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

WRIT PETITION NO. 4031 OF 2022

Sayaji Hariba More and Ors. ... Petitioners

vs.

Vitthal Nana Yewale and Ors. ... Respondents

Mr. Nagesh Y. Chavan for the Petitioners.

Mr. Mahindra Deshmukh for the Respondent nos. 1 to 9.

CORAM : SANDEEP V. MARNE, J.

DATED : 24 JANUARY, 2023

P.C. :-

1. By this petition the petitioners assail order dated 18 February 2022 passed by the Civil Judge Junior Division, Kadegaon in R.C.S. No. 145 of 2018. By that order the trial court has proceeded to allow the plaintiffs application for leading of secondary evidence in respect of document dated 1 July 1968.

2. The main grievance of the petitioners is that the trial court has failed to record even a single reason while allowing the application and the order merely reads "Granted".

3. Another objection of the petitioners to the plaintiffs leading secondary evidence in respect of document dated 1 July 1968 is that though the entire suit is based on that document and there is complete absence of any averment in the plaint about the document dated 1 July 1968 being lost.

4. It is further contended that since the plaintiffs failed to produce the document dated 1 July 1968, the defendants were required to issue notice for production of the original document on 22 October 2021. The application seeking permission to lead secondary evidence was thereafter filed by the plaintiffs by raising contention for the first time that the document dated 1 July 1968 is lost. In such circumstances, it is urged on behalf of the petitioners that the trial court ought not to have allowed the application seeking permission to lead secondary evidence.

5. Per contra, the petition is resisted by learned counsel appearing for the respondents submitting that in law there is no necessity of filing application to lead secondary evidence. The plaintiffs could have straightaway proceeded to file copy of the document dated 1 July 1968 and lead secondary evidence in respect thereof. In support of his contention the counsel for the respondent has relied upon judgment of this

court in *Parasanbai Dhanraj Jain and Others vs. Sunanda Madhukar Jadhav*¹.

6. After hearing the learned counsel for the parties I am of the view that the manner in which the trial court has proceeded to decide the plaintiff's application at Exhibit 47 by order dated 18 February 2022 is unacceptable. No reasons are recorded and the application is allowed by using just one word "Granted".

7. While the trial court ought to have recorded reasons while deciding the application at Exhibit 47, the law expounded by this court in *Parasanbai Dhanraj Jain (supra)* would in fact not even require filing of formal application for leading of secondary evidence. This court has held in paragraph 10 and 11 of the judgment as under :-

"10. This, I regret to say, is a misconception that has now attained the proportions of an epidemic, especially in the Court of Small Causes and in the civil courts. Apparently, none of these courts seems to care that there is no provision in the Code of Civil Procedure 1908 or the Evidence Act for any such application. Nobody seems to care either that there are reported decisions starting from Indian Overseas Bank v Triokal Textile Industries & Ors., (AIR 2007 Bom 24 : 2006 (6) Bom CR 85) of Vazifdar J (as he then was) directly to the contrary and saying that no such application is maintainable, desirable or even necessary.

1 2017 DGLS (Bom.) 1857

11. I have recently set out the law on this (Order dated 3rd November 2017 in Writ Petition No. 11151 of 2017, *Karthik Gangadhar Bhat v Nirmala Namdeo Wagh & Anr*. See also: *Anandji Virji Shah & Ors v Ritesh Sidhwani & Ors*, Chamber Summons No. 1153 of 2015 in Suit No. 395 of 2007, decided on 27th June 2016.; *Ajaykumar Krishnaprasad Seth v Maya Ramesh Belvetkar & Anr*, Chamber Summons No. 17 of 2016 in Testamentary Suit No. 18 of 2003 in Testamentary Petition No. 628 of 2001, decided on 13th October 2016.; *MMTC Ltd v Samarth Auto Care Pvt Ltd*, Suit No. 427 of 1995, order dated 1st October 2014.; *Lajwanti v Jayshree P Madhwani & Ors*, Testamentary Suit No. 6 of 2004, order dated 14th December 2016.; *Sumati & Ors v Yashodhara & Ors*, 2016 (6) All MR 507 (per Shukre J).and I will say so briefly once again: either secondary evidence is led or it is not led. Either the provisions of Section 65 are met or they are not met. No permission of a Court is required to lead evidence of any kind. No judge in the subordinate judiciary to this High Court will hereafter will insist on any such application under any circumstances whatsoever. I do not think I can put it in any clearer terms than this. Any such order is wholly illegal and liable to be set aside. A copy of this order is now to be circulated to every Civil Judge in the State of Maharashtra. To clarify: in an evidence affidavit under Order 18, a witness may well say of a given document that he cannot prove it by direct evidence and then proceed to adduce the secondary evidence in compliance with Section 65 of the Evidence Act. The trial court is to consider that evidence, viz., the reason given for not leading direct evidence, and the secondary evidence led, and is to then decide whether the secondary evidence led is sufficient. That is all. There is absolutely no question of an application, whether styled as an interim application or a 'MARJI' application, for 'permission' to lead secondary evidence. The Court cannot refuse that permission, and it cannot insist on an application for any such permission."

8. Following law expounded by the court in *Parasanbai Dhanraj Jain (supra)* there was no necessity for the plaintiff to file a formal application for seeking leave to lead secondary

evidence. Therefore even though the trial court ought to have have recorded reasons while allowing the application, non-recording of such reasons cannot be reason to set aside the order passed by the trial court. In the peculiar facts and circumstances of the present case, the plaintiffs could have straightaway proceeded to lead secondary evidence in respect of the document dated 1 July 1968. Whether such secondary evidence is admissible or not and whether the document would be proved or not is something that would depend upon the nature of the evidence that is led before the trial court.

9. In these circumstances I do not find any reason to interfere in the order passed by the trial court. The Writ petition is devoid of merits.

10. The Writ Petition is dismissed. There shall be no orders as to costs.

(SANDEEP V. MARNE, J.)