

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8442 OF 2019

1. Shaikh Aftab Ahmed s/o Shaikh
Akhlaque Ahmed,
Age-55 years, Occu-Business,
R/o Delhi Gate, Bashira Building,
 2. Gazi Zubair Ahmed s/o Gazi Zahi
Ahmed,
Age-50 years, Occu-Business,
R/o Manzoorpura, Aurangabad,
- PETITIONERS

VERSUS

1. Bhimrao s/o Sandu Waghmare,
Age-70 years, Occu-Agriculturst/
Pensioner,
R/o House No.5/15/29-P,
Bhimnagar, Bhausingpura,
Aurangabad.
 2. Tanabai w/o Bhimrao Waghmare,
Age-45 years, Occu-Household,
R/o As above,
 3. Pratik s/o Bhimrao Waghmare,
Age-29 years, Occu-Education,
R/o As above,
 4. Komal d/o Bhimrao Waghmare,
Age-27 years, Occu-Education,
R/o As above,
 5. Swapnalata d/o Bhimrao Waghmare,
Age-25 years, Occu-Education,
R/o As above,
 6. Prajakta d/o Bhimrao Waghmare,
Age-24 years, Occu-Education,
R/o As above
- RESPONDENTS

Mr.A.D.Kasliwal, Advocate for the petitioners.
Mr.A.R.Kawade, Advocate for respondent Nos. 1 to 6.
Mr.S.V.Adwant, Advocate to assist the Court.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 01/10/2019

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioners – original plaintiffs are aggrieved by the order dated 19.06.2019, passed by the trial Court by which Exhibit-28, filed by the plaintiffs, seeking permission to lead secondary evidence in Special Civil Suit No.331 of 2014, has been rejected.

3. The issue is as regards an “agreement to sell” dated 12.06.2014 (Isar Pavati). The plaintiffs have stated in their plaint that the said agreement to sell was signed between the parties and was notarised. It is admitted that the said document was not registered.

4. The defendants have submitted in paragraph no.26 of their Written Statement that such an “Isar Pavati” was actually executed on 12.06.2014. Similar admission is found specifically in paragraph no.6

of the plaint in RCS No.962 of 2014 filed by Bhimrao s/o Sandu Waghmare, who is defendant no.1 in the present suit.

5. The learned Advocate for the petitioners submits that on 19.09.2015, the trial Court allowed application Exhibit-19 filed by the plaintiffs seeking impounding of the notarised "Isar Pavati" dated 12.06.2014 under Section 34 of the Bombay Stamps Act (presently Maharashtra Stamps Act). The learned Advocate for the petitioners submits that as the learned Advocate dealing with the suit filed by the plaintiffs misplaced the notarised agreement to sell, the same could not be produced before the Court though, by an order dated 19.09.2015, Exhibit-19 was allowed by the trial Court and the plaintiffs were directed to produce the document for being forwarded to the Collector (Stamps).

6. He further concedes that the learned advocate representing the plaintiffs before the trial Court, after producing a photostat copy of the said document, should have called upon the defendants to admit or deny the said document, as is provided under the Code of Civil Procedure. Since the defendant- Bhimrao has admitted the document in the Written Statement and has also admitted this aspect in his own suit RCS No.962 of 2014, it would have been easy to deal with this issue of

adducing secondary evidence in this matter. The trial Court has rejected application Exhibit-28 for the reason that this Court has directed that the suit be decided within a time frame up to 30.09.2019, by its order dated 04.12.2018 passed in W.P. No.1384 of 2017.

7. The learned Advocate for the plaintiffs relies upon the judgment delivered by this Court at the Principal Seat in the matter of Parasanbai Dhanraj Jain & others Vs. Sunanda Madhukar Jadhav [2017 (6) ALL MR 877], wherein it is concluded that no permission to lead secondary evidence is necessary. The Court cannot refuse such permission. No application to lead secondary evidence is required as the Court cannot insist on filing of an application for seeking such a permission. The learned Counsel submits that this order has been circulated to the entire subordinate judiciary in the State of Maharashtra.

8. I find that the plaintiffs in the case in hand have not properly assisted the trial Court. The defendant No.1 Bhimrao, in the present suit, has himself filed his own RCS No.962 of 2014 against the same plaintiffs and has specifically averred that an agreement to sell was prepared on 12.06.2014 and it is a notarised document.

9. The Counsel further submits that this Court, earlier has taken a

view on 03.11.2017 in the case of Karthik Gangadhar Bhat Vs. Nirmala Namdeo Wagh & another, 2017 (6) ALL MR 769 and in Parasanbai (supra) that the trial Courts have continued to persistently ignore settled law and binding precedents on the question of leading secondary evidence. It is held that, for the 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. No permission is required from the trial Court for leading secondary evidence. The trial Court cannot insist on making an application for such permission.

10. The Counsel, however, states that an earlier view taken by this Court, at Nagpur, in **Shri Suresh s/o Shrikrishna Pandharipande Vs. Parag s/o Padmakar Pandharipande**, 2016 (2) ALL MR 563, decided on 14.09.2015, was not cited. So also, the law laid down by the Hon'ble Apex Court in the matter of **Rakesh Mohindra Vs. Anita Beri & others**, (2016) 16 SCC 483, was also not cited.

11. Considering the conspectus of the matter and after hearing the learned Advocates for the respective sides, after notice, I felt it appropriate to appoint Advocate Shri S.V.Adwant to assist the Court.

12. The learned Advocate for the petitioner / original plaintiffs

submits that he has no doubt that an application for leading secondary evidence has to be filed. If the pleadings as regards a document which is lost or destroyed, are not found in the plaint or the written statement, as the case may be, the concerned litigant has to file an application before the Trial Court for seeking permission to lead secondary evidence. The Trial Court can direct the said litigant to first lead evidence on the theory of loss of document or the destruction of the document and thereafter, if the Trial Court is convinced that such a document is lost or destroyed and a copy is available subject to the fulfillment of the conditions mentioned in Sections 63 and 65 of the Indian Evidence Act, secondary evidence could be permitted.

13. He has relied upon the view taken by this Court at Nagpur in the matter of Shri Suresh Pandharipande (supra) and the earlier view taken by this Court in the case of Bank of Baroda, Bombay Vs. Shree Moti Industries, Bombay and others [2009(1) Mh.L.J. 282]. It was held in paragraph Nos.3 and 4 in Suresh Pandharipande (supra) as under :-

*“3. Shri Mardikar, the learned counsel appearing for the respondent-original plaintiff has relied upon the decision of this Court in case of **Bank of Baroda, Bombay Vs. Shree Moti Industries, Bombay and others reported in 2009(1) Mh.L.J. 282**, more particularly, paragraphs 25 to 27 therein. The court has held that if anybody wants to lead secondary evidence, two things are required to be proved; (I) there must be evidence of the*

existence of the original documents, and (ii) there must be evidence of their loss. He submits that the trial Court has held that the document is not authenticated and this view is in conformity with the aforestated decision.

4. The proposition laid down in the said decision cannot be disputed. However, in the present case, the court is required to consider the application under Section 65 of the Evidence Act for grant of permission to lead secondary evidence, and the contents of the application can be established only if the party is permitted to enter the witness box, and is subjected to cross-examination. The veracity of the statements made by the party seeking permission to lead secondary evidence has to be tested on the cross-examination by the other side. Otherwise there would be miscarriage of justice. The two things contemplated by the aforestated decision can not be proved unless party concerned is permitted to enter the witness box and/or examine the witnesses who are also subjected to cross examination by adversarials. As and when photostat copy of the document is tendered in evidence, its admissibility in evidence or whether it can be marked as an exhibit can be decided. Similarly, it is after the evidence is led, the Court can consider the question as to whether the evidence so led is admissible in law as secondary evidence. The matter can be tested thereafter in the light of the guidelines laid down by this Court in the judgment cited supra. Till then the application has to be kept pending. The court has committed an error in refusing to grant permission to the party to enter the witness box, and/or examine the witnesses in support of the claim made in such application. The order impugned cannot therefore, be sustained.”

(Emphasis supplied)

14. He has then relied upon the judgment delivered by this Court at the Nagpur Bench in the matter of Smt.Sumati @ Asha w/o late Anil Subhedar and others Vs.Yashodhara w/o late Sunil Subhedar and others [2016(6) ALL MR 507]. It was held in paragraph Nos.10 to 14, as under :-

“10. Having regard to the nature of controversy involved the question that arises in this petition is: Whether the stage of proving the foundational facts necessary for leading of the secondary evidence of the original Will has arrived now ? Before answering the question, it would be appropriate to know what could be the foundational facts from the perspective of this case. They could be ascertained from [Section 65\(c\)](#) of the Indian Evidence Act 1872 which lays down that secondary evidence may be given of the existence, condition or contents of a document 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.

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 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.

13. In the instant case, what has been done by the impugned orders is only grant of permission to adduce secondary evidence. The secondary evidence, which is a copy of Photostat copy of the original Will has not been admitted in evidence so far. For such secondary evidence to be admitted, the party interested in adducing the secondary evidence would have to satisfy the above referred conditions by leading necessary evidence in that regard. So, the party would be required to be given an opportunity to lead necessary evidence in order to satisfy the Court about fulfilling of the necessary conditions so that the Will in question can be admitted in evidence and marked as an exhibit. That stage has not reached so far. As and when it reaches, the petitioners will have all the opportunity to prove the respondent Nos.1 to 3 wrong or satisfy the Court that the Will in question in fact does not exist and that it has never been executed by late Smt. Sushila. Therefore, learned Joint Civil Judge, Senior Division has rightly held that, by allowing the application granting permission to adduce secondary evidence, no prejudice would be caused to the rights of the petitioners. The petitioners would certainly have a right to controvert the respondent Nos.1 to 3 as well as respondent No.4 when they will say, subject to necessary pleadings, that the original Will dated 6.11.1997 is in existence and has been lost for the reasons not known to them. Therefore, failure to record a clear cut finding regarding satisfaction of the Court about existence or otherwise of the Will in question has not caused any prejudice to the rights of

the petitioners and in fact recording of such a finding at this stage would have been premature. After all the parties are required to be given full opportunity for proving their respective contentions and this is what seems to be the import and effect of the impugned orders. Then, giving of permission to adduce secondary evidence by itself would not lead to an inference that secondary evidence has been admitted. As stated earlier, for admitting the secondary evidence the necessary conditions must be fulfilled and the stage of fulfillment of those conditions or otherwise is yet to arrive and will arrive when the parties stand before the Court for adducing necessary evidence.

14. It may be true that in the agreement to sell dated 4th November, 2005 there may be some admissions given by respondent Nos.1 to 4, indicating that late Smt. Sushila died intestate and that these respondents along with late Shri Anil jointly inherited the property involved in dispute together with house structure thereon by intestate succession as per [Hindu Succession Act](#), 1956. It may also be true that the respondent No.4, when he submitted an application dated 14.9.2004 to the assessor Nagpur Municipal Corporation, Nagpur praying for mutating the names of all the legal representatives in the record of the Nagpur Municipal Corporation, Nagpur did not make any mention of the Will dated 6.11.1997 of Smt.Sushila. It is also true that when the written statement dated 29.4.2006 was filed by the respondent Nos.1 to 3, they did not mention anything about the date of Will of Smt. Sushila as being of 6.11.1997. It may also be that their pleadings, might be suggesting as these respondents having knowledge about the Will of late Smt. Sushila and yet no specific pleading was raised then that inspite of their best of efforts, they

could not trace out the Will. It may also be true that in the amendment application dated 29.10.2004, there is no pleading raised in a specific manner that the Will in question has been lost. But, one cannot lose sight of the fact that as against these circumstances, there also exist some other circumstances, as for example, stand of respondent Nos.1 to 4 about existence of Will in question and exchange of notices between the parties on production of the Will in question, which would warrant appreciation of all the facts and circumstances together on merits of the case. That would be possible only when the evidence is actually adduced to prove the existence of conditions so necessary for admitting secondary evidence.”

15. He has also relied upon the judgment delivered by this Court at the Aurangabad Bench in the matter of Suresh Bajirao Patil and others Vs. Shankar Kalu Patil and others, in WP Nos.4442/2016 and 4778/2016 decided on 29/04/2016, in which this Court has concluded in paragraph Nos. 11 and 12 as under :-

“11. Although respective parties have argued as aforesaid, law as has been quoted under [section 65](#) of the Evidence Act may {20} wp4442-16 play a significant role in the matter. It is not the case of the parties that the documents at all are non existing. As a matter of fact, certified copies of the documents in the list appended to Exhibit-595 have been produced, save document at serial No.2 from table in the impugned order. It is indisputable position that original sale deeds are not in possession of defendant No.9 and that the proceedings hitherto clearly give an indication that procedure

contemplated under [sections 65](#) and [66](#) of the Evidence Act for production of the originals from the plaintiff in whose possession the documents were, reasonably expected to have been asked to be produced. The court, upon such a request had directed the plaintiff to file affidavit. The plaintiff had filed an affidavit referring to that original of document at serial No.1 is in his possession, however, originals of documents No.2 to 6 are not in his possession. In the circumstances, it emerged that existence of documents is not disputed and the situation would be covered by [section 65](#) sub section (a) of the [Evidence Act](#), wherein said document appears to be out of reach of defendant No.9 and in possession of persons, who are not subject to the process of the court. The court, while passing the order, appears to have overlooked this aspect in respect of [section 65](#) and has considered only partially that document does not appear to be in possession and power of the plaintiff and thus request of permitting to lead secondary evidence cannot be considered.

12. However, looking at the provisions of [section 65](#) of the Evidence Act itself, the consideration by trial court appears to be half-way. The application Exhibit-611, therefore, will have to be considered keeping in view the provisions of [section 65](#) of the Act and the object underlying the same. The reason which has detained the court from refusing to accede to the request of secondary evidence of documents at serial No.3 to 6 appears to be incongruous with the provisions of law. Application Exhibit-611, therefore deserves a positive consideration and deserves to be allowed.”

16. He then refers to the judgment delivered by this Court at Goa in Hemlatabai Ravikant Darne and others Vs. Prakash Gurudas Timblo and

others, in WP No.1151/2016 decided on 16/03/2017, in which it has been concluded in paragraph No.26 as under :-

“26. The prayer of the petitioner for production of the secondary evidence is relatable to Section 65(c) of the Evidence Act which says that the secondary evidence may be given of the existence, condition, or contents of a document 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 its own default or neglect, produce it in reasonable time. It can thus be seen that under Section 65(c) it has to be shown that the original has been either destroyed or lost or when the party offering evidence of its contents cannot nor any other reason, not arising from its own default or neglect, produce it in reasonable time. Section 63 of the Evidence Act defines secondary evidence, which means and includes, copies made from the original by mechanical process, which in itself ensures the accuracy of the copy, and copies compared with such copies. In the present case, the document Exhibit D-20 is a photocopy which can be said to be a copy made by mechanical processes which in itself ensures accuracy of the copy. The document D-20 has been admitted by the Court witness Ms.Delia Dias to be produced before the Court by Advocate Chodankar, who was representing the Bank. It has also come in the evidence of Ms.Delia Dias that the original of the document at D-20 is not available with the Bank. If that be so, it follows that the original (which was otherwise not in the custody or control of the petitioners) is either lost or is not available. Thus the reasoning articulated by the learned Trial Court that the foundational fact is not established, to my mind, cannot be accepted. It is also not possible to accept that because Exhibit C-82 is produced and

admitted in evidence on record, copy thereof cannot be permitted to be produced as a secondary evidence. This is because the document at D-20 is not the copy of Exhibit C-82. Ms.Delia Dias has admitted in categorical terms and the Trial Court in para 11 of the order dated 02/12/2010 has observed that there is visible discrepancy in the document at D-20 and the one at Exhibit C-82. Thus, this cannot be a case where a copy of the same document is sought to be produced as a secondary evidence of which original is on record. For this reason, I do not find that the impugned order can be sustained.”

17. He has then relied upon the judgment delivered by this Court at the Nagpur Bench in Motiram Ramji Aadhe Vs. Yogita Motiram Aadhe in Criminal Writ Petition No.132/2019, decided on 18/07/2019, wherein it has been held in paragraph Nos.11, 12, 13,14 as under :-

“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 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.

13. In the instant case, what has been done by the impugned orders is only grant of permission to adduce secondary evidence. The secondary evidence, which is a copy of photostat copy of the original Will has not been admitted in evidence so far. For such secondary evidence to be admitted, the party interested in adducing the secondary evidence would have to satisfy the above referred conditions by leading necessary evidence in that regard. So, the party would be required to be given an opportunity to lead necessary evidence in order to satisfy the Court about fulfilling of the necessary conditions so that the Will in question can be admitted in evidence and marked as an exhibit. That stage has not reached so far. As and when it reaches, the petitioners will have all the opportunity to prove the respondent Nos.1 to 3 wrong or satisfy the Court that the Will in question in fact does not exist and that it has never been executed by late Smt. Sushila. Therefore, learned Joint Civil Judge, Senior Division has rightly held that, by allowing the application granting permission to adduce secondary evidence, no prejudice would be caused to the rights of the petitioners. The petitioners would certainly have a right to controvert the respondent Nos.1 to 3 as well as respondent No.4 when they will say, subject to necessary pleadings, that the original Will dated 6.11.1997 is in existence and has been lost for the reasons not known to them. Therefore, failure to record a clear cut finding regarding satisfaction of the Court about existence or otherwise of the Will in question has not caused any prejudice to the rights of the petitioners and in fact recording of such a finding at this stage would have been

premature. After all the parties are required to be given full opportunity for proving their respective contentions and this is what seems to be the import and effect of the impugned orders. Then, giving of permission to adduce secondary evidence by itself would not lead to an inference that secondary evidence has been admitted. As stated earlier, for admitting the secondary evidence the necessary conditions must be fulfilled and the stage of fulfillment of those conditions or otherwise is yet to arrive and will arrive when the parties stand before the Court for adducing necessary evidence."

Shri J.S. Gandhi would further rely on the decision in Suresh s/o Shrikrishna Pandharipande vs. Parag s/o Padmakar Pandharipande, 2016(2) Mh.L.J. 437, to buttress the submission that unless the evidence is adduced, it would be impossible to establish that the conditions which would render the secondary evidence admissible are fulfilled. The submission is that only if the evidence is led, can the Court consider the question as to whether the evidence is admissible in law as secondary evidence. Shri J.S. Gandhi would further rely on the decision of a learned Single Judge in [Parasanbai Dhanraj Jain & others vs. Sunanda Madhukar Jadhav](#), 2017(6) ALL MR 877, and in particular on paragraph 11 thereof which reads thus :

"11. I have recently set out the law on this (Order dated 3rd November, 2017 in Writ Petition No.11151/2017, [Karthik Gangadhar Bhat v. Nirmala Namdeo Wagh and another](#). See also [Anandji Virji Shah and others v. Ritesh Sidhwani & Ors](#), Chamber Summons No.1153 of 2015 in Suit No.395 of 2007, decided on 27th June, 2016;

Ajaykumar Krishnaprasad Seth v. Maya Ramesh Belvetkar & Anr., Chamber Summons No.17 of 2016 in Testamentary Petition No.628 of 2001, decided on 13th October, 2016, MMTCLtd v. Samarth Auto Care Pvt Ltd., Suit No.417 of 1995, order dated 1st October 2014; Lajwanti v. Jayshree P. Madhwani & others, Testamentary Suit No.6 of 2004, order dated 14th December 2016; Sumati and Ors. v. Yashodhara & Ors., 2016(6) ALL MR 507 (per Shukre J.) and I will 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."

13. In [Parasanbai Dhanraj Jain and others vs. Sunanda Madhukar Jadhav](#), the view taken by the learned Single Judge is that no permission is required to lead secondary evidence. The trial Court is obligated to consider the evidence and then decide whether the secondary evidence led is sufficient and the trial Court cannot insist on an application for permission to lead secondary evidence.

14. In the facts of the present case, the learned trial Court has rejected the application Exhibit 98 by observing that the identification, relevancy and accuracy of the recorded conversation is not proved. It would be appropriate if the learned trial Court records a finding on the aforesaid three requirements after the petitioner adduces his evidence. At this stage, it would be premature to jettison the contention of the petitioner-husband that he is entitled to lead secondary evidence. In any event, even if the petitioner-husband is permitted to lead secondary evidence, the admissibility of the secondary evidence would have to be decided by the trial Court on the basis of the evidence adduced."

18. In so far as the issue as to whether the orders passed by this Court in [Karthik Bhatt \(supra\)](#) and [Parasanbai Jain \(supra\)](#), are in the backdrop of the earlier judgments of this Court and the Apex Court, having not been cited, the learned Advocate for the petitioners relies upon the judgment of the Hon'ble Apex Court in the matter of [G.L.Batra](#)

Vs. State of Haryana and others [2013 AIR SCW 6042] and in the matter of Dr.Vijay Laxmi Sadhao Vs. Jagdish [AIR 2001 SC 600] and contends that the moment any Bench of this Court has to take a different view than the one taken in the case of Karthik Bhatt (supra) and Parasanbai Jain (supra), the matter will have to be referred to a larger Bench. He, however, submits that the petitioner is prepared to file an affidavit in support of application Exh.28 and lead evidence to make out a case of loss of the document and then lead secondary evidence if the Trial Court grants such permission.

19. Mr.Adwant, learned Advocate submits that his submissions regarding the primordial question to be decided by this Court, are based on the sources of the Law like Enacted Legislation, Precedents and Opinions of Eminent Jurists. He, therefore, relies upon Sections 61, 63 and 65 of the Evidence Act, which read as under :-

61. Proof of contents of documents - The contents of documents may be proved either by primary or by secondary evidence.

Section 63 in The Indian Evidence Act, 1872

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.

Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.”

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 [India] to be given in evidence;"
- (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.

20. He submits that Section 61 of the said Act lays down the procedure as regards the proof of the contents of the documents. The contents of the documents can be proved by primary or secondary evidence. The words "primary evidence" precede the words "secondary evidence", which would mean that the former enjoys supremacy over the latter. It does not mean that the Act has given any option to a party to prove the contents of the documents, either by leading primary

evidence or by secondary evidence. The words “primary” and “secondary” would connote their comparative values in the eye of Law. Primary evidence is a Rule and secondary evidence would be an exception. Every Rule can be proved by exception. However, an exception cannot partake the character of the Rule.

21. He then relies upon Section 63 of the Indian Evidence Act to submit that it is not restricted to the 5 clauses mentioned in Section 63 as it is an inclusive definition as is held in Lacho Vs. Darima [AIR 1986 Allahabad 303]. Clauses 1 to 3 refer to the copies of the documents, clause 4 refers to the counter parts of the documents and clause 5 refers to accounts of the contents of the documents.

22. He has then relied upon Section 65 of the Indian Evidence Act to contend that while proceeding to lead secondary evidence, a party must first satisfy the Trial Court that it is not in a position to meet the legal requirements to produce primary evidence, despite every endeavour to do so. The Court may, upon been satisfied about the bonafides of the party and the truthfulness in its failure to produce primary evidence, allow the said party to discharge the burden of proof by adducing secondary evidence. It would be improper to place secondary evidence on par with primary evidence. When a Court permits a litigant to lead

secondary evidence, it presupposes that the document sought to be produced by secondary evidence is a genuine document.

23. Considering the effect of Section 63 of the Indian Evidence Act, a litigant must establish that a foundation for leading secondary evidence has been laid. Secondary evidence on a document can only be allowed when the original document is proved to have existed at some point in time and that it was either destroyed or lost and its contents can be proved only by secondary evidence since the said document is admissible in evidence. In the event a document which is lost or destroyed, would not have been admissible in evidence even if the original would have been available, for want of registration or payment of stamp duty, a copy of such original document cannot be permitted to be proved by secondary evidence.

24. According to him, the salient features of secondary evidence are as under :-

- [a] Secondary evidence is not at par with primary evidence.
- [b] Secondary evidence is such evidence which can be offered in the absence of the better evidence which the Law primarily requires.
- [c] Section 61 and 63 of the Indian Evidence Act, when read together, would show that the contents of the document must be proved by production of the document so as to be available for the inspection of the Court.

[d] The truth of the contents of the document cannot be proved even prima facie by merely producing the document for the inspection of the Court.

[e] Section 90 of the Indian Evidence Act does not override the provision contained in Section 61 to 63 and 65.

[f] Secondary evidence, as the word indicates, is an evidence which can be given in the absence of better evidence being not available, only after a proper explanation of its absence has been tendered.

[g] Secondary evidence is admissible only when primary evidence is not available.

[h] If the original document is in existence and is not produced by a party, secondary evidence on the basis of the production of its copy, is not permissible.

[i] Under no circumstances, can secondary evidence be admitted as a substitute for inadmissible primary evidence .

[j] Secondary evidence upon considering Section 66, cannot be permitted unless the party proposing to lead secondary evidence has given a notice for production of document to the other side in whose possession, the admissible original document is available.

25. He has then relied upon the 68th and 69th report of the Law Commission of India to the extent they deal with the scope of secondary evidence. The relevant paragraphs of the report are reproduced as under :-

“16.68th to 69th REPORT OF THE LAW COMMISSION OF INDIA -

II. Scope of Secondary Evidence-Sections 63 and 65

“29.8. Section 63 not self-contained – Before proceeding to deal with

the various clauses of section 63 in detail, it is necessary to discuss one important question pertaining to the scope of “secondary evidence” as a whole.”

“29.15A. Need for amendment – In so far as the decisions of the High Courts noted above could be rationalized, one may state that the approach underlying them is as follows :-

(a) the species of evidence mentioned in section 65 is also secondary evidence, but

(b) a species of evidence not mentioned in section 63 or section 65 is not secondary evidence.

These decisions also reveal one serious defect in the section, namely, that in order to find out what is secondary evidence, one has also to read section 65, clauses (b) and (g).”

“29.20. Reasons for the view – The principal object underlying the approach indicated above is to introduce accuracy as well as neatness in the provisions of the Act and to restore symmetry and consistency between Section 63 and Section 65. For taking the view that clauses (b) and (g) of section 65 essentially deal with secondary evidence, several reasons suggest themselves.”

“29.22A. Views – The argument that merely the factum of admission is proved, misses the point that when the contents of a document are admitted, what is ultimately to be proved is the document, and not the

admission. The admission is only the medium. Moreover, the written document is admissible only within the framework prescribed by section 65, first part, which clearly states that secondary evidence may be given of the existence, condition or contents of a document.

It is next to be recalled that section 65 deals with cases in which secondary evidence relating to documents may be given, and says that secondary evidence may be given of the existence, contents or condition of a document in the following cases, and thereafter proceeds to enumerate seven cases in which secondary evidence may be given.

The language of Section 65 makes it clear, that the section does not deal with kinds or varieties of secondary evidence. If the section dealt with kinds of secondary evidence, it will be meaningless because the kinds of secondary evidence have already been enumerated in section 63.”

17.177th to 185th REPORT OF THE LAW COMMISSION OF INDIA

The suggestions and recommendations of the 69th Report of the Law Commission, submitted in 1977, were not considered and implemented, therefore were sent back to the Law Commission for further review. After exhaustive study, the Law Commission has presented its report on 13.3.2003, recommending that clause (a) of Section 65, should read as follows :

(a) when the original is shown or appears to be in the possession or power -

- (i) 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 and such person does not produce the original ; or
- (ii) of any person legally bound to produce it, and such person, after receiving the notice in section 66, does not produce it; or
- (aa) when the original is shown or appears to be in the possession of any person not legally bound to produce it, and such person, after receiving notice from the Court at the instance of any party to produce the original, does not produce it.”

26. With regard to references to secondary evidence by eminent jurists, Mr.Adwant relies upon WIGMORE ON EVIDENCE (FIRST INDIAN REPRINT, 2008) and submits on the basis of the test for sufficiency of proof of loss, page No.439 of the book. It is observed by the Author that no doubt, destruction signifies that the thing no longer exists, while a loss signifies merely that it cannot be discovered. In the first place, the moment that the destruction becomes questionable (when not proved by eye witnesses of burning or tearing), the enquiry is raised whether the search for it has been sufficient and, in the next place, the proof of a loss usually carries the implication that the thing not found has ceased to exist and thus assimilates the question to one of destruction.

27. At page No.440, the Author notes that 'the question thus evolves itself into an enquiry as to the sufficiency of the search. At the outset of the subject, it should be plainly understood, as great Judges have so often told the Bar, as their successor and the Bar having new generations, has often forgotten, that there is not and cannot be any universal or fixed rule to test the sufficiency of the search for a document alleged to be lost. The enquiry must depend entirely on the circumstances of the case.'

28. At page No.441, the Author notes that this general principle of relativity, that the sufficiency of the search depends upon the circumstances of the case, is sometimes expressed in the form of a standard of diligence. The search, it is said, must appear to have been made with such diligence as was reasonable upon all the facts of the case in hand. The party proving the documents must have used all reasonable means to obtain the original. At page No.442, the Author notes that the determination of the sufficiency of the search and in general of the proof of the fact of loss should be left entirely to the Trial Court's discretion.

29. SARKAR ON EVIDENCE - 13TH EDITION, published by Wadhwa

and Company Nagpur, has also expressed similar views. The Author holds the view that in order to admit secondary evidence, it is important to bear in mind the nature of the document, enquiries made about the original and the evidence about the search and loss. If an instrument is destroyed or lost, the parties seeking to give secondary evidence of its contents, must give some evidence that the original once existed and must then either prove its destruction positively, or at least presumptively, as by showing that it has been thrown out as useless or he must establish its loss by proof that a search has been unsuccessfully made for it, in the place or places where it was most likely to be found and of persons likely to have its possession. The degree of diligence necessary in the search, would depend much on its own peculiar circumstances and the party is generally expected to show that he has, in good faith, exhausted in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which are accessible to him.

30. In THE INDIAN EVIDENCE ACT - A CRITICAL COMMENTARY COVERING EMERGING ISSUES AND INTERNATIONAL DEVELOPMENTS BY DR.V.NAGESWARA RAO, published by Lexis Nexis Butterworths Wadhwa, Nagpur, the Author notes at page No.371 that no secondary evidence exists without the original. The xerox copy or

the photo copy by itself will not become secondary evidence unless it is shown that it is the accurate copy of the original. The original document was itself admissible in evidence. Thus if the document was not attested and executed, duly stamped or registered as required by Law, the original document would have been inadmissible in evidence even if it was produced and, hence, secondary evidence of such a document is impermissible u/s 65.

31. In PHIPSON'S EVIDENCE - 4TH EDITION, the Author notes at page No.495 that secondary evidence is evidence which may be given in absence of that better evidence which the Law requires to be given first, when a proper explanation of its absence is given.

32. Section 104 of the Indian Evidence Act indicates that the burden of proof is on the party seeking to adduce secondary evidence and refers to the illustration to Section 104 which reads as *“A wishes to prove, by secondary evidence, the contents of a lost document. A must prove that the document has been lost.”*

33. The Hon'ble Supreme Court has held that laying of foundation for leading secondary evidence is a Rule and departing from it, is not permissible. In Sital Das Vs. Sant Ram and others [AIR 1954 SC 606],

it was held in paragraph No.16 as under :-

“16.....

Mr. Achhru Ram argues that the document being more than 30 years old, there is a statutory presumption available to it under [section 90](#) of the Indian Evidence Act. But this contention is altogether unavailing. The language of [section 90](#) of the [Indian Evidence Act](#) requires (he production of the particular document in regard to which the court is invited to make the statutory presumption. If the document produced is a copy, admissible as secondary evidence under [section 65](#) of the Evidence Act and is produced from proper custody and is over 30 years old, then only the signatures authenticating the copy may be presumed to be genuine; but production of a copy is not sufficient to raise the presumption of the due execution of the original (Vide -- 'Basant Singh v. Brij Raj Saran Singh', AIR 1935 PC 132 (C). In this case no foundation was laid for reception of secondary evidence under [section 65](#) of the Evidence Act, nor can the copy produced be regarded as secondary evidence within the meaning of [section 63](#). In these circumstances, we must hold that the will alleged to have been executed by Kishore Das in the year 1911 has not been proved and the translation of an alleged copy of it which has been produced in this case should be excluded from consideration.”

34. In the case of The Roman Catholic Mission Vs. The State of Madras and another [AIR 1966 SC 1457] (5 Judges), the Hon'ble Court held that, when no foundation is laid for establishing a right to lead secondary evidence, copies of the original are not admissible in

evidence.

35. The learned Advocate for respondent Nos. 1 to 6 submits that the impugned order passed by the Trial Court on 19/06/2019 is a result of the following aspects :-

[a] Even if it is presumed that the agreement to sell dated 12/06/2014 was available, it was an unstamped and unregistered document, which in itself is not admissible in evidence, therefore permission to prove it by secondary evidence, cannot be granted.

[b] The said application Exhibit 28, seeking permission to lead secondary evidence, was not supported by any affidavit.

[c] By order dated 05/01/2019 below Exh.1, the petitioner was directed to file the original agreement to sell so as to be sent for impounding. Despite the direction, he failed to comply on the pretext that the document was lost.

36. The learned Advocate for the petitioners submits that he would file an affidavit in support of Exh.28 and he would follow the Law of leading evidence to prove that the said document dated 12/06/2014 has been factually lost. All contentions of the litigating sides can be kept open to be considered by the Trial Court.

37. Order VII Rule 14 (1), (2) and (3) read as under :-

“14. Production of document on which plaintiff sues or

relies :- (1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, where possible, state in whose possession or power it is.

[(3) A document which sought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.]”

38. It is, therefore, obvious that the pleadings of a litigant must set out the foundation as regards a document in his possession. If not, he must state in whose possession can the document be found. Such a document has to be produced alongwith the pleadings. Order VIII Rule 1(a) pertains to the duty of a defendant to produce a document.

39. Under Order XI Rule 14, it would be lawful for the Court at any time during the pendency of any suit, to order the production of such document, which is in possession of the said party. Order XI Rule 16 provides for issuance of notice for the production of a document. Order XII Rule 4 permits a party to issue a notice calling upon another party,

not later than 9 days before the day fixed for the hearing, to admit any specific fact or facts. Order XII Rule 8 relates to the form in which a notice for production of documents is to be issued.

40. Under Order XIII, the production, impounding and return of the documents is prescribed. Order XVI deals with summoning an attendance of a witness and even production of documents by such witness whose attendance in the Court is required for leading evidence. It is, therefore, apparent that, when a litigant is legally expected to lead primary evidence, he has to produce the original document before the Court. Without producing the original document which is otherwise admissible in evidence, there cannot be primary evidence before the Court. The moment a litigant notices that the primary evidence is not available and the original document is either destroyed or lost, the only legally permissible manner of informing the Court is to file an application stating that the original document is destroyed or lost. An application is a means of communication so as to convey to the Court the stand taken about the loss of primary evidence and then put forth a formal request for permission to lead secondary evidence.

41. Section 65 of the Indian Evidence Act reads 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 [India] to be given in evidence;"

(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 document.”

42. Clause A would indicate that secondary evidence can be led if a litigant declines to produce an original document though it is proved to be in his exclusive possession and the Court has directed him to produce. Clause B permit secondary evidence 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. Clause C is a situation when secondary evidence can be permitted if 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. The rest of the clauses are not relevant for the case in hand.

43. Mr.Adwant has cited paragraph No.88 under Chapter VI – PRE-TRIAL STAGES, set out in the Civil Manual issued by the High Court of Judicature, Appellate Side Bombay, which reads as under :-

“88. Under clause (c) of Section 30 of the Code, a Court may order any fact to be proved by affidavit. This is a power which may well be used to secure formal proof of facts. It is desirable to make full

use of the provisions of Order XIX for the proof of simple or in controvertible facts.

Whenever a fact is allowed to be proved by an affidavit, an order should invariably be passed by the Court. [Emphasis supplied].

44. It is, therefore, apparent that the Court has the power to order any fact to be proved by affidavit and such a power can well be used to secure the formal proof of facts. Whenever a fact is allowed to be proved by an affidavit, an order should invariably be passed by the Court. Under Chapter VII of the Civil Manual – INCIDENTAL PROCEEDINGS, paragraph No.93 reads as under :-

“93. (a) It is for the Court to decide whether it will allow an oral application or insist on a written application. The general rule hereto followed is that applications materially affecting the conduct of a suit or the legal position or rights of either party, should be received only in writing. In matters of mere routine or indulgence and matters wholly within the discretion of the Judge, motions may be made orally.

(b) Along with every written application for an interlocutory order, the applicant shall file as many copies thereof as there are opponents. Similarly, along with the written statement to the application, the opponent shall file a copy thereof for the use of the applicant or applicants, as the case may be, and the opponent or the opponents or the applicants, as the case may be, shall receive such copy or copies from the Court.”

45. It is, therefore, left to the Court to decide whether it will allow an oral application or insist on a written application. The general rule followed is that applications materially affecting the conduct of a suit or the legal position or rights of either party, should be received only in writing. Clause 94 of the Civil Manual obliges a Judicial Officer to pass an order on every application indicating as to how the said application has been disposed off.

46. Clause 230 under Chapter IX – DESPATCH OF COURT BUSINESS, prescribes that all preliminary matters should, as far as possible, be disposed off before the date fixed for the trial. Such preliminary matters include, the proof of facts by affidavit, the issue and return of commissions for making plans, or for examining witnesses etc., and all matters connected with the discovery and inspection of documents. Clause 231 prescribes the fixing of an early date called as the “settling date” for giving list of witnesses and paying the necessary process fee and expenses. It is thus expected of the parties to complete the stages of production of documents and for examining witnesses.

47. In the matter of State of Rajasthan and others Vs. Khemraj and others [(2000) 9 SCC 241], the Hon'ble Apex Court (3 Judges Bench), held in paragraph Nos. 2 and 3 as under :-

“2. Though this case has a chequered history, but at this stage we are only concerned with an order made by the trial court on 21st January, 1997 on an application filed by the appellants under [Section 65](#) of the Evidence Act to produce secondary evidence in respect of a map, the attested copy of which had been filed with that application. The learned trial court recorded that the application seeking permission to lead secondary evidence under [Section 65](#) of the Evidence Act was not supported by any affidavit and also that the averments contained in the application were vague. It was on account of these deficiencies that the learned trial court rejected the application filed under [Section 65](#) of the Evidence Act. The High Court, in revision, did not interfere with the order of the trial court on 1.2.1999. Hence, the appeal by special leave.

3. In the face of the pleadings of the appellants and the defects noticed by the trial court, no fault can be found with the orders of the trial court or of the High Court. However, it appears appropriate to us, in the interest of justice, to permit the appellant to file a fresh application in the trial court for seeking permission under [Section 65](#) of the Evidence Act to lead secondary evidence supported by a proper affidavit and giving full details necessary to attract the provisions of [Section 65](#) of the Evidence Act.”

48. In the matter of J.Yashoda Vs.K. Shobha Rani [(2007) 5 SCC 730], the Hon'ble Apex Court held in paragraph Nos. 7, 8 and 9 as under :-

“7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to

be valid, the same party is not entitled to introduce secondary evidence of its contents.

8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in [Section 63](#) is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence.

9. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. [Section 65](#) deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under [Section 64](#), documents are to be provided by primary evidence. [Section 65](#), however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section. In Ashok Dulichand v. Madahavlal Dube and Another [1975(4) SCC 664], it was inter alia held as follows:

"After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for

no interference. According to clause (a) of [Section 65](#) of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in 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 of any person legally bound to produce it, and when, after the notice mentioned in [Section 66](#) such person does not produce it. Clauses (b) to (g) of [Section 65](#) specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of [Section 65](#), the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed Photostat copy. Prayer was also made by the appellant that in case respondent no. 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the Photostat copy had been filed by the appellant was in the possession of Respondent No. 1. There was also no other material on the record to indicate the original document was in the possession of respondent no.1. The appellant further failed to explain as to what were the circumstances under which the Photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit

denied being in possession appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the Photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court."

49. In H.Siddiqui (Dead) by LR's Vs. A.Ramlingam [(2011) 4 SCC 240], the Hon'ble Apex Court concluded in paragraph No.12 as under :-

"12. Provisions of [Section 65](#) of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide: [The Roman Catholilc Mission & Anr. v. The State of Madras & Anr.](#), AIR 1966 SC 1457; [State of Rajasthan & Ors. v.](#)

[*Khemraj & Ors.*, AIR 2000 SC 1759; *Life Insurance Corporation of India & Anr. v. Ram Pal Singh Bisen*, \(2010\) 4 SCC 491; and *M. Chandra v. M. Thangamuthu & Anr.*, \(2010\) 9 SCC 712\).](#)”

50. In [*Kaliya Vs. The State of Madhya Pradesh \[\(2013\) 10 SCC 758\]*](#), the Hon'ble Apex Court dealt with a similar issue and concluded in paragraph Nos. 13 and 14 as under :-

*“13. Section 65(c) of the Act 1872 provides that secondary evidence can be adduced relating to a document 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. The court is obliged to examine the probative value of documents produced in court or their contents and decide the question of admissibility of a document in secondary evidence. (Vide: *H. Siddiqui (dead) by Lrs. v. A. Ramalingam*, AIR 2011 SC 1492; and *Rasiklal Manikchand Dhariwal & Anr. v. M.S.S. Food Products*, (2012) 2 SCC 196). However, the secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the court that it was not in his possession or control of it and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the party gives in evidence a certified copy/secondary evidence without proving the circumstances entitling him to give secondary evidence, the opposite party must raise an*

objection at the time of admission. In case, an objection is not raised at that point of time, it is precluded from being raised at a belated stage. Further, mere admission of a document in evidence does not amount to its proof. Nor, mere marking of exhibit on a document does not dispense with its proof, which is otherwise required to be done in accordance with law. (Vide: *The Roman Catholic Mission v. The State of Madras*, AIR 1966 SC 1457; *Marwari Khumhar & Ors. v. Bhagwanpuri Guru Ganeshpuri & Anr.*, AIR 2000 SC 2629; *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P. Temple & Anr.*, AIR 2003 SC 4548; *Smt. Dayamathi Bai v. K.M. Shaffi*, AIR 2004 SC 4082; and *Life Insurance Corporation of India & Anr. v. Rampal Singh Bisen*, (2010) 4 SCC 491).

14. In *M. Chandra v. M. Thangamuthu & Anr.*, (2010) 9 SCC 712, this Court considered this aspect in detail and held as under:

“47. We do not agree with the reasoning of the High Court. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised 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 through no fault of that party.” A similar view has been re-iterated in *J. Yashoda v. K. Shobha Rani*, AIR 2007 SC 1721.”

51. In Rakesh Mohindra Vs. Anita Beri and others [(2016) 16 SCC 483], the Hon'ble Apex Court noted that as the defendant desired to lead secondary evidence, it filed an application in the Trial Court u/s 65 of the Evidence Act seeking permission to prove the letter of disclaimer executed by Justice Tekchand by way of secondary evidence. The Trial Court had allowed such an application by issuing a specific order. The Hon'ble Apex Court concluded that as a general rule, documents are proved by leading primary evidence. Section 64 of the Evidence Act provides that documents must be proved by primary evidence except in cases mentioned in Section 65 of the Evidence Act. In conclusion, the Hon'ble Apex Court held in paragraph No.15, 20 and 24 as under :-

“15. The pre-conditions for leading secondary evidence are that such original documents could not be produced by the party relied 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 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.

24. However, we make it clear that mere admission of secondary evidence, does not amount to its proof. The genuineness, correctness and existence of the document shall have to be established during the trial and the trial court shall record the reasons before relying on those secondary evidences.”

52. In the above backdrop, I find that none of the judgments referred to above and the provisions of the Civil Manual were cited before the learned Single Judge of this Court in the matter of Karthik (supra) and Parasanbai (supra), wherein this Court has concluded that an application for permission to lead secondary evidence is neither necessary nor desirable. When a party goes to trial, he may have direct or primary evidence and secondary evidence. It is for him to decide which of these can be best proven and a party may always place before the Trial Court secondary evidence as contemplated by Evidence Act without the leave of the Court and there is no reason to demand an application for permission to lead secondary evidence.

53. I find that another learned Single Judge of this Court has held in

the matter of Prakash Gurudas Timblo and others Vs. Hemlatabai Ravikant Darne and others [2016(5) Mh.L.J. 320], that it is necessary for the Trial Court to form an opinion and be satisfied about the existence of the conditions u/s 65 before leave is granted to produce a document as a secondary evidence. The application filed for seeking such a permission, has to be properly dealt with. It was concluded in paragraph no.14 as under :-

“14. It is true that normally this Court would be slow in interfering with orders at an interlocutory stage. However, in the present case, as noticed earlier, the order is totally unreasoned. It would further appear that the question is not only about the admissibility and reliability of the documents but as to whether they can be allowed to be produced by way of secondary evidence. The learned Senior Counsel on behalf of the petitioners submitted and to my mind rightly so, that the leave granted to produce the document as a secondary evidence, presupposes that there is an original of this document in existence. 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 Evidence Act under which such production can be allowed.”

54. In Satish Ramdas pant Bhamburkar Vs. Pramod Ramdas pant Bhamburkar [2017(6) Mh.L.J.711], this Court recognized the filing of an application for producing secondary evidence. Similarly, the learned Single Judge of this Court at Goa, recognized a similar right in Dekon

Enterprises Vs. Joema Monteiro and others [2018(3) Mh.L.J. 392]. In Sandeep Komalsingh Rajput Vs. State of Maharashtra [2019(1) Mh.L.J. 300], this Court concluded in paragraph Nos. 5 and 6 that an application for production of secondary evidence has to be supported by an affidavit.

55. In the matter of Bank of India Vs. M/s Allibhoy Mohammed and others [AIR 2008 Bombay 81], this Court in paragraph Nos. 24 to 29 as under :-

“24. At this juncture, Sections 61, 62 and 63 of the Evidence Act need to be looked into. Section 61 lays down that contents of the documents may be proved either by primary or by secondary evidence. This Section is based upon the principal that "best evidence" in the possession or power of the party must be produced. What the best evidence is, it depends upon facts and circumstances of each case. Generally speaking, the original document is the best evidence. The contents of every written paper are, according to the ordinary and well established rules of evidence, required to be proved by the original document, and by that alone, if the document is in existence. It is, therefore, necessary that when a document is produced as primary or secondary evidence, it will have to be proved in the manner laid down in Sections 67 to 73 of the Evidence Act.

25. Where the execution of the document like promissory note was denied, it is required to be proved through the scribe, where the truth of the facts stated in the affidavit is in issue mere proof of

handwriting and execution of the document would not furnish evidence of the truth of the facts stated in the document or contents. Truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence, i.e. by the evidence of person who can vouchsafe for the truth of the facts in issue as held by the Apex Court in Ramji Dayawala and Sons Pvt. Ltd v. Invest Import, A.I.R. 1981, S.C. 2085. Person with knowledge must be examined. Every document should first be started by some proof before the person who disputed that document can in any way be considered as proved because it's genuineness is not disputed by the opposite party. Documents do not prove themselves.

26. In the case on hand, person who can vouch for truth of the facts in issue has not been examined. Hence, documents cannot be said to have been proved in accordance with the provisions of Evidence Act.

27. Let me now deal with the photo copies of some of the documents filed on record. Section 63 of the Evidence Act provides- for leading secondary evidence. Secondary evidence cannot be accepted without sufficient reason being given for non production of the original. The loss of original document must be shown in order to lead secondary evidence. Secondary evidence of the document can be allowed to be lead only where original is proved to have existed but was lost or misplaced (see AIR 1973 Bom 66. Filmistan Private Ltd. Co. v. The Municipal Corporation for Greater Bombay). The document unless shown to have been compared with original one, mere copy of the document does not become secondary evidence. The person giving oral evidence who accounts for the contents must have himself seen the original document and not a mere copy. "Seen" here will obviously mean "read". A person who proposes to testify the contents of a document, either by copy or otherwise, must have read

it. The contents of private documents may be proved as secondary evidence by any witness who has in fact read them. The secondary evidence is required

to be proved in the same manner in which primary evidence.

28. Section 65 of the Evidence Act provides that in each type of cases secondary evidence relating to the document may be given. This Section enumerates the seven exceptional cases in which secondary evidence is admissible. Secondary evidence is of the contents which cannot be admitted without the production of document in such a manner within one or the other of the cases as provided for in the Section.

29. The prior permission of the Court required to be taken for producing secondary evidence of the documents on the grounds that original documents were lost. To sum up, when anybody wants to lead secondary evidence, two things are required to be proved; there must be evidence of the existence of the original documents and there must be evidence of their loss. No permission to lead secondary evidence was obtained by the plaintiff-bank. ”

56. In Ganpat Pandurang Ghongade and others Vs. Nivrutti Pandurang Ghongade [2008(5) Mh.L.J. 153], this Court held in paragraph No.13 as under :-

“13. Exh. 38 as also Exh. 47 are secondary evidence. There is no evidence on record to show that original was not available. On the contrary, the trial Court has already recorded a finding that it is in possession of respondent. The lower appellate Court has not considered this aspect at all. On the strength of oral evidence of brother Kisan, the lower Appellate Court has found the contents of

Exh. 47 to be more correct and therefore for this reason only it has refused to act upon Exh. 38. However, it has overlooked provisions of Sections 65 and 66 of Indian Evidence Act. Until and unless there was a leave sought to tender secondary evidence 'and leave was granted, no Secondary evidence could have been looked into. Exh. 47 being secondary evidence, could not have been looked into at all by lower Appellate Court. The logic behind the arrangement as found by learned lower Appellate Court in Exh. 47 is already considered by me above. The arrangement allegedly made in favour of present respondent does not appear to be consistent with the earlier part of the document. However, it cannot be forgotten that Exh. 47 is only a xerox copy. Whether the alleged portion is an alteration or not also cannot be conclusively decided as original document has not come on record. It is a well known fact that in the process of preparing xerox copy, there can be several manipulations and hence it is unsafe to act upon said xerox copy."
[Emphasis supplied]

57. A similar view has been taken by the Andhra Pradesh High Court in K.Krishna Appala Naidu Vs. B.Sohanlal and others [AIR 2004 AP 439], by the Madhya Pradesh High Court in the matter of Ravi Kumar Bajpai Vs.Shakuntala Devi and others [2017(1) MPLJ 692], by the Madras High Court in the matter of The Food Corporation of India Vs. M/s K.Duraipandian and Sons [1997-2-L.W.128] and by the same High Court in the matter of M/s Bajaj Auto Limited Vs. M/s TVS Motor Co.Ltd., [2016-4-L.W.865].

58. It, therefore appears to me that the Law laid down by the Hon'ble Apex Court in *Sital Das, Roman Catholic Mission, State of Rajasthan, J.Yashoda, H.Siddiqui, Kaliya and Rakesh Mohindra*, (supra) and the Law laid down by this Court in *Prakash , Suresh, Smt.Sumati @ Asha, Satish, Bank of India and Ganpat* (supra) were not cited before this Court when the cases of *Karthik Bhat* (supra) was decided on 03/11/2017 and *Parasanbai* (supra) was decided on 10/11/2017. Considering the view of the Hon'ble Supreme Court, the judgments delivered earlier by this Court, the Civil Manual, the views of jurists and the risk involved in permitting secondary evidence in the face of *photostat* copies and absence of foundational pleadings, it would be necessary to mandate filing of a application supported with an affidavit, for permitting recording of secondary evidence.

59. Mr.Adwant, with regard to conflicting decisions, submits that, inspite of judicial exhortations to the contrary, Co-ordinate Courts have differed at times with each other for various reasons and therefore the Court will have to choose one of the options for resolving the issues of conflicting decisions, i.e. (a) follow the Larger Bench, (b) follow the earlier Bench, (c) follow a later decision and (d) follow a decision, which is closest to the facts of the case. He, therefore, submits that the

view taken in Karthik (supra) and Parasanbai (supra) can be declared '*per incuriam*'.

60. As Winder - J, considering instances in United Kingdom where Co-ordinate Benches of the Court of Criminal Appeal and Divisional Court have given decisions inconsistent with each other, observes :-
“when precedents of a kind which are normally binding on the Court are in conflict with one another, the obligation on the Court, if any, is uncertain, although the problem is not a new one.”

61. *Locus classicus* on the subject is Young Vs. Bristol Aeroplane Co.Limited [1944(2) The All England Law Reports 293], in which case, while reiterating the general rule that the court of Appeal was bound by its own earlier decisions, Lord Greene M.R. propounded 3 exceptions to the Rule, which are as under :-

[a] The Court is entitled and bound to decide which of the two conflicting decisions of its own, it will follow.

[b] The Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords.

[c] The Court is not bound to follow a decision of its own if it is satisfied that the decision was given *per-incuriam*.

62. In Hampton Vs. Holman [1877 5 Ch.D. Law Reports 193] Jessel M.R. has stated that, *“Now I take it that both the cases to which I have referred are not to be reconciled with Hayes Vs. Hayes (1828) 38 F.R.822, at all events. They defer from it so far as to leave me at liberty now to say that Hayes Vs. Hayes is not a sound Law.”*

63. Discussing the *raison d'etre* of the exceptions, Salmond observes that, *“whenever a relevant prior decision is not cited before the Court, or mentioned in the judgment, it might be assumed that the Court acts in ignorance or forgetfulness of it. If the new decision is in conflict with the old, it is given per incuriam and is not binding on the later Court.”* However, he proceeds to state, *“Although the later Court is not bound by the decision so given per incuriam, this does not mean that it is bound by the first case. Perhaps, in strict logic, the first case should be binding since it should never have been departed from, and was only departed from per incuriam. However, this is not the rule. The rule is that where there are previous inconsistent decisions of its own, the Court is free to follow either.”*

64. On the issue whether freedom to choose the better of the two conflicting decisions is concerned, such freedom would apply only when

the later decision was rendered in ignorance of the earlier one or even in complete cognizance of it. In Young's case (supra), Lord Greene M.R. said that the freedom of choice would apply “*where the Court has acted in ignorance of a previous decision of its own or of a Court of Co-ordinate jurisdiction, which covers the case before it.*”

65. In my view, there can be no debate that ignoring a binding precedent is certainly not a virtue, provided the Law is cited. However, intentionally departing from a view taken earlier would certainly be unacceptable keeping in view the majesty of Law and the doctrine of precedents and *stare decisis*. I must quickly add that neither of the parties before the learned Single Judge, in Parasanbai (supra) and Karthik (supra), had cited earlier judgments. My learned Brother was apparently not properly assisted.

66. It also cannot be ignored that it is humanly impossible in today's world for a Judge to have read all the judgments published in hundreds of journals. Docket explosion, which has occurred in the last two decades has made the task of Judges even more challenging keeping in view the huge number of cases and hundreds of journals publishing judgments of different Courts. At times, it may happen that the Advocates appearing for the parties may not be aware of an earlier

view taken by a Co-ordinate Bench or a Bench of a larger strength. In this backdrop, a Court may take a view, oblivious of the earlier view taken and believing that the view taken by it is the correct position of Law.

67. The learned Advocates for the petitioner/original plaintiffs and on behalf of respondent Nos. 1 to 6, original defendants submit that this petition can be disposed off as the petitioners are willing to file an affidavit in support of application Exh.28. All contentions of the defendants with regard to the theory of loss of the document propounded by the plaintiffs, be kept open so as to disprove the said contention.

68. In view of the above, this petition is partly allowed by setting aside the impugned order dated 19/06/2019. Exh.28 is restored in Spl.Civil Suit No.331/2014. An affidavit in support of the said application shall be filed on or before 18/10/2019 before the Trial Court. It is, however, made clear that if the document which is sought to be proved by leading secondary evidence appears to be not in conformity with the Law of Evidence and if the original document which is lost, is otherwise not admissible in evidence even if the original would have been available, the Trial Court would be at liberty to refuse

permission to the original plaintiffs for leading secondary evidence. Rule is made partly absolute accordingly.

69. I record my appreciation for the admirable assistance rendered by the learned Advocate Mr.Adwant, in this matter.

70. Considering the above, though the writ petition is partly allowed for the reasons assigned, I deem it appropriate to refer the following issue to the Hon'ble The Chief Justice of the Bombay High Court for considering a reference to a Larger Bench :-

[A] Whether any litigant can be permitted to lead secondary evidence as a matter of right without the leave of the Court and is not required to make an application to seek such permission from the Trial Court before leading secondary evidence ?

71. The learned Registrar (Judicial) shall, therefore, place this matter, under Chapter I Rule 8 of the Bombay High Court, Appellate Side Rules, 1960 before the Hon'ble The Chief Justice of the Bombay High Court.

(Ravindra V.Ghuge, J.)