

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.13448 OF 2017

Sanjay Dashrath Dhanure,
Age: 46 years, Occu: Business,
R/o. Shop No.7, Paras Sankul,
D.S.P. Bungalow Road,
Jalgaon, Tq. & Dist. Jalgaon

....PETITIONER

VERSUS

1. Vijay Uttamchand Parakh,
Age: 50 years, Occu: Business,
R/o. Plot no. 75, Shivram Nagar,
Jalgaon, Tq. & Dist. Jalgaon

2. Kamalkumar Uttamchand Parakh,
Age: 60 years, Occu: Business,
R/o. Plot no. 75, Shivram Nagar,
Jalgaon, Tq. & Dist. Jalgaon

....RESPONDENTS

.....

Mr G. V. Wani, Advocate for petitioner;

Mr A. G. Talhar, Advocate for respondent No.1

CORAM : SMT. BHARATI DANGRE, J.

DATE : 6th January, 2022

PER COURT:

1. The petitioner, the original defendant in a suit, instituted by the plaintiffs (respondents herein) for possession and recovery of rent in respect of a shop of the respondents, in the form of Regular Civil Suit No.386/2013, is aggrieved by the order passed by the learned Civil Judge Junior Division, Jalgaon, on 29/06/2017,

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below Exh.41, under which, the petitioner is directed to produce the original leave and licence agreement within 14 days from the date of the order and on failure to do so, the plaintiffs are granted liberty to refer to the Xerox copy of the leave and licence agreement as secondary evidence.

2. Heard the learned Counsel for the petitioner Shri. G. V. Wani and the learned Counsel Shri A. G. Talhar for respondent No.1.

The chronology and sequence of events would reveal that the plaintiffs instituted a suit for possession and recovery of rent in respect of shop owned by them and the pleadings in the suit is to the effect that an agreement of leave and licence has been executed between father of the respondents, late Uttamchand Fulchand Parakh and defendant therein Shri. Sanjay Dhanure (the present petitioner) for a period of 24 months, commencing from 01/06/2007. It was pleaded that the licence fees was agreed to be Rs.1,000/- along with the payment of necessary taxes.

On summons being issued, the petitioner put his appearance and filed his written statement and denied the pleadings in the plaint and is specifically pleaded that after expiry of period of

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leave and licence, the landlord had accepted the rent till June 2014, however, he has not given receipts and as such, he has become tenant of the said shop.

3. The plaintiffs moved an application vide Exh.41, requesting the Court to direct the defendant to produce the original leave and licence agreement dated 01/06/2007. The petitioner denied that he is in possession of any such document and he specifically pleaded that the plaintiffs are the original landlord and therefore, they are one, who shall have custody of the said document. He, therefore, pleaded for dismissal of the said application by specifically pleading that the copy of the agreement, which has been produced by the plaintiffs on record, is not an agreement which entered with him and moreover, since it is not registered document, it shall not be read in evidence and the original agreement was never in his possession.

Upon this application and a consideration of say, the learned Judge recorded that the plaintiffs had filed xerox copy of the leave and licence agreement along with the list of the documents and the defendant has denied the custody of the original document, xerox copy of which has been filed by the plaintiffs. Since suit is

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based on the said document, the learned Judge recorded that it is necessary to bring on record the original leave and licence agreement. Hence, the following order came to be passed :-

ORDER

- (i) *Application is allowed.*
- (ii) *Defendant is directed to produce the original leave and licensee agreement within fourteen days from the date of order.*
- (iii) *If defendant fails to produce the said leave and license agreement, then plaintiffs have liberty to go through the xerox copy of leave and license agreement produced on record as secondary evidence.*
- (iv) *Both parties are directed to take note of this order.*

4. The petitioner moved an application for reviving on the ground that the original document is not a registered document and it is not in his custody and therefore, without foundational fact being placed, the prayer to lead secondary evidence could not be granted. This application is also rejected with the following observations :-

- 3) *As per the Evidence Act, there is procedure to lead primary and secondary evidence, but every party has right and liberty to prove such document as well as their*

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oral submission by leading proper and substantial evidence beyond reasonable doubt. No doubt, plaintiffs permitted to lead secondary evidence because the suit is based on the leave and license agreement executed between landlord and tenant and the plaintiff is having the burden to prove said document beyond reasonable doubt. Therefore, mere permission to lead secondary evidence does not amount to proof of said document. In other words, it cannot be said that by allowing permission to lead secondary evidence, the alleged document is proved beyond reasonable doubt. I think there is no mistake found on behalf of this Court and, hence no need to review own order of this court. Therefore, I pass the following order.

ORDER

Application is rejected.”

5. Perusal of the record and proceedings reveal that the case of the plaintiffs is based upon the agreement executed by the father of the plaintiffs with the petitioner, leasing down the suit shop to him from 01/06/2007 to 31/05/2009 viz. for a period of 24 months on leave and licence basis with licence fees of Rs.1,000/- being agreed upon. Apart from licence fees, the property tax of Rs.1,583/- was also agreed to be borne by the licensee. The plea in the plaint is to the effect that on 01/07/2007, the agreement was signed by the licensee in respect of the property mentioned in

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paragraph 1 of the suit. It is also specifically pleaded that the document bear the signature of the deceased Uttamchand Parakh and Shri. Sanjay Dhanure and based on the said agreement of leave and licence, the defendant carried out an activity of fair price shop in the said premises. The specific pleading is, on expiry of the said period, the licensee ought to have vacate the possession of the suit shop, but since he failed to do so, from 01/06/2009, he continued to occupy the shop premise as a trespasser.

If the plaintiffs base their case upon the agreement, it was imperative for them to produce the same on record.

In the written statement, the defendant disputed the claim of the plaintiffs that the said shop has been bequeathed by the deceased Uttamchand in plaintiffs' favour and he denied their existence as landlord. In absence of the document in the form of an agreement being not registered, it's legality was questioned. He specifically pleaded that he continued to pay the rent of Rs.1,000/- to the land owner till February 2013 by cash, however, no receipts were passed by the landlord. Thus, the case of the defendant is that he had become the monthly tenant of deceased

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Uttamchand and he also sought permission from the Court to deposit the rent from March 2013 to June 2014.

6. The plaintiffs, who based their case on the agreement, however, only produced the xerox copy of the said agreement and moved an application seeking direction to the defendant to produce the original agreement, which the defendant denied the same in his possession. The learned Judge, under the impugned order, directed him to produce the original leave and licence agreement within 14 days of the order and on failure to do so, granted liberty in favour of the plaintiffs to go through the xerox copy of the agreement produced on record as secondary evidence.

The procedure directed to be followed, is clearly in contrast to the provisions contained in the Indian Evidence Act, 1872 in the form of Section 65, which provide that the cases in which secondary evidence relating to documents may be given. As far as the contents of the documents are concerned, Section 66 of the Indian Evidence Act prescribe the procedure, when the secondary evidence can be permitted to be lead.

In the wake of the provisions contained in the Indian Evidence Act, secondary evidence may be given of the existence,

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condition or contents of a document, when the original is shown or appear to be in possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, process of the Court, or of any person legally bound to produce it, and when after the notice mentioned in Section 66, such person do not produce it. Before permitting secondary evidence to be brought on record, the foundation has to be lead for leading secondary evidence and in the present case, without complying the requirement of Section 66, the Court could not have permitted the plaintiffs to read the said document as a secondary evidence. In a case where neither the original documents are produced on any time nor has any factual foundation being lead for giving secondary evidence, it is not permissible for the Court to allow the party to adduce secondary evidence. Secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases, provided under Section 65 of the Indian Evidence Act. The secondary evidence must be authenticated by foundational evidence that the alleged copy is not in fact true copy of the original. Mere admission of the document in evidence does not

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amount to its proof and therefore, it is obligatory on the part of the Court to decide the question of admissibility of the document in secondary evidence before making endorsement thereon.

7. The learned Judge, while passing the impugned order, has not discussed anything relating to foundational evidence. In the wake of the above, the impugned order, to the extent of direction No.(iii) cannot sustain and deserves to be quashed and set aside. The writ petition is allowed to that extent. No orders as to costs.

(SMT. BHARATI DANGRE, J.)

sjk