

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5790 OF 2017

Sahakarshilp Cooperative Housing
Society Ltd. .. Petitioners
vs.
Balchandra A. Nikarge and anr. .. Respondents

Mr. Vaibhav Singh I/b R.U. Singh for the Petitioner.
Mr. Mandar Soman for Respondent No.1.
Mr. Santosh Parad for Respondent No.2/MCGM

CORAM : M. S. SONAK, J.

DATE : 8 APRIL 2019.

ORAL JUDGMENT :

1] Heard Mr. Viabhav Singh for the petitioner and Mr.Madnar Soman for respondent No.1 and Mr. Santosh Parad for respondent No2.

2] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

3] The challenge in this petition is to the order dated 28th September 2016 by which the petitioner's application to lead secondary evidence came to be rejected.

4] The impugned order reads thus:

“ORDER

This unregistered NM is taken out by the Plaintiffs for Condonation of Delay in moving the application to lead Secondary Evidence and permit to them to lead Secondary Evidence. Plaintiffs also sought leave of the

Court to register NM.

From the perusal of the application it is seen that Plaintiff want to lead Secondary Evidence and for that purpose Plaintiffs have taken out this NM. However for leading the Secondary Evidence permission of leave of court as such is not require. What is require by the party to lead Secondary Evidence is to lay foundation so as to entitle it to lead the Secondary Evidence. This is in view of the provision of Section 65 of Evidence Act and r/w. Section 63. Hence, leave as claimed by the Plaintiff is rejected.

Advocate Mr. Gandhi for Defendant No.1 present and seeking time to lead evidence. Time granted.

Adv. Mr. Giri for Defendant No.2 present.

Matter adj. to 19/10/2016 for R/E.”

5] The view taken by the learned Trial Judge is inconsonance with the view taken by the learned Single Judge of this Court in **Karthik G. Bhat vs. Nirmala N. Wagh and anr. - 2018 (1) Mh.L.J.726**. However, learned counsel for the petitioner points out that the effect of the impugned order is that the petitioner may not be in a position to lead secondary evidence, though, a case is made out to lead secondary evidence. This is not correct. The effect of the impugned order is not to prevent the petitioner from leading any secondary evidence, but the impugned order merely states that there was no necessity for the petitioner to take out an application seeking leave to lead secondary evidence. With this clarification, there is really no necessity to interfere with the impugned order.

6] The aforesaid means that the petitioner is at liberty to lead evidence and therein to lay foundation so as to entitled it to lead secondary evidence. The impugned order really does not cause any prejudice to the petitioner, if, the same is construed as clarified above. Further, the trial in the suit was stayed by this Court. The stay is now ordered to be vacated. Accordingly, the petitioner now shall have liberty to produce secondary evidence consistent with the law laid down by this Court in *Karthik Bhat* (supra).

7] Rule is disposed of in the aforesaid terms. There shall be no order as to costs.

8] Parties to appear before the learned Trial Court on 23rd April 2019 and produce an authenticated copy of this order.

9] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)