

(2015) 06 BOM CK 0192

In the Bombay High Court

Case No : Writ Petition No. 7533 of 2014

Hemantkumar and Company and Others

APPELLANT

Vs

J.C.P.L. Farma Private Limited and Others

RESPONDENT

Date of Decision : 23-06-2015

Acts Referred:

Evidence Act, 1872 — Section 123
Stamp Act, 1899 — Section 36

Citation : (2015) 06 BOM CK 0192

Hon'ble Judges : S.P. Deshmukh, J

Bench : Single Bench

Advocate : S.B. Yawalkar, for the Appellant; A.G. Talhar, Advocates for the Respondent

Final Decision : Allowed

Judgement

S.P. Deshmukh, J—Rule. Rule made returnable forthwith. Heard the learned counsel for appearing parties finally with consent.

2. In present petition, order dated 9th July, 2014, on Exhibit-178 an application of respondent No. 1 - plaintiff in special civil suit No. 106 of 2005 passed by 2nd joint civil judge, senior division, Jalgaon is being assailed by the petitioners-original defendants, predominantly on the ground that exhibition of documents could not have been allowed straight-away while many documents are not admissible in evidence at all for various reasons, and as such, those could not have been exhibited nor their exhibition would have any efficacy. Submissions are being advanced by placing reliance on a ruling by full bench of this court in the case of Hemendra Rasiklal Ghia Vs. Subodh Mody, (2008) 6 ALLMR 352 : (2008) 6 BomCR 519 : (2008) 5 CTC 577 : (2008) 6 MhLj 886 , elaborately considering the aspects of production of the documents, their admissibility and stages of objection to the same and consideration of said documents.

3. Learned counsel for petitioners submits that perusal of impugned order shows that the considerations which have led to the ruling are not looked into by the

trial court and as such the decision as has been rendered has fragile foundation and is not tenable.

4. Mr. Talhar, learned counsel appearing for respondent No. 1, however, tried to justify the order impugned referring to that it is not a case that the petitioners would have no opportunity at all to deal with the documents sought to be produced. He submits that trial court has for reasons considered that those should be tentatively exhibited keeping the point about admissibility open as also exhibition of the same would be subject to proving of the contents of the documents.

5. Full bench appears to have considered aspects of exhibition of documents, their admissibility and stages of objections to the same in the ruling, particularly, in paragraphs No. 70, 71, 72 to 76, which read as under-.

"70. The above judgment in the case of F.D.C. Limited Vs. Federation of Medical Representatives Association India (FMRAI) and Maharashtra Sales and Medical Representatives Association, AIR 2003 Bom 371 : (2003) 2 ALLMR 510 : (2003) 5 BomCR 376 : (2003) 3 MhLj 327 is affirmed by the Supreme Court in Ameer Trading Corporation Ltd. Vs. Shapoorji Data Processing Ltd., AIR 2004 SC 355 : (2004) 97 CLT 417 : (2003) 9 JT 109 : (2003) 9 SCALE 713 : (2004) 1 SCC 702 : (2003) 5 SCR 634 Supp : (2004) 1 UJ 627 . It is, thus, ruled that unless deponent thereof enters the witness-box and confirms the contents of the affidavit the same cannot be taken on record and exhibited. Once the affidavit of evidence is taken on record and exhibited making part of the record of the case, the opponent, at this stage, must raise an objection to the admissibility and proof of the documents which the Court has to decide by a judicial order.

Classification of Documentary Evidence vis-?-vis

Adjudication thereon:

71. The admissibility of the document in evidence may be broadly classified into three classes--

(i) that objection to the document which is sought to be proved is itself insufficiently stamped and the objection relates to deficiency of stamp duty of the document;

(ii) where the objection does not dispute admissibility of document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient; and

(iii) the objection that the document which is sought to be proved is ab initio inadmissible in evidence.

72. In the first case, the Court, before which the objection is taken about

admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case as held by the Constitution Bench in *Zaver Chand v. Pukhraj Surana* (supra) Once a document has been marked as an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, section 36 comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the trial Court itself or to a Court of Appeal or Revision to go behind that order. such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction. Similar view is expressed by the Supreme Court in the case of *Bipin Shantilal Panchal Vs. State of Gujarat and Another*, AIR 2001 SC 1158 : (2001) CriLJ 1254 : (2001) 74 ECC 287 : (2001) 134 ELT 611 : (2001) 3 JT 120 : (2001) 2 SCALE 167 : (2002) 10 SCC 529(1) : (2001) 2 SCR 29 : (2001) 1 UJ 573 : (2001) AIRSCW 841 : (2001) 2 Supreme 65 ; wherein it is made clear that if the objection relates to deficiency of stamp duty of a document, the Court has to decide the objection before proceeding further.

73. In the case of *Ram Ratan v. Bajarang Lal* (supra) the Apex Court reiterating the above view has observed that the Court, as of necessity it would be trial Court, before which the objection is taken about admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. So the objection relating to deficiency of duty cannot be raised or decided at the later stage of the suit. It has to be decided there and then unless taken on record subject to objection so as to avoid the rigour of section 36 of the Stamp Act.

74. In the second category of the case, the objection should be taken when the evidence is tendered. Once the document has been admitted in evidence and marked as an exhibit, the objection that it should not be admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. This proposition is rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would enable the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object become fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons; firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility there and then; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to

the party leading the evidence. Failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence.

75. If the objection to the proof of document is not decided and the document is taken on record giving tentative exhibit, then the right of the cross-examiner is seriously prejudiced. Once the document is used in cross-examination, then the document gets proved and can be read in evidence as held by the Supreme Court in the case of Ram Janki Devi and Another Vs. Juggilal Kamlapat, AIR 1971 SC 2551 : (1971) 1 SCC 477 : (1971) 3 SCR 573 . If the cross-examiner decides not to cross-examine based on unexhibited document and, ultimately, at the fag end of the trial, the document is held to be admissible and proved, then, the cross-examiner as a rule of fair play would be entitled to further opportunity to cross-examine based on that document resulting in delayed trial defeating the very object and purpose of the amendment to the C.P.C.

76. In the third case merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded. It is available to be raised even at later stage or even in appeal or revision. There is no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in affidavit filed by in examination-in-chief or while recording oral evidence. For example in case of unregistered sale-deed or gift-deed or lease-deed requiring registration, no evidence of the terms thereof can be given. On the ground of public policy, evidence derived from unpublished official records of the State cannot be given except with the permission of the head of the department concerned as laid down under section 123 of the Evidence Act. Such a document, therefore, can be tentatively exhibited and the decision thereon can be postponed till the suit reaches the stage of judgment. However such objection has also to be decided before the judgment is delivered. The objection to the admissibility of such evidence can always be taken at any stage of the suit.

77. Thus, we hold and rule that ordinarily an objection to the admissibility of the document in first and second categories of cases (excluding third type of case) has to be taken before the document is exhibited which, necessarily, postulates decision on the objection then and there. In other words, whether document is admissible or inadmissible is matter which should always be ruled upon at the time when the document is being proved or put in or the question asked to the witness. Such practice and procedure is fair to both parties.

78. It may be observed that sometimes in the case of second category, evidence can be received subject to objection in anticipation of other evidence, which, if produced, will remove the objection. In such cases, a final decision on the objection can be postponed to a later stage but, at any rate, it must be decided before the court proceeds to judgment. Omission in this respect is likely to prejudice the party producing the evidence by letting the matter remain in a dubious state and then depriving the party tendering the evidence of an

opportunity of making up the defects which in many cases he would be ready to do if he is told that the objection is allowed as observed hereinbefore."

6. It is apparent from perusal of impugned order that the court was oblivious of aforesaid ruling on the relevant aspects involved in the matter. In view of the same, I deem it appropriate that application Exhibit-178 filed by the plaintiffs be viewed in the context of the decision of full bench and decision be rendered thereon.

7. Accordingly, impugned order dated 9th July, 2014 below Exhibit-178 filed by respondent No. 1 - plaintiff in special civil suit No. 106 of 2005 passed by 2nd joint civil judge, senior division, Jalgaon stands set aside. Exhibit-178 stands restored to its position as had been subsisting immediately before the date of the impugned order. The trial court to decide Exhibit-178 afresh in the light of decision (supra) of full bench by giving opportunity to the parties to address themselves on the issue.

8. Writ petition is allowed. Rule is made absolute in above terms. No order as to costs.

9. Needless to refer to that this order shall not influence decision to be rendered on merits on Exhibit-178 by the trial court.