

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12496 OF 2018

Michele Boutique and Others ...Petitioners
vs.
State of Maharashtra and Others ...Respondents

Mr. Javeed Hussein a/w. Mr. Bukhari and Mr. H. Bhatia i/b.
Hussein & Co., for the Petitioners.
Mr. Damle, Sr. Advocate i/b. Mr. S.A. Bhagwat, for the Respondent
Nos. 2 and 3.

CORAM : M. S. SONAK, J.

DATE : NOVEMBER 24, 2018

ORAL JUDGMENT:

. Heard Mr. Hussein, learned counsel for the Petitioners
and Mr. Damle, senior advocate along with Mr. Bhagwat for
Respondent Nos. 2 and 3 – the contesting Respondents. The
presence of Respondent No. 1 is not necessary for deciding the
issue which arises in the present Petition.

2. Rule.

3. With consent of and with request of learned counsel for
the Petitioners and Respondent Nos. 2 and 3 rule is made
returnable forthwith.

4. The challenge in this Petition is to the order dated 13th
June, 2017 made by learned trial Judge to the extent, it permits

the marking of documents at Sr. Nos. 4 and 5 of the list of documents as Exhibits 54 and 55 in the course of examination of P.W.1.

5. The relevant portion of the impugned order, which is now the subject matter of challenges in this Petition, is paragraph 4 which read as follows:

4. The document at Sr. No. 4 is the xerox copy of the defendants' letter dated 30.04.1993 and Sr. No. 5 is the original letter dated 09.07.2007. It is submitted by the defendants that the said are not relied by the Plaintiff in the pleading and are not a per law and therefore, the same is not admissible. However, there appears to be reference of these letters in the evidence of P.W. 1 in para 10 and 11. Accordingly, they are marked as Exh. 54, 55.

6. Mr. Hussein, learned counsel for the Petitioners submits that earlier leave to produce these very documents was rejected by the learned trial Judge by observing that there are no pleadings in respect of such documents and therefore, unless the Plaint is amended there is no question producing such documents.

Mr. Hussein points out that therefore the Respondent applied for amendment, but such application was rejected. He points out that such rejection has nowhere been challenged. In these circumstances, Mr. Hussein submits that learned trial Judge clearly exceeded its jurisdiction permitting the production and marking these very documents as Exhibits in the course of evidence of P.W. 1. On this ground Mr. Hussein submits that the impugned order to the extent it marks two documents as Exhibits 54 and 55 warrants interference.

7. Mr. Damle, learned senior Advocate for Respondent Nos. 2 and 3 (original Plaintiff) submits that these two documents are clearly reflected in the deposition of P.W. 1 at paragraph 10 and 11. He points out that the document at Sr. No. 4 is a letter written by the Defendant himself and since the original thereof was sought to be produced, the Petitioners can have no legitimate objection to the same. Mr. Damle points out that document at Sr. No. 5 is the original letter issued by Mumbai Port Trust in which Mumbai Port Trust has referred to several breaches committed by the Petitioners. He points out that all these was specifically pleaded in paragraph No. 8 of the Plaint. Mr. Damle submits that in such circumstances, learned trial Judge has exercise discretion and

permitted the production of such documents and therefore marked them as Exhibits, it cannot be said that this portion of the impugned order is in excess of jurisdiction so as to warrant any interference.

8. The rival contention now called for determination.

9. At the earlier stage of the proceeding the Respondent Nos. 2 and 3, had taken out application (Exhibit 39) seeking leave to produce secondary evidence in respect of agreement dated 30th April, 1993 as also leave to produce certain documents including letter dated 30th April, 1993 (Document at Sr. No. 4) and letter dated 9th July, 2007 (Document at Sr. No. 5). This application was disposed by the learned trial Judge vide order dated 7th May, 2015. Leave was granted to lead the secondary evidence in respect of agreement dated 30th April 1993. However, in so far as the letters dated 30th April, 1993 and letter dated 9th July, 2007 are concerned, no leave was granted by the learned trial Judge by reasoning the following at paragraph 2 of the order dated 7th May, 2015.

2. As regards production of documents D & E
i.e. xerox copy of letter dated 30.04.1993 and letter
received by the plaintiffs dated 9.7.2007 are

concerned, there is no pleading in respect of these letters. The letter dated 9.7.2007 is after filing of her suit. Unless plaintiffs seek amendment to that effect blanket permission to produce documents which are not relied or referred in the pleadings cannot be given. The defendants did not file reply to this application, therefore, it is proceeded without reply of defendants. The learned advocate for the defendants argued the application without filing reply. Considering the reply given to the letter issued by the plaintiffs and willingness of the defendants to make original agreement dated 30.4.1993 for inspection permission to lead secondary evidence to that effect can only be given by allowing this application partly. As regards status of counterfoils Annexure-B is concerned, it will be considered while deciding the admissibility of the documents. Hence, I pass the following order.

3. Application is partly allowed to the extent of permission to lead secondary evidence in respect of

agreement dated 30.4.1993.

10. In order to overcome the difficulty of each of pleadings, the Respondent Nos. 2 and 3 applied for amendment of the Plaint including *inter alia* by way of pleadings in respect of letters dated 30th April, 1993 and letter dated 9th July, 2007. Learned trial Judge by an order dated 21st March, 2016, rejected the application. This has not been challenged by Respondent Nos. 2 and 3 and therefore at least in so far as the learned trial Court is concerned, has attained finality.

11. After all this it was not open for the learned trial Judge to permit the production of letters dated 30th April, 1993 and 9th July, 2007 in the course of evidence of P.W. 1 and thereafter to mark the same as Exhibits 54 and 55. The learned trial Court has reasoned that there is reference to these letters in the evidence of P.W. 1 at para Nos. 10 and 11 of the affidavit in lieu of examination in chief. However, this by itself was not at all sufficient to virtually review the earlier order dated 7th May, 2015. Besides, it is settled that no amount of evidence which is not backed by pleadings can at all be regarded as relevant. There can be no variation between pleadings and proof. Therefore, merely because there may have

been reference to these two letters in the deposition of P.W. 1 which by these was not a good ground to permit the production of these documents and marking of the same as Exhibits. To that extent the impugned order is clearly in excess of jurisdiction and therefore warrants interference.

12. The contention raised by Mr. Damle cannot be accepted in the peculiar facts and circumstances of the present case as long as the order dated 7th May, 2015 made by learned trial Judge stands. The Respondent Nos. 2 and 3 did attempt to amend their pleadings, however, no leave was granted by the learned trial Judge to amend the pleadings. This means that there was virtually no change in the circumstances which prevailed when the order dated 7th May, 2015 was passed. Despite this fact, the learned trial Judge was not justified in setting at naught its earlier order dated 7th May, 2015 in this manner.

13. For all the aforesaid reasons, the impugned order to the extent it permits the production of letters dated 30th April, 1993 and 9th July, 2007 and marking the said letters as Exhibits 54 and 55 is set aside. Save and except this portion the rest of the order is not interfered particularly because the learned counsel for the Petitioner made it clear that the Petitioner was not challenging the

rest part of the order.

14. Rule is made absolute to the aforesaid extent.
15. There shall be no order as to the costs.
16. All concerned to act on the authenticated copy of this order.

(M. S. SONAK, J.)