

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE SIDE JURISDICTION**  
**WRIT PETITION NO.7192 OF 2018**

|                                        |   |            |
|----------------------------------------|---|------------|
| Ramniklal S. Mathuria (since deceased) | ] |            |
| Kalavati R. Mathuria (since deceased)  | ] |            |
| Amish Ramniklal Mathuria               | ] | Petitioner |
| Vs.                                    |   |            |
| Ramesh Rancchoddas Parekh              | ] | Respondent |

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Ms. P. P. Madhwani i/b V.T. Lulia, for Petitioner.  
 Mr. Sameer R. Logade, for Respondent.

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**CORAM : R.G. KETKAR, J.**

**DATE : 10<sup>th</sup> OCTOBER, 2018.**

**P.C:**

Heard Ms. Madhwani, learned Counsel for the petitioner and Mr. Logade, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant' has challenged the order dated 8<sup>th</sup> March, 2018 passed by the learned Judge, Court Room No.38 of the Court of Small Causes at Mumbai (Bandra Branch) below Exhibit 96 in R.A.E.& R Suit No.307/812 of 1995 as also the judgment and order dated 4<sup>th</sup> May, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai (Bandra Branch) in Revision Application No.31 of 2018. By these orders, the Courts below partly allowed application-Exhibit 96 made by the defendant for marking the letter dated 12<sup>th</sup> March, 2015 which was earlier marked as 'Article-Y-5' as exhibit. The Courts below have permitted the defendant to withdraw

copy of the statement of account produced along with letter dated 12<sup>th</sup> March, 2015 as per prayer clause (b) of application Exhibit 96.

3. In support of this Petition, Ms. Madhwani has invited my attention to the additional affidavit filed by the defendant in February, 2016 and in particular paragraph 6 thereof. In paragraph 6 of that affidavit, the defendant made reference to the letter dated 12<sup>th</sup> March, 2015 received by Mr. Mehta on behalf of Siddhartha Apartments Pvt. Ltd. The said letter was produced at Sr. No.6 in the list of documents produced by the defendant. The defendant further deposed that the said letter is exact copy of letter dated 12<sup>th</sup> March, 2015 and there is acknowledgment of service of the same and the same be marked as exhibit. She also invited my attention to paragraphs 4 and 5 of the application Exhibit 96 where the defendant reiterated the contention that photo copy of the letter dated 12<sup>th</sup> March, 2015 is exact copy of the original. Photo copy of the letter dated 12<sup>th</sup> March, 2015 is marked as 'Article-Y-5' which was produced along with additional affidavit of evidence. She, therefore, submitted that the letter dated 12<sup>th</sup> March, 2015 ought to be marked as exhibit. In support of her submission, she relied on following decisions;

- [1] Karthik Gangadhar Bhat Vs. Nirmala Namdeo Wagh and another, 2017 (6) Bom. C.R. 554.
- [2] Order dated 14<sup>th</sup> December, 2016 passed by this Court [Coram: G.S. Patel, J.] in Testamentary Suit No.6 of 2015 in Lajwanti w/o Bhagwandas Madhwani Vs. Jayshree P. Madhwani and others.

4. Ms. Wadhvani submitted that in case of **Karthik Gangadhar Bhat** (supra), the learned Single of this Court observed that section 65 of the Indian Evidence Act 1872 (for short 'Act') does not speak of any 'application' at all. It only speaks of nature of evidence adduced as secondary evidence. When

leave is granted, apparently secondary evidence is then led but that leave is, completely unnecessary. In the case of **Lajwanti w/o Bhagwandas Madhwani** (supra), in paragraph 8, it is observed that it is entirely fallacious to assume that no photo copy can ever be admitted into evidence. She, therefore, submits that impugned order be set aside. On the other hand, Mr. Logade, supported the impugned orders.

5. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. From perusal of the record, it is evident that the defendant filed application Exhibit 87 for taking additional affidavit of evidence on record in view of the subsequent events that had taken place. The defendant filed additional affidavit in February, 2016. By order dated 13<sup>th</sup> April, 2016, the learned trial Judge allowed the application Exhibit 87. In paragraph 6 of the additional affidavit of evidence of February, 2016, the defendant stated thus;

“I say that in my cross examination dated 21/1/2016 I have stated I had given letter along with cheque for rent from February, 1980 to March, 2016 to Siddhartha Apartments Pvt. Ltd. The said letter was received by Mr. Mehta on behalf of Siddhartha Apartments Pvt. Ltd on 12<sup>th</sup> March, 2015. I produce the said letter at Serial No. “6” in list of documents produced by me. I say that the said letter is exact copy of said letter and there is acknowledgment for service of the same and the same may be marked as Exhibit”.

6. On 29<sup>th</sup> June, 2016, the learned trial Judge passed order on admissibility of documents produced by the defendant along with additional list of documents Exhibit 89 which inter alia included letter dated 12<sup>th</sup> March, 2015. The said letter was produced at Sr. No.6. By that order, the learned trial

Judge marked that document as “Article-Y-5” which is to the following effect;

“6.The document at Sr. No.6 is Letter dated 12/03/2015 of Siddhartha Apartment Pvt. Ltd and Statement of Central Bank of India. Letter and Bank Statement being photo-copy marked as Article-Y-5 and Article-6”.

The defendant has not challenged that order. Instead of challenging that order, the defendant filed application Exhibit 96 sometime in July, 2017 reiterating contention which was earlier raised in paragraph 6 of the additional affidavit of evidence. The learned trial Judge has considered this aspect and noted the prayers made in the application Exhibit 96. In so far as prayer clause (b) is concerned, the learned trial Judge permitted the defendant to withdraw copy of the statement of account produced along with letter dated 12<sup>th</sup> March, 2015, thereby granted prayer clause (b). In so far as prayer clause (a), admissibility of documents and marking letter dated 12<sup>th</sup> March, 2015 as 'Article-Y-5' is concerned, the learned trial Judge observed that no revision is filed against the order dated 29<sup>th</sup> June, 2016. The learned trial Judge was of the view that application Exhibit 96 is in substance seeking review of the order dated 29<sup>th</sup> June, 2016 and the said prayer cannot be considered by the subsequent Judge of the same Court and accordingly rejected the application.

7. Aggrieved by this decision, the defendant preferred revision application which was rejected by the Appellate Court on 4<sup>th</sup> May, 2018 substantially on the ground that the revision is not maintainable in view of the decision of the Full Bench of this Court in **Bharatiben Shah Vs. Gracy Thomas and others, 2013 (2) Mh. L. J, 25**. The Appellate Court was of the view that order below Exhibit 96 is a procedural order and does not affect substantive rights. Ms. Wadhwani relied on **Karthik Gangadhar Bhat** (supra) and **Lajwanti**

**w/o Bhagwandas Madhwani** (supra). In my opinion, the said decisions are not applicable to the facts of the present case.

8. In my opinion, no error is committed by the learned trial Judge while rejecting application Exhibit 96. The defendant did not challenge the order dated 29<sup>th</sup> June, 2016 by which the letter dated 12<sup>th</sup> March, 2015 was marked as 'Article-Y-5' after considering paragraph 6 of the additional affidavit of evidence of February, 2016. Hence, Petition fails and the same is dismissed.

9. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in memorandum of Appeal as contemplated by Section 105(1) of C.P.C. The defendant is at liberty to challenge the order dated 29<sup>th</sup> June, 2016, if so advised.

**[R.G. KETKAR, J.]**