

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No.624 of 2018**

Bhandari Ram, S/o. Jethu Gond, aged about 70 years, R/o. Village Khalpodi, Tahsul Lundra, District Surguja (CG)

---- **Petitioner****Versus**

1. Kunwar Sai, S/o. Nanka Gond, aged about 45 years, R/o. village Khalpodi, Tahsil Lundra, District Surguja (CG)
2. State of Chhattisgarh through Collector, Surguja Ambikapur, District Surguja (CG)

---- **Respondents**

For Petitioner	:	Mr.Manoj Paranjape and Mr.Anurag Singh, Advocates
For Respondent No.1	:	Mr.Rakesh Pandey, Advocate
For Respondent No.2	:	Mr.Adi Raj Surana, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal**Order on Board****11/12/2018**

1. Invoking jurisdiction of this Court under Article 227 of the Constitution of India, the petitioner/plaintiff herein seeks to challenge the order dated 21.6.2018 passed by the trial Court, whereby application preferred by him under Section 65 of the Indian Evidence Act, 1872 seeking permission to lead secondary evidence has been rejected by the trial Court holding that in order to lead secondary evidence application is not required to be filed and same is not maintainable in law.
2. Mr.Manoj Paranjape and Mr.Anurag Singh, learned counsel for the

petitioner/plaintiff, would submit that though the trial Court is partly right in holding that for leading secondary evidence no separate application is required to be made, but thereafter fixed the matter for evidence holding the application to be not maintainable. They would further submit that the trial Court ought to have permitted the plaintiff to lead secondary evidence during course of trial in accordance with law.

3. On the other hand, Mr.Rakesh Pandey, learned counsel for respondent No.1, would submit that no separate application is required to be filed for leading secondary evidence. Therefore, the trial Court is absolutely justified in rejecting the application as not maintainable.
4. Mr.Adi Raj Surana, learned Deputy Government Advocate for respondent No.2 would take no stand.
5. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.
6. Section 65 of the Indian Evidence Act, 1872 (hereinafter called as “the Act of 1872”) provides for cases in which secondary evidence relating to documents may be given. It provides that secondary evidence may be given of the existence, condition, or contents of document in cases as set-out in clauses (a) and (g) thereof. Section 65 of the Act of 1872 states as under:-

“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 1[India] to be given in evidence²; 1[India] to be given in evidence²;"

(g) when the originals 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.”

Thus, before allowing such production by way of secondary

evidence, it is necessary for the trial Court to form an opinion and be satisfied about the existence of the conditions under Section 65 of the Act of 1872 under which such production can be allowed.

7. The Bombay High Court in the matter of Indian Overseas Bank v. Trioka Textile Industries¹ has held that separate application for permission to lead secondary evidence is not necessary. It was held as under:-

“2. A Chamber Summons seeking leave to lead secondary evidence is not necessary. The proceeding is in fact misconceived. 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 is raised, whether or not to admit the secondary evidence in evidence. If evidence is lead 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.

3. An independent application by way of a Chamber Summons or Notice of Motion is neither required nor desirable. It is always open for the party to lead secondary evidence before the Judge recording the evidence/hearing the matter without taking out such an application.”

8. Thereafter, again in the matter of Parasanbai Dhanraj Jain and others v. Sunanda Madhukar Jadhav and others² the Bombay High Court has reiterated the principle of law laid down in Trioka Textile Industries (supra) and held as under:-

“11. I have recently set out the law on this 1 and I will

¹ 2007 AIR (Bom) 24

² 2017 SCC Online Bombay 9875

say so briefly once again: 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 to 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."

9. Recently also, in the matter of Karthik Gangadhar Bhat v. Nirmala Namdeo Wagh and Ors³ the Bombay High Court again reiterated the same principle and observed as under:-

"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

3 2018(1) MHLJ 726

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."

10. I am respectfully agree with the view taken by the Bombay High Court in the above-stated judgments (*supra*) that no separate application is required to be filed seeking permission to lead secondary evidence and it is open to the party seeking to lead secondary evidence before the trial Court in accordance with Section 65 of the Evidence Act subject to objection by other side, if any and that objection has to be considered by the trial Court at that time.

11. Reverting to the facts of the present case in the light of principle of

law laid down in the above-stated judgments (*supra*), it is quite vivid that in this case a certified copy of the Will was sought to be produced by the plaintiff as secondary evidence. The trial Court while holding that the application for permission to lead secondary evidence is not required to be filed, ought to have given an opportunity to lead secondary evidence in accordance with law, which was not given by learned trial Court and straightway that has been rejected holding the application to be not maintainable, rather the trial Court could have allowed the plaintiff to lead secondary evidence of said document and would have proceeded further allowing the plaintiff to lead secondary evidence subject to objection by other side, if any. That course has not been adopted by the trial Court.

12. In the matter of **Rakesh Mohindra v. Anita Beri and others**⁴ the Supreme Court has stated the preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. It was observed as under:-

“15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document

4 (2016) 16 SCC 483

cannot accepted.

20. It is well settled that if a party wishes to lead secondary evidence, the court is obliged to examine the probative value of the document produced in the court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law.”

13. In the light of aforesaid legal position, the impugned order passed by the trial Court is partly set aside and it is held that no separate application for leading secondary evidence is required to be filed and party seeking to lead secondary evidence is required to comply with conditions enumerated in Section 65 of the Evidence Act and would be entitled to lead secondary evidence subject to objection, if any, by other side and adjudication by the trial Court in accordance with law and subject to compliance with Section 65 of the Evidence Act.
14. The writ petition is allowed to the extent sketched hereinabove. A copy of this order be sent to the trial Court by fax/e-mail. No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No.624 of 2018****Petitioner**

Bhandari Ram

Versus**Respondents**

Kunwar Sai and another

Head-Note**(English)**

In order to lead secondary evidence under Section 65 of the Indian Evidence Act, 1872, no separate application is required.

(हिन्दी)

भारतीय साक्ष्य अधिनियम, 1872 की धारा 65 के अधीन द्वितीयक साक्ष्य प्रस्तुत करने में किसी पृथक आवेदन की आवश्यकता नहीं है।