

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.828 of 2017

Dekon Enterprises,
Having office at 1st floor, Block No.2,
Laxmi Bhuvan, Mapusa Goa, Represented
by the sole proprietor Mrs. Ashraf Essani
Major of age, Having office at 1st floor,
Block No.2, Laxmi Bhuvan, Mapusa Goa,
Represented herein by Her constituted
attorney and son Mr. Sameer Essani, 44
years of age, Resident of Noor Villa,
Opposite S.F. X School, Mapusa, Bardez,
Goa, (Constituted vide POA dated
07/06/2007, executed before Notary P.J.
Karkera, registered in his office on
07/06/2007, under Registration No.
1778/07)

..... Petitioner

V/s.

- 1 Mrs. Joema Monteiro,
Major of age
Wife of late Savio Monteiro,
r/o. H.No. 806, Karabhat,
Chorao- Goa.
- 2 Miss Jesuina Moneteiro
Major of age,
Daughter of late Savio Monteiro
r/o. H.No. 806, Karabhat,
Chorao- Goa.
- 3 Miss Michelle Monteiro,
Major of age,
Daughter of late Savio Monteiro
r/o. H.No. 806, Karabhat,
Chorao- Goa.
- 4 Miss Marina Monteiro,
Major of age,
Daughter of late Savio Monteiro
r/o. H.No. 806, Karabhat,

Chorao- Goa.

- 5 Miss Priyanka Monteiro,
Major of age,
Daughter of late Savio Monteiro
r/o. H.No. 806, Karabhat,
Chorao- Goa.

..... Respondents

Shri A.D. Bhobe, Advocate for the Petitioner.

Shri P. Kholkar, Advocate for the Respondents.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on : 5th February,2018

Pronounced on : 9th February,2018.

JUDGMENT :

1. Heard Shri A.D. Bhobe, learned Advocate for the petitioner and Shri P. Kholkar, learned Advocate for the respondents.
2. Rule. Shri P. Kholkar, learned Advocate waives service on behalf of the Respondents.
3. This petition takes exception to the order dated 18/03/2017 pursuant to which the learned trial Court dismissed the application of the petitioner seeking leave to produce secondary evidence of a notarized copy of the statement of accounts.
4. Heard Shri A.D. Bhobe, learned Advocate for the petitioner who invited attention to the statement of accounts and submitted that an endorsement was made by Savio, since deceased,

predecessor of the respondents at the foot of the statement in the course of his business transaction with the petitioner. The petitioner had filed an application to produce secondary evidence and in which a clear assertion was made that the notarized copy of the statement of accounts was produced on record alongwith the plaint. The respondents had objected to the application on the premise that in the absence of such a document, it could not take a plea of leading secondary evidence and besides the statement that the original statement of accounts appears to have been misplaced or lost was vague and did not entitle the plaintiff to lead secondary evidence. The trial Court by the order under challenge proceeded on an assumption that the petitioner wanted to produce the printout of the statement of accounts and in that view of the matter proceeded to record so in the impugned order by losing sight of the essence of the application. The case of the petitioner was clearly covered under section 65(c) of the Evidence Act and therefore the impugned order had to be quashed and set aside and leave granted to the petitioners to produce the secondary evidence on record.

5. Shri P. Kholkar, learned Advocate for the respondents submitted that there was no averment in the plaint qua the statement of accounts and/or the endorsement made by the said Savio. There was also no reference to the statement of accounts

bearing the signature of Savio in the plaint. The plaintiff had approached the Court with unclean hands inasmuch as though the impugned order was passed on 18/03/2017, the petitioner had moved the application before the trial Court on 17/04/2017 and which fact was suppressed from this Court while filing this petition in September, 2017. There was no infirmity with the impugned order and hence, the petition was liable to be dismissed. He placed reliance in **J. Yashoda v/s. K. Shobha Rani** [(2007(5) SCC 730)] in support of his case.

6. A cursory perusal of the pleadings forming a part of the petition would reveal that the petitioner had averred at paragraph 3 of the plaint that the late father namely Savio of the defendants i.e. the present respondents was carrying on the business of shrimp farming, used to purchase shrimp feed from the petitioner and he used to make the said purchases on a credit basis. The petitioner had further averred that he was liable to pay an amount of ₹5,72,956.54 and in that context placed reliance on the statement maintained by the petitioner of the purchases made by late Savio and forming an integral part of the plaint at Annexure P1(Colly). It is in that context that the petitioner sought leave of the trial Court to produce the notarized copy of the statement of accounts on record as secondary evidence since it apparently bore out the noting and the signature of the said Savio. The respondents

while filing their written statement in defence had not denied the fact that a notarized copy of the statement of accounts was produced on record by the petitioner which is relevant for the case of the petitioner. The case of the respondents was simpliciter one of denial of the entire case set up by the petitioner.

7. Chapter V of the Evidence Act on the aspect of documentary evidence provides in terms of Section 61 that the contents of the documents may be proved either by primary or by secondary evidence. Primary evidence in terms of Section 62 means the document itself produced for the inspection of the Court while secondary evidence means and includes certified copies from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies, copies made from or compared with the original, counterparts of documents as against the parties who did not execute them and oral accounts of the contents of a document as contained therein. Section 65 deals with the category of cases in which secondary evidence relating to documents may be given. Sub Section (c) is one of such eventuality namely when the original is 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. In other words, production of documents by way of secondary evidence is permissible in terms

of sub-clause (c) when original has been destroyed or lost and the party offering evidence of its contents cannot produce in original for any other reason not arising from its own default or neglect. Therefore, it is not as if secondary evidence of a document cannot be produced in evidence. The question of proof of its contents, its evidentiary value etc. would depend upon the factual matrix and the law of evidence relating to the admissibility of the document. Therefore, merely because secondary evidence is sought to be produced, it cannot be screened out on the premise that the original was not produced for inspection as has been the contention of Shri P. Kholkar, learned Advocate for the respondents.

8. In **J. Yashoda** (supra), the Apex Court held that for adducing secondary evidence it is necessary for the party to prove existence and execution of the original document and that conditions laid down in Section 65 of the Evidence Act must be fulfilled before secondary evidence can be admitted. This judgment in no way supports the case of Shri Kholkar, learned Advocate for the respondents inasmuch as the consistent case of the petitioner was that they had relied on the notarized statement of accounts in support of their case and which formed an integral part of the pleadings as contended in paragraph 3 of the plaint. The question before the trial Court was not whether the petitioner could make multiple copies or generate copies by use of the computer of the

statement of accounts as understood erroneously by the learned trial Court. What actually the petitioner sought to produce on record was a copy of the statement of accounts bearing the writing and the purported signature of the deceased Savio on record as secondary evidence and of which the notarized copy was already a part of the record as observed by the learned trial Court in the order under challenge.

9. The contention of Shri Kholkar, learned Advocate for the respondents that the petitioners had complied with the order of the trial Court by moving the application on 17/04/2017 is misplaced to say the least. There is also no basis in his contention that the petitioner had indulged in suppression by withholding a reference to this Court's records in the present petition filed at a latter point of time at the end of September,2017. The filing of the application on 17/04/2017 had no bearing on this petition which was filed to assail the order dated 18/03/2017 pursuant to which the learned trial Judge had declined the relief to produce the secondary evidence on record in the nature of the notarized copy of the statement of accounts. It was completely lost on the trial Court that the respondents could well assail the correctness of the statement of accounts, the writing and the signature therein not being purportedly of the late Savio and raising objection to its contents and its proof thereof.

10. In any event, the petitioner would not stand to benefit nor draw any advantage by withholding reference to the application dated 17/04/2017. A plea was canvassed on behalf of the respondents by Shri P. Kholkar, learned Advocate for the respondents that no inspection was given of the notarized copy of the statement of accounts. This contention too is without any substratum inasmuch as the plaintiff having relied on the statement of accounts in the pleadings alongwith the plaint, it is not as if the respondents were taken by surprise and could well have taken inspection or sought for the inspection of the documents at the appropriate stage. Besides, the notarized copy of the statement of accounts was on record and in that light too the contention of Shri P. Kholkar, learned Advocate for the respondents does not merit attention. The learned trial Court completely lost track of the fact that the notarized copy of the statement of the accounts was produced by the petitioner on record and that what was sought was the leave of the Court to produce the secondary evidence which was permissible in law, the proof of its contents notwithstanding. The trial Court quite on the contrary went off at a tangent observing that the petitioner could generate 'n' number of copies by the computer print out and could produce a certified copy in terms of Section 65(B) of the Evidence Act when it was nobody's case. The impugned order therefore suffers from the vice of failing to exercise jurisdiction which it possessed justifying

interference by this Court in exercising its power of superintendence by recourse to Article 227 of the Constitution of India.

11. In the result, i pass the following

O R D E R

The petition is allowed and the impugned order is quashed and set aside.

NUTAN D. SARDESSAI, J.

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