

(1979) 09 BOM CK 0044
In the Bombay High Court
Case No : Suit No. 77 of 1970

Ramnath Nandlal Dhoot and Co. and Another

APPELLANT

Vs

B.R. Shroti and Others

RESPONDENT

Date of Decision : 26-09-1979

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 174
Civil Procedure Code, 1908 (CPC) — Order 11 Rule 12, Order 11 Rule 13, Order 13
Rule 1, Order 13 Rule 2, Order 13 Rule 2(1)

Citation : AIR 1980 Bom 387

Hon'ble Judges : Aggarwal, J

Bench : Single Bench

Advocate : P.K. Thakore, C.J. Shah and C.S. Dhavan, for the Appellant; H.G. Advani and D.J. Dalal, for the Respondent

Judgement

1. The day-to-day hearing of this suit is interrupted on account of the 2nd defendants producing documents which are neither disclosed in the affidavit of documents nor produced at or before the settlement of issues. The Plaintiffs have closed their case. The 1st defendant is absent throughout. The 2nd Defendants' first witness's examination-in-chief is in progress. The plaintiffs strongly object to the production of the documents on several grounds. In order to appreciate the controversy, a brief note of the nature of the suit be made.

2. There are two plaintiffs. The 1st Plaintiff's claim that on 20th February 1969 the 1st Defendant appointed them as pucca Adatias. The 1st Plaintiffs sold to the 2nd Plaintiffs caster seeds by two contracts dated 24th February, 1969, and 1st March, 1969. The 2nd defendants-South-Central Railway had appointed the 1st defendant as Out-Agency Contractor at Karimnagar and the term of the 1st Defendant was expiring on 28th February, 1969. The 1st Defendant forwarded to the 1st Plaintiffs two railway receipts both D/- 27-2-1979 on the basis of which, according to the 1st Plaintiffs, they collected Rs. 40,000/- from the 2nd plaintiffs on 3rd March, 1969 by cheque, but on the same day they made a telegraphic transfer of Rs. 40,000/- to the 1st Defendant. The two wagon loads covered

under the two railway receipts never reached Bombay and hence the 1st plaintiffs and the 2nd Plaintiffs mutually put an end to the two contracts and the 1st Plaintiffs refunded to the 2nd-Plaintiffs Rs. 40,000/- and got the two railway receipts endorsed in the 1st Plaintiffs" name. The Plaintiffs now want a decree for about Rs. 47,000/-against the 1st/2nd Defendants for the value of the two wagon loads of caster-seeds. The 1st defendant has remained absent. The 2nd Defendants" principal contention is that the goods were not delivered by the 1st Defendant at Karimnagar Out-Agency and hence no liability attaches and the 1st Defendant in collusion with others has sought to defraud the Railways.

3. During the examination-in-chief of the 2nd Defendants" first witness M. K. N. Murthy, Mr. Dalal, learned Counsel appearing for the 2nd Defendants, produced the Railway Receipt Book containing various carbon copies of the two railway receipts tendered in evidence by the plaintiffs. Mr. Thakore, learned Counsel on behalf of the Plaintiffs, objected to its going in evidence as it was not disclosed on affidavit nor any notice given that the same would be produced nor inspection thereof was offered. The examination-in-chief of the witness Murthy was resumed this morning and his further evidence was recorded. Mr. Dalal again wanted to produce the Railway Receipt Book and other documents and stated that the 2nd Defendants" Advocate had addressed a letter to the Advocates for the Plaintiffs last evening, but as the letter was sought to be delivered at about 6.30 p. m., by which time the instructing Advocate Mr. Bhatt, who is the Proprietor of Messrs, Bhatt and Company had left the office and, therefore, the letter could not be accepted by his office. The service of the letter was beyond the prescribed hours. Mr. Dalal stated that inspection of the documents was offered after the hearing concluded at 4.45 p. m., but they were told to write a letter. The letter which could not be delivered yesterday was delivered this forenoon at 11.40 a. m. which is obviously while the hearing was on. This is the background.

4. Mr. Dalal stated that the particulars of the documents which the 2nd Defendants want to produce are set out in the letter dated 25th September, 1979 addressed to Messrs. Bhatt & Co. The documents are (1) Forwarding Note executed by Defendant No. 1, (2) Railway Receipt Book Numbers from 611551 to 611600, (3) Transit Slip Book from 15300 to 15399, (4) Wagon Registration Register, (5) Wagon Registration Money Receipt Book from 124601 to 124650, (6) Goods Cash Book from 21st January, 1969, (7) Register of Goods received from Karimnagar Out-Agency loading and despatch from 1-9-1965 to 31-7-1971, (8) Rider Agreement dated 9-2-1968, and (9) Letters to Defendant No. 1 for extending period of Out-Agency contract. Mr. Dalal further stated that these documents are relevant to show that the 1st Defendant as the consignor had in fact not delivered 582 bags of caster-seeds at Karimnagar Out-Agency nor sent to Warangal Station for despatch to Wadi Bunder as sought to be evidenced by the two railway receipts, Ex. B (collectively). These documents were exhibited in the Court of the Assistant Sessions Judge at Karimnagar, before whom the 1st Defendant and others were standing trial for the offences with which they were

charged in connection with the present subject matter of the suit. The Sessions case was over in about 1971. The 1st defendant who was convicted had filed an appeal. The appeal was over in 1972. The documents were withdrawn from the Sessions Court in or about March 1979 and were brought to Bombay and shown to the Advocate for the 2nd Defendants. Thereafter the same were kept in the office of the Central Railway, Bombay. When the hearing of the suit started before me, the documents were brought to the Court from the Office of the Central Railway. Mr. Dalal submitted that the production of these documents is necessary to establish the 2nd defendants' case and, therefore, I should receive them in evidence even at this stage. Mr. Dalal referred to Rule 174 of the Bombay High Court (Original Side) Rules, 1957, and also to the provisions of Order XIII, Rules 1 and 2 of C. P. C. to substantiate his submission. He also referred to two cases (1) Sir Hari Ram Goenka and Others Vs. Lachmi Singh and Others, and (2) Kanda v. Waghu, AIR 1950 PC 68.

5. Mr. Thakore for the plaintiffs strenuously opposed the application. Firstly, proper procedure in the nature of making a regular affidavit of documents as envisaged under the Bombay High Court (Original Side) Rules, 1957, and Order XI Rules 12 and 13 of C.P.C. should be followed. Secondly, the present stage at which the production is sought is a very late stage. The plaintiffs will have to take inspection of these documents and this would mean delay of the trial. Thirdly, the 2nd defendants had made their affidavit of documents on 14-8-1973 and the supplemental affidavit of documents on 29-8-1979 and in view of the averments contained in those affidavits with regard to the documents in the possession, custody and control of the 2nd defendants and the omission to refer to these documents, these documents should not be allowed to be produced. Fourthly, as the Plaintiffs have closed their case, irreparable harm will be caused to them in different ways: (1) The Plaintiffs will have to recall their witnesses, if necessary. (2) The Plaintiffs may have to lead other evidence, i. e., fresh evidence, if necessary. (3) If the documents intended to be produced disclose a new case, the plaintiffs will be required to meet that case. (4) The documents are sought to be produced in the midst of the evidence of the 2nd Defendants' witness Murthy. Mr. Thakore also relied on Rule 174 of the Bombay High Court (Original Side) Rules. The head-note from *Gopika Raman Roy v. Atal Singh*, 31 Bom LR 734 : AIR 1929 PC 99, was read out.

6. Order XI C.P.C. deals with "Discovery and Inspection". Rules 167 to 174 of the Bombay High Court (Original Side) Rules are under the sub-heading "Discovery and Inspection" which supplement Order XI C.P.C. except Rule 174 which deals with "effect of non-disclosure of documents". It is in the following terms :--

"174. No documentary evidence in the possession or power of any party, which should have been but has not been disclosed in the affidavit of documents, or which is required to be disclosed in a supplementary affidavit of documents and has not been disclosed, shall be received at any subsequent stage of the proceedings, unless good cause is shown to the satisfaction of the Court for the

non-disclosure thereof; and the Court receiving any such evidence shall record the reasons for so doing".

7. Order XIII C. P. C. deals with "Production, Impounding and Return of Documents". Sub-rule (1) of Rule 1 lays down that the parties or their pleaders shall produce, at or before the settlement of issues, (before the 1976 amendment it was "at the first hearing of the suit") all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all the documents which the Court has ordered to be produced.

8. Sub-rule (1) of Rule 2 of Order XIII deals with effect of non-production of documents in the following terms :--

"2. (1) No documentary evidence in the possession or power of any party which should have been, but has not been produced in accordance with the requirements of Rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing".

9. Now. Rule 174 and Sub-rule (1) of Rule 2 of Order XIII are made for the common object of not receiving in evidence any documentary evidence at any subsequent stage of the proceedings which is not disclosed in the affidavit of documents or not produced at or before the settlement of issues. Both the rules demand good cause being shown to the satisfaction of the Court for non-disclosure or non-production, as the case may be. Both the rules require the Court to give reasons for receiving such documentary evidence. To a large extent, the direction to the Court not to receive in evidence documentary evidence (i) which was already in the possession or power of the party desiring to produce, (ii) which should have been but has not been disclosed in the affidavit of documents, and (iii) which is required to be disclosed in the supplementary affidavit of documents but has not been disclosed. The direction, however, is naturally not absolute because there are likely to be cases in which in spite of the documentary evidence being in possession or power of either party, for some reasons it is not disclosed in the affidavit of document or supplementary affidavit of documents. In such cases, certain checks are provided before documentary evidence is received. The party seeking to tender the document in evidence has to show good cause to the satisfaction of the Court. "Good Cause" is that which is adequate, sound and genuine ground or reasons, I suppose. What is good cause will depend upon the facts and circumstances of each case.

10. Now, the circumstances mentioned by Mr. Dalal show that the documents desired to be tendered were produced in the Sessions Court. Obviously, the police must have seized them on search or otherwise. Though the appeal was over in 1972, yet the documents remained in the custody of the Sessions Court

till they were withdrawn. When they were brought to Bombay, they were shown to the 2nd defendants' Advocate who, it appears, did not take the care to include them in the supplementary affidavit of documents in August 1979, disclosing (i) a certified copy of the Seizure Memo made by the "police and (ii) a certified copy of the first information report lodged with the police by the present witness Murthy. There is nothing unusual if the officers of the 2nd Defendants took back the documents and kept in the office of the Central Railway, Bombay. Having regard to the nature of the defence set up by the 2nd defendants, it is not improbable that the Officers concerned thought it fit to keep the documents in their custody and bring the same to Court when the trial starts. I do not think that there was any design or strategy in not disclosing these documents earlier, nor Mr. Thakore drew my attention to any circumstance to enable me to draw such an inference against the 2nd defendants. I am satisfied that good cause is shown for non-disclosure and that no mala fides can be attributed to the 2nd defendants or its officers.

11. It is possible to know the nature of the Railway Receipt Book and the Transit Slip Book to guard against improper introduction of these documents at this stage of the trial. Witness Murthy's deposition indicates that what is popularly known as Railway Receipt is the fourth carbon copy and not the original. The original and four carbon copies bear different printed names. The original is marked "Accounts", the first carbon copy "through Invoice", the second carbon copy "Transit Invoice", the third carbon copy "record" and the fourth carbon copy "Receipt". What is sought to be produced now are the original and three other carbon copies. The two Railway receipts bearing Nos. 611551 and 611552 which would be the fourth carbon copies, are already exhibited through the Plaintiffs. This prima facie rules out any manufacturing of the original or other carbon copies. The second document is Transit Slip. The evidence of witness Murthy shows that the original memo remains in the "Transit Slip" book and copy is removed. Other documents, I am told by Mr. Dalal, also go to show that the 1st Defendant had not delivered the goods. The 2nd defendants' case inter alia is one of non-delivery of the goods by the consignor or fraud practised by the consignor or the consignee, or an agent of the consignor or the consignee. I, therefore, feel that in my search for truth or in order to get at the truth, for which this trial is being held for the last 5 days, I should receive these documents. I am satisfied about their relevance. I think that these documents should form a part of the evidence to get to the bottom of the matter. There is no doubt that there is an element of delay or even negligence on the part of the 2nd defendants in not disclosing them in affidavit of documents, but that by itself is not sufficient to reject the application.

12. As regards Mr. Thakore's objection that the procedure of making an affidavit of documents should be followed, I do not think that such a procedure is contemplated under Rule 174 itself. It may be that in a given case the Court feels that the party should make an affidavit if there is a doubt about the party's bona fides. In the present case, I do not think that it is necessary to demand an

affidavit. I think that compliance with the conditions imposed by Rule 174 is in itself a safeguard.

13. The second objection about late stage is immaterial once the Court is satisfied that a good cause is shown. The words "at any subsequent stage of the proceedings" are wide enough. In this context, production of the documents through the 2nd Defendants' witness Murthy is not a late stage. The third objection has no substance in view of the above discussion. The last objection relating to irreparable harm does not impress me. The manner in which the objection is worded shows that this is just an apprehension on the part of the plaintiffs. I will give the Plaintiffs sufficient opportunity as might become necessary by reason of receiving these documents. They can rebut these documents and show that they are not genuine.

14. This takes me to the three cases relied upon by both sides. In *Sir Hari Ram Goenka and Others Vs. Lachmi Singh and Others*, it is observed:--

"Order 13, Rule 1 was enacted to secure a fair trial of a case, not to penalize parties for not producing documents in time. Its main object was to prevent parties from manufacturing evidence pending the trial to meet unexpected exigencies. Now, if there is no ground for believing that the document tendered has been manufactured, then, in my opinion, the Judge exercises his discretion improperly in rejecting a document on the ground that it was produced too late, for, as I have said, the rules to be found in the CPC were not enacted for penalizing the parties, but to secure a fair trial of the case."

15. In *Gopika Raman Roy v. Atal Singh*, 31 Bom LR 734 : AIR 1929 PC 99, their Lordships of the Privy Council said that the rule as to exclusion of documentary evidence laid down in Order 13, Rule 2, C. P. C., comes into play when the documents on which the parties rely should have been, but were not, produced at the first hearing of the suit. Such documents cannot be admitted in evidence at any subsequent stage of the proceedings without the leave of the Court. Their Lordships further said that such leave should not ordinarily be refused where the documents are official records of undoubted authenticity. Another test laid down by them was, if there is possibility that such documents would assist the the Court to decide rightly the issues before it, the leave should be given.

16. Again, in *Kanda v. Waghu*, AIR 1950 PC 68, the view expressed is that the Court has a discretion and while generally speaking, it will be a wise exercise of the discretion to admit such evidence (Official records of undoubted authenticity which may assist the Court to decide rightly the issues before it), the question must be decided in each case in the light of the particular circumstances.

17. There is also a pronouncement of the Supreme Court in *Madan Gopal Kanodia Vs. Mamraj Maniram and Others*, in these words:--

"Order 13, Rule 2 of the CPC does not provide for any particular ritualistic formula in which the order of the Court has to be passed. The object of Order 13,

Rule 2 is merely to prevent belated production of documents....."

After quoting Order XIII, Rule 2, C.P.C., their Lordships add:--

"This provision clearly clothes the Court with discretion to allow production of documents, if it is satisfied that good cause is shown to its satisfaction."

18. The above case law strengthens my approach in allowing the production of documents, for I am satisfied that good cause is shown for their non-disclosure or non-production and that they do not appear to have been brought into existence to meet unexpected exigencies of the case. Their production would help me to get to the bottom of the controversy and thus assist me to decide rightly the issues before me.

19. I, therefore, allow the second defendants to produce the documents indicated in their letter dated 25th September 1979. Needless to say that the plaintiffs must get a reasonable opportunity to examine the documents, so that they can understand the nature and the contents thereof and also be fully equipped in cross-examining the witness in the box or other witnesses to follow. For this purpose, the second defendants are directed to give inspection to the plaintiffs" Advocates on record at 2.45 p.m. today in the High Court Library and the matter is to stand over till tomorrow, ie. 27th September, 1979.

20. Mr. Thakore states that the matter be kept on 2nd October, 1979 so that the plaintiffs have sufficient time to consider the documents. Adjourned to 2nd October, 1979 at 11 a.m.

21. Mr. Thakore applies for costs and states that a lump sum costs of Rs. 300/- should be awarded. Mr. Advani submits to the orders of the Court. I think that costs of Rs. 125/- are adequate because this matter has been otherwise heard from 11 a.m. to 2 p.m.

22. Order accordingly.