have been executed by petitioner / defendant no.2 in favour of the respondent No.1 / plaintiff. Obviously, the petitioners have strongly resisted the said application. The learned Civil Judge (Senior Division), Aurangabad by its impugned order dated 07.01.2017 allowed the application. Hence, this

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writ petition.

4. Learned counsel for the petitioners / defendant Nos. 1 & 2 submits that, initially respondent No.1 / original plaintiff has filed an application Exh. 74 for direction to petitioner / defendant no.1 to make discovery about the said documents on oath, which are in her possession. The present petitioners have opposed the said application by filing their say. It has been specifically contended in the said say that those documents neither in existence nor in their custody. They have also denied the said fact in their written statement. Though the learned Judge of the trial court has taken a note of the submissions made on behalf of the respondent / plaintiff about the alleged fraud by the petitioners / defendants for taking custody of the aforesaid receipts, further observed that existence of the documents, as detailed in application Exh.74, cannot be believed only relying upon the photo copies and there need to be more cogent evidence to establish their existence. The learned Judge of the trial court by order dated 15.04.2015 has rejected the said application.

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5. The learned counsel for the petitioners submits that respondent no.1/ plaintiff has not challenged the said order passed below Exh.74 and afterwards filed an application Exh.77 seeking permission to lead secondary evidence in respect of those receipts. The learned counsel submits that respondent No.1 / plaintiff has failed to lay down a basic foundation to bring his case under clause (a) of Section 65 of the Evidence Act. According to respondent No.1 / original plaintiff though the receipts are being notarized receipts, even then the respondent / plaintiff has not examined the concerned notary to create a foundation for seeking permission to lead secondary evidence in respect of those receipts. Learned counsel submits that the documents in question are admittedly the photo copies. Since the trial court has already rejected application Exh.74, there is no possibility of the document being compared with the original. Consequently, the conditions in Section 65 (a) of the Evidence Act have not been satisfied.

Learned counsel for the petitioners in order to substantiate his contentions placed reliance on following cases :

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- i) Smt. J. Yashoda Vs. Smt. K. Shobha Rani, reported in 2007 AIR SCW 2713;
- ii) The Roman Catholic Mission Vs. The state of Madras and another, reported in AIR 1966 SC 1457.

6. Learned counsel for respondent No.1 / original plaintiff submits that it has been specifically pleaded by the plaintiff that the defendant / petitioner No.2 had executed four receipts in his favour while accepting the part consideration amount of Rs.10,00,000/- by putting his signature on it. After execution of the said receipts, the plaintiff got two copies from the notary and placed those on record. Learned counsel submits that the original receipts are kept by the petitioner / original defendant no.2 by giving assurance to the respondent / original plaintiff that those are required for getting sanction, N.A. and lay-out order. The learned counsel submits that after handing over those original receipts to the petitioner / original defendant no.2, he never given it back to the respondent / plaintiff. The petitioners, however, conveniently taken a stand in the written statement about the non-execution and non existence of

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said receipts. The learned counsel submits that in order to confront the photo copies of the receipts, which have been got prepared through the notary, respondent / plaintiff has filed an application Exh.77 seeking permission to lead secondary evidence. Learned counsel submits that in fact, the application seeking permission to lead secondary evidence is neither necessary nor desirable.

7. Learned counsel for the respondent in order to substantiate his contentions, placed reliance on the judgment of this Court in the case ***Karthik Gangadhar Bhat Vs. Nirmala Namdeo Wagh and another,*** reported in 2017 (6) ALL MR 769.

8. Section 65 of Evidence Act provides for permitting the parties to adduce secondary evidence. However, on plain reading of provisions of Section 65, it appears that such course is subject to fulfillment of certain conditions. The respondent / plaintiff by filing an application Exh. 77 sought permission to lead secondary evidence in terms of clause (a) of Section 65 of the Evidence Act. It is well

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settled that in case original documents are not produced at any time nor has any factual foundation being laid for giving secondary evidence, it is not permissible for the court to allow the party to adduce secondary evidence. Thus, the secondary evidence relating to the contents of a documents is inadmissible, until the non-production of the original is accounted for so as to bring it within one or other of the cases provided for in the section.

9. In the instant case, the respondent / plaintiff has failed to lay down any factual foundation for giving a secondary evidence in respect of those receipts. Prima facie, it is difficult to believe that even though the respondent/plaintiff has given such huge amount to the petitioners / defendants and thereupon certain receipts are given, the original receipts were handed over to respondent No.1 / plaintiff for the purpose of obtaining the N.A. sanction and lay-out. Further, even though, those receipts are notarized, the respondent / plaintiff has not bothered to examine the notary in order to create a factual foundation about existence of the original receipts. It has to be mentioned here that the

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plaintiff's evidence is already over and now the matter is posted for evidence of the defendants and while the petitioner/defendant is under cross-examination, the respondent / plaintiff wanted to confront him with photo copies of those receipts for which basic foundation is lacking. However, the learned Judge of the trial court has dealt with it in a very causal manner and in para no.4 of the order observed that this is statutory right given by the provision of the Code of Civil Procedure to the party concern. The learned Judge of the trial court has not given reference to the provisions of Section 65 of the Evidence Act. In view of above, the impugned order is not sustainable. Hence, the following order.

ORDER

- I. Writ petition is hereby allowed. No costs.
- II. The order dated 07.01.2017 passed by Civil Judge (Senior Division), Aurangabad below Exh.77 in Special Civil Suit No. 496 of 2011 is hereby quashed and set aside.
- III. Application Exh.77 in Special Civil Suit No. 496 of 2011 is hereby rejected.
- IV. Writ petition is accordingly disposed of.

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10. It is made clear that, the observations made by this Court are for deciding the application Exh.77 and the trial court shall decide the suit on its own merits without getting prejudiced by the observations made in this order.

(V.K. JADHAV, J.)

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