

THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8413 OF 2016
(Bharat Petroleum Corporation Limited Vs. Jalgaon Municipal
Council)

Mr.Sanket S.Kulkarni, Advocate for the petitioner.
Mrs.Chaitali Kutti, Advocate for the respondent.

(CORAM : V. L. ACHLIYA, J.)

DATE : 23/04/2018

PER COURT :

1. By this petition filed under Article 227 of the Constitution of India, the petitioner – original plaintiff has challenged the order dated 12.04.2016 passed below Exh.59 in R.C.S. No.247 of 2008 by learned Civil Judge Senior Division, Jalgaon. By the impugned order, the learned Civil Judge Senior Division, Jalgaon passed an order to admit and mark the documents produced along with list Exh.61 as exhibits to be read in evidence.

2. Heard the learned advocate for the petitioner and respondent. Perused the impugned order.

3. Before dealing with the submissions advanced, it is necessary to consider few facts leading to filing of this petition. Petitioner –

original plaintiff filed a civil suit as against the respondent / Municipal Corporation challenging the order dated 08.10.2008 passed by the Municipal Commissioner to revoke the permission to erect the canopy and further direction to remove the same. Petitioner - original plaintiff has challenged the action on the part of the defendant that the erection of canopy is not unauthorized and the order passed by the Municipal Corporation is illegal and arbitrary and taken at the instance of third person.

4. On conclusion of the evidence of plaintiff, the defendant filed evidence by way of examination-in-chief in the form of affidavit of its witness namely Chandrakant Rangnath Nikam, Assistant Director, Town Planning, Municipal Corporation, Jalgaon. The affidavit was filed at Exh.59. Along with affidavit, the defendant filed documents to be relied as an evidence. Learned Judge of the Trial Court called upon the plaintiff to record his say as to the documents produced with list Exh.61. The plaintiff has recorded its objection on list Exh.61. The admission of the documents in evidence objected on the ground that the documents as mentioned in list Exh.61 are true copies and original. The plaintiff has specifically mentioned in the objection raised that unless and until original documents are produced and the documents mentioned in list Exh.61 cannot be

admitted in evidence. The admission of the document also objected on the ground that the documents as produced and sought to be marked as Exhibits to be read in evidence, not referred in the Written Statement. In spite of the written objections raised, the learned Judge has not passed specific order before proceeding to record the evidence of witness for defendant. After the witness for defendant stepped into the witness box during the course of recording of further examination in chief, the learned Judge passed the order to mark all the documents (except Sr.No.9) as exhibits to be read in evidence. Being aggrieved, the petitioner has preferred this petition.

5. Mr. Sanket Kulkarni, learned advocate for the petitioner submits that though the challenge raised in the petition to the impugned order is on various grounds, but the petitioner confine its challenge as to legality and correctness of the order passed by the Trial Court to admit the true copies of the documents as exhibits without the case made out to lead the secondary evidence. By referring the overall facts of case and order passed, the learned Advocate submits that the order passed is *per se* illegal, perverse and unsustainable in Law.

6. On the other hand, the learned advocate for the respondent

supported the order passed by the Trial Court and contended that the documents produced are public documents and therefore the trial court has rightly marked those documents as exhibits. In support of the submissions advanced, the learned advocate has referred and relied upon the decision of this Court in the case of Kishor Sukhdeo Walhekar Vs. State of Maharashtra and others [2009(4) Mh.L.J. 817].

7. On due consideration of the submissions advanced in the light of the order passed by the trial court, I have no hesitation to hold that the order passed is perverse and liable to be set aside. Perusal of the list of the documents produced at Exh.61 (Exh-E to the petition) clearly reflect that all the 18 documents produced by the defendant along with the affidavit of witness for defendant and called upon to be admitted in evidence are the copies of documents and not the original documents. So also none of the documents mentioned in list Exh.61 can be termed as a 'public documents'. The documents as mentioned in list Exh.61 are the private documents. Most of the documents mentioned in the list are the copies of the applications moved by the respondent seeking permission, copy of the complaint received and the correspondence between plaintiff and defendant. One of such document mentioned at Serial No.9 is a xerox copy of the

agreement. Plaintiff has rightly raised objection that as the documents are not the original documents, same cannot be accepted in evidence unless the originals are produced. It is also pointed out that there is no special privilege and exemption available for the local body from producing original documents. It is rather surprising that though the documents produced are private documents and defendant has not produced the originals of those documents, still the trial court has passed the impugned order to mark all the documents as Exhibits to be read in evidence except the documents at Sr.No.9 which is the xerox copy of the agreement. As provided under Section 64 of the Evidence Act (hereinafter referred to as the said 'Act'), the documents in evidence must be proved by primary evidence except in the cases mentioned in Section 65 of the said Act. Section 65 of the said Act enumerate the instances wherein the secondary evidence can be given of the existence, conditions or contents of the documents when the original is not available or cannot be produced, for one or other reason mentioned in Section 65 of the said Act. Section 65 reads as under :

“65. Cases in which secondary evidence relating to documents may be given — *Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-*

(a) When the original is shown or appears to be in the

possession or power—

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.”

8. It is pertinent to note that it is no where the case of respondent – defendant that originals of those documents are not available and therefore they are required to lead secondary evidence. In absence of any case being made out to lead secondary evidence, the trial court has grossly erred in passing the impugned order and to mark the copies of private documents as exhibits to be read in evidence inspite of objection raised by plaintiff. The procedure adopted by the trial court is unknown to law. There is no special provision making an exception for the local body exempting from producing the primary evidence. In this view, the order passed by the trial court is perverse, not sustainable in law and liable to be set aside. The decision in the case of **Kishor** (*supra*) referred and relied upon by the learned advocate for the petitioner have no bearing upon the facts of the case for the sole reason that the documents as produced along with list Exh.61 cannot be termed as a public documents.

9. Since the trial court has committed gross irregularity in conduct of the proceeding, the order needs to be set aside and the case needs to be referred back to the trial court for taking fresh decision in the matter.

10. At this stage, the learned advocate for the respondent – defendant, on instructions from the officer present in the court, makes a statement that defendant – Municipal Corporation will produce the original documents the copies of which are produced with list Exh.61 on the next date of hearing. Since the cross-examination of the witness for the defendant is yet to begin, no serious prejudice would cause to the petitioner – plaintiff if the original documents are allowed to be produced before the cross-examination.

11. In this view, I am inclined to set aside the impugned order and direct the parties to appear before the Trial Court on 11/06/2018. Defendant is permitted to produce the original documents. The copies of which filed with list Exh.61. The Trial Court is directed to allow the defendant to conduct further examination in chief so as to enable the respondent/defendant to prove the documents and thereafter allow the petitioner/plaintiff to cross examine the

witnesses.

12. Writ petition is disposed of in the above terms. The issue in respect of admissibility of the documents is kept open and is to be decided by the Trial Court in accordance with Law.

(V. L. ACHLIYA J.)