

MHAU130001572018



ORDER BELOW EXH.26 IN RCS NO.60 OF 2018
(Samina Vs. MCA)

1. Plaintiff has filed this application seeking permission to lead secondary evidence in respect of several documents. Plaintiff has submitted that, most of the original documents are not traceable. Hence, they be permitted to lead secondary evidence in respect of those documents.
2. Defendant has given hand written day. Defendant has strongly opposed this application. Defendant has submitted that this application is not tenable. Hence, this application is liable to be rejected.
3. I heard Ld. counsel for the parties.
4. I perused this application and say submitted. It is held by **Hon'ble Supreme Court in the case of Dhanpat Vs. Sheo Ram 2020 ALL SCR 990,**

"There is no requirement that an application is required to be filed in terms of Section 65(c) of the Evidence Act before the secondary evidence is led. A party to the lis may choose to file an application which is required to be considered by the trial Court but if any party to the suit has laid foundation of leading of secondary evidence, either in the plaint or in evidence, the secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed".

This case law is applicable to facts of the present case.

5. It is held by Hon'ble Bombay High Court in the case of **Karthik Gangadhar Bhat, Vs Nirmala Namdeo Wagh, Writ Petition No. 11151/2017, dated 3rd November 2017,**

"In the present case it appears that at an early stage an application was filed styled as an 'application under Section 65 of the Evidence Act' seeking 'permission' to prove the contents of a lease deed by secondary evidence. A copy of this application is at page 59, Exhibit "G".

7. Section 65 of the Evidence Act reads 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 document 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 can not, 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 a 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 India to be given in evidence;

(g) when the original consists 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.”

As is clear, this Section does not speak of any ‘application’ at all. It only speaks, as Vazifdar J said, of the nature of the evidence adduced as secondary evidence.

8. In this context, Section 63 is also to be noticed:

“63. Secondary evidence.— Secondary evidence means and includes—

- (1) certified copies given under the provisions hereinafter contained;*
- (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;*
- (3) copies made from or compared with the original;*
- (4) counterparts of documents as against the parties who did not execute them;*
- (5) oral accounts of the contents of a document given by some person who has himself seen it.”*

9. The result of such applications, which as I have noted are misconceived and not maintainable, is that exceedingly peculiar orders are passed either allowing or disallowing the leave sought. When leave is granted, apparently secondary evidence is then led but that leave is, as we have seen, completely unnecessary and a party may always place before the Trial Court secondary evidence as contemplated by the Evidence Act without such leave. The result of disallowing the application is even more serious because the evidence in question is wholly excluded from consideration without the slightest examination of the proposed secondary evidence. There is no question of examining the secondary evidence first at the stage of considering the application for leave. If the secondary evidence is sufficient to prove the document, then the document must be admitted into evidence. One of two things happen on any such application: either the secondary evidence is not considered, and the document is

shut out, which is wrong, or the evidence is considered twice over, once for the so-called 'leave' and then again at the time of admitting the document.

10. This is no way to conduct the trial. Conceivably, it might result in a document that might otherwise be admissible and proved by secondary evidence being wholly left out only because of an order of this kind on an application that in itself is misconceived and not contemplated in law. This procedure wastes scarce judicial time and achieves nothing. When a party goes to trial, he may have direct or primary evidence of some documents, and secondary evidence of others. It is for him to decide which of these he can best prove by what evidence.

11. Take the two situations under Section 65(a) and (c). In the first, notice is given to the other side to produce an original; the other side does not produce the notice. Section 66 requires such a notice, but also contains exceptions. One of these is in sub-clause.

(2), "when, from the nature of the case, the adverse party must know that he will be required to produce it". There are others. Therefore, it is not in every case that such a notice is compulsory.

A. simple example is that of a letter by the party A to party B. The original is with party B. He knows, or must know, from the nature of the case, that he will be required to produce the original. He does not. No notice is necessary, and party A can straightaway produce his office copy of that letter. No 'leave' or 'permission' is required to do this.

Under Section 65(c), 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 65(c), any evidence of the contents is admissible. Again, there is simply no question of 'leave' being required.

12. In the present case, by the impugned order, the plaintiffs were ostensibly 'permitted' to lead secondary evidence with respect to a certified copy of a registered lease deed but were disallowed to lead secondary evidence in respect of a gift deed.

13. The entire order is one that cannot be sustained. It adopts a procedure unknown to our law and jurisprudence and directly contrary to decisions of this court.

This case law is applicable to fact of the present case.

6. In the present case plaintiff should not obtain permission to adduce secondary evidence. He can directly produce secondary evidence alongwith necessary averment. Court shall decide that issue at the time of recording of evidence of plaintiff witness. Hence I pass this order.

ORDER

This application is hereby disposed off.

Date :- 23/11/2021
Place :- Aurangabad.

Sd/-
(Smt. S. N. Morwale)
Civil Judge Senior Division
(Corporation Court), Aurangabad.

CERTIFICATE

I affirm that the contents of this P.D.F. file Order are same, word to word, as per the original Order.

Name of the Stenographer : Manjushri S. Salve
Court : C.J.S.D.(Corporation Court), Aurangabad
Date : 23/11/2021
Order signed by the
presiding officer on : 23/11/2021
Order uploaded on : 23/11/2021