

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

WRIT PETITION NO.11000 OF 2021

Mohd. Ahmed Khan s/o Mohd. Ismail Khan
Age: 59 years, Occu: Agriculture,
R/o: Gut No.55, at Satara,
Aurangabad

... Petitioner

Versus

1) M/s Kazi and Sanghani Constructions
Beed, a Registered Firm,
Through its Partner,
Sameer s/o Gulam Nabi Kazi
Age: 42 years, Occu: Agriculture & Business,
C/o: Kazi and Sanghani Constructions
Kazi Nagar, Jalna Road, Beed

2) Atul s/o Mansukhlal Sanghani
Age: 50 years, Occu: Agriculture & Business,
Partner of M/s Kazi and Sanghani Constructions
Beed, C/o Kazi and Sanghani Constructions
Kazi Nagar, Jalna Road, Beed

... Respondents

...

Mr. A. P. Bhandari, Advocate for Petitioner
Mr. Ajinkya A. Joshi, Advocate h/f Mr. A.S. Pathak, Advocate for
Respondent Nos.1 and 2

...

CORAM : NITIN B. SURYAWANSHI, J.

**RESERVED ON : 29th AUGUST, 2023
PRONOUNCED ON : 21st SEPTEMBER, 2023**

ORDER :

1. This petition challenges order dated 20/09/2021, passed by learned 12th Joint Civil Judge, Junior Division, Aurangabad, below Exhibit-42 in Regular Civil Suit No.54/2017, thereby marking the document as Article and deferring the

consideration of issue regarding execution/impounding and admissibility of the document, to the stage of final disposal of suit.

2. Petitioner/plaintiff filed the suit for mandatory and perpetual injunction. Respondents/defendants appeared and opposed the suit by filing written statement and say. Trial Court framed issues at Exhibit-33. Petitioner/plaintiff then filed affidavit of examination-in-chief on 09/09/2021. On the same day, respondents issued notice to the petitioner under Order 12 Rule 8 of the Code of Civil Procedure, calling upon petitioner/plaintiff to produce original Notarized Development Agreement. Petitioner replied the said notice stating that original development agreement is not in his custody and after search if the same is traced, it will be filed.

3. During the cross-examination of petitioner, respondents submitted application Exhibit-61 for production of documents, placed on record along with the list of documents and a document i.e. photocopy of the development agreement. The said document was confronted to the petitioner. At this stage, objection was raised on behalf of petitioner for relying on the said document on the ground that the same is not registered and not sufficiently stamped. The document being photocopy, the same cannot be referred in cross-examination. Trial Court has marked the said document as Article-A and rejected the objection and deferred the consideration

of issue regarding execution/impounding and admissibility of document to the stage of final disposal of suit.

4. Heard learned advocate for petitioner and learned advocate for respondent Nos.1 and 2.

5. Learned advocate for petitioner has assailed the impugned order by placing reliance on the Full Bench decision of this Court in *Hemendra Rasiklal Ghia Vs. Subodh Mody, 2008 (6) Mh.L.J. 886*. He submits that, trial Court has committed serious error in giving Article number to the disputed document and photocopy cannot be confronted to the witness in cross-examination. Deferring the consideration of issue of execution/impounding and admissibility of said document, is contrary to the ratio in Full Bench decision. He submits that, trial Court ought to have considered admissibility of said document at that stage only. According to him, the impugned order is, therefore, unsustainable. He submits that in terms of Rule 4 Order 12 costs of proving the document may be on the petitioner/plaintiff, but that will not make inadmissible document admissible.

6. Learned advocate of respondents, on the other hand, supported the impugned order, by placing reliance on *Pandharinath L. Bhandari Vs. Bharti Trimbak Bhandari and Others, 2021 SCC OnLine Bom 444*.

7. Perused the memo of writ petition, annexures thereto and the impugned order as well as citations relied on by the parties.

8. In *Hemendra Rasiklal Ghia* (supra) Full Bench was considering question, "*Whether objections as to the admissibility or mode of proof of evidence, oral and documentary, should be decided upon, when raised or whether decisions thereon can be deferred to a later stage*". This question is answered by the Full Bench holding that,

"60. If the objection to the proof of document is not decided and the document is taken on record giving tentative exhibit, then the right of the cross-examiner is seriously prejudiced. Once the document is used in cross-examination, then the document gets proved and can be read in evidence as held by the Supreme Court in the case of Ram Janki Devi V. Juggilal Kamlapat,. If the cross-examiner decides not to cross-examine based on unexhibited document and, ultimately, at the fag end of the trial, the document is held to be admissible and proved, then the cross-examiner as a rule of fair play would be entitled to further opportunity to cross-examine based on that document resulting in delayed trial defeating the very object and purpose of the amendment to the Civil Procedure Code."

"73. However, by way of exception, the objection relating to the admissibility of the document requiring resolution of complex issues, having effect of arresting progress of the matter, or if the admissibility of the evidence is dependent on receipt of further evidence, then, in such cases the trial Court can, in the interest of justice, defer the issue of deciding admissibility of the document. In Ram Ratan v. Bajarang Lal (supra), the Supreme Court has also observed that in a given circumstance a document can be exhibited with the endorsement made by the learned trial Judge "objected, allowed subject to objection", clearly indicating that the objection has not been judicially

determined and the document was tentatively marked. This procedure is to be followed only in exceptional circumstances. Ordinarily, the objection to the admissibility of the document should be decided as and when raised without reserving the question as to admissibility of the document until final judgment in the case. We may make it clear that omission to object to a document, which in itself is inadmissible in evidence, would not constitute such document in evidence."

"76. The Courts trying the suit or proceedings involving peculiar facts do have a discretion to work out its own procedure and determine the stage of deciding the admissibility of the documents for the reasons to be recorded, if it advances the cause of justice without causing prejudice to the rights of either of the parties. The discretion should not be used fancifully. It is quite possible that sometimes when party fails to substantiate the allegations, he may resort to dilatory tactics to harass the opponent by filing irrelevant and frivolous documents to prolong the continuance of the case. This should be checked by exercising power available with the Court. As already said, procedure is always evolved to serve the ends of justice and to avoid miscarriage of justice."

9. In ***Pandharinath L. Bhandari*** (supra) the learned Single Judge of this Court has held;

"6. Heard. Learned Counsel for the parties. Question arising for consideration; are;

a. Whether scheme of Code of Civil Procedure, 1908 (CPC for short) interdicts, the parties to the suit from confronting the witness of adverse party with a document, not on the Courts' record, but shown or produced to the witness for the first time in his cross-examination?

b. The next question is: the party, which has otherwise failed to file documents at appropriate stage could be permitted to bring on record the document through evidence of the witness of adversary by putting or confronting him with such document?

7. The main object of the cross-examination is to bring out the falsity and to find out the truth and further to weaken qualify or destroy the case of Opponent and to establish

the own case through Opponents' witness. Thus objects are to impeach the accuracy, credibility and general value of the evidence given in-chief, to sift the facts already stated by the witness, to detect and expose discrepancies or to illicit suppressed act, which will support the case of cross-examining party. The exercise of this right is regarded and one of the most efficacious for recovery of truth. Provisions of Section 137 of the Indian Evidence Act, 1872 empowers and Section 146 to 150, regulates cross examination of witness. Confronting witness, with a document is permissible to test veracity of witness; under Section 146 of the Evidence Act. Though the range of cross-examination is unlimited, it must relate to relevant facts. Thus 'relevancy of document', to which witness is confronted with, is a essential condition.

(Emphasis supplied)

8. Thus, to be stated that the provisions of Order-7 Rule-14(4), Order-8 Rule-1 (A)(4) and Order-13 Rule-3(a) of the CPC are exceptions to the Rules, regulating the production of documents by the Plaintiffs and Defendants alongwith the plaint and written statement. To achieve the desired result. While witness of adverse party is examined, if the party to the suit is not permitted to confront the witness with a document, which has not been produced with the pleadings, adverse party cannot test the veracity or impeach the credit of the witness. Thus, the legislation in its wisdom carved out aforesaid exceptions. Thus, in view of explicit provisions of CPC, it cannot be held that the document cannot be produced or shown, for the first time to the witness during the cross- examination, though it was not produced with the pleadings. The first question is answered accordingly."

10. Coming to the facts of the present case, plaintiff has given reply to the notice issued by defendants under Order 12 Rule 8, that original document is not in his custody. Still, it will be searched and on being available or traced out, the same can be filed. Plaintiff has admitted in his cross-examination that original

copy of the development agreement Article-A is in his possession and he has shown willingness to produce the same on record. He has further admitted that prior to the development agreement Article-A, defendant Nos.1 and 2 had no concern with the suit property. He has denied suggestion that, since there is no mention about the roads in original development agreement, he is not producing the same in the Court.

11. It is, thus, evident from record that petitioner/plaintiff though is in possession of the original development agreement, is not ready to produce it. In these peculiar facts, since the plaintiff was giving evasive replies about terms and conditions mentioned in the development agreement, it was necessary to confront him with the photocopy of said development agreement and as the photocopy was referred during cross-examination of plaintiff, trial Court has rightly marked it as Article-A. No fault can be found with the marking of the said agreement as Article-A.

However, the trial Court is not justified in holding that admissibility and proof of the said agreement will have to be decided at the stage of final hearing of the suit. Trial Court will have to decide admissibility and proof of the said agreement during the course of recording of evidence. Defendants will be at liberty to lead secondary evidence under Section 65 of the Indian Evidence Act,

1872. If the defendants prove the said agreement by leading secondary evidence, then the trial Court will Exhibit the same. Trial Court will consider whether in the facts of the present case, the document is sufficiently stamped and it needs to be impounded before reading it in evidence. If the trial Court finds that the document was to be compulsorily registered, then it cannot be read in evidence except for collateral purpose.

12. As stated above, all these aspects will have to be decided by the trial Court during the course of hearing of the suit and not at the time of final adjudication. With these observations, the writ petition is disposed of, with no order as to costs.

(NITIN B. SURYAWANSHI, J.)