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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2990 OF 2014

Ebrahim Mohd. Hussein Khatri & Ors ... Petitioners

V/s.

Zulekha Oosman Gani Khatri & Ors ... Respondents

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Mr. A. S. Khandeparkar, Sr. Advocate a/w Mr. Farhan Shaikh a/w Mr. Rohit P Mahadik a/w Mr. Rushikesh Bhagat a/w Ms Apprva Khaneparkar a/w Mr. Vaibhav Kulkarni, for Petitioners.

Mr. Shubham J. a/w Mr. G. R. Agarwal, for Respondent Nos.1 to 3.

CORAM : AMIT BORKAR, J.

DATED : NOVEMBER 29, 2023

P.C.:

1. The petitioners are original defendants in a suit for partition, separate possession and declaration that the conveyance deed dated 19 October 2001 is not binding on plaintiff's share. In the said suit, the plaintiff filed an application on 27 January 2014 seeking permission to lead secondary evidence to prove the agreement to sell dated 7 November 1988.
2. The Trial Court by the impugned order dated 4 February 2014 granted such permission to lead secondary evidence.
3. This Court in the case of **Parasanbai Dhanraj Jain & Ors Vs.**

Sunanda Madhukar Jadhav reported in 2017(6) ALL MR 877, it is held that permission to lead secondary evidence is not necessary. Either secondary evidence can be lead or is not lead, the question which the Court is required to decide as to whether the ingredients of Section 65 of the Indian Evidence Act, 1872 have been complied with or not. This Court, therefore, directed the Trial Court that the Court shall not refuse permission to lead secondary evidence.

4. In view of the observations made in the said judgment, it is not necessary to adjudicate upon the validity of the order granting permission to lead secondary evidence. It shall be open for the plaintiff to lead evidence in accordance with Section 65 of the Indian Evidence Act, 1872. However, it will be open for the petitioner to raise objection is whether the document of agreement to sell complied with under Section 65 of the Indian Evidence Act or not and if such objection is raised, the Trial Court shall decide as to whether the agreement to sell in question is proved as per law or not.

5. With this clarification, the writ petition stands disposed of on above terms. No costs.

(AMIT BORKAR, J.)