

MHSCA 20034122017

IN THE COURT OF SMALL CAUSES, AT MUMBAI

Review Appln.No.01/ 2018

IN

L.E. SUIT NO. 130 / 172 of 2010

Exh.7

Mr.Maganbhai P.Parmar, Plaintiff

Versus

Shri.Raman P.Parmar & Ors., Defendants

Advocate for plaintiff : Shri. D.D.Jani

Advocate for defendants : Smt.S.S.Singh

***Coram : Shri. A.V.Mishra,
Judge,
Court Room No.14,
Date: 31.03. 2018***

:Application for Review :

:JUDGMENT:

(Delivered on this 31st day of March 2018)

1. The plaintiff- applicant has moved this application under Order-47 R-1 (1) of C.P.C. for review of order dtd- 28.11.2017 passed by this Court in L.E.Suit No.130/172/ 2010 between the parties to this application.

2. The factual matrix of the case is as under:-

The plaintiff/ applicant has filed L.E.Suit No.130/172/ 2010 against the respondents/ defendants for eviction on various grounds mentioned in the plaint. The plaintiff- applicant closed his evidence and thereafter the defendants filed evidence of D.W.1 along with

compilation of documents. The defendants also applied for production of various documents with permission to lead secondary evidence regarding document i.e. xerox copy of affidavit vide application-exh.54 which application came to be allowed and the defendants were directed to lead secondary evidence regarding said document. The plaintiff claims that the defendant has not led any secondary evidence by filing separate affidavit of evidence inspite of objections raised by him and above said order but has relied upon evidence of D.W.1 and the said copy. The Court rejected the application -exh.59 moved by him for directing the defendants to file separate application and thereafter admitted the above said document in evidence by passing order on admissibility of documents on list exh.53 below exh.52 on 28.11.2017 without giving an opportunity of cross-examination to the plaintiff prior to exhibition of this document. The Court has ignored the above said order passed below exh.54 and also the provisions of sections-63 and 65 of the Evidence Act. There is an error apparent on the face of record and there are sufficient reasons for review of the said order. The Court has also acted against the principles of natural justice by ignoring plaintiff's application by not allowing the cross-examination of D.W 1 before deciding the admissibility of said document. He has claimed that the above order is not legal and proper and has resulted into miscarriage of justice. He has therefore, prayed for review, reversion and /or modification of the above said order.

3. The defendants by filing their reply vide exh.4 strongly resisted this application contending that this application is based on false grounds. They have contended that they were permitted to adduce secondary evidence regarding above document by the Court and accordingly they adduced secondary evidence in the form of above

document and evidence of D.W.1 . They were not directed to adduce secondary evidence as claimed by plaintiff. The Court has not directed to file separate affidavit regarding above document and there were no directions to allow cross-examination before deciding the admissibility of the said document. They have contended that plaintiff's application -exh.59 has already been rejected and said order has become final. This Court has rightly decided the admissibility of document by passing above said order on 28.11.2017 and there is no error or mistake apparent on the face of record or any sufficient ground for review, reversion or modification of the said order. The plaintiff has falsely claimed that his application for permission to cross-examine the D.W 1 was ignored by the Court as said application was moved after passing of the above said order. They have contended that the plaintiff has moved this application on false and frivolous grounds and have thus prayed for dismissal of this application with heavy costs.

4. The plaintiff by filing rejoinder vide- exh.5 denied the contentions of the defendants made in exh.4 and has prayed for allowing this application.

5. From the rival pleadings and claim, following points arise for my determination and I have recorded my findings of each of them for the reasons mentioned thereunder:-

POINTS:

FINDINGS

1. Whether the plaintiff has made out a case for review of the order under Order-47 Rule-1(1) of the C.P.C.?

NO

2. What order?

As per final order.

:REASONS:

: AS TO POINT No.1:

6. The learned Advocate for the plaintiff has argued that the defendant has not complied with the order passed below exh.54 and has not led any secondary evidence to prove the xerox copy of the said affidavit. The said copy of the affidavit is a xerox copy and not a photo copy. The Court has admitted the documents in the evidence without leading any secondary evidence by the defendants and without giving an opportunity of cross-examination to the plaintiff before deciding admissibility of documents as contemplated under sections-63 and 65 of the Evidence Act and as per directions given in the above said order. He has argued that the Court has totally ignored the provisions of sections- 63 and 65 of the Evidence Act and above said directions and has committed mistake/ error which is apparent on the face of record itself. He has argued that the plaintiff has made out sufficient cause for review of this order and by relying on the following judgments and orders in case of :-

1. *Jaldu Ananta Raghuram Arya & Ors.,v/s.Rajah Bommadevara Naga Chayadevamma & Ors., A.I.R. 1958 Andhra Pradesh 418,*
2. *J.Yashoda v/s.K.Shobha Rani, 2007(6) Bom.C.R.783 (SC) and*
3. *Bank of Baroda,Bombay V/s.Shree Moti Industries, Bombay & Ors., reported in 2009 (1) Mh.L.J 282(Bom.)*

filed vide **list exh.6** has argued for allowing this application.

7. Per contra, the learned Advocate for the defendants has argued that the Court has adopted proper procedure as per provisions of Order-18 of the C.P.C. and sections-63 and 65 of the Evidence Act.

The plaintiff is coming with procedure unknown to Law of Evidence and C.P.C. The defendants have adduced sufficient secondary evidence in the form of evidence of D.W 1 and by filing photo copy of the said document. He has argued that above document has been properly admitted in evidence and there is no error or mistake in such admission and no application or provisions of law has been ignored while passing above said order by the Court. He has argued that this application is contrary to the provisions of Evidence Act and it is an appeal in disguise and no case is made out to review the said order. He has thus argued for dismissal of this application with heavy costs.

8. The plaintiff is claiming review under Order- 47 R-1(1) of the C.P.C. The said provisions provides that - any person aggrieved by decree or order of the Court can apply for review of the judgment and order on following grounds:-

- i) On discovery of new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made;
- ii) On account of some mistake or error apparent on face of record ;
or
- iii) for any other sufficient reasons.

The plaintiff shall have to fulfill the criteria laid down in above provisions to make out a case under above said provisions to seek relief of review of aforesaid order.

9. The plaintiff by relying upon above said judgments has claimed that the defendants were directed to lead secondary evidence but have not complied with the said order and provisions of the said Act whereas the defendants claim strict compliance of above said provisions. So before proceeding further it would be apposite to note down the ratio laid down in above said case-laws.

(i) As per ratio laid down in *supra Jaldu's* case, section-65 of the Evidence Act permits leading of a secondary evidence only where the original has been lost as destroyed and there is sufficient proof of search for the original to render the secondary evidence admissible . It must be established that the party has exhausted all the sources and means available to him for search of said document and grant of such permission on compliance of legal provisions is a matter of discretion of the Trial Court.

(ii) In *supra J. Yashoda's case*, the Hon'ble Apex Court was pleased to hold that secondary evidence as a general rule is admissible only in absence of primary evidence . Secondary evidence is an evidence which may be given in absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in section- 63 is exhaustive and section- 65 deals with the proof of the contents of the documents tendered in the evidence . In order to enable a party to produce secondary evidence, it is necessary for the party to prove existence and execution of the original document and secondary evidence of the contents of the document cannot be admitted without non- production of the original being first accounted for in such a manner so as to bring it within one or the other cases provided in section- 65 of the Evidence Act.

(iii) In the *supra* case of ***Bank of Baroda, Bombay***, it was held that secondary evidence of document can be allowed to be led only where the original is proved to have existed, but lost or misplaced and documents unless shown to have been compared with the original, mere copy cannot become secondary evidence. Similarly mere production of documents purporting to have been signed or written by certain person is no evidence of its authorship and it is necessary to prove genuineness and execution of the document by giving the proof of the handwriting and signature of the document.

10. The record of concerned L.E.Suit 130/172/2010 shows that after closure of evidence by the plaintiff, the defendants filed evidence of D.W.1 vide exh.52 along with compilation of documents vide list exh.53 and also filed composite application for production of documents and for permission to lead secondary evidence regarding affidavit dtd- 18.02.2003 filed at Sr.No.2 in list exh.53 vide application-exh.54. Said application was allowed and the defendants were permitted to file documents and to lead secondary evidence as per prayer. This order does not show that the defendants were directed to lead secondary evidence and to file separate affidavit of evidence for the said document as claimed by the plaintiff. This order does not show that the defendants were directed to adduce evidence regarding said document and plaintiff was permitted to cross-examine the said witness prior to exhibition of such document and prior to decision of admissibility of said document. Such contention of the plaintiff about having been given right to cross-examine the witness prior to deciding the admissibility of the said document, therefore, cannot be accepted. On such permission to lead secondary evidence being granted, the

defendants relied upon the evidence of D.W.1- Dinesh R.Parmar and above photo copy of affidavit as their secondary evidence regarding said document. The plaintiff thereafter applied for directing the defendants to file separate evidence of affidavit regarding above document vide exh.59 which came to be rejected for the reasons mentioned in the said order after hearing both sides. Thus, the Court did not issue any specific directions to the defendants to file separate affidavit of evidence regarding above said document as claimed by the plaintiff at any point of time. Such claim of plaintiff, therefore, is unacceptable.

11. The record in above suit further shows that thereafter both sides were heard on the point of admissibility of documents filed vide list-exh.53 and evidence-exh.52 and accordingly the Court by passing order on 28.11.2017 admitted above said document in evidence by holding it as admissible at that stage. The plaintiff claims that he was not given permission to cross-examine D.W.1 prior to exhibition of said document. As per procedure and provisions of Order-18 Rule-4 of the C.P.C., in every civil case, the examination-in-chief of witness shall have to be given on affidavit by supplying copies thereof to the opposite party and where the documents are filed and the parties rely upon the said documents, the proof and admissibility of documents which are filed alongwith affidavit shall be subject to orders of the Court. It further provides that evidence -(cross-examination and re-examination) of the witness in attendance whose evidence. (examination-in-chief) has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed for it. This provision does not provide for conducting cross-examination of witness who has filed his examination-in-chief prior to passing order on admissibility of

documents. It however shows that after filing of evidence on affidavit, firstly further examination-in-chief of the witness has to be recorded, then admissibility of documents has to be decided by passing order by the Court and thereafter the cross-examination and re-examination of such witness has to be recorded. In this matter too, D.W.1 has filed his examination-in-chief of affidavit and thereafter, the parties were heard on the point of admissibility of documents filed by the defendants and order regarding admissibility of documents came to be passed as per above said provisions and now the plaintiff has right to conduct the cross-examination of above witness and the defendants have right to re-examine said witness subject to making out a case for such re-examination. The plaintiff's peculiar claim of deciding admissibility of above document after cross-examination of D.W 1 is not consistent with above said provisions of law. His reliance on observations in above said order passed below exh.54 about giving of chances to both the parties to lead evidence too does not support his contentions as above observations appear to be regarding above said provisions of Order-18 and appear to be a further liberty to the plaintiff to lead evidence about secondary evidence led by the defendants as plaintiff's evidence is already closed and defendants' evidence is in progress. However, operative part of said order does not speak of grant of even above said liberty to the plaintiff to adduce further evidence but it only specifically permits the defendants to lead secondary evidence. Hence, above order too does not support the plaintiff's contentions. The plaintiff has failed to show specific provisions in support of above said claim. His above claim is contrary to above said provisions of law and is not supported by any specific orders or provisions of law. Hence, his such claim is untenable. The Court has adopted proper procedure as per provisions of C.P.C. to

conduct evidence of above witness and to decide the admissibility of documents of above witness. Hence, the claim of plaintiff about giving of directions and of conducting cross-examination prior to and for deciding the admissibility of above document cannot be accepted.

12. The plaintiff has claimed that above document is not a photo copy but is a xerox copy and as defendants have not led necessary secondary evidence, above document cannot be admitted in evidence through the evidence of D.W.1. The term 'photo-copy' and 'xerox copy' of documents are synonymous terms. In legal parlance, the copy of document prepared from any copying machine including machine of xerox company is also called as 'photo-copy' and in general practice, the said copy prepared from such machine is called as 'xerox copy'. Hence, the above terms are same / similar. The document i.e. copy of affidavit is prepared from xerox machine and can be termed as 'xerox copy' or 'photo-copy'. Hence, the above contentions of the plaintiff is unacceptable. The affidavit - exh.52 of D.W.1 shows that he has deposed that the original tenant -Smt.Lalita during her life time executed duly notarized copy of affidavit dtd- 18.02.2003 nominating him to get the tenancy of the suit premises in his name after her death by affirming before the Notary Public- Shri.D S Prabhu by registering the same with the Notary. He has deposed that Smt.Lalita affixed her right hand thumb impression on it and he identifies the same. He has deposed its contents to be true and correct and that original affidavit was available with him after death of Smt. Lalita. He has also deposed that above document got lost/misplaced by him and inspite of diligent search, he could not trace it out. He has further deposed that he had personally seen and read the original affidavit and photo-copy of affidavit was prepared from the photo copier

machine in his presence and at that time original document was in his possession. He has further deposed that photo-copy of above affidavit is a genuine document and it is an exact true copy of the original. He has further deposed above photo copy to be coming from proper custody and has therefore prayed for marking said secondary evidence as exhibit. His above evidence shows that he has given evidence about existence of above original document and also of its loss subsequently. His evidence points towards execution of written document in his presence and has witnessed such execution. He has specifically deposed thumb impression on above document to be that of the executant. His evidence also shows that he has seen and read the original document and was present at the time of preparation of the photo-copy and his statement that said photo-copy is an exact true copy of the original and that it is genuine and its contents are true and correct also points towards comparing of said copy with the original as he was in possession of original at the time of preparing such photo-copy. His evidence shows that he has given evidence of existence of original document and preparation of above copy from the original by mechanical process and comparing of the said copy from the original. He has given evidence to show that above copy was made from or compared with the original and he himself had seen the original document and he is giving account of contents of said document. He has thus complied with provisions of Section-63 of the Evidence Act and above photo-copy and the evidence led by him in his affidavit can be termed as 'secondary evidence' as defined in Section-63 of the Evidence Act. He has also laid necessary foundation and accounted for loss of above document as provided under Section- 65 of the Evidence Act. Rather he has already got permission from the Court to lead secondary evidence. He has adduced necessary evidence to make above

document admissible in evidence at this stage. He has complied with the provisions of Evidence Act including its Sections-63 and 65 and also of criteria for admitting secondary evidence laid down in supra case-laws relied upon by the plaintiff. Hence, above document is admissible in evidence . In view of the same, above document has been rightly marked as 'exhibit' at this stage. There is no error or mistake, leave alone any mistake or error apparent on the face of the record, or any sufficient reason for review of the order. There is no question of ignoring provisions of sections-63 and 65 of the Evidence Act while passing above said order. The order passed is not in contravention of law governing secondary evidence and there is no error apparent on face of record. The question of such order to have resulted into miscarriage of justice too does not exist. Even otherwise, the plaintiff has every opportunity to conduct cross-examination of D.W.1 or other witnesses, if any, on all aspects including above document and evidence and therefore, question of any prejudice to him does not arise at all. In above circumstances his grievance and claim of admitting above document which is a xerox copy in evidence without cross-examination of D.W.1 too has no merits. The document has been rightly marked as exhibit and the plaintiff has every opportunity to conduct cross-examination and rebut the said document and the proof and value of the said document can be decided at the time of final hearing. Hence, the claim of plaintiff for review, reversion or modification of said order cannot be accepted.

13. The plaintiff has alleged that the Court has ignored his application -exh.99 while passing above said order and acted against the principles of natural justice. The record of said suit shows that his application-exh.59 for directing defendants to file separate affidavit was

rejected on merits after hearing and considering the submissions of both sides. Thereafter, both sides were heard at length on the point of admissibility of documents and order regarding it was passed on list -exh.53 below exh.52 on 28.11.2017 at 4.25 P.M. He has filed certified copy of said order vide exh.2 in this matter. The record of above suit further shows that after passing of this order, he moved application-exh.99 i.e. exh.4 annexed with this application, for fixing date for cross-examination of D.W.1 on above secondary evidence at 4.35. P.M. The first order on the said application too shows the said factual situation. Said application was not filed prior to decision of admissibility of documents but was filed subsequently after passing of above said order. His application was not on record at the time of passing of above said order. Hence allegation / contention of the plaintiff about ignoring of said application by the Court while passing above said order is not just incorrect but is blatantly false. In above circumstances, the question of ignoring of above application and acting against the principles of natural justice does not arise at all. The application therefore, is not tenable on above ground and hence, his prayer for review on the above ground too cannot be accepted.

14. The plaintiff thus has failed to show his contentions and grounds for review of the above said order to be correct. The order passed, therefore, is legal and proper and is consistent with above provisions of C.P.C. and Evidence Act. There is no error apparent on the face of record or sufficient reason for review of above said order. The plaintiff has failed to show the grounds and to fulfill the criteria for review of the said order as contemplated u/O.47 Rule-(1)(1) of C.P.C. discussed above. Hence, question of acceptance of prayer for review,

reversion or modification of order does not arise at all.

15. Though in this case the defendants have sought permission to lead secondary evidence and the Court has permitted them to do so however, in the recent judgment and order of the Hon'ble High Court of Judicature at Bombay in W.P.No.11151/2017 in between ***Kartik Gangadhar Bhat V/s. Nirmala Namdeo Wagh & Anr., passed on 03.11.2017***, it was held that the practice of insisting on filing an application for seeking permission to lead secondary evidence is wrong and under section-65 (c) of the Evidence Act, where the original is lost, the party seeking to adduce secondary evidence must depose that the original is lost and must also depose to the other conditions set out in that sub- clause, viz. that he is not guilty of default or neglect. The section itself says that in a case under section- 65(c), any evidence of the contents is admissible. Again, there is simply no question of 'leave ' being required.

16. Here the defendants have been granted permission and have adduced secondary evidence about existence of original document, its execution by executant, its loss and the copy produced to be a true copy of the original. They have fulfilled necessary conditions and have led necessary foundation to press provisions of section-65 (c) of the Evidence Act into service. They have thus complied with provisions of law to show the above said document to be admissible in evidence and accordingly it has been rightly admitted and marked as exhibit. Hence, the question of conducting cross-examination of above witness prior to deciding admissibility of documents as claimed by the plaintiff does not arise at all in view of above case-laws and above discussion. Hence, in view of above discussion and ratio laid down in

above case-laws, this application is not tenable.

17. The plaintiff has complied with provisions of law and ratio laid down in above referred all the case-laws. Hence, in view of such compliance and considering the different and peculiar facts and circumstances of this case, above case-laws relied upon by the plaintiff, with respects, do not come to his rescue in seeking the reliefs sought. It is thus clear from above discussion that the plaintiff has failed to make out any case for review of above said order passed on List- exh.53 below exh.52 filed vide exh.2 in this matter, hence the reliefs sought cannot be granted. No prejudice would be caused by rejection of this application to the plaintiff as he has every right to conduct cross-examination on above said secondary evidence and has every opportunity to rebut the same and to meet with the same and the case and further mere exhibition of the document does not amount to its proof and the issue of proof of said document and validity of the said document can be decided at the stage of final hearing and the plaintiff has every opportunity to meet with the same as well. Hence, in view of above discussion, I record my findings as against point no.1 in the negative.

AS TO POINT NO.2:

18. The findings recorded as to point no.1 shows that the plaintiff has failed to make out any case for review of above said order. Hence, this application being devoid of merits, deserves to be dismissed with costs. I, therefore, record my findings as against point no.2 accordingly and under the facts and circumstances, I proceed to pass

the following Order-

:ORDER:

The Review Application No.01/2018 in L.E.Suit
No.130/172/ 2010 is hereby dismissed with costs.

[A.V.Mishra,]
Judge,
Court Room No.14,
Date: 31.03. 2018

Order dictated on : 31.03. 2018
Order typed on : 31.03.. 2018
Printed on : 09.05. 2018
Order checked : 09.05. 2018

Typed by Ms. S S Pednekar

MHSCA 20034122017

IN THE COURT OF SMALL CAUSES, AT MUMBAI

Review Appln..1/ 2018

IN

L.E. SUIT NO. 130 / 172 of 2010

Mr.Maganbhai P.Parmar, Plaintiff

Versus

Shri.Raman P.Parmar, & Ors., Defendants

***Coram : Shri. A.V.Mishra,
Judge,
Court Room No.14,
Date: 31.03. 2018***

: OPERATIVE ORDER :

The Review Application No.01/2018 in L.E.Suit
No.130/172/ 2010 is hereby dismissed with costs.

***[A.V.Mishra,]
Judge,
Court Room No.14,
Date: 31.03. 2018***

Order dictated on : 31.03. 2018
Order typed on : 31.03. 2018
Printed on & Order checked : 31.03. 2018

Typed by Ms. S S Pednekar

