

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1501 OF 2020

Murlidhar Tilwani .. Petitioner
Versus
Naresh G. Wadhwa & Ors. .. Respondents

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Mr.Atul Damle, Senior Advocate i/b Mr.Prashant P. Kulkarni
for the Petitioner.

Mr.Rohaam Cama with Mr.Anish Karande, Mr.Siddhanth
Chhabria i/b Ms.Taanishka Sharma for the Respondent Nos.1-
4 & 6-10(c).

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CORAM: BHARATI DANGRE, J.
DATED : 26th OCTOBER, 2021

P.C:-

1. By the present writ petition, the petitioner has posed a challenge to the impugned order dated 26/08/2019, passed by the learned Judge, City Civil Court, Bombay in Notice of Motion No.175 of 2019 (the number is wrongly mentioned in the title clause as 275 of 2006) in S.C.Suit No.5914 of 2005. By the impugned order, the request made by the plaintiff for exhibiting an agreement dated 01/07/2004, has been rejected.

2. A brief background of the said order calls for a mention. The petitioner, who is the original plaintiff, instituted a suit for declaration that the agreement dated 01/07/2004, being

annexed as Exh.B to the plaint, executed by defendant No.1 in his favour on payment of part consideration, for Flat No.1, Plot No.763, Shri Krishna Co-Op. Hsg. Soc. Ltd. is valid and subsisting and its specific performance is sought. The document at Exh.B is in form of a receipt, acknowledging the payment of part consideration of Rs.1,00,000/- and the total consideration fixed for the flat of which the description is set out in the said receipt, is mentioned as Rs.24,00,000/-. A specific statement in the receipt is to the following effect :-

“I agree to give peaceful and vacant possession of the flat to Mr.Murlidhar T. Tilwani upon receiving the balance amount of Rs.23,00,000/- only”.

3. In order to traverse the claim of the plaintiff, a written statement is filed by the defendant No.1 on 10/04/2009 wherein in paragraph (j.), defendant No.1 has admitted the existence of the document, though a specific plea is taken to the effect that the document, being receipt at Exh.B to the plaint, was executed without explaining him the contents thereof or its legal effect. A specific plea is also taken by the defendant that the said receipt was executed by adopting fraud and misrepresentation and ill intention is also attributed. The receipt is, therefore, pleaded to be null, void, illegal and non-est and not creating any right, whatsoever in favour of the plaintiff.

The learned Judge framed the following issues in the aforesaid suit.

- “1. Whether Plaintiff is entitled for specific performance of contract dated 01.07.2004 against the Defendant?
2. Whether Plaintiff is entitled for possession of the suit property for Defendant?
3. Whether Plaintiff is entitled for alternative relief of refund of Rs.8 lacs with interest at the rate of 18% pa from the date of suit till its realization?
4. What Order and Decree?”

4. The affidavit in lieu of examination-in-chief came to be filed by the plaintiff on 09/12/2014. Prior to said event, a compilation of documents came to be produced on behalf of the plaintiff, which is placed on record at page 92-A of the writ petition. The said list enumerates seven documents and document No.2 is the agreement/receipt dated 01/07/2004. In the order-sheet dated 06/01/2018, the learned Judge has exhibited all the documents, which have been produced by the plaintiff at page 92-A, barring the document at Sr.No.2 being the agreement dated 01/07/2004 which is the bone of contention between the parties. The order dated 06/01/2018 reads thus :

“Plaintiff present. Adv. Mr. S.K. Jain for defendant present. KB Adv. Mr. Prashant Kulkarni for plaintiff present. Adv. Mr. S.K. Jain for defendant present. Document at serial no. 1 at Exh., 5 is the original bank certificate dtd. 7.12.2014 it is marked as Exh. 7. Document at serial no. 3 is admitted by the advocate of defendant but the contents are denied. Document at

serial no. 3 is marked as Exh. 8. Document at serial no. 4 is the copy of letter dtd. 22.11.2004. There is no date on the said letter. The sealed envelope is attached with the copy of the letter. The copy of the letter is not marked as Exhibit but the sealed envelope alongwith the letter inside it and the AD card is marked as Exh. 9(colly). The envelope may be opened later if required. The documents at serial no. 6 are the original bills and marked as Exh. 10(colly). The document at serial no. 7”

5. In the affidavit in examination-in-chief, the plaintiff has specifically made the following statement :-

“4. I say that the Defendant No.1 has executed a agreement in the form of a writing and has impressed her thumb impression on the said receipt, which constituted a concluded Agreement between the Plaintiff and the Defendants. The Defendant No.1 has impressed her thumb on the agreement written by Defendant No.2 in the presence of her sons, the Defendants No.2 & 3, and the Defendants No.2 & 3 have confirmed the agreement by signing the same in confirmation and in the presence of one another and the plaintiff has been put the possession of only a portion of the open area which was the balcony to which the plaintiff has carried out the repairs to that portion and the same has been locked by the plaintiff after covering the same, the plaintiff has not been put into possession of the remaining area of the suit flat. **I produce the said original Agreement dated 1st July, 2004.**”

It is pertinent to note that thereafter the plaintiff was cross-examined and also examined his witnesses. The defendant closed his evidence and chose not to examine any witness.

6. The plaintiff woke from his slumber in the year 2019 and took out the Notice of Motion for exhibiting the agreement dated 01/07/2004, narrating that inadvertently the document was not exhibited and the fact that it was not exhibited could not be noticed and once it was noticed, the Notice of Motion is taken out. The said Notice of Motion was vehemently opposed and the learned Judge, on consideration of rival contentions, rejected the same.

7. On perusal of the impugned order and, particularly, para 8 thereof, it can be discerned that the delay on part of the plaintiff and the stage of the trial were considered as foremost factors, which refrained the learned Judge from entertaining the Notice of Motion. He has recorded that the plaintiff offered himself for cross-examination prior to getting the document exhibited and, therefore, he has lost his right to get the document in question exhibited. The negligence on part of the plaintiff has been reasoned, for ousting him of the right to get the document exhibited.

8. On hearing learned senior counsel Mr.Damle for the petitioner and learned counsel Mr.Cama for the Respondents, I have perused the record of the writ petition. The order dated

06/01/2018 can be clearly read as the one where the learned Judge has missed out the document at Sr.No.2 being the agreement dated 01/07/2004. It appears to be a mistake, since if at all the document was refused to be exhibited, the learned Judge ought to have cited the reasons for its refusal. As far as the other documents enlisted at page 92A, the said documents have been exhibited. True it is that, the plaintiff also roused at a belated stage, when the evidence is closed and though learned counsel Mr.Cama has vehemently submitted that the plaintiff who is prosecuting the suit ought to have been diligent in following his own pursuit and if he was seeking a relief based on the document, he ought to have taken care to get the said document exhibited. In any case, the procedure is only the handmaid of justice and the delay, cannot be surely a ground to defeat the legitimate claim of the plaintiff. If the learned Judge has failed to mark the said document, without assigning any reason for doing so, I see no reason why the plaintiff should suffer on account of flaw, on the part of the learned Judge.

9. At this stage, learned counsel Mr.Cama raises an objection qua the admissibility of the said document. I am not in any way hesitant in making an observation to the effect that exhibiting the document is one aspect and accepting its admissibility and the contents is another. The submission of Mr.Cama is to the effect that the document is not adequately stamped. He is at liberty to raise this objection whenever the document would be sought to be exhibited by the learned Judge through the plaintiff. The said objection of Mr.Cama is a

justifiable one and he cannot be denuded of his right to object the document being exhibited on the ground that it is inadequately stamped and as such cannot be read in evidence. But, inadvertence of not marking the document out of sheer neglect cannot cost the plaintiff. It is informed by the parties that the evidence is now closed and the matter is listed for final arguments.

I am conscious of the position that by remanding the matter back, by setting aside the impugned order, it would take the proceedings to an anterior stage, where probably some time may be consumed. However, in order to render substantial justice to the parties, particularly when, the relief claimed in the suit is revolving around the said document dated 01/07/2004 and the learned Judge has rightly settled the issue to the effect that whether the plaintiff is entitled for specific performance of the contract dated 01/07/2004, the document needs to be exhibited. This is, however, subject to the objection being raised by the respondents about exhibiting the said document on the ground that it is not adequately stamped and also about its mode of proof. If an order is passed by the learned Judge deciding to exhibit the said document, needless to state that the defendant is also entitled to cross-examine the plaintiff on the ground of its proof, admissibility, genuineness etc.

10. In light of the aforesaid discussion, by setting aside the impugned order, the matter is remanded back to the trial court for permitting the document in form of receipt dated 01/07/2004 to be exhibited, subject to the objection being

raised by the defendant about it being exhibited, on account of its mode of proof, admissibility and further permitting the cross-examination of the plaintiff at the instance of the defendant, if he is called for re-examination and, if warranted, by leading further evidence by the defendant. This exercise shall be undertaken by the learned Judge within a time schedule of six months.

11. With the aforesaid direction, the writ petition is partly allowed. It is clarified that barring the issue pertaining of exhibiting the document in question, which has been rejected under the impugned order, I have not gone into merits of the matter.

(SMT. BHARATI DANGRE, J.)