

(2016) 06 BOM CK 0054
In the Bombay High Court
Case No : Writ Petition No. 848 of 2015

Prakash Gurudas Timblo

APPELLANT

Vs

Hemlatabai Ravikant Darne alias Hemalatabai Kamotim
Timblo

RESPONDENT

Date of Decision : 29-06-2016

Acts Referred:

Citation : (2016) 4 ALLMR 913 : (2016) 6 BCR 185 : (2016) 4 CivCC 681 :
(2016) 5 MhLJ 320

Hon'ble Judges : C.V. Bhadang, J.

Bench : Single Bench

Advocate : Shri V.R. Dhond, Senior Advocate with Shri D. Pangam and Shri S.P. Munj, Advocates, for the Appellant; Shri J.E. Coelho Pereira, Senior Advocate with Ms. Anupama B. Shah and Shri V. Korgaonkar, Advocates, for the Respondent

Final Decision : Allowed

Judgement

C.V. Bhadang, J.—Rule. Rule made returnable forthwith. The learned Counsel for the contesting respondent Nos. 1 and 2 waives service. Heard finally by consent of the parties.

2. The challenge in this petition at the instance of the original defendant Nos. 1 to 6 is to the order dated 19/07/2014 passed by the learned Civil Judge, Senior Division at Margao, whereby, application dated 29/08/2013 in Special Civil Suit No. 102/2001/A filed by the respondent Nos. 1 and 2, who are the original plaintiffs, for production of the document (D-20) has been allowed and the same is directed to be "treated as a secondary evidence". The respondent Nos. 3 to 5 are original defendant Nos. 7 to 9 before the Trial Court.

3. The brief facts necessary for the disposal of the petition may be stated thus:

That the respondent Nos. 1 and 2 have filed the aforesaid suit for declaration that the final judgment/order dated 15/03/2000 passed in inventory proceedings

No. 72/1998 approving the partition, be declared as null and void and for injunction, etc. The respondents No. 1 and 2 are also seeking a declaration that the second document carrying the oval seal on its front part at Exhibit 82 allegedly made by Ms. Radha Timblo, is forged and fabricated.

4. It appears that the learned Trial Court summoned Ms. Dalia Dias, the Chief Manager of Corporation Bank, Margao as a Court witness who was examined on 12/01/2011 purportedly "under Section 165 of the Evidence Act". The said witness stated that Advocate Shridhar R. Chodankar "may be", one of the panel members of the Bank, in the year 2002. The witness was shown Vakalatnama (14-D) of advocate Chodankar, as representing the Bank and the witness agreed that the seal appearing on the said Vakalatnama, is of the Corporation Bank, Margao but she stated that she cannot identify the signature of the Manager, who signed the same. In so far as the material controversy involved in this petition is concerned the witness was shown xerox copies of two applications (D-20) in the file and she stated that the xerox copies were produced in the Court on 23/07/2004 by Advocate Chodankar, on behalf of the Bank. The witness also admitted about a letter dated 23/07/2008 (69-D) sent to the Corporation Bank.

5. The witness stated that as per the letter dated 23/07/2008, the two original applications which are now admitted in evidence at exhibit 82 were produced by the Bank. The witness was thereafter asked to explain the discrepancy between the xerox copy of the said application (in respect of Radha Timblo) which is at D-20 and the original of the said applications which are at exhibit 82. The witness stated that handwriting is different as also the signature of the applicant is different and the seal also differs.

6. Be that as it may, the plaintiffs filed an application before the learned Trial Court on 29/08/2013, contending that Ms. Dalia Dias, during the course of her deposition, has admitted about advocate Chodankar having produced the xerox copies of the two applications (D-20) and, therefore, "it stands proved that the copies were obtained by xeroxing the originals, which were in the Bank". It was contended that no new exhibit number was given and therefore "by way of abundant caution" a separate exhibit number be given to the said copies or alternatively, if it is held that they are not exhibited, in evidence, then the same may be exhibited, "as secondary evidence".

7. The application was opposed on behalf of the original defendants No. 1 and 2 and the defendants No. 3 to 6 by filing separate replies. It was denied that the documents can be exhibited or allowed to be produced by way of secondary evidence.

8. The learned Trial Court on hearing the parties passed the following order on the application filed by the respondent Nos. 1 and 2/plaintiffs on 19/07/2014:

"Heard both side learned Counsel. Document marked as Ex. D/20 herein is hereby allowed to produce with leave by this Court for reasons stated in the present application by the learned Counsel for the plaintiff. The document at Ex.

D/20 is treated as secondary evidence. Hence, application is allowed."

It is this order which is subject matter of challenge in this petition.

9. I have heard Shri Dhond, the learned Senior Counsel for the petitioners and Shri J.E. Coelho Pereira, the learned Senior Counsel appearing for the respondents No. 1 and 2, who are the contesting respondents.

10. Shri Dhond, the learned Senior Counsel for the petitioners has challenged the impugned order mainly on two grounds. Firstly, it is submitted that the order is unreasoned and it does not show that the learned Trial Court has considered the reply filed by the petitioners and/or the objection and the contentions raised therein. It is submitted that for this reason alone, the order is vulnerable and has to be set aside. Secondly, it is submitted that even otherwise, the order cannot be sustained on merits. The learned Senior Counsel, points out that the copies (D-20) which are applications said to be made by Radha Timblo for obtaining two demand drafts, cannot be allowed to be produced, as secondary evidence, inasmuch as the necessary conditions as required for allowing such production, under Section 165 of the Evidence Act, are not satisfied. The learned Senior Counsel was at pains to point out that the documents are not exhibited, as such. He points out that the documents find place in file D of the Trial Court's record which comprises of miscellaneous papers. He submits that as the original applications are already on record at exhibit 82 there is no question of allowing production of any xerox copies by way of secondary evidence. The learned Counsel has placed reliance on various decisions in the case of H. Siddiqui (dead) by LR's v. A. Ramalingam reported in (2011) 4 SCC 240, J. Yshoda v. K. Shobha Rani reported in (2007) 5 SCC 730, U. Sree v. U. Srinivas reported in (2013) 2 SCC 114, and of this Court in the case of Bank of Baroda v. Moti Industries and Ors. reported in 2008 (6) Bom.C.R. 659.

11. On the contrary, it is submitted by Shri Pereira, the learned Senior Counsel for the respondents that the xerox copies which are now allowed to be produced by way of secondary evidence are already exhibited at D-20. He points out that the Court witness Ms. Dalia Dias has also admitted in her evidence that the said xerox copies were produced before the Trial Court on 23/07/2004 by advocate Chodankar on behalf of the Bank and, as such, the learned Trial Court was justified in allowing the production by way of secondary evidence. The learned Senior Counsel has pointed out that if the Trial Court has exercised discretion in allowing the production of the document by way of secondary evidence, in the absence of such exercise of discretion, being shown to be either arbitrary or perverse, this Court may not interfere with the same. Reliance is placed on behalf of the respondents No. 1 and 2 on the decision of the Hon'ble Apex Court in the case of K. Mallesh v. K. Narender and Ors. reported in (2016) 1 SCC 670 and M. Chandra v. M. Thangamuthu and anr. reported on (2010) 9 SCC 712.

12. I have carefully considered the rival circumstances and the submissions made. At the outset it is necessary to mention that the impugned order lacks

reasons which has prompted the learned Trial Court, in directing, the document D-20 "to be treated as secondary evidence". Section 65 of the Indian Evidence Act 1872 provides for cases in which secondary evidence relating to documents may be given. It provides that secondary evidence may be given of the existence, condition or contents of a document in cases as set out in clauses (a) to (g) thereof. Section 65 of the Evidence Act may be reproduced thus:

65. Cases in which secondary evidence relating to documents may be given

Secondary evidence may be given of the existence, condition, or contents of a documents 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 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 40[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 document is admissible.

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

In case (e) or (f), a certified copy of the 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.

The present case would not be governed by the contingencies as specified in Section 65 (a) and (d) to (g). The case made out in the application filed by the respondents No. 1 and 2 is that the Court witness Ms. Dlia Dias has admitted about advocate Chodankar having produced the documents (D-20) on behalf of

the Bank and, therefore, they stand admitted and be assigned a separate exhibit as "secondary evidence". The impugned order does not show that the learned Trial Court has adverted to the requirements of Section 65 of the Evidence Act and has considered the contentions raised on behalf of the petitioners, while ordering that the document (D-20) be treated as a secondary evidence. It is well settled that even where order passed is a discretionary order, it is expected that the Trial Court records some reasons, may be brief, to show that the discretion has been exercised in a judicious manner. A reference in this regard may be made to the decision of the Hon"ble Supreme Court in Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity and Others (2010) 3 SCC 732 in which it is held thus:

"40. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice-delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. "The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind." [Vide State of Orissa v. Dhaniram Luhar, (2004) 5 SCC 568; and State of Rajasthan v. Sohan Lal and Ors. (2004) 5 SCC 573]."

13. I find that the impugned order lacks reasoning and for this reason, the impugned order will have to be set aside and the application will have to be sent back to the learned Trial Court for deciding the same afresh after hearing the parties. In such circumstances, it would not be necessary to advert to the judgments cited on behalf of the parties in details which can be considered by the Trial Court while deciding the application. I only propose to make a brief reference to the decision in the case of K. Mallesh (supra) in which the Hon"ble Apex Court had found that the impugned order was passed at an interlocutory stage during the pendency of the suit about admissibility of two documents. It was held that the admissibility, reliability and registrability of the document can be considered independently at the time of hearing of the trial and not prior thereto.

14. It is true that normally this Court would be slow in interfering with orders at an interlocutory stage. However, in the present case, as noticed earlier, the order is totally unreasoned. It would further appear that the question is not only about the admissibility and reliability of the documents but as to whether they can be allowed to be produced by way of secondary evidence. The learned Senior

Counsel on behalf of the petitioners submitted and to my mind rightly so, that the leave granted to produce the document as a secondary evidence, presupposes that there is an original of this document in existence. Thus, before allowing such production by way of secondary evidence it is necessary for the Trial Court to form an opinion and be satisfied about the existence of the conditions under Section 65 of the Evidence Act under which such production can be allowed.