

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 14302 OF 2017

Manoj Manilal Gala

And Ors.

...Petitioners

Versus

Shahnaz Boman Khaver

And Ors.

...Respondents

....

Mr. Zain Mookhi a/w. N.C. Parekh and Sunil Vyas I/b. Mansukhlal Hiralal & Co. for the petitioners.

Mr. Nainesh N. Amin, Advocate for Respondents No.1C, 1D, 1F, 1G and 2.

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CORAM : R. G. KETKAR, J.

DATE : 21st AUGUST, 2018

P.C.

1. Heard Mr.Zain Mookhi, learned counsel for the petitioners and Mr.Nainesh N. Amin, learned counsel for respondents No.1C, 1D, 1F, 1G and 2, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'plaintiffs', have challenged the judgment and order dated 11.3.2015 passed by the learned Judge, Court Room No.14 of the Court of Small Causes Court at Bombay below Exhibit-60 in R.A.D. Suit No.1750 of 1994 as also the judgment and order dated 1.9.2017 passed by the Appellate Bench of the Small Causes Court at Mumbai in (iii) Revision Application

No.213/2015. By these orders, the Courts below rejected the application made by the plaintiffs for admitting in evidence the document (two audio cassettes) at Sr. No.8 at Exhibit-34 and mark the same as Exhibit and permit the defendants to cross-examine PW-2.

3. The plaintiffs have instituted R.A.D. Suit No.1750/1994 *inter alia* praying for declaration that the plaintiffs are the tenants of original defendant No.1, since deceased, and defendants No.1A to 1F in respect of Shop NO.7 on the ground floor of the building known as 'Premsons House' situate at Bhulabhai Desai Road (formerly known as Warden Road), Bombay – 400 026 and as such is protected tenant under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947; for injunction restraining the defendants from disturbing the exclusive possession, use and occupation as also enjoyment of the plaintiffs in respect of the suit premises. It appears that original defendants No.1 and 2 have instituted suit on the original side of this Court being Suit No.3699/1995 for dissolution of the partnership. On account of enhancement of pecuniary jurisdiction the suit was transferred to the City Civil Court, Bombay. In the City Civil Court, the present plaintiffs are defendants No.1. In that proceedings, defendants No.1 raised objection as regards the jurisdiction of the City Civil Court to entertain and try the suit. Defendants No.1 therein contended that

there is a relationship of landlord and tenant between the plaintiff and defendant No.1 and as such the City Civil Court has no jurisdiction to entertain and try the suit. The issue was raised under Section 9-A of Code of Civil Procedure, 1908 (for short, 'C.P.C.') and the parties adduced evidence. The plaintiffs herein relied upon two audio cassettes which are sought to be produced in evidence in the present proceedings. The learned Judge of the City Civil Court after considering the evidence on record held that the evidence in the form of audio cassettes recording conversation between Mrs. Humayun the wife of original plaintiff No.1 and defendant No.1 in that suit was not clinching, unambiguous, credible and reliable. By order dated 19.5.2014, the learned Judge of the City Civil Court overruled the preliminary objection raised by the plaintiffs herein and held that the City Civil Court has jurisdiction to entertain and try the suit.

4. Aggrieved by that order, the plaintiffs herein instituted C.R.A. No.848/2014 in this Court. By order dated 21.1.2015, this Court rejected Revision Application. Aggrieved by these orders, the plaintiffs herein preferred Special Leave Petition before the Apex Court, which was dismissed on 13.4.2015.

5. By the impugned order, the learned trial Judge rejected the application Exhibit-60 taken out by the plaintiffs herein. While rejecting

the application, the learned trial Judge also referred to the proceedings in the City Civil Court. As far as the Appellate Court is concerned, the Appellate Court also considered extensively the proceedings of the City Civil Court from paragraphs-13 onwards and observed that the City Civil Court did not find two audio cassettes reliable and clinching and its authenticity was also doubted.

6. In support of this Petition, Mr. Mookhi strenuously contended that the Courts below committed serious error in rejecting the application. The issue before the City Civil Court was as regards its jurisdiction to entertain and try the suit. In the present case the plaintiffs are claiming declaration of their tenancy rights in the suit premises. Merely because some findings are recorded by the City Civil Court about the reliability of the audio cassettes produced while deciding the preliminary issue that may not come in the way of the Small Causes Court in marking the documents. He submitted that existence of audio cassettes is not in dispute. While rejecting the application, the learned trial Judge observed that the plaintiffs did not produce the original tape recorded cassettes. The learned trial Judge should have given an opportunity to the plaintiffs herein to produce the original cassettes instead of rejecting the application on the ground that the original tape recorded cassettes were not produced. Mr. Mookhi also relied upon

following decisions :

- (i) Hemendra Rasiklal Ghia v. Subodh Mody, 2008 (6) Mh.L.J. 886 (Full Bench) and in particular paragraph-74; &
- (ii) Yusufalli Esmail Nagree v. State of Maharashtra, AIR 1968 SC 147 and in particular paragraphs-6 and 7 thereof.

7. Mr. Mookhi submitted that at the threshold the Courts by refusing to mark two audio cassettes as Exhibits have precluded the plaintiffs herein from proving the contents of these cassettes. The Courts below ought to have marked these cassettes as Exhibits and subject to proving the contents thereof by the plaintiffs should have considered them in evidence. He, therefore, submitted that the Petition requires consideration.

8. On the other hand, Mr. Amin supported the impugned orders. He submitted that the genuineness of these two audio cassettes was gone into threadbare by the learned Judge of the City Civil Court. Said order was confirmed right upto the Apex Court. He has taken me through the orders passed by the City Civil Court, this Court as also the Apex Court and submitted that no case is made out for interfering with the impugned orders.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the

material on record. It is not in dispute that defendant No.1 herein have initially instituted the suit on the Original Side of this Court for dissolution of the partnership, wherein the plaintiffs herein were defendant No.1. During the course of hearing of application for interim relief the plaintiffs, who are defendant No.1 therein, raised objection to the jurisdiction of the Court to entertain and try the suit on the ground that there is relationship of landlord and tenant between the parties. A preliminary issue was framed and the parties adduced evidence in support of their respective case. Said suit is transferred to the City Civil Court. The plaintiffs herein also produced two audio cassettes which are sought to be produced in the present proceedings before the Small Causes Court. By order dated 19.5.2014, the learned Judge of the City Civil Court overruled the objection raised by the plaintiffs herein and held that the City Civil Court has jurisdiction to entertain and try the suit.

10. Aggrieved by this decision, the plaintiffs herein preferred C.R.A. No.848/2014 in this Court. In paragraph-11, the learned Single Judge of this Court (Coram: R.M. Savant, J.) dealt with the findings recorded by the City Civil Court. In paragraph-18 it was observed thus:

“18. It would now be necessary to consider the evidence which was produced by way of the tape recorded conversation. The conversation that is

recorded is of the two alleged meetings which took place in May 1994 and in July 1995 between the wife of the Plaintiff No.1 Mrs.Humayun and the Defendant No.1. In so far as the said two cassettes (tapes) Exh.D1/1 and Exh.D1/5 are concerned the most telling infirmity, in so far as the said evidence is concerned is that the date and time of the tape recorded conversation is not mentioned. As indicated above, it is the case of the Defendant No.1 that he had gone for meeting with Mrs.Humayun in May 1994 and in July 1995. It has also come in evidence that in respect of the cassette Exh.D1/5, the tape record was switched off in the midst of conversation and therefore, the entire conversation was not recorded. In so far as the said two cassettes are concerned, they are admittedly magnetic audio cassettes, which can be erased and rerecorded. Pertinently the Inlay Card of both the cassettes were not produced which could have shown the month and year of the manufacturing of the said cassettes. It is the case of the Defendant No.1 that the cassettes after the recording was made were taken out from the cupboard in the year 1995 and three copies were prepared, one of which was given to his advocate. The Trial Court has therefore, observed the said fact raises a serious doubt about the audio cassettes produced being original. It is further required to be noted that the cassettes were taken out again in the year 2001 and therefore, the cassettes were in the custody of the Defendant No.1 for seven years. It is required to be noted that the said audio cassettes were never sealed before any authority much less a Notary public when the said precaution could have been taken. It has come on record that there are 100 instances of the conversation not transcribed in respect of the audio cassette Exh.D1/1 and 200 instances in respect of Exh.D1/5. Apart from the fact that the substantial portion of the cassettes Exh.D1/1 and Exh.D1/5 are not audible and therefore, could not be

transcribed. What creates a doubt is the long standing silence of the Defendant No.1 in respect of the said cassettes. In as much as, though the RAD suit was filed by him in the Small Causes Court and various applications were filed in the instant suit, no mention of said cassettes was ever made until in some proceedings a fleeting reference was made by the Defendant No.1 in the year 2001 that he has recorded the conversation. The said conduct of the Defendant No.1 therefore, creates a doubt and strikes at the evidentiary value of the said cassettes, in so far as the case of the Defendant No.1 that the Partnership Deed was a camouflage for the tenancy agreement.”

11. In paragraph-19, the learned Single Judge referred to the decisions dealing with time and place of recording of magnetic cassettes. The judgments referred in paragraph-19 held that since they are susceptible to being erased and reused the evidence by way of the said tapes has to be accepted with utmost caution. The learned Judge of the City Civil Court had observed that said piece of evidence cannot be safely relied upon and the evidence in the form of cassettes is not clinching, unambiguous, credible and reliable. As noted earlier, against that decision, the plaintiffs herein preferred S.L.P. which was also dismissed. Thus authenticity of two audio cassettes was gone into by the City Civil Court as also by this Court and after considering the evidence adduced by the parties, a categorical finding was recorded as regards the authenticity of two audio cassettes.

12. Mr. Mookhi relied on paragraph-74 of **Hemendra Ghia's** case (supra). In paragraph-71 of that decision, the Full Bench referred to the classification of admissibility of documents in evidence. Paragraph-71 reads thus :

- “71. The admissibility of the document in evidence may be broadly classified into three classes-
- (i) that objection to the document which is sought to be proved is itself insufficiently stamped and the objection relates to deficiency of stamp duty of the document;
 - (ii) where the objection does not dispute admissibility of document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient; and
 - (iii) the objection that the document which is sought to be proved is *ab initio* inadmissible in evidence.”

13. Clause (ii), extracted hereinabove, deals with the objection which does not dispute admissibility of document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. The said category is dealt with by the Full Bench in paragraph-74. In the present case, the objection is not about the mode of proof of these two audio cassettes, but, the objection is about the genuineness of these two audio cassettes itself. As mentioned earlier, said aspect was considered threadbare by the City Civil Court and by this

Court. In view thereof, said decision relied upon by Mr. Mookhi does not advance the case of the plaintiffs.

14. Insofar as the decision in **Yusufalli Nagree** (supra) is concerned, in my opinion said decision is in fact against the plaintiffs. In paragraph-6, the Apex Court observed that an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. In the present case, these aspects were dealt with by the City Civil Court and by the learned Single Judge of this Court.

15. In view thereof, I do not find that the Courts below committed any error in rejecting the application. Hence, the Petition fails and the same is dismissed.

16. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by section 105(1) of C.P.C.

(R. G. KETKAR, J.)

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