

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.6003 OF 2019

- PETITIONERS** : 1. Gautam s/o. Sitaram More,
 aged about 35 years, Occ.:
 Business,
2. Nitin S/o. Sitaram More,
 aged about 35 years, Occ.:
 Business,
3. Smt. Panchafulabai Wd/o.
 Sitaram More,
 aged about 73 years, Occ.:
 Household,
4. Ku. Jyoti D/o. Sitaram More,
 aged about 32 years, Occ.:
 Household,
5. Swati D/o. Sitaram More, aged
 about 27 years, Occ.:
 Business,
 All 1 to 5 R/o."- Waman Nagar,
 Khamgaon, Tq. Khamgaon, Dist.
 Buldhana

Original Defendants No.3 to 7

..VERSUS..

- RESPONDENTS** : 1. Purushottam S/o. Laxman
 Akarte,
 aged about 62 years, Occ.:
 Agriculture, R/o.:
 Gavhan, Tq.
 Shegaon, Dist. Buldhana
 Presently at Chembur,
 Suswagatam Nagar, Postal
 Colony, Road No.15, Room
 No.175, Chembur, Mumbai-71
2. Madhukar Sitaram More,
 aged about 53 years, Occ.:
 Service, R/o.: Kolori, Tq.
 Khamgaon, Dist. Buldhana

Original Plaintiff

3. Satish S/o. Sitaram More,
aged about 40 years, Occ.:-
Business, R/o.:- Waman Nagar,
Khamgaon, Tq. Khamgaon, Dist.
Buldhana.

Shri. H. R. Gadhia, Advocate for the Petitioners
Shri. K. P. Sadavarte, Advocate for Respondents.

CORAM : N. B. SURYAWANSHI, J.

DATE : 08.10.2021.

ORAL JUDGMENT

RULE. Rule made returnable forthwith.

Heard finally with the consent of the parties.

2. This petition impugns the order dated 26.07.2019 (Annexure-G) passed by the learned Civil Judge Senior Division, Khamgaon below Exh-338 in Special Civil Suit No.25 of 2006, thereby rejecting the Application of Petitioner seeking recalling of Plaintiff-Witness for cross-examination and the order dated 13.08.2019 (Annexure-I) passed below Exh-339, thereby rejecting the Application seeking review of the order dated 26.07.2019 (Annexure-G).

3. The Petitioners are the original Defendant Nos.3 to 7 in Special Civil Suit No.25 of 2006 and the Respondent No.1 is the original Plaintiff and the Respondent Nos.2 and 3 are the original Defendant Nos.1 and 2.

4. The suit was filed by the Respondent No.1 seeking specific performance of contract against the Petitioners and the Respondent Nos.2 and 3. During the trial, an Application (Exh-338) came to be filed by the Petitioners seeking recall of Plaintiff-witness for further cross-examination on the ground that the Defendants have filed certificate dated 28.05.2006 (Exh-313), subsequent to the cross-examination of the Plaintiff and during the course of recording evidence of the Defendants and they want to cross-examine the Plaintiff in respect of that document. The Application came to be rejected by the Trial Court. This order is impugned in the present petition.

5. Heard the learned Advocate for the Petitioners and the learned Advocate for the Respondents.

6. The learned Advocate for the Petitioners assailed the impugned order stating that the Trial Court has committed an error in rejecting the Application, which amounts to denial of fair opportunity to the Petitioners. Therefore, he submits that in the interest of natural justice, the Application filed by the Petitioners needs to be allowed by setting aside the impugned order.

7. Per contra, the learned Advocate for the Respondents supported the impugned order by placing reliance in *Michelle Rejji Cope .Vs. Murial wd/o. Benhar Cope, 2019(3) ALL MR 805*. According to him, the Trial Court was justified in rejecting the Application.

8. A certificate (Exh-313) is filed by the Defendant Nos.1 and 2 during his cross-examination in February, 2019. The Trial Court has observed that if the certificate (Exh-313) contradicts the evidence of Plaintiff then, it is a matter of argument and not a matter of recall the Plaintiff to confront him with the said certificate. It is also noted that Exh-313 is filed by the Defendant Nos.1 and 2 and the Application (Exh-

338) is filed by the Defendant Nos.3 to 7, but the Defendant Nos.1 to 7 have filed common written statement.

9. In Michelle Rejji Cope (*supra*), this Court has held that :

“Recall of witness for additional cross-examination on the ground that necessary questions were not put to witness by advocate while cross-examining the witnesses, it does not fulfill the criterion of Order 18 Rule 17. The power under Order 18 Rule 17 is to be invoked doing justice between parties and not to enable party to fill up lacunae in its case.”

.....

“It is not every erroneous order that deserves to be corrected in exercise of supervisory jurisdiction under Article 227 should be interfered with.”

10. In view of above observations, I do not find any perversity or illegality in the impugned order passed below Exh-338.

11. The learned Advocate for the Petitioners has also raised a grievance that while passing the impugned order below Exh-338, the Trial Court has observed thus :

“The plaintiff has proved a receipt exhibit-171. The witness for the plaintiff namely Samadhan Shirsath, PW-6 has proved the carbon copy of receipt exhibit-171 and at exhibit-227.”

While passing the order below Exh-339, the Trial Court has further observed that :

“Secondly, the very criteria to mark a document with an exhibit number is that the respective document has been proved in the evidence as provided under the provisions of the Evidence Act. It enables the Court to take into consideration the said document while appreciating the evidence. Therefore, unless and until the document is proved in consonance with the provisions of the Evidence Act, it cannot be marked with an exhibit number.”

12. The learned Advocate for the Petitioners therefore contends that the Trial Court has recorded a finding against the Petitioners/Defendants that the said documents are proved by the Plaintiff and its witness, and therefore, the Trial Court will be considering those documents has proved and will consider this, while appreciating the evidence on record.

13. The Trial Court in the impugned order has also observed that :

“I may say that the observations as made vide a decision on an application exhibit-338 is limited to the extent of that application.

....

The proof of document is different aspect than its probative and evidentiary value which has to be considered at the time of arguments and the Judgment.”

14. It is settled legal position that mere exhibiting of a document does not make it admissible in evidence. Its admissibility can always be questioned by the opposite party at the time of final argument. The Hon’ble Supreme Court in *Sait Tarajee Khimchand .Vs. Velamarti Satyam Alias Satteyya, 1971 AIR(SC) 1865*, wherein it is held that :

“Mere marking of exhibits cannot be the proof of documents.”

In *Hemendra Rasiklal Ghia .Vs. Subodh Mody, 2008(6) Mh.L.J.*, the Full Bench of this Court held thus :

.....

(iii) “Objection to the document which in itself is inadmissible in evidence can be admitted at any stage of the suit reserving decision on question until final judgment in the case.

The Court trying the suit or proceedings as far as possible is expected to decide the admissibility or proof of document as indicated

hereinable. As we have already added a word caution that while exercising discretion judiciously for the advancement of the cause of justice for the reasons to be recored, the Court can always work out its own modality depending upon the peculiar facts of each case without causing prejudice to the rights of the parties to meet the ends of justice and not to give the handle to either of the parties to protract litigation. The aim should always be to prevent miscarriage of justice and expedite trial, which is the dire need of the time.”

15. In the light of above ratio, it is clear that merely because the documents are exhibited in the present case, it cannot be said that they are proved. The Petitioners/Defendants are entitled to question their admissibility and proof of these documents at the time of final arguments. The Trial Court will have to appreciate the admissibility of these documents, and therefore, probative and evidentiary value after hearing the parties on merits. The Trial Court will be under an obligation to consider the admissibility of these documents after hearing the parties at the time of final hearing of the suit.

16. With these observations, Writ Petition No.6003 of 2019 is disposed of.

Rule made absolute in the above terms with

no order as to costs.

(N. B. SURYAWANSHI, J.)

TAMBE