

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 9773 OF 2016**

Kalpana Vijaykumar Desai

.. Petitioner

Versus

Yusuf Karmali Kerawala and Ors.

.. Respondents

-
- Ms. Shilpa Kapil, Advocate for Petitioner
 - Mr. Vinod Solanki, Advocate for Respondent Nos. 1 to 7
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CORAM : MILIND N. JADHAV, J.**DATE : FEBRUARY 06, 2023.****P.C.:**

1. Heard Ms. Kapil, learned Advocate for Petitioner and Mr. Solanki, learned Advocate for Respondent Nos. 1 to 7.
2. Perused the impugned order dated 15.09.2014 passed by the City Civil Court at Bombay on Exhibit No. 4 in S.C. Suit No. 8332 of 2002.
3. The Petitioner who is the Plaintiff before the learned Trial Court has filed a list of documents below Exhibit-4. The list of documents have been particularly objected to by the Respondents i.e. Defendants before the learned Trial Court.
4. Perusal of the impugned order would suggest that there are 52 documents which were filed by the Plaintiff out of which documents at Serial Nos. 47 to 52 have been allowed to be exhibited

by the learned Trial Court as they have been admitted by the Defendants.

5. In so far as documents at Serial Nos. 1 to 47 are concerned, the learned Trial Court after examining the said documents has returned the following finding:

“ 8. On perusal of documents at serial no.1 it is observed that the documents at serial no.1 is in the zerox form while in which it is referred as original letter therefore the said documents could not be exhibited.

Similarly, on perusal of plaint , it is observed that the documents at serial no.2 is not referred and annexed to the plaint. Similarly, the witness is not party to the said documents therefore it could not be exhibited. So also it is observed that the defendant disputed to exhibit the documents which are at serial no.3 to 18 on the ground that those documents neither relied on in the plaint or releted to the plaintiff's witness as a author or receiptner.

No doubt, the witness referred those documents in his chief examination. The documents at serial no.2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 are the receipts in original formats issued by Haribhai Estate Pvt.Ltd., to Mohd. Jivraj but again there is no any evidence or reference or in respect of authorised custody of plaintiff of those documents then ultimately the plaintiff is required to prove those documents by following due procedure.

Similarly, the documents at serial no.19 though bank statement of United Commercial Bank, Mandavi, but said documents are not signed by bank officers who is supposed to sign on certified copy which is exhibited under bankers book of evidence act. So also the plaintiff not stated in his evidence affidavit how the firm M/s Vijaykumar Bachhubai Company is related to the plaintiff and in what manner the plaintiff have possession of the said documents. So also Adv. Solanki for the defendant objected the documents at serial no.17 on the ground that the said letter neither issued by plaintiff nor addressed to plaintiff and on perusal of the said documents it is observed that though the said documents referred in evidence affidavit still it is issued by Karmali Mohd. Jivraj and addressed to Haribhai Estate, Pvt. Ltd., then for want of explanation for custody of those documents by the plaintiff, the documents could not be exhibited without formal suit.”

6. In so far as documents at Serial Nos. 20, 21, 22 to 47 are concerned, it is the case of the Defendants that the said documents have not been relied upon by the Plaintiff in the plaint nor filed alongwith the plaint. This position is disputed by the learned Advocate for the Petitioner. In so far as these documents are concerned, learned Trial Court has returned the following findings :

“9. The documents at serial no. 21 which is marked as Exh.F' again issued by the Jivraj Company to Vijaykumar dtd. 10.8.1977 but not reflected name of present plaintiff or in person name of deceased plaintiff. Similarly, not referred by the plaintiff in the plaint.

So also the documents at serial no.22 to 46 objected by the defendant on the ground that the said documents are not attached with plaint not relied on in the plaint , above that the plaintiff is not either author or receiptner of the said documents.

10. On perusal of documents at serial no.22 to 26 it is observed that the documents at Exh. G- to G-24 reflecting the correspondence between Karmali Mohd. Jivraj and Haribhai Estate Pvt.Ltd.,. The plaintiff witness referred the said documents in his chief examination and the reasons that the plaintiff's husband having possession of those documents but again the status of husband of plaintiff in company of Haribhai Estate Pvt. Ltd.,is not explained by the plaintiff's witness either in the plaint neither in the evidence in affidavit of plaintiff's witness then ultimately, the said documents without formal proof of contents could not be exhibited.

11. In short, the defendants admitted the documents at serial no. 47 to 52 and challenged the remaining documents on the ground that the plaintiff is not authorised person to have a custody of those documents and the plaintiff is not either author or receiptner of those documents.”

7. Thus after duly considering the aforesaid documents, the learned Trial Court passed the following order :

ORDER

1. The documents at serial nos. 1 to 46 of list of documents are hereby marked as Exh. (a) to (tt) respectively for identification purpose.

2. The documents at serial nos. 47 to 52 are hereby exhibited and marked as Exh. 5 to Exh. 10 respectively.

3. The plaintiff is hereby directed to prove the documents at serial nos. 1 to 46 which are marked as Exh. (a) to (tt) by following due procedure of law.

4. The next date is fixed for further chief examination of plaintiff.”

8. The learned Advocate for the Petitioner today submitted that the next date before the learned Trial Court for cross examination of the Plaintiff is 20.02.2023 and in that view of the matter the Plaintiff should not be ousted in so far as the aforementioned documents are concerned. Undoubtedly, the learned Trial Court has given cogent reasons for non marking of the documents as Exhibits in the impugned order passed as far back as on 15.09.2014 after which for almost 9 years the suit has remained stagnant.

9. It is pertinent to note that the learned Trial Court has not ousted the right of the Petitioner/Plaintiff before me to prove the documents at Serial Nos. 1 to 46 which have been marked by the learned Trial Court for identification as Exhibit-(a) to (tt) and passed a direction directing the Plaintiff i.e. Petitioner before me to prove the same by following the due procedure of law.

10. *Prima-facie* perusal of the aforementioned findings and considering the submissions advanced by Ms. Kapil, it is seen that documents which are at Serial Nos. 1 to 46 are original documents and according to her some of the documents are admittedly not addressed

by the Plaintiff but received by him which is in the nature of correspondence. Some of the documents are actually the originals.

11. Be that as it may, the Plaintiff has been permitted by the Trial Court to prove the said documents by following the due procedure of law.

12. Considering the order dated 10.02.2015, the suit before the learned Trial Court was stayed.

13. Be that as it may, considering that the substantive right of the Petitioner is duly granted by the impugned order namely Clause -3 of the operative part of the impugned order, the impugned order dated 15.09.2014 is sustained.

14. Needless to state that the Petitioner / Plaintiff shall be at liberty to prove the documents at Serial Nos. 1 to 46 by following the due process of law strictly in accordance with the provisions of the Indian Evidence Act by taking out appropriate application as provided for therein. If any such application is taken out by the Petitioner/Plaintiff, learned Trial Court is directed to dispose of the said application expeditiously as early as possible and preferably within four weeks from the date of filing of such application. Needless to further state that the cross examination of the Plaintiff to be held on 20.02.2023 shall be deferred in that case.

15. That apart, the learned Trial Court had also fixed the matter for further examination-in-chief of the Plaintiff by virtue of the

impugned order itself, but considering this order, the Plaintiff is at liberty to take out appropriate application in accordance with law.

16. Ms. Kapil would submit that since the matter is listed before the learned Trial Court on 20.02.2023, appropriate application with respect to the aforementioned documents i.e. documents at Serial Nos. 1 to 46 shall be filed by the Plaintiff before the learned Trial Court on that date.

17. With the above directions, Writ Petition is disposed.

[MILIND N. JADHAV, J.]

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KILAJE

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by SONALI
SATISH KILAJE
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2023.02.08
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