



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1962 OF 2016

Shri. Prakash Narayan Nehete
Since deceased through his
Legal Representatives

- 1(A) Shri. Pushkar Prakash Nehete
Age : 31 years, Occu : Advocate
- 1(B) Smt. Vasundhara Prakash Nehete
Age : 53 years, Occu : Household,
- 1(C) Smt. Sarala Narayan Nehete
Age : 76 years, Occu : Household,
All residing at 10/1, Shankarwadi,
Behind Bhushan Gas Agency,
Ring Road, Jalgaon 425001

.... **Petitioners**
(Ori. Plaintiff)

Versus

M/s. Ram Infrastructure Limited,
A company incorporated under the
Companies Act, 1950, having its
Registered Office at Ujwal Apartments,
Suyog Colony, Jalgaon – 425001

Alternative Address--
6, SHREYASH RESIDENCY,
GANESH WADI, JALGAON – 425001,
Maharashtra, INDIA

(Summons be served on above both address)

Managing Director

Shri. Umakant Dinkar Nehete

.... **Respondent**

Advocate for Petitioners : Mr. S. B. Yawalkar
Advocate for Respondent : Mr. S. H. Tripathi

CORAM : MANJUSHA DESHPANDE, J.

PRONOUNCED ON : 15 JANUARY, 2025

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with the consent of parties.
2. The petitioners are the legal representatives of deceased plaintiff in Regular Civil Suit No. 162 of 2005, who are challenging the order dated 09.12.2015 passed by the IIIrd Joint Civil Judge, Senior Division, Jalgaon (Trial Court) below Exh. 43 rejecting the application to lead secondary evidence.
3. It is the contention of the petitioners that inspite of compliance of the necessary conditions for entertaining the application to lead secondary evidence as provided under Section 65 of the Indian Evidence Act, the Judge of the Trial Court has been pleased to reject the application. Though it is implicit that the petitioner had taken all efforts to bring the document on record in which he has sought permission to lead secondary evidence, the Trial Court has not taken into consideration the efforts taken by him. Resultantly, causing miscarriage of justice, the observations of the Trial Court while rejecting the application are contrary to the record.

4. The brief facts leading for filing of the application to lead secondary evidence are ; the defendant Company is in business of B.O.T. projects of roads and bridges infrastructure. The plaintiff being an Engineering Graduate was professional consultant in planning and designs. The plaintiff and defendant entered into a Memorandum of Royalty Agreement on 20.04.2003. The agreement was signed by both the parties before the Notary. The original copy of the agreement is with the defendant Company and it's attested copy is with the plaintiff. According to the agreement which is entered between the plaintiff and defendant, the plaintiff is a Patron Consultant and is entitled to enjoy and share benefits from the company presently and in future, as a legacy in monetary terms defined as 'The Royalty' to be derived from the issue of the company.

5. The defendant Company was under obligation to pay and accredit Royalty in two parts settled annually i.e. 1% lump sum on actual project cost on each and every project works and 1% on amount received as revenue and earnings through all sources and by all means as gross receipts in all such projects for total / full life of projects.

6. As per the clause (10) of the Agreement, the Royalty was

split into two parts as the time spread for the project is extensive and prolonged for all infrastructures or any such project and any advance of this liability creates initial burden and effect on feasibility of the project. According to the said agreement, the defendant paid an amount of Rs.1,30,000/- to the plaintiff. However, thereafter, no amount was received by the plaintiff till filing of the suit. No balance sheet or certified copy of the balance sheet, Royalty Ledger Account as well as Profit and Loss Account of the Company was served to the plaintiff. Therefore, after issuing the notice to defendant through his Advocate, the present petitioner i.e. plaintiff filed a suit seeking direction to produce the record regarding the earnings of the company, about its income, expenditure and Profit and Loss Account and balance sheet and further seeking direction for making payment @ 1% of the project cost and 1% of the actual earning after taking the accounts from the defendant towards the remuneration as per the agreement with other reliefs.

7. The suit was filed on 11.04.2005. Upon filing of the suit, the defendant Company has filed its written statement on 15.09.2005. In the written statement, the defendant has raised preliminary objections without admitting the Memorandum of Undertaking of Royalty Agreement. Defendant has raised objection regarding the

maintainability of suit on the ground that the Agreement is on an unstamped paper filed by the plaintiff dated 16.08.2001 and subsequent Memorandum of Agreement dated 20.04.2003. According to the defendant, the agreements were executed by practicing fraud, deception and undue influence. The suit is resisted by raising various objections in the written statement including maintainability of the suit.

8. In the written statement, particularly in para No. 1-E, the defendant has stated that there is no legal sanctity of M.O.U. in the eye of law as there is no legal and valid contract between the plaintiff and defendant. Both the documents i.e. M.O.U. dated 06.08.2001 and 28.04.2003 have been got executed by the plaintiff from defendant by practicing serious fraud. In view of the filing of plaint and written statement, the issues were framed by the Trial Court on 09.04.2014. In the issues which were framed at Exh. 31, the first issue which was formulated is as under :

“1. Does plaintiff prove Memorandum of Royalty Agreements dated 16.08.2001 and 24th April 2003 ?”

9. In view of the first issue which has been framed by the Trial Court, the plaintiff has filed application seeking direction to the defendant to produce the original copy of the Memorandum of

Royalty Agreement dated 20.04.2003 in the Court. In the application, it has been categorically stated that in view of the framing of issue regarding proof of memorandum of Royalty Agreement at Exh. 31, he had sent a registered notice dated 16.10.2014 to the respondent to produce the original Memorandum of Royalty Agreement. However, the notice has returned unserved with an endorsement that the 'Addressee does not reside on the said address'. The notice alongwith postal acknowledgment has been placed on record along with the application.

10. In view of the return of notice, the application was filed by the plaintiff seeking direction to the defendant to produce the documents in order to facilitate his affidavit in support of evidence. The said application was filed on 03.12.2014. Upon being heard, the defendants were directed to file their say. In reply to the said application, the defendant has filed its 'say' at Exh. 38 wherein it was denied that no such agreement was ever been executed. The defendant has referred in para 3-B of his written statement wherein there is denial by the defendant of being in possession of any such original agreement and it is further reiterated that the plaintiff has practiced fraud on the defendant.

11. In view of the say filed by the defendant on 20.12.2014, vide order dated 18.08.2015, the Trial Court has been pleased to reject the application at Exh. 38 filed by the plaintiff. While assigning the reasons for rejection of the application, the Trial Court has observed that after having carefully gone through the pleadings of the parties and documents placed on record, as has been rightly pointed out by the defendant, since beginning, it is the stand of the defendant that no such Memorandum of Royalty Agreement has ever been executed by the defendant Company in favour of the plaintiff and defendant is not in possession of any such agreement. Therefore, the plaintiff has to prove that the agreement was executed and the original thereof is in possession of the defendant. It is observed by the Trial Court that on the basis of material placed on record, no presumption can be drawn that the defendant is in possession of the agreement and therefore, the application filed by the plaintiff has been rejected.

12. Learned Advocate Mr. Yawalkar for the petitioner submits that after his application (Exh. 38) is rejected by the Trial Court, considering the issue which was material for deciding the suit, and since he has failed to seek favourable orders from the Court in order to secure the original copy of the Agreement on which he is

placing reliance, he was left with no other alternative but to file an application seeking permission to lead secondary evidence. Accordingly, he has filed application seeking permission to lead secondary evidence dated 19.10.2015 at Exh. 43.

13. According to learned Advocate for the petitioner, as contemplated under Section 66 of the Indian Evidence Act, he had sought production of original document from the defendant by issuing notice. He has annexed copy of notice along with postal acknowledgment at Exh. 36. The notice and acknowledgment were filed by him along with application seeking direction from the defendant to produce the Memorandum of Royalty Agreement which was in possession of defendant. Since the application seeking direction to the defendant to produce the same has been rejected by the Trial Court, he was constrained to file application seeking permission to lead secondary evidence. According to him, for proving his case of Royalty, the best available evidence is the Memorandum of Royalty Agreement, the photocopy of which has already placed on record. Since his efforts for producing the primary evidence have failed, he was constrained to file application seeking, leave to produce the secondary evidence. The application filed by the petitioner seeking permission to lead secondary evidence dated 19.10.2015 is at

Exh. E page No. 38 of the writ petition.

14. The defendant Company has filed its 'say' to the application at Exh. 43. It is contended by the defendant that while deciding the application at Exh. 38, it is observed that no such Memorandum of Royalty Agreement dated 20.04.2003 exists. Therefore, the present application is based on presumption and assumption, hence deserves to be rejected.

15. Based on the 'say' filed by the defendant, the Trial Court has been pleased to reject the application vide its order dated 09.12.2015. It is this order which has been impugned in the present writ petition. While deciding the application below Exh. 43, it is observed by the Trial Court that for admitting the secondary evidence, the plaintiff is required to fulfill certain prerequisites as provided in Section 65 of the Indian Evidence Act. It is further observed that since already at Exh. 38, there is an observation made by the Trial Court that the document ought to be proved is not in the possession of the defendant. The condition, existence and contents of the alleged document is not admitted by the defendant and not proved by the plaintiff. Therefore, it is not possible in terms of Section 65 of the Indian Evidence Act, to rely on the xerox copy of the so called document produced by the plaintiff. Accordingly, the application has

been rejected.

16. The learned Advocate for the petitioner submits that in fact, considering that a particular issue in respect of proving a Memorandum of Royalty Agreement has been framed, the whole case of the plaintiff is based on the said document. All the reliefs sought by the petitioner are based on the agreement which is executed by the defendant. Unless the said document is placed on record, no relief can be granted in his favour. The learned Advocate for the petitioner has drawn attention of this Court to Sections 61, 62 and 63 of the Indian Evidence Act which read thus :

Section 61 – Proof of contents of documents – The contents of documents may be proved either by primary or by secondary evidence.

Section 62 – Primary evidence – Primary evidence means the document itself produced for the inspection of the Court.

Section 63 – Secondary evidence – Secondary evidence means and includes -

- (1) certified copies given under the provisions hereinafter contained,
- (2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

17. The documentary evidence in whatever form is to be proved by producing evidence in the form of documents on record. Section 61 of the Indian Evidence Act is about proof of contents of document. The proof of document may be proved either by primary or secondary evidence. Hence, the parties are required to prove a document either by producing a primary or a secondary evidence. Section 62 of the Indian Evidence Act speaks about primary evidence. A primary evidence is a document itself produced for the inspection of the Court. Primary evidence would mean the original document which is executed, whereas Section 63 is about secondary evidence. Secondary evidence means a certified copy or a copy made from original by mechanical process or copy made from or compared with the original or the counterparts of the document as against the party who did not execute for and so on. Secondary evidence is the copy of a primary evidence. In absence of primary evidence, the parties are permitted to lead secondary evidence.

18. Section 64 of the Indian Evidence Act provides that documents are proved by primary evidence. When primary evidence is not available, Section 65 of the Indian Evidence Act provides

contingencies in which secondary evidence is permitted to be produced. Section 65 of the Indian Evidence Act reads thus :

65. Cases in which secondary evidence relating to document may be given - Secondary evidence may be given of the existence, condition or contents of a document in the following cases :-

(a) When the original is shown or appears to be in the possession or power -

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) When the original is of such a nature as not to be easily movable;

(e) When the original is a public document within the meaning of section 74;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;

(g) When the originals consist of numerous accounts or

other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the documents is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

19. According to the learned Advocate for the petitioner, as contemplated under Section 65(a), he has already issued notice to the defendant to produce the original document and the defendant has failed to produce it. Therefore, he has very much complied with the pre-condition for permitting a party to produce secondary evidence. He has made every endeavour to produce the primary evidence by issuing notice, as well as seeking direction from the Court to the defendant to produce the original on record. Therefore, after making all possible efforts, he is seeking permission to lead secondary evidence i.e. a copy of agreement which he has already placed on record. Having complied with all necessary pre-conditions for granting permission to lead secondary evidence, it was incumbent upon the Trial Court to allow the application of the plaintiff.

20. Learned Advocate for the petitioner further submits that the reason given by the Trial Court for rejecting the application is that, since beginning, it is the stand of the defendant that no such Memorandum of 'Royalty Agreement' has been executed by defendant Company in the favour of plaintiff and the document is not in his possession. At the same time, the Trial Court has also observed that for admitting the secondary evidence, plaintiff is required to comply the provisions of Section 65 of the Indian Evidence Act.

21. In the present case, admittedly, the petitioner has already taken steps as contemplated under Section 66 of the Indian Evidence Act, by issuing notice as well as filing an application before the Trial Court seeking direction to the defendant to produce the original.

Section 66 of the Indian Evidence Act read thus :

66. Rules as to notice to produce. - Secondary evidence of the contents of the documents referred to in Section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, [or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case :

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it :-

(1) When the document to be proved is itself a notice;

- (2) When, from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force
- (4) When the adverse party or his agent has the original in Court;
- (5) When the adverse party or his agent has admitted the loss of the document;
- (6) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

22. It is further observed by the Trial Court in the order passed below Exh. 38 that the original document sought to be proved is not in the possession of the defendant. It is not out of reach of this Court. The contents, existence and conditions of the alleged document are not admitted by the defendant. Since the condition, existence and contents of the original document were not pleaded and proved by the plaintiff, it is not possible in terms of Section 65 of the Indian Evidence Act, to rely on the xerox copy of the document produced by the plaintiff since the plaintiff has failed to satisfy condition of Section 65 of the Act. Therefore, the application was rejected.

23. Learned Advocate Mr. Tripathi appearing for defendant, has opposed the prayer of the petitioner and vehemently submitted

that in his written statement, in the first paragraph itself, while opposing the claim of the plaintiff, it is categorically stated that without admitting the Memorandum of undertaking for Royalty Agreement, it is stated by him that the documents were executed by playing fraud and deception as well as undue influence and coercion. He has raised various other objections regarding jurisdiction and maintainability of the suit on account of existence of arbitration agreement. The existence of the document itself has been denied. Therefore, application filed by the plaintiff seeking direction to produce the original document has been rightly rejected by the Trial Court by its order dated 18.08.2015.

24. He further submitted that inspite of that, the plaintiff has filed the application seeking permission to lead secondary evidence in the form of xerox copy of 'Royalty Agreement' dated 20.04.2003 which was not at all maintainable. In view of the earlier order passed at Exh.38, according to him, no such agreement was executed by him. Therefore, there cannot be secondary evidence of a document which does not exists. According to him, the Trial Court has rightly passed the order rejecting the application of the plaintiff by relying on the earlier order passed below Exh. 38.

25. The observations of the Trial Court are contrary to the

records since the plaintiff had already demonstrated that, pre-condition as provided under Section 65-A of the Indian Evidence Act, which is reproduced herein above has been complied with by the plaintiff by issuing notice. Similarly, the observations made by the Trial Court in para 6 of the order wherein it is observed by the Court that the original document sought to be proved is not in possession of the defendant is also totally incorrect. Upon going through the order passed below Exh. 38, it is apparent that while recording the stand of the defendant, it is recorded that no such 'Memorandum of Royalty Agreement' has been executed in favour of the plaintiff and defendant is not in possession of any such document. Based on the said stand of the defendant, the Trial Court has observed that the plaintiff has to prove the agreement was executed and the original thereof is in possession of defendant and no presumption can be drawn that the defendant is in possession of the said document. Therefore, the Trial Court has observed in it's order that document is not in possession of the defendant is totally misconceived. The Court has merely recorded that plaintiff has to prove that the document was executed and the original of the same is in possession of the defendant. Hence, the reason for rejecting the application of the petitioner are contrary to the record and suffers from non-application of mind.

26. The observations regarding non-compliance of the pre-condition for maintaining application under Section 65 of the Indian Evidence Act, are also contrary to the record. Upon going through Section 65 of the Act, it is evident that anyone of the condition as mentioned in Section 65 from (a) to (g) makes a party eligible for seeking permission to lead secondary evidence.

27. In the present case, it is already demonstrated by the plaintiff that he has already issued notice as provided under Section 66 of the Act, the necessary condition has been fulfilled. The Trial Court was not justified in rejecting the application at Exh. 43. The learned Advocate for the petitioner placed his reliance on the judgment in case of **Vijay Vs. Union of India and Others 2023 SCC OnLine SC 1585**. The Hon'ble Supreme Court has carved out the conditions under which secondary evidence of the original instrument can be adduced.

28. The observations recorded by the Hon'ble Supreme Court based on various judicial pronouncements in the above judgment is reproduced herein below which reads thus :

“34. After perusing various judgments of this Court, we can deduce the following principles relevant for examining the admissibility of secondary evidence:

33.1 Law requires the best evidence to be given first, that

*is, primary evidence.*¹⁵

*33.2 Section 63 of the Evidence Act provides a list of the kinds of documents that can be produced as secondary evidence, which is admissible only in the absence of primary evidence.*¹⁶

*33.3 If the original document is available, it has to be produced and proved in the manner prescribed for primary evidence. So long as the best evidence is within the possession or can be produced or can be reached, no inferior proof could be given.*¹⁷

*33.4 A party must endeavor to adduce primary evidence of the contents, and only in exceptional cases will secondary evidence be admissible. The exceptions are designed to provide relief when a party is genuinely unable to produce the original through no fault of that party.*¹⁸

*33.5 When the non-availability of a document is sufficiently and properly explained, then the secondary evidence can be allowed.*¹⁹

*33.6 Secondary evidence could be given when the party cannot produce the original document for any reason not arising from his default or neglect.*²⁰

*33.7 When the copies are produced in the absence of the original document, they become good secondary evidence. Still, there must be foundational evidence that the alleged copy is a true copy of the original.*²¹

*33.8 Before producing secondary evidence of the contents of a document, the non-production of the original must be accounted for in a manner that can bring it within one or other of the cases provided for in the section.*²²

*33.9 Mere production and marking of a document as an exhibit by the Court cannot be held to be due proof of its contents.*²³ *It has to be proved in accordance with the law.*²⁴

29. So far as the present case is concerned, the petitioner, will be covered by para 35 and 36 of the said judgment, which reads thus :

“35. A reading of Section 65(a) of the Evidence Act displays the following:

- a. Secondary evidence can be presented as a substitute when the original document/primary evidence is in the possession of the opposing party or held by a third party;*
- b. Such a person refuses to produce the document even after due notice,*
- c. It must be ensured that the alleged copy is a true copy of the original.*

36. Applying the constituents of Section 65(a) of the Evidence Act to the present facts, in reference to the averments made, we find that the exact status of the documents in question could not be ascertained as one party claims that the other has the said documents and the other has allegedly stated that it was with her counsel. However, the said documents could not be recovered from the said counsel, as per records. In such a situation, therefore, the presentation of secondary evidence could be allowed, if other requirements are complied with.”

30. The documents on record as well as the pleadings of the parties, disclose that, in para 3-B of the written statement, there is clear admission of having executed the Agreement through the Director of Company, Shri. Umakant Dinkar Nehete. Relevant portion from the Para 3-B of the written statement is reproduced herein below.

3 B. The director of the company Shri. Umakant Dinkar Nehete met with an accident on 09.07.2002 having an head injury and of a serious nature. On account of this serious accident, the family of Shri. Umakant Nehete was completely disturbed and confused. In this confused and mentally disturbed situation plaintiff got himself prepared the so called Memorandum of Royalty Agreement dated 20-04-2003 and persuaded Shri. Umakant Nehete to sign the same. In fact Umakant Nehete was at that time being totally disturbed mentally signed it without knowing it and undertaking it.....

31. From the above statement made in para 3-B, it is an admission given by the defendant that, when the Director of the Company was in totally disturbed mental state, the Agreement was executed by him. Therefore, the denial of existence of the said agreement in the subsequent application Exh. 38 is contrary to the admission given in the written statement.

32. Moreover, the finding of the Trial Court while rejecting the application referring the order passed below Exh. 38 is also misconceived since it does not appreciate the scope of Section 65 of the Indian Evidence Act and compliance made by the plaintiff as provided under Section 66. Since the existence of document is already admitted in the written statement and the necessary compliance for permitting a party to lead secondary evidence has been made, as has been observed by the Hon'ble Supreme Court in **Vijay** (supra). The

order passed by the Trial Court becomes unsustainable in view of the settled position of law laid down by the Hon'ble Supreme Court in the above-quoted judgment of **Vijay** (supra). Therefore, the impugned order being contrary to the judicial pronouncement which is squarely applicable to the facts of the present case, becomes unsustainable and the order passed by the Trial Court deserves to be quashed and set aside. Hence, following order.

ORDER

- I. Writ Petition is **allowed** in terms of prayer Clause (B).
- II. The order dated 09.12.2015 passed by the learned IIIrd Jt. Civil Judge Junior Division (First Court), Jalgaon below Exh. 43 in Regular Civil Suit No. 162 of 2005, stands quashed and set aside.
- III. Rule is made absolute in above terms. Writ petition stands disposed of.
- IV. However, it is hereby made clear that all the issues between the parties are kept open to be agitated before the Trial Court.

[MANJUSHA DESHPANDE, J.]

Omkar Joshi