

Ashokkumar Bhavarlal Jain and another	...	Petitioners
Vs.		
Arjun N. Desai (decd) through his L.R.		
Jamunaben Arjun Desai and others	...	Respondents

CORAM : R. G. KETKAR, J.
DATE : MARCH 14, 2019

Not on Board. At the request of Mr. Damle, learned Counsel for the petitioners, taken up for admission.

2. This Petition takes exception to the order dated 14.08.2017 passed by the learned Judge, Court Room No.33 of the Small Causes Court at Mumbai (Bandra Branch) below exhibit-62 in R.A.E.&R. Suit No.445/856 of 2006 as also the order dated 06.04.2018 passed by the Appellate Bench of the Small Causes Court in Revision Application No.124 of 2017. By order dated 14.08.2017, the learned trial Judge allowed the application exhibit-62 filed by the plaintiffs and permitted them to lead secondary evidence and photocopy of the tenancy agreement dated 25.02.1993 Article X was allowed to mark Exhibit subject to rebuttal evidence. By order dated 06.04.2018, the Appellate Court dismissed the Revision Application on the ground that the order passed by the trial Court does not affect substantive rights of the defendants. In view of the decision of the Apex Court in ***Bhartiben Shah Vs. Smt. Gracy Thomas***, 2013 (2) ALL. M.R. 9 (F.B.), Revision is not maintainable.

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paragraph 14(a) of the plaint. In paragraph 14(a) of the plaint, plaintiff contended that defendant is now denying the title of the plaintiff in respect of the suit premises in spite of the defendant having signed, executed and delivered tenancy agreement to the plaintiff, which is at exhibit-A to the plaint. Defendant No.2 has endorsed his signature as a witness for due and proper execution of tenancy agreement. Mr. Damle submitted that in view of the assertions made in paragraph 14(a), it is evident that original of the alleged tenancy agreement is retained by the plaintiff. He submitted that amendment in the Suit was carried out on 11.07.2007 and the present application for leading secondary evidence is made on 01.04.2017. As the original agreement is in custody of the plaintiff, the plaintiff was not justified in seeking permission to adduce secondary evidence. The Courts below were also not justified in allowing the application.

4. Mr. Damle further submitted that in paragraph 5 of the application, plaintiff contended that the true copy of the tenancy agreement dated 25.02.1993 is certified by Public Notary Mr. Nitin G. Raut, after verification with the original tenancy agreement dated 25.02.1993. As against this, a perusal of certification by Mr. Nitin G. Raut, Notary shows that on the basis of evidence / instrument produced before him, he has certified it as a true copy. In other words, Notary has not seen the original tenancy agreement. The Courts below were, therefore, not justified in marking it as exhibit.

5. I have considered the submissions advanced by Mr. Damle. I have also perused the material on record. A perusal of the order of the trial Court shows that the learned trial Judge observed in paragraph 7 that in order to prove the tenancy agreement dated 25.02.1993, plaintiffs examined P.W.2 Shankar and P.W.3 Shreedhar. P.W.2 Shankar is attesting witness on the tenancy agreement and P.W.3 Shreedhar is

executor of the said agreement. A copy of the tenancy agreement Article X was certified to be true by the Advocate and Notary Mr. Nitin G. Raut. After going through the remark of the certification, it is shown that he has certified it on the basis of the evidence of the instrument produced before him. The learned trial Judge, therefore, observed that the contention of the defendants that the original document must be in possession of the plaintiff when the copy of the tenancy agreement was certified to be true copy by the Notary cannot be accepted. That apart, the learned trial Judge has marked this document as exhibit. Merely marking of the document as exhibit that itself does not amount to proving the contents of the said document. Even after marking of the documents, plaintiffs have to prove the contents thereof. Even the learned trial Judge has marked the tenancy agreement dated 25.02.1993 as exhibit subject to rebuttal evidence. Thus, the interest of the defendants is sufficiently protected while passing the impugned order by the trial Court. Hence, no case is made out for interfering with the impugned order. Petition fails and the same is dismissed.

6. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned 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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