

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9233 OF 2023

Baburay Pundalik Salunke

...Petitioner

Versus

Lok Housing And Construction Ltd & Ors.

..Respondents

—————
Ms. Swati Sawant & Adv. P. V. Shekhawat for the Petitioner.

Ms. Nisha Shah i/b Kalpesh Joshi ASJ for Respondent Nos. 2 & 3.
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Coram : Sharmila U. Deshmukh, J.

Date : July 28, 2023.

P. C. :

1. Heard.

2. The challenge in the Petition is to the order dated 2nd August, 2022 rejecting the Petitioner's Application for recalling order dated 1st February, 2021 to the extent of documents at Sr. No. 1 and 4 to 8 and for marking those documents as exhibits.

3. The facts of the case are that, the Petitioner filed suit No. 4497 of 2010 seeking specific performance of an agreement of sale dated 25th

October, 2002. In the written statement the Respondent No. 1 informed about the sale of the suit flat to Respondent Nos. 2 and 3 in the year 2006, pursuant to which the Respondent No. 2 and 3 were added as parties. After the framing of issues, affidavit of evidence under Order 18 Rule 4 came to be filed on 3rd February, 2020 along with the list of documents. As some of the originals were not in possession of the Petitioner an application for certified copies was made to this Court and the documents were received on 13th March, 2020. After receipt of the certified copies, additional affidavit of evidence in lieu of examination-in-chief dated 1st February, 2021 was filed before the City Civil Court along with the list of documents. On 1st February, 2021 some of the documents came to be marked, however, the documents at Sr. No. 1, 4 to 8 were not marked and as such, Notice of Motion bearing No. 2186 of 2021 was preferred to recall the order of 1st February, 2021 to the extent of not marking the documents at Sr. No. 1, 4 to 8 which came to be rejected by the Trial Court giving rise to the present Petition.

4. Heard Ms. Swati Sawant, learned counsel appearing for the Petitioner and Ms. Nisha Shah, learned counsel appearing for Respondent Nos. 2 & 3.

5. Learned counsel appearing for the Petitioner submits that the documents which was sought to be produced at Sr. No. 1, 4 to 8 are photo copies of the documents which are part of record of this Court in Appeal proceedings. She would further submit that as the originals are forming part of record and proceedings of this Court in Criminal Appeal No. 167 of 2012, certified photocopies of the said documents were obtained and by the additional affidavit in lieu of examination-in-chief, secondary evidence of that documents was sought to be led. She would further submit that the Trial Court has rejected the Application on the ground that there is nothing on record to show that these are certified copies of public documents, proved documents or original documents.

6. *Per contra*, learned counsel appearing for the Respondent Nos. 2 and 3 submits that the Application in question is filed at a belated stage after the argument of the Respondent Nos. 2 and 3 are concluded. She would further submit that after written submissions were filed, upon the lacuna being pointed out the present Petition was filed seeking to challenge the order dated 2nd August, 2022 in the month of July, 2023. She would further contend that there is nothing on record to show that the originals are not in the possession of the Petitioners and as such, secondary

evidence cannot not be permitted to be led.

7. Considered the submissions of the parties.

8. Upon perusal of the affidavit in lieu of examination in chief, it is evident that the Petitioner has specifically deposed that the original of the documents of which secondary evidence was sought to be led were seized by the officers of CBI, which is now forming part of the records and proceedings of this Court in Criminal Appeal No. 166 of 2012 and 167 of 2012 and therefore, he is not in position to produce the original of the documents. The evidence led also indicates the deposition as regards the contents as well as signature on the said documents and as such, a request was made to mark the same as exhibits.

9. The Trial Court while rejecting the Application has held that there is nothing on record to show that these are certified copies of public documents, proved documents or original documents or that CBI has seized original documents from possession of the Plaintiff and the documents at Sr. No. 1, 4 to 8 are certified copies of the documents. The Trial Court failed to consider the fact that necessary evidence in that

respect had been led inasmuch as, the deposition is in the affidavit of evidence is that the original were seized by CBI and forms part of the records of this Court. That being so, the factual foundation for the purpose of leading secondary evidence was deposed. It is then for the Respondents in the cross examination to bring out the fact that no secondary evidence in that respect can be led for the reason that the Petitioners have not proved that the originals were not in his possession. However, in the present case, the Trial Court has held that as the documents are certified copies, the same cannot be marked as exhibit. It is settled that merely marking of the documents does not imply that the documents are proved and the Plaintiff has to duly prove the contents of the said documents. The evidentiary value of these documents will be considered at the time of final adjudication subject to the objections as to the admissibility or relevancy of the documents. In my opinion, as sufficient foundation was laid for leading secondary evidence of the said documents as the same were required to be marked as exhibits.

10 As regards the contention of learned counsel appearing for the Respondent No. 2 and 3 that the present Petition is a delayed Petition seeking to challenge an order of the year 2022 after final arguments have

been made, the prejudice if any, cause to Respondent Nos. 2 and 3 by the delay, can be compensated by cost which is quantified at Rs. 25,000/-.

11. The impugned order dated 2nd August, 2022 is quashed and set aside. As a result, the prayer made in the Notice of Motion No. 2186 of 2021 seeking to exhibit the documents at Sr. No. 1, 4, 5 ,6, 7 and 8 stand allowed subject to payment of cost of Rs. 25,000/- within a period of one week from today.

12. In view of the above Writ Petition stands allowed.

[Sharmila U. Deshmukh, J.]