

Order Below Exh. 26 in R.C.S. No. 35/2020
(CNR No. MHRT080002532020)

By the present application, the plaintiff has prayed for permission to lead secondary evidence in respect of eight documents, copies of which are produced as per Sr. No. 01 to 08 of list at Exh. 05.

02. It is the case of the plaintiff bank that the defendant has approached it for sanctioning gold loan. After considering the application and the documents produced by the defendant, the bank has sanctioned the loan. The loan amount was disbursed to the defendant. The defendant has not repaid the amount of loan. As the ornaments were hypothecated with the bank, it had right to sale the same for recovering the amount of loan. However, it was revealed that the articles which are delivered by the defendant at the time of hypothecation were in fact not the gold articles, as was stated. Thus, the bank learnt that a fraud is played with it and it is cheated. Thus, a crime has been registered. A police report is filed thereupon against the defendant and others. Regular Criminal Case bearing No. 16/2019 is thus registered and pending for trial in this Court.

03. The plaintiff contends further that the documents i.e. loan application, promissory note, letter titled 'L-435', letter titled 'L-440', document of draft declaration, document of loan agreement and loan sanction letter are seized by police during investigation of the aforesaid offence. These documents are sent to the Chief Examiner of the Handwriting, for examination of handwriting/signature. The plaintiff bank has tried to get back

those documents. However, time and again it was told to the bank that the documents are not yet received. Therefore, the bank had to make the applications for adjournment when the present suit is posted for hearing. As the documents are with the Chief Examiner of the Handwriting, the original documents cannot be produced. The plaintiff bank has produced on record, the copies of these documents at Sr. No. 01 to 08 of list at Exh. 05. The suit is being delayed unnecessarily as the documents are with the office of Examiner of Handwriting. Thus, according to the plaintiff, the permission for adducing secondary evidence, be granted.

04. The application is opposed by the defendant by filling reply. It is contended that any of the circumstances which enable a party to adduce secondary evidence is not made out. According to the defendant, there is no just circumstance to allow the plaintiff bank to adduce secondary evidence in respect of the alleged documents. Thus, the application is liable to be rejected, according to the defendant.

05. Perused the record. Heard both sides.

06. Learned advocate for the plaintiff Shri. K. S. Sahastrabuddhe has submitted that section 65 of the Indian Evidence Act, 1872 ('the Act' in short) provides the circumstances in which secondary evidence can be adduced. He has relied on the judgment of Hon'ble Supreme Court of India in the case of **Jagmail Singh and Another Vs. Karamjit Singh and Others [2020 DGLS (SC) 413]**, to submit that when the foundational facts showing the existence of the circumstances authorizing adducing of secondary

evidence are established, a party is entitled to adduce the secondary evidence. Further, according to the learned advocate, present case is squarely covered by the principles as laid down by Hon'ble Supreme Court in the case of **Vijay Vs. Union of India and Others [2023 DGLS (SC) 1203]**. According to him, since the original documents are held up with the Chief Examiner of the Handwriting in connection with the collateral criminal proceeding, the plaintiff bank cannot obtain or produce these documents. Further, said officer is not subject to the summons by this Court. Therefore, notice as per section 66 of the Act is also not necessary. Considering all these aspects, the present case clearly falls under clauses (a) and (c) of section 65 of the Act. Hence, the application deserves to be allowed, submitted the learned advocate.

07. On the other hand, learned advocate Smt. P. C. Chavan, appearing for the defendant, would submit that reading of the provision of section 65 of the Act would clearly show that the leave to adduce secondary evidence in respect of a document can be granted only when the case is covered by either of the seven clauses to that section. When the original documents are available and they are with some third person, a notice as per section 66 is mandatory. Without such notice being issued and without the proof as to foundational facts, the plaintiff cannot be allowed to adduce secondary evidence. To substantiate her contentions, learned advocate has relied on the judgment of Hon'ble Madhya Pradesh High Court in the case of **Smt. Rekha Rana And Ors. Vs. Smt. Ratnashree Jain (AIR 2006 MP 107)**.

08. For the purpose of the present application, it is necessary to note the provisions of sections 65 and 66 of the Act. They read as follows -

65. Cases in which secondary evidence relating to document 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 cannot, 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 originals consist 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 documents is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of 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.

66. Rules as to notice to produce.

Secondary evidence of the contents of the documents referred to in Section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case :

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it :-

(1) when the document to be proved is itself a notice;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

09. In the case of, **Jagmail Singh (supra)**, Hon'ble Supreme Court has observed that, "... A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, 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 notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original evidence has not been furnished".

10. In the case of **Vijay (supra)**, after perusing various earlier judgments, Hon'ble Supreme Court has pleased to lay down principles relevant for examining the admissibility of secondary evidence. They are as follows -

- "1. Law requires the best evidence to be given first, that is, primary evidence.
- 2. Section 63 of the Evidence Act provides a list of the kinds of documents that can be produced as secondary

evidence, which is admissible only in the absence of primary evidence.

3. If the original document is available, it has to be produced and proved in the manner prescribed for primary evidence. So long as the best evidence is within the possession or can be produced or can be reached, no inferior proof could be given.

4. A party must endeavor to adduce primary evidence of the contents, and only in exceptional cases will secondary evidence be admissible. The exceptions are designed to provide relief when a party is genuinely unable to produce the original through no fault of that party.

5. When the non-availability of a document is sufficiently and properly explained, then the secondary evidence can be allowed.

6. Secondary evidence could be given when the party cannot produce the original document for any reason not arising from his default or neglect.

7. When the copies are produced in the absence of the original document, they become good secondary evidence. Still, there must be foundational evidence that the alleged copy is a true copy of the original.

8. Before producing secondary evidence of the contents of a document, the non-production of the original must be accounted for in a manner that can bring it within one or other of the cases provided for in the section.

9. Mere production and marking of a document as an

exhibit by the Court cannot be held to be due proof of its contents. It has to be proved in accordance with the law”.

11. In the case of **Smt. Rekha Rana And Ors. (supra)**, the trial Court has held that registered sale deed is a public document and has allowed the plaintiff to adduce the secondary evidence. On challenge before the Hon’ble Madhya Pradesh High Court, it was held that the sale deed is not a public document. Moreover, the foundational facts permitting the plaintiff to adduce secondary evidence were found to have not proved, in light of peculiar facts of that case. Consequently, the plaintiff was not allowed to adduce the secondary evidence.

12. In the present case, there is no dispute that a criminal proceeding bearing Regular Criminal Case No. 16/2019 is pending against the defendant. There is no dispute that said criminal proceeding is relating to the alleged fraud and cheating by the defendant.

13. By the present application it is specifically stated that the documents of which secondary evidence is sought to be adduced are held up before the Examiner of Handwriting, in connection with aforesaid RCC No. 16/2019. Said fact is also not specifically denied by the defendant.

14. As such, it is to be seen that whether the plaintiff has made out the foundational facts in which leave to adduce secondary evidence can be granted? Secondly, it is to be seen that whether the notice under section 66 of the Act was mandatorily required to be served? Thirdly, it is to be seen that, whether in the given circumstances, the plaintiff bank can be allowed to adduce the secondary evidence, as prayed?

15. In the present case, the record reveals that the original documents are with the Chief Examiner of Handwriting, in connection with the collateral criminal proceeding. Photocopies thereof are produced on record. Said criminal proceeding is pending before this Court since 2019. Present suit is also pending since 2019. If the documents referred to the handwriting expert are called for the purposes of this suit, the proceeding and the work in connection with RCC No. 16/2019 would be restrained. Moreover, there may arise the question as to identity of the documents which were sent for the examination. For the purposes of a civil suit, criminal proceeding cannot be stalled and vice versa.

16. Moreover, for no fault on the part of the plaintiff bank, it is unable to produce the original documents, for aforesaid reasons. Examination of the documents and completion of the proceeding of RCC No. 16/2019 will take time. It would be not reasonable to cause further delay for the trial of present suit, until completion of that proceeding. That would prejudice the interest of the plaintiff bank. Particularly, when there is no dispute that the loan agreement has been entered by the defendant, the plaintiff cannot be asked to wait until further uncertain time and then to adduce the evidence.

17. Further, the documents are pending before the concerned authority who is bound by law to carry the work assigned and make report in the proceeding in which those documents are sent. As such, said authority cannot be compelled to produce the documents in the present suit. Accordingly, said authority is not subject to the process of the Court in the present matter. Being so, the notice under section 66 of the Act is not necessary. Moreover, the foundational facts, as stated above, are made out by the plaintiff. Being so, in view of the principles

of law laid down in the aforesaid authoritative pronouncements of the Hon'ble Supreme Court, the plaintiff bank can be allowed to adduce secondary evidence, as prayed. Thus, the application deserves to be allowed. Hence, I pass following order -

ORDER

1. Application is hereby allowed.
2. The plaintiff bank is permitted to adduce secondary evidence as to the documents, copies of which are produced at Sr. No. 01 to 08 in the list at Exh. 05.
3. Costs in cause.

Date : 26/03/2024

(B. D. Tare)
Civil Judge, J.D., Deorukh

- : C E R T I F I C A T E : -

I affirm that the contents of this Pdf file order are same words as per original order.

Name of Stenographer	:- S. A. Bhale
Court Name	:- The Court of Civil Judge (J.D.) & Judicial Magistrate F.C., Deorukh
Date of decision	:- 26/03/2024
Order signed by PO. on	:- 26/03/2024
Order uploaded on	:- 26/03/2024