(1967) 06 BOM CK 0003

Bombay High Court

Case No: O.C.J. Suit No. 383 of 1962

Bhima Tima Dhotre	APPELLANT
Vs	
The Pioneer Chemical Co.	RESPONDENT

Date of Decision: June 23, 1967

Acts Referred:

- Evidence Act, 1872 - Section 59, 67

Citation: (1968) 70 BOMLR 683 : (1968) MhLj 879

Hon'ble Judges: Vimadalal, J

Bench: Single Bench

Judgement

Vimadalal, J.

After Mr. Poonawalla had examined all his witnesses but before he closed his case, Mr. Poonawalla applied that the post-card dated August 22, 1958, which had been marked X for identification, be admitted in evidence as an exhibit, as the same has been duly proved by the Evidence of plaintiff No. 2 who has deposed to its handwriting as well as signature. In support of that application, Mr. Poonawalla has not relied upon any authority, but has advanced the simple contention that once a document is proved it must be admitted in evidence, and that once it is admitted in evidence he is entitled to rely on its contents. As the question is, however, of considerable importance and occurs very frequently in the course of trials in Courts, I am bound to consider all the authorities on the same.

2. Mr. Poonawalla''s application was opposed by Mr. B. J. Kapadia on behalf of the defendants who relied in support of his objection on the decision in the case of Madholal Sindhu v. Asian Assu. Co. Ltd. (1945) 56 Bom. L.R. 147 In that case, Bhagwati J. held that a document could not be admitted in evidence without calling the signatory or the writer thereof, if what was sought to be proved was the contents of that document. Bhagwati J. took the view (at p. 148) that proof of the signature or the handwriting in respect of a document in accordance with Section 67 of the Evidence Act would be "sufficient in those cases where the issue between the

parties was whether a document was signed or written wholly or in part by that person." The decision of Bhagwati J. was considered by Coyajee J. in an unreported ruling on admissibility given by him on August 12, 1952, in Jiyajirao Cotton Mills v. Gill & Co. (1952) O.C.J. Suit No. 834 of 1951, decided by Coyajee J., on August 12, 1952 (Unrep.). In that ruling, Coyajee J. has differed from the view taken by Bhagwati J. and has held that the mere fact that a party might be unable to call the author of the document as a witness does not affect its admissibility, although it may considerably damage the probative value of such a document. He, therefore, allowed the document in question which was a letter to be admitted in evidence on proof of the signatures thereon. It was observed by Coyajee J. in the said ruling that the admission of a document only means that the contents of the document are produced before the Court in the form of evidence. It is at that stage that the Court applies its mind to see whether it is a reliable document and what is the probative value of that document. He observed that the statements in a document admitted in evidence are not, and certainly not, admitted as true statements, because, like any other evidence, it would have to be weighed, its probative value ascertained, and either accepted or rejected. In the case of Mobarik Ali v. State of B''bay (1957) 61 Bom. L.R. 58. the Supreme Court held that proof of the authorship of a document is proof of a fact, like that of any other fact, and the evidence relating thereto may be direct or circumstantial. It was further observed in the judgment in the said case that proof of the handwriting of the contents, or of the signature, by one of the modes provided in Sections 45 and 47 of the Evidence Act was not the only mode, and that a document may also be proved by the internal evidence afforded by the contents of the document itself. The last mode of proof would be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the Court, This question came up again for consideration very recently before a Division Bench of this Court in the case of In the matter of Mr. D. and Mr. S. (1961) 68 Bom. L. R. 228, in which their Lordships approved of the decision of Bhagwati, J. in the case of Madholal Sindhu v. Asian Assu. Co. Ltd. cited above and held as follows (at pp. 232-233) :

...To conclude this part of the discussion, we hold, in the first place, that what has been formally proved is the signature of Abreo and not the writing of the body of the document at exh. 28 and secondly, that even if the entire document is held formally proved, that does not amount to a proof of the truth of the contents of the document. The only person competent to give evidence on the truthfulness of the contents of the document was Abreo.

Their Lordships distinguished '"Mobarik Ali''s case on the ground that the only question that arose before the Supreme Court in that case related to formal proof of the document, and the further question about proof of the contents of the document did not arise in that case.

3. I agree with the construction which the Division Bench in the case of In the matter of Mr. D. and Mr. S., has placed on the judgment of the Supreme Court in Mobarik Ali''s case, but I do not agree with the view which the Division Bench has taken in regard to the admissibility of documentary evidence. I am, however, bound by that decision which is the decision of a Division Bench and, following the same, I must uphold the objection taken by Mr. Kapadia with regard to the admissibility of the document in question before me. Even so, I feel that as the point is of considerable importance, I must express my own views with regard to the same.

4. In my opinion, to hold that a document is not admissible for proof of its contents unless the writer is called, is to denude documentary evidence of all its value and is clearly contrary to certain express statutory provisions to be found in the Evidence Act to which I will presently refer. Documentary evidence becomes meaningless if the writer has to be called in every case to give oral evidence of its contents. If that were the position, it would mean that, in the ultimate analysis, all evidence must be oral and that oral evidence would virtually be the only kind of evidence recognised by law. That, however, is not the position under the Evidence Act. The definition of the term "evidence" in Section 3 of the Evidence Act lays down that evidence means and includes statements made by witnesses, which are called oral evidence, and documents produced before the Court, which are called documentary evidence. Section 59 of the said Act enacts that all facts, except the "contents" of documents, may be proved by oral evidence. This provision would clearly indicate that to prove the contents of a document by means of oral evidence would be a violation of that section, and Section 91 expressly prohibits that being done in the case of contracts, grants or other dispositions of property which have been effected in writing. That, however, is not all. Section 61 of the said Act lays down in unambiguous terms: '' ''The contents of documents may be proved either by primary or by secondary evidence", and Section 62 makes it clear that primary evidence means the document itself produced for the inspection of the Court. Needless to say, in view of the provisions of Section 67 of the Evidence Act, a document must, however, be proved in the manner provided by Sections 45, 47 or 73 of the said Act, or by the internal proof afforded by its own contents as laid down in Mobarik Ali''s case, What is important to note is the use of the word "contents", both in Sections 59 and 61 of the Evidence Act, which leaves no room for doubt that when a document is proved in the manner laid down by the Evidence Act, the contents of that document are also proved. Of course, as Coyajee J. has observed, if the writer is not called and the matter merely rests on proof of the document, it will be for the Court to consider, on the facts of each ease, what probative value should be attached to the statements contained in the document. The view taken with regard to admissibility of documentary evidence in Madholal Sindhu''s case as well as in the case of In the matter of Mr. D. and Mr. S., is based largely on the assumption that oral evidence is always superior to documentary evidence because it is on oath and can be subjected to cross-examination. What is, however, overlooked is that a contemporaneous

record is often much safer and has more probative value than oral evidence led at the trial, even though that oral evidence may have been given on the most solemn oath and subjected to the most rigorous cross-examination. It is for that reason that the Evidence Act advisedly lays down that the contents of a document can be proved by proving the document in the usual manner, a proposition that emerges unequivocally from a combined reading of Sections 59, 61 and 62 of that Act. To require that the writer of the document should be called is, in my opinion, to import in regard to documentary evidence the rule laid down in Section 60 of the Evidence Act which, in terms, applies only to oral evidence, and to ignore the several statutory provisions set out above.

5. There can be no doubt that a statement contained in a document may also be hearsay evidence, as when the writer says in a letter, "X told me that Y had died". Such a statement not being within the knowledge of the writer himself and being based on what he heard from somebody else, would be written hearsay. The contents of a document, duly proved, are received in evidence as statements made by the writer. What somebody else told the writer does not, however, become his statement merely because he reproduces it in the document and cannot be said to be the "contents" of the document in which his statements are recorded. The passage from Halsbury, 3rd edn., Vol. 15, para. 533 at p. 294, cited in the Division Bench judgment in the case of In the matter of Mr. D. and Mr. S., if properly construed, in my opinion, lays down nothing more than that proposition, In fact, it states that the contents of counsel''s opinion would be admissible for the purpose of proving what the opinion was, but would not be admissible to prove the truth of any statement of fact made by counsel in his opinion, which would be a matter which he has only heard from somebody else. Statements in a document are admissible to the same extent to which they would be admissible if the writer had made those statements from the witness-box-no less and no more. Legal propositions, such as that proof of a document does not amount to proof of "the truth" or "the correctness" of its contents, or that proof of a document is no "guarantee of the truth or correctness" of its contents, are, in my opinion, entirely out of place in regard to the question of admissibility of documentary evidence. The question that arises at that stage is only this: "On execution being proved, can the document be used for the purpose of proving its contents?" The answer must be: "Yes, to the same extent as oral evidence to that effect". The object of proving a document is, no doubt, to prove the truth or correctness of those contents, but whether it amounts to proof of "the truth" of the contents of the document is purely a question of probative value and not of admissibility. There is no guarantee of the truth of the contents of a document merely by reason of the proof of that document, but neither would there be any guarantee of the truth of oral evidence merely by reason of the fact that the deponent has stated the same on oath, and has subjected himself to cross-examination. In my opinion, the view taken by Bhagwati J. in Madholal Sindhu''s case as well as by the Division Bench in the case of In the matter of Mr. D.

and Mr. S., is contrary to the plain language of Sections 59 and 61 of the Evidence Act which in terms refer to "the contents" of documents, and is in violation of the fundamental rule of evidence that lies at the root of Sections 59 and 91 of the said Act that the contents of a document cannot be proved by oral evidence. Being bound by the decision of the Division Bench in the case of In the matter of Mr. D. and Mr. S., I must, however, follow the same and decline to admit the postcard marked "X" (for identification) in evidence.