

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5016 OF 2018

M/s. J. M. Constructions ...Petitioner

Versus

M/s. Shamrock Impex Pvt. Ltd. & Ors. ...Respondent

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M/s. J. M. Constructions ...Petitioner

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M/s. Shamrock Impex Pvt. Ltd. & Ors. ...Respondent

Charles J. De Souza a/w Ms. Sakshi Bhalla – Advocate for the petitioner.

Dr. Birendra Saraf a/w Rohan Sawant, Yogesh Adhia & Laxman Jain – Advocate for the Respondent 1 to 5.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 28th JUNE 2019.

P.C. :

The petitioner in both the Writ petitions claims to be the landlord having succeeded its predecessor-in-interest. That predecessor inducted the first respondent into the property as a lessee. The petitioner, as the lessor, filed R.A.E. Suit No.

467/767 of 2005 for eviction. Its principle plea is that it *bona fide* needs the property. Issues framed, the trial began. Then the lessor filed Exhibit-A witness summons, requiring the Senior Police Inspector, L.T. Marg Police Station, Mumbai, to produce eight documents. Through an order, dated 18.03.2016, the Trial Court allowed the lessor's application. Then, that order has led to two Writ petitions

2. The lessees filed WP No.4833 of 2016 and 4842 of 2016, assailing the trial Court's order. Eventually, they withdrew both the writ petitions. It was without prejudice to their right to question, during the trial, the relevance of those documents. Then, the police officer concerned produced all the documents except document no. 7. That is the Chief Police Prosecutor's opinion, dt.29.03.2005. But it emerged from the police officer's reply that the 7th document lies with another police authority.

3. In that context, the lessor filed another witness summons; the lessees, however, opposed it. Eventually, the Trial Court, through its order dated 16.01.2018, rejected the lessor's claim to have the document summoned from another police station. Aggrieved, the lessor has filed Writ Petition No. 5016 of 2018.

4. Besides that, when the lessor wanted to mark the documents the police officer already produced, the lessees objected to it. The Trial Court sustained that objection, through its order, dated 18.10.2016. Despite that rejection, the lessor filed a praecipe requiring the trial Court to reconsider its earlier

decision. Even that praeceipe met the same fate: dismissal. Thus aggrieved, the lessor filed WP No. 5017 of 2018.

Arguments in WP No.5016 of 2018:

Petitioner's:

5. In the above factual background, Ms. Sakshi Bhalla, the learned counsel for the lessor, has submitted that the trial Court, in the order assailed in Writ Petition No. 5016 of 2018, has presumed the irrelevance of the document sought to be summoned and then concluded that it need not be summoned. According to her, the trial Court has contradicted itself. To elaborate, she has submitted that initially the trial Court itself has allowed the lessor's plea to have all the documents summoned. When one document could not be produced, the parties realized that it was in the custody of some other police station. So the lessor filed another application to have that document summoned. Even though the lessees had not objected to the supposed irrelevance of that document, the trial Court, in fact, traveled beyond the pleadings and held that it was irrelevant.

6. In that context, Ms. Sakshi Bhalla has contended that consistency is a judicial virtue. The Trial Court ought not to have taken, according to her, contradictory stands on the same issue; that is, the production of a particular document. She has further submitted that it is for the party to rely on the document and to prove it ultimately. Neither the court nor the adversary, she has continued, could insist on the suitor's revealing how he is going

to use that document in the trial. Thus, she urges this Court to allow the Writ petition No. 5016 of 2018. To buttress her contentions, she has relied on *Bipin Shantilal Panchal v. State of Gujarat*[¹].

Respondents’:

7. *Per contra*, Dr. Birendra Saraf, the learned counsel for the respondents, has submitted that the trial Court has ample powers to decide whether a document is relevant before it allows a party to summon that document. Otherwise, the trial will drag on endlessly. So, even if the Court wanted to accept the lessor’s entire plea about the document, in the end it is only an opinion the lessor wanted to rely on. According to Dr. Saraf, an opinion can be no piece of evidence—more particularly if it is sought to be produced and marked through a third party who has nothing to do with that opinion. Thus, he has contended that the Trial Court orders suffer from no legal infirmity.

Arguments in WP No.5017 of 2018:

Petitioner’s:

8. In Writ petition No. 5017 of 2018, Ms. Sakshi Bhalla has submitted that *Bipin Shantilal Panchal* has categorically held that marking of documents is a distinct procedural step, detached from proving that document. Plainly put, mere marking of a document does not amount to its proof. Thus, she

¹ []AIR 2001 SC

contends that the trial Court ought to have allowed the lessor to mark all the documents through the officer who produced them before the Court. It is entirely for the lessor, she asserts, to prove the veracity and relevance of the documents during the trial. So she finds fault with the trial Court's denying an opportunity to the lessor to have the documents marked. The trial Court's approach spells injustice, she concludes.

Respondents':

9. Dr. Saraf has asserted that the trial Court can receive the documents once an officer produces them answering the witness summons. But he cannot be the person through whom those documents can be marked. In that context, he submits that *Bipin Shantilal Panchal* has already been distinguished by this Court's Full Bench in *Hemendra Rasiklal Ghia v. Subodh Mody*^[2]. Taking me through the material parts of *Hemendra Rasiklal Ghia*, Dr. Saraf has elaborated on them. He points out that it has divided the to-be-marked documents into three categories. Stressing on the second category, he has submitted that here the lessor wanted to mark that category document. And the trial Court has rightly upheld the respondents' objections. Dr. Saraf argues that if a document is a private document, it ought to be marked only through its author, lest it should prejudice the other party.

² [1] (2008) 6 MhLJ 886

10. Dr. Saraf has further pointed out that a document allowed to be kept on record without it being properly marked would also prejudice the other party, for that would create confusion in the court's mind about its validity. In the end, he urges this Court to dismiss both the Writ Petitions.

Reply:

11. In reply, Shri Charles D'souza, the learned counsel for the lessor, supplementing Ms. Sakshi Bhalla's submissions, has submitted that trial Court has adopted a very strange procedure. Shri D'souza has also taken me through the material portions of *Hemendra Rasiklal Ghia*. According to him, the judgment, in fact, helps the lessor's cause rather than the lessees'. He emphasizes that the marking of the document is an intermediary step, and it does not authenticate the contents of the document. Plainly put, marking of the documents is nothing more than placing it on record.

12. Shri D'souza asserts unless the documents come on record, the lessor cannot prove their relevance or even veracity. That is, if a document is thrown out at the threshold, it is impossible for any party to prove that document. Thus, he urges this court to allow the writ petition. In the alternative, Shri D'souza has also submitted that the trial Court must allow the document to come on record for another reason: for the appellate court's scrutiny. According to him, even if the trial Court is disinclined to refer to the document, in appeal the Appellate Court may still find it admissible and relevant.

13. Heard Ms Sakshi Bhalla and Shri Chalres D'souza for the petitioner and Dr. Birendra Saraf for the respondents.

Discussion:

14. Elaborate were the rival submissions, but the issues lie in a narrow compass: summoning of a document and marking of already-summoned documents. The lessor filed Exhibit-A witness summons to a Senior Police Inspector and wanted the officer to produce eight documents. In March 2016, the trial Court allowed it. The officer produced the documents except one: the Chief Police Prosecutor's opinion, dt.29.03.2005.

15. As the opinion-document was lying with another police authority, the lessor filed another witness summons. In January 2018, the trial Court rejected the lessor's request. This has given rise to Writ Petition No. 5016 of 2018.

16. But the lessor wanted to mark the already summoned documents through the police officer who produced them. The lessees objected to it. In October 2016, the trial Court sustained the lessees' objection. Again, the lessor filed a praecipe for the trial Court to reconsider its earlier decision. That praecipe, too, was rejected. This has given rise to WP No. 5017 of 2018.

17. So the two issues we should address are these: (1) Can a document of opinion, if it were, be summoned by a third party to use that document in its support in a judicial proceeding? (2) Can a private document be marked through a witness who merely produced that document in answer to court's summons? The second issue opens that seemingly intractable question: an

objection taken, how should a document be marked? In other words, when is a document marked and when is it proved?

(1) Can a document of opinion, if it were, be summoned by a third party to use it in its support in a judicial proceeding?

18. As I have already noted, the trial Court permitted the lessor to summon a few documents. In answer to the witness summons the lessor took, the police officer in custody of those documents produced all but one. That one document is found with another police authority. So the lessor again applied to have that document, too, produced. This time, the trial Court rejected the lessor's request. Is it justified?

19. The lessees contend that the trial Court's action is justified. According to them, it is the Chief Police Prosecutor's opinion, dt.29.03.2005. They maintain that opinion is no piece of evidence. Even its production, according to them, serves no purpose. First, it is mere opinion. Second, it cannot be marked as a substantive document—especially through a person other than the opinion giver.

20. Before ruling on this controversy, we must note that earlier the trial Court, at the lessor's request, summoned the same document along with other documents. Only that document could not be produced. So the lessor applied for the second time; this time, to have it produced from the proper source—another police authority. But the trial Court took a contrary stand. It felt that the summoning of that document serves no purpose.

21. Indeed, consistency is a desirable, nay necessary, judicial virtue. The document being unavailable at one place is no substantial ground for the trial Court to take a different stand—to contradict itself. That answered, the lessees' second limb of attack is that it is an opinion and it has no evidentiary value. I am afraid the value of a document cannot be prejudged. The value of a piece of evidence cannot affect its admissibility in any way. Admissibility and the probative force of a piece of evidence are quite different things. When a document is to be proved and relied upon in evidence, as this Court has held in *Zenna Sorabji v. Mirabelle Hotel Co. (P) Ltd*^[3], there are three aspects to be considered by the Court: (i) the proof of the execution of the document, (ii) proof of the contents of the documents and (iii) the evidentiary value of the document as a whole.

22. This assumes importance in the face of the fact that trial Court, in the first instance, permitted the party to seek its production. The document was looked for at a wrong place; the official concerned provided the correct source of its availability. So the lessor reapplied for its production from the proper source. In my view, the Trial Court ought to have allowed the application, the questions about the document's efficacy or utility notwithstanding. Once it is produced, it is for the lessor to have it marked in the manner law permits. Its production is not be-all and end-all.

23. I accordingly answer the first question in the lessors'

³ [1] AIR 1981 Bombay 446

favour.

(2) Can a private document be marked through a witness who merely produced that document in answer to court's summons?

24. This issue opens seemingly an intractable question: (a) an objection taken, how should a document be marked? In other words, when is a document marked and when is it proved?

(a) The Production of Documents:

25. To begin with, Order 13, Rule 1 of CPC mandates that the original documents must be produced at or before the settlement of issues. Sub-Rule (1) compels the parties or their pleader to produce all the documentary evidence in original, on or before the settlement of issues. As per sub-rule (2), the Court shall receive the documents so produced if they come with an accurate list of those documents. But 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.

26. Order 7, Rule 14 of CPC deals with the production of documents on which plaintiff sues. If a plaintiff sues upon a document in his possession or power, he shall produce it, as the sub-rule (1) mandates, in court when the plaint is presented. He

should also, at the same time, deliver the document or its copy to the court. If the document is not within the plaintiff's possession or power to be produced, he should, wherever possible, state in whose possession or power it is.

27. Similarly, Order 8, Rule 1A speaks of the defendant's duty to produce documents upon which he relies. A defendant must produce the documents along with the written statement if they are in his possession or if he can produce them. Sub-rule (3) provides for the exception. The defendant may produce the document with the court's leave. Thus, both Orders 7 and 8 require the parties to state, wherever possible, before the court in whose possession or power a document lies. Of course, this mandate applies when the party cannot produce that document, in the first place.

(b) Acceptance or Rejection of Documents:

28. Under Order 13, Rule 3, the court can reject irrelevant or inadmissible documents. It can do so at any stage of the suit. But it must record the grounds of rejection. Once the documents are admitted, the court, under Rule 4, endorses on the documents admitted in evidence: (a) the number and title of the suit; (b) the name of the person producing the document; (c) the date on which it was produced, and (d) a statement of its having been so admitted. The Judge should sign or initial the endorsement.

29. Similarly, Rule 6 of Order 13 prescribes how the rejected documents should be dealt with. If the court considers a

document relied on by either party inadmissible, it shall endorse the same particulars as mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected. Each High Court's Civil Rules of Practice or Civil Manuals provide for the procedure to mark documents. As with this High Court, its Civil Manual (Act 99 of 1960) details the procedural nitty-gritty—especially clauses 254 and 259.

(b) Production from a Third Party:

30. Order 16 deals with the summoning and attendance of witnesses. Rule 6 concerns summons to produce a document. Any person may be summoned to produce a document, without being summoned to give evidence. And any person summoned merely to produce a document shall be deemed to have complied with the summons if he gets the document produced instead of his attending personally to produce it.

31. Rule 15 of Order 16 deals with the duty of persons summoned to give evidence or produce a document. The person summoned to give evidence must appear before the court “for that purpose.” But if he is summoned to produce a document, he may either “attend to produce it, or cause it to be produced, at such time and place.” Therefore, a witness who is asked to produce a document need not even attend the court. It will suffice if he ensures the production of the document before the court by some other means or through someone else.

(c) Marking of Documents:

32. We will begin our discussion with *Ram Rattan (Dead) by Lrs., v. Bajrang Lal*, a three-Judge Bench decision of the Supreme Court. One of the questions in *Ram Rattan* is, can a party object to marking of an insufficiently stamped document?

33. *Ram Rattan* has held that when the plaintiff tenders a document in evidence while in the witness box, the defendant can object to its marking. The objection may be about the insufficient stamp on the document. Then, it is obligatory upon the trial judge to apply his mind to the objection raised and decide it in accordance with the law. Tendency sometimes is, as *Ram Rattan* notes, to postpone the decision to avoid interruption in the process of recording evidence. So, a very convenient device is resorted to: marking the document in evidence subject to objection. This, however, does not mean that the objection about the admissibility is judicially decided; it is merely postponed. In such a situation, at a later stage, before the suit is disposed of, the trial Court must decide the objection.

34. I must note *Ram Rattan* concerns the objection about the document, not about the person through whom the document should be marked. So its holding does not help us.

35. Let us now examine *Bipin Shantilal Panchal*. Another three-Judge Bench noticed the trial court's not proceeding with the matter in the face of an objection about the admissibility of any material in evidence. It termed this an archaic practice. The objections at that stage, according to *Bipin Shantilal Panchal*,

lead to avoidable rounds of litigation. The proceedings would be put on hold interminably at an interlocutory stage.

36. So to remedy this malady, *Bipin Shantilal Panchal* suggested an alternative practice: Whenever an objection is raised during evidence-taking stage about the admissibility of any material or item of oral evidence, the trial court can note of such objection. Then, it should mark the objected document tentatively as an exhibit subject to such objections to be decided "at the last stage in the final judgment." If the court finds at the final stage that the objection so raised is sustainable, it can keep the evidence excluded from consideration.

37. Now let us examine the case holding of *Hemendra Rasiklal Ghia*. This Court's Full Bench has extensively treated the document marking, especially, in the backdrop of the Supreme Court's *Bipin Shantilal Panchal*. After exhaustively analyzing the issues, *Hemendra Rasiklal Ghia* has categorized, in paragraph 71 of the judgment, the objections about document marking into three categories: (i) the objection to the documents insufficiently stamped; (ii) the objection about the mode of proof; and (iii) the objection about the document *ab initio* inadmissible in evidence.

38. Then, *Hemendra Rasiklal Ghia* has gone on to explain the procedure the trial Court should adopt under each category. About the second category, the Full Bench has observed that once the objection is raised, it must be resolved there and then.

So, if the court sustains that objection, the plaintiff or the defendant may mark the documents through a proper person or by adopting an acceptable procedure. According to *Hemendra Rasiklal Ghia*, if the other party does not object to the document marking, he should not be permitted to raise the admissibility in the midst of the trial. It observes:

58. [I]n the second category of the case, the objection should be taken when the evidence is tendered. Once the document has been admitted in evidence and marked as an exhibit, *the objection that it should not be admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. This proposition is rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would enable the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular.*

...

60. If the objection to the proof of document is not decided and the document is taken on record giving tentative exhibit, then *the right of the cross-examiner is seriously prejudiced. . . .*

(italics supplied)

What Does Evidence Act Say?

39. Here the question is about through whom the lessors should mark the documents. To determine this, we should first determine whether the documents are private or public. Section 74 of the Evidence Act does not define “public document”; it

rather enlists the types of public documents. According to that section, these are the public documents:

- (1) documents forming the acts or records of the acts—
 - (i) of the sovereign authority,
 - (ii) of official bodies and tribunals, and
 - (iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;
- (2) public records kept in any State of private documents.

40. And all other documents, as Section 75 states, are private. To begin with, public documents enjoy a statutory presumption under Section 114 of the Evidence Act. Public documents are prepared by a public servant in discharge of his public duties; and they are available for inspection to the public, in public office, during the appointed time, sometimes for a fixed fee. A certified copy of a public document can be admitted in judicial proceedings and is, usually, proved by secondary evidence. That said, the court is bound to presume its genuineness from “the duly certified secondary copy.”

41. Section 77 of the Act does allow certified copies to be produced in proof of the contents of the public documents or parts of the public documents. Indeed, the proof of different public documents is provided under Section 78 of the Act; and Section 79 speaks of the presumption about the genuineness of certified copies.

42. But if a document is private, it suffers from certain shortcomings. But once it is admitted in any judicial proceeding,

it cannot be treated as inferior evidence. For getting a private document admitted, its original—the primary evidence—is the best choice, and its marking must be through its author. If it is secondary, without proving one of the conditions laid down under Section 65 of the Act, the secondary evidence of a private document cannot be admitted in judicial proceedings.

43. Section 65 of the Act permits the secondary evidence before the court under certain circumstances. We need not elaborate on them, though.

44. Parties may secure documents from public authorities. But all the documents the public authorities submit or supply cannot be termed public documents. In other words, if an official certifies and supplies a private document, which he has come to possess officially, it still remains a private document. Copies obtained from or produced by a public authority cannot be termed public documents or primary evidence. Only if the original qualifies to be a public document, then does its certified copy. But if the original is a private document, its copy secured from an official does not get transformed into a public document.

The Procedural Path:

45. As I have already noted, under Rule 15 of Order 16 of CPC, if a person is summoned to produce a document, he may either “attend to produce it, or cause it to be produced, at such time and place.” Therefore, a witness who is asked to produce a document need not even attend the court. Then, the question of

marking the documents through him does not arise. Instead, if it is a public document, the person through whom it is marked hardly matters. It can be marked through a party to the proceedings. It need not be through the official that issued it. But a private document must be marked through its originator or author. Here, the police officer was summoned to produce documents. He produced them. His role has ceased. In other words, on the summoned official's producing the documents, they were placed on the court's record. Then, the question is, what is the nature of these documents that have reached the court's record?

46. The Gujarat High Court in *State of Gujarat v. Ambalal Maganlal Shah*^[4], has noted the distinction between “record of the Court” and “the record of the acts of the Court”. A private document does not become a public document simply because it is filed in the Court. “To be a public document, it should be a record of the act of a public officer or Court.” There is, according to *Ambalal Maganlal Shah*, a distinction between the record of the act of the Court and the record of the Court. So it has observed:

“[A] document which forms part of the record of the Court does not necessarily form record of the act of the Court. It may be that upon a private document, which is a record of the act of private parties a second act is done by the public officer or by the Court, namely filing the document or putting a number on the document. Only that portion of the document, which records the act of the Court in filing

⁴ [1966 Cri LJ 967]

the document would be a public document. Therefore, that part of the document, namely the original part would be a private document forming the record of the act of the private parties and what is subsequently added to that document by the Court would be a public document." Therefore, it can clearly be deduced that simply because a document is filed before any Court/ Tribunal/ Authority in any form, the same would not acquire a 'public' character. *In fact, it is not the record of the Court, rather, the record of acts of the Court which is considered as public document.* Clearly, the pleadings or even private documents filed before the various Courts/ Tribunals/ Authorities would not make such documents 'public'. However, orders or decrees passed by the Courts/ Tribunals/ Authorities are public document, as they are the record of the acts of such Courts/ Tribunals/ Authorities.

(italics supplied)

How to Mark a Private Document:

47. In *Smt. Rekha Rana v. Smt. Ratnashree Jain*^[5], a Division Bench of Madhya Pradesh High Court, per R. V. Raveendra C.J., as his Lordship then was, has answered this question. A private document cannot be used in evidence unless its execution is admitted by the party against whom it is intended to be used, or it is established by proof that it is duly executed. In this context, *Rekha Rana* has held that a private document must be proved

- i. by examining the executants of the document; or
- ii. by examining a person in whose presence the signature/mark was affixed to the document; or
- iii. by referring the document to a handwriting expert and examining such expert; or

⁵ [] AIR 2006 MP 107

- iv. by examining a person acquainted with handwriting/signature of the person who is supposed to have written/signed the document; or
- v. by requesting the Court to compare the signature of the executant in the document with some admitted signature of the person shown as executants; or
- vi. by proving admission by the person who is said to have signed the document, that he signed it.

48. Therefore, the lessors' effort to mark the documents through the officer summoned under Order 16, Rule 15 of CPC cannot be sustained. The documents summoned may be public documents, or private documents, or a combination of both. They have come on record, but they have not yet become part of the record. So the party that summoned them must first determine which are public documents and which are private ones. As I have noted, the marking of public documents presents no problem. If the summoned documents is private, then, as held in *Rekha Rana*, the party must take steps to get the private document or documents marked through a proper person.

The Answers:

49. A private document cannot be marked through a person who has merely produced that document in answer to the court's summons.

50. If the objection is about the mode of proof, the party that summoned the document must ensure that it is marked through a proper person. Thus marked, the document becomes a part of the court record. But its proof is altogether a different matter. Pithily put, document marking is procedural; document

proving is adjudicatory—judicial. The proof of the document—that is, the veracity of its contents—depends, say, on the document's nature, source, the statutory presumptions it may carry with it. Even if all these aspects are satisfactory, still its relevance is yet another matter. A document emerging to be genuine still may be irrelevant for the court to adjudicate an issue before it. Thus, the proof and relevance may be tested on the touchstone of cross-examination.

51. So I answer the second question, with all its collateral questions, in the lessees' favour.

With the above observations and directions, the writ petition stands disposed of.

[DAMA SESHADRI NAIDU, J.]