

(Reportable)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.13436 OF 2019

Badrinarayan Gaurishankar Palasaniya.

Deceased through His L.Rs.:-

(Died on 28.10.2014)

- 1 Rukhminbai Badrinarayan Palsaniya,
Age : 75 years, Occupation : Household,
(wife of Deft. No.1)
- 2 Mukund Badrinarayan Palsaniya,
Age : 53 years, Occupation : Business.
(son of Defendant No.1)
- 3 Arun Badrinarayan Palsaniya,
Age : 55 years, Occupation : Business.
(Son of defendant No.1)

Petitioner nos.1 to 3, R/o at Palsaniya
Traders, Hiwarkhed Road,
Akot, Tal.Akot, District Akola.

- 4 Sau.Santosh Vishnuprasad Agrawal,
Age : 56 years, Occupation : Housework,
(daughter of Defendant No.1)
R/o Popatkhed Road, Akot,
Tq.Akot, District Akola.
- 5 Sau.Komal (Kumodini) Kailash Agrawal,
Age : 58 years, (Daughter of defendant No.1),
R/o Hiwarkhed Road, Akot,
Tal.Akot, District Akola.

...PETITIONERS
(Orig.Defendants)
(Heirs of Orig.Deft.No.1)

-VERSUS-

- 1 Omprakash Sitaram Agrawal,
Age : 60 years,
Occupation : Agri & Business,
R/o 122, Navi Peth, Jalgaon,
Tq. & Dist.Jalgaon.
- 2 Mohanlal Dwarkadas Gindodia,
Age : 68 years, Occupation : Business,
R/o 132/A, Malegaon Road,
Near Wagh Devta Mandir,
Dhule, District Dhule.

...RESPONDENTS
(No.1 Orig. Plaintiff,
No.2 Orig. Deft. No.2)

...
Advocate for the Petitioners/ Defendants : Shri Sant Kishor C.
Advocate for Respondent 1/ Plaintiff : Shri Shah Subodh P.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 07th November, 2019

ORAL JUDGMENT:

1 The issue raised in this petition is whether, foundational pleadings regarding a vital document like "Power of Attorney" are necessary for placing reliance upon and for production at a belated stage?

2 The petitioners submit that Respondent no.2 (Mohanlal Gindodia) is the original defendant no.2 in the suit and is fully supporting the plaintiff/ respondent no.1 herein. He is a formal party and can be deleted. Hence, deletion is permitted only for the purpose of the cause of action arising in this writ petition.

3 Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

4 The petitioners are the legal heirs of the original deceased defendant no.1 (Badrinayaran Palsaniya) in Special Civil Suit No.222/2009. They are aggrieved by the order dated 29.07.2019 passed by the Trial Court by which, application exhibit 90 filed by the plaintiff seeking permission to produce one office copy and three original documents, has been allowed and costs of Rs.2500/- has been imposed upon the plaintiff.

5 The contentions of the petitioners/ defendants can be summarized as under :-

- (a) After the suit was lodged in October, 2009, the Trial Court framed the issues on 03.05.2013.
- (b) The recording of evidence of the plaintiff commenced on 14.07.2015.
- (c) On 16.07.2019, the cross examination of the plaintiff was concluded.
- (d) On 17.07.2019, the plaintiff preferred application exhibit 90 stating therein that he discovered one office copy and three original documents on 16.07.2019 after returning from the court and these four documents would have a direct impact on the decision in the suit and hence, he sought permission to

file the said documents.

(e) The four documents are :-

(i) Office copy of the application made by the plaintiff to the District Collector, Jalgaon dated 25.02.1991 for seeking Non Agriculture (NA) permission,

(ii) The original special Power of Attorney (PoA) dated 05.10.1981 given by the deceased defendant Badrinarayan to the plaintiff with respect to his one-third share in the entire suit property for the purposes of carrying out the measurement, conversion to non agriculture, signing plans, etc.,

(iii) The original special Power of Attorney (PoA) dated 07.06.1991 given by the deceased defendant Badrinarayan to the plaintiff authorizing him to perform all such acts as are necessary in respect of conversion of the agricultural land to non agricultural land, and

(iv) The original sanctioned layout of the suit land consisting 76 plots dated 10.10.1990.

(f) There is no foundational pleading in the plaint as well as in the affidavit in lieu of examination in chief pertaining to these documents, especially the two PoA documents.

(g) The pleadings in paragraph 11(a), (b) and (c) of the plaint do

not indicate any reference to the original PoA documents.

- (h) The plaintiff has subjected himself to cross examination and after the recording of his testimony is concluded, one cannot find any reference to such documents, which are sought to be produced at a later stage.
- (i) Order VII Rule 14(2) and (3) of the Code of Civil Procedure would be a legal obstacle to the plaintiff in filing the said documents.
- (j) Order XIII Rules 1 and 2 would also not permit the production of such documents.
- (k) The documents pertain to the years 1981 to 1991 and were purportedly in the custody of the plaintiff, which could have been produced along with the plaint or prior to the settling of the issues.
- (l) In the absence of the foundational pleadings, these documents can be branded as being manufactured by the plaintiff.
- (m) As there are no pleadings in the plaint as well as in the affidavit in lieu of examination in chief, it would tantamount to the plaintiff having waived his right to refer to the said documents even if it is presumed, without admitting, that the said documents are in existence.

- (n) The Trial Court has failed to apply its mind to the case and has mechanically permitted the plaintiff to produce the documents only because the law is that a litigant should be granted liberty to produce his best evidence.
- (o) In paragraph 11 of the plaint, the plaintiff submits that he believed Badrinarayan and this would indicate that he had acted purely on the belief that Badrinarayan had entrusted him the task of developing the property.
- (p) No reasons are assigned as to why the plaintiff has not pleaded in the plaint that he derived an authority to deal with the suit property through the PoAs from Badrinarayan.

6 The learned advocate for the original plaintiff/ respondent no.1 herein, who is the only contesting party, submits as under :-

- (a) The plaintiff is a property dealer and his business is with regard to dealing in real estate and developing immovable properties.
- (b) His real sister is married to defendant no.2 (Mohanlal).
- (c) The deceased defendant Badrinarayan was the real brother of Ratanbai Bansilal Gindodia and Bansilal Gindodia is the uncle of defendant no.2 (Mohanlal).
- (d) Since Badrinarayan purchased the suit property on

27.02.1981 and was not a resident of Jalgaon, he had entrusted the responsibility to the plaintiff to deal with the said property and carry out the development activity for which the said agricultural land was to be converted into N.A..

- (e) Believing Badrinarayan and Mohanlal, the plaintiff started developing the property and invested huge amounts.
- (f) In 1995, he had also filed a writ petition in the High Court upon being duly authorized to do so by Badrinarayan. The petition was filed seeking the returning of betterment charges from the then Municipal Council, Jalgaon.
- (g) The plaintiff succeeded in acquiring N.A. permission and prepared 76 plots in the said property after the layout was sanctioned by the authorities.
- (h) Reliance is placed upon paragraphs 7 to 11 of the plaint to contend that the plaintiff was duly authorized by Badrinarayan to do all acts with regard to development of the suit land.
- (i) Order VI Rule 2 does not require that the plaintiff should plead even on evidence, which would be produced. It permits the pleadings in a concise form and contain the statements, but not evidence by which, such statements are to be proved.

- (j) The language used in paragraphs 7 to 11 of the plaint would clearly indicate that the plaintiff has acted for and on behalf of Badrinarayan in developing the property upon being duly authorized by him.
- (k) Reliance is placed upon the judgments delivered in *Chitrakala Fal Dessai vs. Balu Marathe alias Mane s/o Jyotiba Marathe, 2006(6) Mh.L.J. 427* and *Taiba Quareshi and others vs. Mrs. Marina Sequeria Lourdes, 2004(3) Mh.L.J. 917*.

7 In rebuttal, the learned advocate for the petitioners/defendants relies upon paragraphs 12 and 13 of the plaint to contend that the plaintiff has specifically referred to the special PoA executed by Badrinarayan on 14.11.1992 before the Executing Magistrate, Taluka Dhule and has also referred to the special PoA executed by defendant no.2 (Mohanlal) on 14.11.1992. When these details have been mentioned in the plaint, the fact that two PoAs allegedly dated 05.10.1981 and 07.06.1991 have been specifically left out by the plaintiff, would lead to a conclusion that the plaintiff did not desire to rely on the said two PoAs.

8 I have considered the submissions of the parties and the reports cited. The issue, therefore, to be decided in this petition is as to what should be the nature of the pleadings of the parties insofar as the

plaint and the written statement is concerned and whether, Order VI Rule 2 would require a reference to a document on which a specific reliance can be placed.

9 It requires no debate that the foundational pleadings are necessary in a plaint or a counter claim as well as in a written statement, insofar as secondary evidence, which would form the basis for deciding the suit, is concerned. Whether, a reference to a document is necessary in the plaint so as to dislodge any submission or contention of the opponent that a particular document has been manufactured? In the case of ***Chitrakala Fal Dessai (supra)***, the learned Single Judge of this Court has referred to the facts of the case and the conclusions in paragraphs 4 to 9 read as under :-

- "4. *The application was rejected by the trial Court on the ground that the suit is filed as back as in the year 1998. According to the trial Court the plaintiff has not shown sufficient cause as to why the said documents were not produced earlier. The Court further observed that the petitioner had relied upon these documents in another suit. Therefore the statement that these documents were misplaced and were not in the petitioner's possession is a false statement.*
5. *The learned counsel for the petitioner has assailed the impugned order on several counts. He submitted that by amendment of the Civil Procedure Code, the requirement of the plaintiff showing sufficient cause has been deleted. Therefore in the facts and circumstances of the case, in the interest of justice and to ensure proper adjudication of the controversy involved, the trial Court ought to have granted the petitioner's application. The*

learned counsel relied upon Ramnath Nandlal Dhoot & Co. and another v. B.R. Shroti and others (A.I.R. 1980 Bombay 387).

6. *On the other hand, the learned counsel for the respondent contended that the suit was filed in the year 1988. He submitted that such belated attempt to produce the documents should not be allowed by this Court. He submitted that no acceptable reasons have been assigned by the petitioner as to why he could not produce the said documents earlier.*
7. *Particulars of the documents which are sought to be produced are given in paragraph 5 of the application. It is apparent that all these documents except two documents are public documents. In this connection, I may usefully refer to the judgment in Vencu Gopal Tari and others v. Nilconta S. Xete and others (AIR 1975 Goa, Daman & Diu 32). In that case the Court was dealing with the Civil Procedure Code (1908). The Court was considering a case where the lower court had refused to allow production of certified copies of public documents. The Court observed that provisions of Order 13 have been enacted to secure a fair trial of the case and not penalise parties for not producing documents in time. The main object of R.2 of O.13 is to prevent parties from manufacturing evidence during the trial. The Court further observed that the stigma that the documents in question could be manufactured, does not attach to the public documents. In the circumstances the Court allowed production of copies of public documents. Since the documents except documents at serial No.(f) and (j) in paragraph 5 of the application are public documents, I see no reason why their production should not be allowed.*
8. *So far as document at serial Nos.(f) and (j) are concerned, I am of the opinion that in the interest of justice even they must be allowed to be produced. In this connection I may usefully refer to Ramnath's case (supra). In that case the defendant wanted to produce documents which were neither disclosed in the affidavit of documents nor produced at or before settlement of issues. This Court*

considered Order 13, rules 1 and 2 of Code of Civil Procedure 1908. O.13, r.1 required the parties to produce all documentary evidence at or before the settlement of issues. Under R.2 of O.13, if a party failed to do so, he could not produce the said documents at any subsequent stage of proceedings unless good cause was shown to the satisfaction of the Court for non-production of the documents. This Court quoted the observations of the Patna High Court in *Sir Hari Ram v. Lachmi Singh* (AIR 1928 Pat 537) which read thus:-

“O.13, R 1 was enacted to secure a fair trial of a case, not to penalize parties for not producing documents in time. Its main object was to prevent parties from manufacturing evidence pending the trial to meet unexpected exigencies. Now, if there is no ground for believing that the document tendered has been manufactured, then, in my opinion, the Judge exercises his discretion improperly in rejecting a document on the ground that it was produced too late, for, as I have said, the rules to be found in the Code of Civil Procedure were not enacted for penalizing the parties, but to secure a fair trial of the case.”

This court accepted the explanation offered by the defendant and permitted the production of documents.

9. It is pertinent to note that rule 2 of Order 13 requiring good cause to be shown has now been deleted and by amendment sub-rule (3) is added to Order 14 which states that leave of the Court has to be obtained for production of such documents. But even accepting that while persuading the Court to grant leave, a party has to show cause why the documents could not be produced earlier, not a very strict, restricted and pedantic view can be taken of this provision. Ultimately the Court will have to ensure that all documents which assist it to resolve the controversy before it in an efficient manner are available for its perusal. Unless the Court comes to a conclusion that the facts are so gross that the only inference that can be drawn from the conduct of the party is that the documents which are sought to be produced are manufactured, the Court should not

generally deny leave to produce documents because ultimately it is always open to the other side to cross-examine the party who produces the documents to establish that the said documents are not relevant or that the case based on the said documents is not true. In my opinion in this case, at this stage, it is not possible to come to a conclusion that the documents at serial nos.(f) and (j) are manufactured. However, that does not preclude the defendant, if he so desires, to cross-examine the plaintiff and persuade the Court to hold so. In the nature of things, no final opinion can be expressed by this Court on this aspect of the matter, at this stage. "

(Emphasis supplied)

10 It requires no debate that the litigating side should be permitted to produce the best evidence that is available and an opportunity to produce the documents at an appropriate stage would constitute the right of a litigant. The contention of the petitioner as regards the reference to the documents can be considered in the light of Order VI Rule 2, which reads as under :-

"Order VI : Pleadings Generally

2. *Pleading to state material facts and not evidence:-*

(1) *Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.*

(2) *Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.*

(3) *Dates, sums and numbers shall be expressed in a pleading in figures as well as in words."*

11 This Court has recently delivered a judgment in the matter of *Shaikh Aftab Ahmed s/o Shaikh Akhlaque Ahmed and another vs. Bhimrao Sandu Waghmare and others*, Writ Petition No.8442/2019 (Aurangabad Bench) decided on 01.10.2019. The issue in the said matter was with regard to the right to lead secondary evidence. Judicial pronouncements on the right to lead secondary evidence over a period of almost 80 years have been considered by this Court and it has been concluded that if a document is lost or destroyed, the foundational pleadings would be mandatory so as to gather the existence of such document. The design of manufacturing documents and producing the same as secondary evidence without there being any foundational pleading, has been consistently discouraged by the courts. The foundational pleading is, therefore, necessary, be it in a plaint or a written statement or even a counter claim.

12 Order VI Rule 2 of the Code of Civil Procedure prescribes as to the contents of the plaint and the written statement. Such pleadings of the material facts on which the party pleading relies upon for the sake of his claim or defence have to be in a concise form and the evidence by which such pleadings have to be proved, is not to be narrated in the plaint or written statement.

13 I find from Order XIII Rule 1(1) that the parties have to produce on or before the settlement of issues, the documentary evidence

in original where the copies thereof have been filed along with the plaint or written statement. Order XIII Rule 1(3) prescribes that the mandate under Rule 1(1) and 1(2) would not apply to documents, which are produced for cross examination of the witness of the other party or handed over to the witness merely to refresh his memory. Order XIII Rule 1 reads as under :-

*"ORDER XIII :
Production, Impounding and Return of Documents.*

1. *Original documents to be produced at or before the settlement of issues :-*
 - (1) *The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement.*
 - (2) *The Court shall receive the documents so produced:
Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.*
 - (3) *Nothing in sub-rule (1) shall apply to documents :-*
 - (a) *produced for the cross-examination of the witnesses of the other party; or*
 - (b) *handed over to a witness merely to refresh his memory."*

14 It thus, appears that a litigant is permitted to produce the original documents even after the filing of the suit or the written statement and before the settlement of issues, if the copies of the said documents have been filed along with the plaint or the written statement. This liberty available to the litigant to produce the originals is conditional

in nature and the filing of copies of such originals along with the plaint or the written statement, is a pre-condition. If Order VI Rule 2 (2 and 3) and Order XIII Rule 1 are to be read in harmony, it would necessitate filing of documents and the reference to such documents in the pleadings so as to render such pleadings the character of foundational pleadings.

15 Though the learned advocate for the original plaintiff has strenuously canvassed, on the basis of Order VI Rule 2, that the evidence to prove the averments in the plaint need not be pleaded, the fact remains that the documents to be relied upon by the parties have to stand the test of Order XIII Rule 1 and must not create a situation so as to enable the opponent to contend that such documents do not form the part of the suit.

16 I find from the pleadings of the plaintiff that he has consistently averred that Badrinarayan had allowed the plaintiff to act on his behalf and develop the suit property. The plaintiff believed Badrinarayan and performed the acts of development of the property in good faith and upon being duly authorized by him. There is no contention in exhibit 90 that the two PoAs dated 05.10.1981 and 07.06.1991 were lost or misplaced. The issue would be as to whether, these two documents could be termed as being the suit documents in the absence of any pleadings. There is not even a whisper in the pleadings that these two PoAs have been executed by Badrinarayan and that they are in possession of the plaintiff. In fact, in paragraph 11 of the plaint, the plaintiff has

categorically averred that all original documents pertaining to the N.A. permission and the municipal permission are with the plaintiff. There is no pleading that the PoAs of 1981 and 1991 are executed by Badrinarayan or are also in the custody of the plaintiff.

17 The plaintiff has pleaded in paragraph 11(c) of the plaint that Badrinarayan and defendant no.2 (Mohanlal) had asked him to do necessary activities with regard to the purchase of the suit property on 27.02.1981. The date of purchase is mentioned as 27.02.1981 and the PoA sought to be produced is said to be dated 05.10.1981, which is after the purchase, if it is presumed that the said document is genuine.

18 I find from paragraphs 12 and 13 of the plaint that the plaintiff has specifically pleaded about the special PoA (allegedly third PoA) executed by Badrinarayan on 14.11.1992, which pertains to the sale of 76 plots pursuant to the N.A. permission obtained. In paragraph 13 of the plaint, the plaintiff has specifically pleaded that Mohanlal had a special PoA executed on 14.11.1992 by Badrinarayan and he had acted on the basis of the said PoA to execute the agreement for sale of 76 plots on 17.03.1993 in favour of the plaintiff. This is the basis for filing the suit seeking execution of the registered sale deed by the defendants in favour of the plaintiff.

19 The submission of the plaintiff with reference to paragraphs 7 to 11 that no reference of the 1981 and 1991 PoA documents was

necessary in the pleadings, runs counter to the pleadings in paragraphs 12 and 13 wherein, the plaintiff has specifically referred to the PoA document dated 14.11.1992. After taking a close perusal of the pleadings set out in the plaint, I find that the two PoAs dated 05.10.1981 and 07.06.1991 are referred to for the first time in exhibit 90 and there has been no reference, much less, any foundational pleading about the existence of these two documents in the plaint. These two documents would, therefore, appear to be alien to the proceedings.

20 In the matter of *Narendra Pandurang Chatim and another vs. Shrikant Shambu Volvoikar and another*, 2014 (6) *Mh.L.J.* 763, this Court had permitted the production of certain documents as there was a reference to the said documents in the pleadings of the party.

21 In *Roman Catholic Mission vs. The State of Madras and another*, *AIR 1966 SC 1457* (five Judges Bench), the Honourable Supreme Court, while dealing with the right to lead secondary evidence, has held that the copies of the original would not be admissible if no foundation is laid in the pleadings of the parties with regard to such documents.

22 While considering the aspect of whether, a party could be permitted to rely on an attested copy of the document, the Honourable Supreme Court (three Judges Bench) held in the *State of Rajasthan and others vs. Khemraj and others*, 2000 (9) *SCC 241*, that the foundational

pleadings as regards the existence of a document have to be set out in the pleadings of the parties.

23 In view of the above, I find that the Trial Court has erred in not noticing that there is no reference to the 1981 and 1991 PoAs in the plaint as well as in the affidavit in lieu of examination in chief. There is not a whisper about the existence of these documents, at any stage, at the behest of the plaintiff in the pleadings and in the affidavit in lieu of examination in chief. Attempting to produce these two PoAs for the first time in the suit without there being any reference to the said documents and without the existence of the said documents having been averred, has a semblance of creation of documents. The fact that the plaintiff has averred about the PoA dated 14.11.1992 in the plaint renders credence to the submission of the defendants that the plaintiff has specifically relied upon a single PoA dated 14.11.1992 and the absence of pleadings with regard to the 1981 and 1991 PoAs would indicate that the plaintiff does not desire to place reliance on the said documents. The impugned order, therefore, deserves to be set aside to the extent of permitting the production of PoAs dated 05.10.1981 and 07.06.1991.

24 Insofar as the office copy of the application made by Badrinarayan for N.A. permission to the Collector, Jalgaon dated 25.02.1991 is concerned, there is no such pleading in the plaint or the affidavit in lieu of examination in chief and even the copy of the said

document was never produced at any stage before the Trial Court, much less prior to the settlement of issues under Order XIII Rule 1. For the above reasons, the impugned order cannot be sustained to this extent and the permission by the Trial Court to produce the said application dated 25.02.1991 will also have to be quashed and set aside.

25 Insofar as the fourth document i.e. the original sanctioned layout consisting of 76 plots is concerned, there are exhaustive pleadings in support of the said document and especially in paragraph 13(a) of the plaint, which clearly makes a reference to the said fourth document. As such, the impugned order would be sustained to the extent of permitting the production of the original sanctioned layout dated 10.10.1990.

26 In view of the above, this Writ Petition is partly allowed and the impugned order to the extent of granting permission to the plaintiff to produce the office copy of the application dated 25.02.1991 and two PoAs dated 05.10.1981 and 07.06.1991, stands quashed and set aside. Insofar as the costs awarded are concerned, the said imposition was unwarranted and the impugned order to the extent of directing the plaintiff to pay costs is also set aside.

27 Rule is made partly absolute in the above terms.