

K.S. Jadhav

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

WRIT PETITION NO. 14510 OF 2022

Bharat Bhavanbhai Thakkar

**...Petitioner
(Original Plaintiff)**

Versus

M/s Bharat Agencies & Ors.,

**...Respondents
(Original Defendants)**

Mr. Ish Jain, Counsel a/w Mr. Nipeksh Jain a/w Mr. Duj Jain
i/b Kiran Jain & Co., Advocates for the Petitioner.

Mr. Kunal Bhanage i/b Akshay Pawar, Advocate for Respondent
No.2

CORAM : R.I. CHAGLA, J.

DATE : 2nd December, 2022.

ORDER :

1. Heard the learned Counsels to the parties.
2. By this Writ Petition, the Petitioner is seeking setting aside of the impugned order dated 15th February, 2022 which had allowed the Application (Exhibit-76) filed by Respondent No.2 for leading secondary evidence in respect of the copies of writings dated 22nd May, 1995 and 27th May, 1995 (Article Y1 & Y2

respectively).

3. It is the case of the Petitioner that the requirement under Section 65 of the Evidence Act has not been followed in allowing secondary evidence. The learned Counsel appearing for the Petitioner has referred to the decision of this Court in *Karthik Gangadhar Bhat Vs. Nirmala Namdeo Wagh & Anr., 2018 (1) Mh.L.J. 726.* The decision had followed a prior decision of this Court of *Sumati & Ors. Vs. Yashodhara & Ors., 2016 (6) ALL MR 507.* In that case, following the decision of the Apex Court in *M. Chandra*, this Court has held that secondary evidence may be adduced in any form in which it is available, whether a copy, or copy of copy or any other form subject to the condition that the copy is proved to be a true copy of the original. The Supreme Court had observed that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original though there is no fault on its part.

4. In the present case, the Trial Court has considered that

when the Plaintiffs were confronted with the copy of writings at Article Y1 & Y2, during cross examination the Plaintiff as witness has denied the documents. The case of the Defendant No.2a was that the original writings at Article Y1 and Article Y2 were in the custody of the Plaintiff. The Plaintiff who is the Petitioner herein when called upon to produce the originals, failed to do so. The Plaintiff had contended that he had neither admitted about the custody of original writings nor he has possession over them.

5. The Trial Court has considered the writings at Article Y1 & Y2 and arrived at finding that Article Y2 is a second copy of the original writing by noticing that the signature of the deceased Defendant No.2 Mrs. Shakuntala Bipin Seth is original. The writing at Article Y1 also bears the signature of witness viz. Mr. B.R. Narawane and is a copy of the original writing.

6. The Plaintiff during his cross examination admitted about certain contents in the writings, though he stated that he would search for the original. Admittedly, the Plaintiff has not

produced the originals of the writings, rather he had contended in reply that he does not possess the originals. From the said writings it was observed that there was a specific note to the effect that, ‘written and delivered on.....’. The trial Court upon considering the writings at Article Y1 & Article Y2 were out of the same transaction between the parties admitted the copy of the writings at Article Y1 and second copy of Article Y2 in evidence of Defendant No.2(a).

7. The trial Court has recorded that the Plaintiff will have ample opportunity to cross examine the Defendant No.2(a) regarding authenticity of the said documents. Accordingly, the Application for secondary evidence was allowed.

8. Having considered the submissions of the learned Counsel for the Petitioner as well as observing the findings of the trial Court, in my view there is no infirmity in the findings. The Application for secondary evidence which has been made is in view of the original writings not being available and the Court below has examined whether the writings are the true copies

of the originals and has answered in the affirmative.

9. Thus, I find that the conditions in Section 65 of Evidence Act have been satisfied for admission of the secondary evidence. These conditions have been noted in decision of *Karthik Vs. Nimala (supra)*. Further, the Plaintiff can always in cross examination of the Defendant No.2(a) disprove these writings including the authenticity thereof. This has specifically been observed by the Trial Court. Accordingly, there is no merit in the Writ Petition.

10. The Writ Petition is dismissed with no order as to costs.

[R.I. CHAGLA, J.]