

MHKO020007952012



**Order Below Exh. 347 in Spl.C.S. No. 68/2012**  
**(Suryakant Sutar Vs. Sharad Jadhav etc.)**

This is an application for permitting the plaintiff to lead secondary evidence in respect of documents produced along with list Exh.No. 156/1,2,3,5 and 6.

2) It is contended that the plaintiff has executed one agreement and power of attorney in favour of defendant no.1. On the basis of which defendant No.1 entered into transactions with defendant No.2 to 4. As few documents are executed by plaintiff in favour of defendant No.1 and few documents are executed defendant No.1 in favour of defendant No.2 to 4., therefore, all these documents are in possession of either defendant No.1 or defendant No.2 to 4. As per the directions of the Hon'ble Bombay High Court in Writ Petition No. 33935/2023, the plaintiff had issued notice to defendant No.1 to 4 for production of these original documents. However, they have yet not produced it. Therefore, the plaintiff is constrained to move application under consideration for permitting him to lead secondary evidence. Hence, on all these grounds, the plaintiff prayed for allowing the application.

3) Defendant No.1 filed his say to application under consideration vide Exh.371. He has denied all the contentions of application under consideration. It is contended that suit is of the year 2012 and after delay near about 12 years, this application has been moved only to prolong the matter. The plaintiff has not complied with the necessary requirements of the Indian Evidence Act to lead secondary evidence. Notice issued by the plaintiff for production of documents is not received by the defendants. The application has been moved only to prolong the matter and cause harassment of the defendants. Hence, on all these grounds, defendant No.1 prayed for rejection of application.

4) While defendant No. 3 to 8 have submitted their say below overleaf of the application. They have also denied all the contentions of the application and their say is in the same line as that of defendant No.1. Therefore, I am not reproducing it again to avoid repetition.

5) Heard learned advocates for both sides and gone through record of proceeding. Perusal of record shows that original suit is for declaration that sale-deeds executed by defendant No.1 in favour of other defendants are null and void and not binding upon the plaintiff and for compensation, injunction etc. Both sides have closed their evidence and now matter is for final argument. It appears from the record that that the time of final argument, learned advocate for the

plaintiff moved application Exh.340 for exhibiting documents produced along with list Exh.156. Which is partly allowed by my learned predecessor in office. Thereafter, again the plaintiff moved application Exh.341 for exhibiting documents in question as proved documents. However, as the documents were xerox copies and the defendants have objected exhibition of those documents. So said application was rejected after passing detailed order. Again said order the plaintiff preferred writ petition No. 33935/2023 in which Hon'ble their Lordship has directed present plaintiff to take out appropriate application/proceedings as available to him in accordance with the provisions of Indian Evidence Act in order to prove the aforesaid five documents by secondary evidence for the purpose of making them as exhibits within two weeks. In compliance of said order of the Hon'ble High Court the plaintiff has moved present application.

6) It is pertinent to note here that the defendants are not denying the existence of the documents in question nor they are claiming that the documents are in possession of the plaintiff. As per Section 66 of the Indian Evidence Act, plaintiff has issued notice to defendant No. 1 to 4 for production of original documents. Office copies of those notices and postal receipts are produced by the plaintiff along with list Exh. 349. However, acknowledgment receipts are not produced to consider that those notices are served upon the defendants.

7) May it be so notice of application under consideration was also issued by the Court which are served on the defendants. Even then the defendants have not produced the documents. Therefore, from the documents on record, it can be safely said that the plaintiff has complied with Section 66 of the Indian Evidence Act. So in view of Section 65(i) of the Indian Evidence Act, plaintiff can lead secondary evidence in respect of the documents in question. However, as mentioned earlier, matter is now pending for final argument. No application has been moved to reopen the evidence of the plaintiff.

8) With this backdrop, here we have to see legal position. For permitting anyone to lead secondary evidence, the party seeking permission needs to satisfy the Court that the original sale deed is in possession of adversory and even after notice to produce the documents, the defendants have not produced it and without production or proof of the document, the plaintiff will not succeed in his case. In such situation when the party seeking permission to lead secondary evidence fulfills the conditions by laying down foundation for leading secondary evidence. Secondary evidence can be accepted.

9) May it be so. Here, I would like to rely upon the decision of Hon'ble Bombay High Court in the case of *Parasanbai Dhanraj jain Vs. Sunanda Madhukar Jadhav, 2018(1) MhLJ 788*. In this decision, Hon'ble their Lordship has

specifically observed that, there is no provision in law to permit any party to lead secondary evidence of any kind and even there is no necessity to move application for permission to lead secondary evidence. I am reproducing the relevant para of the supra cited decision below for convenience.

“Either secondary evidence is led or it is not led. Either the provisions of Section 65 are met or they are not met. No permission of a Court is required to lead evidence of any kind. No judge in the subordinate judiciary to this High Court will hereafter will insist on any such application under any circumstances whatsoever. I do not think I can put it in any clearer terms than this. Any such order is wholly illegal and liable to be set aside. A Copy of this order is now to be circulated to every Civil Judge in the State of Maharashtra. To clarify in an evidence affidavit under Order-18, a witness may well say of a given document that he cannot prove it by direct evidence and then proceed to adduce the secondary evidence in compliance with Section 65 of the Evidence Act. The trial court is to consider that evidence, viz., the reason given for not leading direct evidence, and the secondary evidence led, and is then decide whether the secondary evidence led is sufficient. That is all. There is absolutely no question of an application, whether styled as an interim application or a 'MARJI' application, for 'permission' to lead secondary evidence. The court cannot refuse that permission, and it cannot insist on an application for any such permission”.

10) So in my view as per the observations of the Hon'ble their Lordship in supra cited decision, in fact the plaintiff is not

required to even move an application seeking permission to lead secondary evidence. However, as now matter is pending for final argument and the plaintiff wants to prove the documents in question for which he needs to lead evidence or needs to reexamine the plaintiff. To do that first of all he needs to get his evidence reopen and get the documents proved as the defendants have not admitted those documents. In such situation in my view following order will meet the ends of justice.

**ORDER**

The plaintiff is directed to take necessary /proper steps.

Date: 18/06/2024  
Sangli.

(Vibha P. Gaikwad)  
2<sup>nd</sup> Civil Judge, Sr. Division,  
Sangli.