



IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.409 OF 2024

s Anand Bose Construction Pvt Ltd,
office at 801, Anand Square "B"
Near Sanjeevani Hospital,
Baina, Vasco da Gama, Goa,
Through its Managing Director,
Shri Anand Chandra Bose,
S/o Nitesh C Bose,
49 years of age, Indian National,
Business, Married,
R/o 801, Anand Square "B"
Near Sanjeevani Hospital,
Baina, Vasco da Gama, Goa

.....Petitioner

V/s

M/s Agency Real Vasco Pvt Ltd,
A company incorporated under the
Companies Act, 1956,
With its registered office at
Mascarenhas Building, 3rd Floor,
MG Road, Panaji, Goa 403001,
Represented in this act by its
Authorised signatory,
Shri Nishakant Pednekar,
s/o Narsiha Pednekar,
41 years of age, Indian National,
r/o H No 667, St Anthony Waddo,
Guirim, Bardez, Goa

.....Respondent

Mr. Gaurang Panandikar, Advocate for the Petitioner.

Mr. J.E. Coelho Pereria, Senior Counsel with Mr. Vinod Korgaonkar, Advocate for the Respondent.

CORAM:

BHARAT P. DESHPANDE, J

DATED:

2nd August, 2024.

ORAL JUDGMENT:

1. Rule. Rule is made returnable forthwith. Heard finally with the consent of the parties.
2. Mr. Panandikar appearing for the Petitioner submits that the application is filed on affidavit for production of secondary evidence on the ground that original documents were lost during shifting of office, as not been considered by the trial Court and the application came to be rejected.
3. The petitioner is the original Defendant who filed an affidavit in evidence and when he stepped into the witness box for production of documentary evidence, it was objected by the Plaintiff on a ground that the original is not produced. Accordingly, he filed an application for leading secondary evidence under Section 65 of the Evidence Act. Said application was objected by the Plaintiff and accordingly the impugned order was passed.
4. Mr. Panandikar would submit that by a wrong interpretation of Section 65(c), first paragraph, Defendant/Petitioner was asked to give reason, which is incorrect. He submits that the contents of the affidavit disclosed that the originals were lost and for that purpose, no other explanation is required. As far as the other two

documents are concerned i.e. the Demand Drafts, Mr. Panandikar fairly submits that other parameters are available to the Petitioners to prove such documents. However, he submits that the documents which Respondent Nos.1, 2, 3, 5, 7 and 8 were in custody of the Petitioner, however, the same were lost during shifting of the office. This reason could have been accepted by permitting the Petitioner to produce secondary evidence however such opportunity has been denied by passing the impugned order.

5. Mr. Pereira would submit that the impugned order neither suffers from illegality nor impropriety as specific reasons are disclosed by considering the provisions therefore no interference is warranted.

6. The application was filed by the Defendant for permitting to lead secondary evidence, squarely covered under Section 65(c) of the Evidence Act wherein the Petitioner/Defendant on affidavit disclosed that the originals have been lost. Mr Panandikar is right in submitting that the first part that the document is lost requires no further explanation and in fact it implies in it that the party was unable to keep the document properly and there is clearly negligence on the part of such party in protecting such document.

7. He submits that the second part of clause (c) requires reasons as to not arising from his own default or neglect which is required to be considered. In the first part since there is ‘comma’ in between and thereafter the word ‘or’ is separate from the first part from the second part and required to be interpreted separately.

8. The learned trial Court has in fact mixed both these aspects and sought an explanation from the Petitioner with regard to the aspect of the document being lost.

9. In the case of **Pandurang G. Dodke v/s. Lanka P. Kshirsagar and Anr.** [AIR 2005 Bom 427], the learned Single Judge of this Court discussed the aspect that the first part of clause (c) of Section 65 of the Evidence Act wherein a statement on affidavit that the document is lost is sufficient enough to allow the party to lead secondary evidence.

10. It is no doubt true that the learned trial Court has considered the decision of the Apex Court in the case of **H. Siddhiqui(Dead) by LRs v/s. A. Ramalingam** [(2011)4 SCC 240] and more particularly paragraph No.12 which shows that there should be a foundation to establish that the original document is lost.

11. By filing an affidavit in the present matter disclosing that the original is lost, in fact shows that the foundation was laid for the purpose of allowing the party to lead secondary evidence. The question whether the document is proved and the contents are to be looked into as evidence, will have to be decided only on appreciation of evidence however restricting the party at the threshold from leading secondary evidence when it is claimed on affidavit that the original is lost, would be denying an opportunity to produce such document in evidence.

12. As far as the objections which the Plaintiff could raise at the time of production of such secondary evidence is concerned, the same is always open and it is for the Court to decide whether it could rely such secondary evidence, only at the time of appreciating such evidence while deciding the matter finally.

13. The documents at Sr.No.1, 2, 3, 5, 7 and 8 therefore could be allowed to be produced as secondary evidence since there is foundation to show that these documents are lost.

14. As far as the document at Sr.No.6 is concerned, the same is a office copy and the letter was forwarded to the MD of the Plaintiff/Respondent in his personal capacity, which is covered under Section 65(a). Admissibility of such document could be

considered at the time of production of such document subject to the objection which could be raised by the Plaintiff. Accordingly, the impugned order needs interference.

15. The impugned order is therefore quashed and set aside.

16. The Defendant is allowed to produce documents at Sr. Nos.1, 2, 3, 5, 6, 7 and 8 by way of secondary evidence. However, it is made clear that the Plaintiff is at liberty to raise relevant objections to such document including admissibility of the contents therein which the trial Court will have to decide at the appropriate stage.

17. Mr. Panandikar submits that he will take necessary steps with regard to document Nos. 4 and 9 which are the Demand Drafts, by summoning the necessary witnesses from the Bank.

18. With these observations, Rule is made absolute in the above terms.

BHARAT P. DESHPANDE, J.