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REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11151 OF 2017**

KARTHIK GANGADHAR BHAT,
Age Adult, Occupation Advocate, R/at:
1209-A/1, Shivajinagar, Pune 411 004

...Petitioner

~ VERSUS ~

- 1. NIRMALA NAMDEO WAGH,**
Age 73 years, Occupation: Household
- 2. ASHWINI AUDUMAR KHUNE,**
Age 53 years, Occupation: Household,
Both R/at: 645, Budhwar Peth, Pune
411 002

...Respondents

APPEARANCES

FOR THE PETITIONER

**Mr Tejas Dande, *i/b Tejas Dande &
Associates***

FOR THE RESPONDENTS

**Mr PK Dhakephalkar, Senior Advocate,
*i/b Nilesh Wable***

CORAM: G.S. PATEL, J

DATED: 3rd November 2017

ORAL JUDGMENT:-

1. Rule. Respondents waive service. By consent, Rule made returnable forthwith and taken up for hearing and final disposal.

2. It is with great regret that I note that the Trial Courts continue persistently to ignore settled law and binding precedents on the question of leading secondary evidence. For reasons that are entirely unclear, there seems to be an insistence on filing an application for 'permission' to lead secondary evidence. This is simply wrong.

3. It is settled law that no such application is at all maintainable or even desirable. In *Indian Overseas Bank v Triokal Textile Industries & Ors.*,¹ Vazifdar J (as he then was), in the context of a chamber summons for such a leave filed on the Original Side, held that such a chamber summons is not just unnecessary, it is misconceived. He said it was neither necessary nor desirable; it is always open to the party to lead secondary evidence before the Trial Court recording evidence or hearing the matter without having to file such an application. In paragraph 2, he said:

"2. A party desiring to lead secondary evidence must do so before the Judge recording the evidence. It is the Judge recording evidence who must decide, if any objection as raised, whether or not to admit the secondary evidence in evidence. If evidence is led before a Commissioner the objection to secondary evidence naturally can only be recorded and not decided by the Commissioner. It is then the Judge hearing the suit who decides the objection."

1 AIR 2007 Bom 24 : 2006 (6) Bom CR 85.

(*Emphasis added*)

4. I myself have followed this decision (as I was bound to do) in *Anandji Virji Shah & Ors v Ritesh Sidhwani & Ors*;² *Ajaykumar Krishnaprasad Seth v Maya Ramesh Belvetkar & Anr*;³ *MMTC Ltd v Samarth Auto Care Pvt Ltd*;⁴ and *Lajwanti v Jayshree P Madhwani & Ors*.⁵

5. In *Sumati & Ors v Yashodhara & Ors*,⁶ SB Shukre J had before him a challenge to an order on a similar application. Though he dismissed the challenge, some of these authorities were cited before him, and he said in that context:

11. In the cases relied upon by the learned counsel for the petitioners and referred to in the earlier paragraphs, it has been held that for adducing secondary evidence it is necessary for the party to prove existence and execution of the original document and that conditions laid down in Section 65 must be fulfilled before secondary evidence can be admitted. This can be seen from the law settled by the Hon'ble Apex Court in the cases of *J. Yashoda* and *H. Siddiqui (supra)*. Following this law only that learned Single Judges of this Court in the judgments rendered in *Luis Sales de Andrade e Souza (jr.) & Anr. (supra)* and *Yeshwant Rambhau Chondhe (supra)* have held that foundational

2 Chamber Summons No. 1153 of 2015 in Suit No. 395 of 2007, decided on 27th June 2016.

3 Chamber Summons No. 17 of 2016 in Testamentary Suit No. 18 of 2003 in Testamentary Petition No. 628 of 2001, decided on 13th October 2016.

4 Suit No. 427 of 1995, order dated 1st October 2014.

5 Testamentary Suit No. 6 of 2004, order dated 14th December 2016.

6 2016 (6) All MR 507.

evidence must be led and the Court should record a satisfaction on the basis of such evidence that the originals are lost or destroyed before admitting the secondary evidence. **In the cases of *Indian Overseas Bank (supra)* and *Anandji Virji Shah (supra)*, learned single judges of this Court have held that any objection to secondary evidence must be decided by the Judge recording the evidence.** In the cases of *Bank of Baroda (supra)* and *Ganpat Ghongade (supra)* learned Single Judges of this Court have followed the settled principle of law regarding necessity of proving the existence and execution of the original document before secondary evidence is admitted. **In the case of *M. Chandra (supra)*, the Hon'ble Apex Court has cleared doubt about the form of secondary evidence holding that it may be adduced in any form in which it is available, whether a copy, or copy of copy or any other form subject to the condition that the copy is proved to be a true copy of the original. Hon'ble Supreme Court also observed that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original though there is no fault on its part.**

12. The law discussed above would show that in order that secondary evidence is admitted, form of the secondary evidence is not material, it could be in any form as for example copy or duplicate copy of the copy of the original document, oral evidence or any other form and that three conditions, which constitute foundational facts, must be fulfilled while pressing into service the provision of Section 65(c) of the Indian Evidence Act, namely, (a) the original document is in existence and has been executed by its executants, (b) it has been lost or destroyed or cannot be produced in reasonable time for any other reason not arising from own default or neglect of the party leading secondary

evidence, and (c) the copy is the true copy of the original.

If these conditions or any one of them are or is not proved, the secondary evidence cannot be admitted.

(Emphasis added)

6. 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 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 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.

14. I am informed that the only reason this application was filed was that notice under Section 66 of the Evidence Act to produce the original documents had not been given. That, as we have seen, is no reason to demand an application for 'permission to lead secondary evidence'. All that the Court needed to do was to grant some time for issuing appropriate notice under Section 66, assuming such a notice was required, which is not always so. I am now told that a notice under Section 66 has already been given.

15. In that view of the matter, the plaintiffs will be at liberty to lead such secondary evidence as they desire on both documents, and the Trial Court will consider whether that secondary evidence is sufficient to prove the documents in question.

16. All questions as to admissibility and relevance are expressly kept open.

17. In the result, the petition succeeds. The impugned order dated 30th August 2017 is quashed and set aside. Rule is made absolute in these terms. No costs.

(G. S. PATEL, J)