

**P.M. Traders and ors. Vs. Union Bank of India and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/56577](http://sooperkanoon.com/56577)

**Court :** DRAT Mumbai

**Decided On :** Mar-27-2006

**Reported in :** IV(2006)BC65

**Judge :** S Parkar

**Appellant :** P.M. Traders and ors.

**Respondent :** Union Bank of India and ors.

**Judgement :**

1. Mr. Nagori for the appellants and Mr. Gopalkrishna Swami for the respondent No. 1 are present.

2. All these three miscellaneous appeals are filed by the different defendants in the same original application against the order passed by the D.R.T.-II, Mumbai on 25th May, 2005 allowing the application made on behalf of the respondent No. 1 Bank/original applicant Bank to lead secondary evidence of the security documents through typed copies filed along with the original application.

3. The respondent Bank had filed an application dated 9th February, 2005 before the D.R.T. to allow them to lead secondary evidence in respect of documents, a list of which was given in Exhibit 'C' annexed to the said application. Those documents were 19 in number and all of them were dated 19th September, 1984. Copies of those documents had been annexed as Exhibits 'A' to 'S' to the original application, which consisted of documents like demand promissory note, deed of

hypothecation, declarations, promissory notes, letters of continuity and guarantee, etc. stated to have been executed by the defendants. The said application was opposed by the defendants/present appellants in the above three appeals. However, the D.R.T. by its impugned order dated 25th May, 2005 allowed the said application relying on the affidavit of one Mr. P.J. Heredia, who was an officer of the respondent No. 1 Bank. The said order is under challenge in these three appeals.

4. The application was made under the provisions of Sections 63 and 65 of the Indian Evidence Act, under which the secondary evidence is permitted to be led by the parties in certain contingencies if the originals are not available for production in the Court. The secondary evidence is defined under Section 63 of the Indian Evidence Act, which includes certified copies of the original documents, copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies, copies made from or compared with the original counter parts of documents as against the parties who did not execute them and oral accounts of the contents of the documents given by some person who has himself seen it.

In this case probably the respondent No. 1 Bank is relying on the oral accounts of the contents of the documents given by their officer Mr.

P.J. Heredia, who claims to have himself seen the original documents.

Section 65 of the Indian Evidence Act mentions the cases in which secondary evidence related to documents may be given, as regards existence, condition or contents of a document in the cases enumerated therein. In the present case, the respondent Bank is relying on Clause (c) of the Section 65 of the Indian Evidence Act, which is applicable in a case 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 produce it in reasonable time.

5. In the present matter, case of the respondent No. 1 Bank is that inspection of the original security documents was given to the defendants' Advocate who was accompanied by the defendants' representative on 13th, 16th, 18th and 20th April,

1987 and defendants had acknowledged having taken inspection on the Bank's Advocate's letter dated 8th April, 1987 addressed to the respondent No. 1 Bank, a copy whereof is annexed as Exhibit 'B' to the said application. It is also the case of the respondent No. 1 Bank that the documents at Exhibits 'A' to 'S' referred to above pertain to the respondent No. 1 Bank's Advocate as those copies were given to them for purpose of drafting the plaint. After annexing those copies or the above exhibits and plaint drafted by their Advocate, one copy of those documents i.e.

of each of those documents, was retained by the respondent Bank's Advocates in their records; implying thereby that the originals must have been returned to the officials of the respondent No. 1 Bank. In para No. 5(e) of the said application leave was sought from the D.R.T. to produce photo-copies of the original documents, which were annexed as exhibits to the original application/plaint.

6. Thus, from the aforesaid contents of the application, it is quite clear that the respondent No. 1 Bank sought permission of the D.R.T. to lead secondary evidence by producing photo-copies of the original documents, copies whereof were annexed as Exhibits 'A' to 'S' to the original application. However, ultimately what has been sought to produce by way of secondary evidence before the D.R.T. is not the photocopies of the original documents but typed copies of the original documents, which has been allowed by the impugned order. In support of the application, an affidavit dated 20th May, 2005 of Mr. P.J. Heredia, Senior Manager of the respondent Bank has been filed, who had joined the concerned branch during the year 1986. In para No. 6 of the said affidavit, it is stated that the respondent Bank had made diligent search of the original documents at all the places where they were likely to be found, but the documents were not treated. However, it is not mentioned in the affidavit what means were adopted or what steps were taken to search those documents. Mr. Heredia, however states that he had compared the typed copies of the original documents, which were annexed to the plaint. The D.R.T., going by these averments in the affidavit, has allowed the application observing that at the relevant time the said officer was working in the concerned branch and that he compared typed copies with the original documents.

7. First of all, the respondent No. 1 Bank has not stated as to how and since when all the original documents were missing and what steps were taken to search those documents. Secondly from the affidavit of Mr.

Heredia, it appears that he had compared typed copies of the original documents which were annexed to the plaint. It would be relevant to quote here two averments made in para 6 of the affidavit of Mr.

Heredia, which are as follows: I say that as per the practice and rules of the Hon'ble High Court the security documents were typed and annexed to the plaint. I say that I have compared the said typed copy with the original documents.

However, it is pertinent to point out that Mr. Heredia had joined the concerned branch of the respondent No. 1 Bank in the year 1986, while the suit was filed in the High Court in the year 1985. In the first para of the said affidavit, year has been changed by hand from 1985 originally typed to 1986. The said affidavit must have been drafted with the two averments quoted above on the assumption that Mr. Heredia had joined the said branch in the year 1985, which was later on corrected. It is interesting to note that para 3 of the said affidavit also has been deleted completely, in which it was stated that, "the defendants have executed the security documents in my presence" that is in the presence of deponent or the said affidavit.

Reliance is placed on behalf of the respondent Bank on letter dated 8th April, 1987 addressed to the Branch Manager of the respondent No. 1 Bank by the Advocates of the Bank asking the Bank's officer to call on them on 13th April, 1987 with all the documents for their perusal i.e.

for the perusal of the Advocates of the respondent No. 1 Bank. The respondent No. 1 Bank is relying particularly on the hand written note at the bottom of the said letter made by the officer of the Bank i. e.

Mr. Heredia which is signed by Mr. Heredia putting date 20th April, 1987. The note or the endorsement is as follows: Attended Advocate's office on 13th, 16th, 18th and 20th and along with the Advocate of the defendants, allowed them to examine

all the exhibits of the plaint in presence of our advocate.

It is significant to mention here that the aforesaid note of Mr.

Heredia states that inspection of all the documents was given to the Advocate of the defendants. This does not appear to be correct because in the letter dated 8th June, 1987 the Bank's Advocate wrote to the Advocate of the defendants/appellants that they had received their letter dated 4th June, 1987 on 6th June, 1987, which fixed the date of giving inspection of the documents on 13th June, 1987. This letter contradicts the endorsement put up by Mr. Heredia on the internal correspondence (letter dated 8th April, 1987) between the Bank and their Advocates that the inspection of all the documents were given to the defendant's Advocate. Copy of this letter has been produced along with affidavit dated 14th March, 2006 filed before this Appellate Tribunal by the defendant No. 4 in appeal No. 225/2005.

8. From the impugned order itself, it appears that on behalf of the defendants it was pointed out to the D.R.T. that typed copies did not mention that Mr. Heredia or any other officer had compared the typed copies with the originals. In the absence of that endorsement and in view of the contradictions which are pointed out above, there is every reason for not believing the statement on oath made by Mr. Heredia.

However, in para 5 of the impugned order it is observed by the Presiding Officer, D.R.T. II Mumbai that he found no reason for not believing the statement made on oath by Mr. Heredia.

9. Thus, what I find is that ingredients of provisions of Sections 63 and 65 of the Indian evidence Act have not been fulfilled on behalf of the respondent No. 1 Bank to allow them to produce secondary evidence, when the application was made to allow them to produce photo copies of the documents. It would have, certainly made some difference if the respondent Bank had sought to produce photo-copies as stated in the application but ultimately what they wanted to produce by way of secondary evidence were only typed copies allegedly compared by Mr.

Heredia at the time of filing of the suit in the High Court in the year 1985 as appears from the contents of para 6 of the affidavit filed in support of the application. This is again contradicted by the endorsement made on 20th April, 1987 below the letter dated 8th April, 1987 addressed to the Bank by the Bank's Advocates as it is inconsistent with the Bank's letter dated 8th June, 1987 addressed to the defendant's Advocate.

Under the aforesaid facts and circumstances I find that there was no warrant for allowing the application made on behalf of the respondent Bank. I therefore, have no hesitation in setting aside the impugned order whereby the respondent No. 1 Bank's application was allowed.

In the result, all the appeals are allowed and the impugned order dated 25th May, 2005 is hereby quashed and set aside.

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