



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	16.10.2025
Pronounced on	31.10.2025

CORAM

THE HONOURABLE DR.JUSTICE R.N.MANJULA

A Nos. 2732, 4976, 4977 & 4978 of 2025 in

C.S.No.166 of 2004

1. Kusum Ashok
W/o.Mr.Ashok Old No.39 New No.9
Jeremiah Road Vepery Ch 7

Applicant / Plaintiff in all
Applications

Vs.

1. Mrs.N.Madan Bai
No.156, Trunk Road, Poonamallee,
Trivellore District 600 056.

2.Mr.N.Ajit Kumar
S/o.Nemichand Jain No.156 Trunk Road
PoonamalleeTrivellore District 56

3.Mr.N.Jaya Kumar
S/o.Nemichand Jain No.156 Trunk Road
PoonamalleeTrivellore District 56

4.Mrs.P.Padmavathi
W/o.Prakash Chand Solanki No.41
Kondapuram Street Trivellore 602 001



5.Mrs.V.Chandra
W/o.M.Veerandar Kumar No.605-a
Wing Adinath Apartments
TardeoGrantes West Mumbai 400 001

6.Mrs.P.Nirmala
W/o.Prakash Chand Lalwani No.13
Clements Road Doveton (near Sms
Hospital) Purasawalkam Chennai 600
007

7.Mrs.P.Lalitha
W/o.Padam Sen Surana Paras Agency
No.90 Nageshwaran South Street
Kumbakonam 612 001

8.Mrs.G.Saraswathi
W/o.Gouthamchandji Surana No.439
M.T.H. Road Ambattur Chennai 53

9.Mrs.V.Kalavathi
W/o.Vijayakumarji Mehta Mahaveer
Jewellers Lawrence Road Cuddalore

10.Mrs.P.Vaijauanthimala
W/o.R.Praveen Kumar Kochar No.86
Mint Street First Floor Sowcarpet
Chennai 600 079

11.Mrs.R.Sharmila
W/o.RateeshKumarji Bhatia Chellani
Complex Veerappan Street Sowcarpet
Chennai 79

Respondents /



Defendants in all Applications

PRAYER in A.No.2732 of 2025 : To permit the Applicant to mark certain documents as secondary evidence as per the schedule herein on record of this Hon'ble Court.

PRAYER in A.No.4976 of 2025 : To permit the applicant to reopen the Plaintiff side evidence on record of this Hon'ble Court.

PRAYER in A.No.4977 of 2025 : To permit the applicant to recall PW1 the Plaintiff as a witness on the side of the Plaintiff on record of this Hon'ble Court.

PRAYER in A.No.4978 of 2025 : To permit the applicant to file and mark certain documents as secondary evidence as per the schedule herein on record of this Hon'ble Court.

In all Applications :

For Applicant: Mr.Aashish jain Lunia

For Respondents: Mr.M.Devendran, for R1, R3 to R11

Mr.A.Palaniappan for R2

COMMON ORDER

A No. 4976 of 2025 and A No. 4977 of 2025



These Applications have been filed to reopen the plaintiff side evidence and to recall PW1 for the purpose of letting additional evidence by marking documents.

A No. 2732 of 2025 and A No. 4978 of 2025

These Applications have been filed to permit the Applicant / plaintiff to mark the copies of the documents listed in the judges summons of these applications as secondary evidence.

1. The documents listed in A.No 2732 of 2025

A. General Power of Attorney dated 04.03.2002 executed by Madan Bai and Others to and in favour of N.Ajit Kumar, son of Nemichand Jain registered as document No.143 of 2002.

B. General Power of Attorney dated 04.03.2002 executed by Madan Bai and Others to and in favour of N.Ajit Kumar, Son of Nemichand Jain and another registered as document No.144 of 2002.

C. Power of Attorney dated 04.04.2002 executed by V.N.Devadoss and N.Ajit Kumar in favour of T.Kumaraswamy.



D. General Power of Attorney dated 04.04.2002 executed by Shanthilal Jain to and in favour of V.N.Devadoss.

E. Power of Attorney dated 04.04.2002 executed by Shanthilal Jain to and in favour of V.N.Devadoss and D.Padma.

2. The documents listed in A.No. 4978 of 2025

A. Receipt executed by Mr.M.Shantilal Jain and Mr.N.Ajit Kumar upon receiving Pay Orders No.026426 and 026425 dated 04.04.2002 drawn on Andhra Bank, Shenoy Nagar, Chennai 600 030.

B. Receipt executed by Mr.M.Shanthilal Jain and Mr.N.Ajit Kumar upon receiving Cheque bearing No.752874 and 752875 dated 01.11.2002 drawn on Andhra Bank, Shenoy Nagar, Chennai – 600 030.

3. It is submitted by the learned counsel for the applicant / plaintiff that an earlier application filed in A.No.4055 of 2024 seeking permission to summon the executants of documents for producing the originals of the same documents now listed in the above A.No.4978 of 2025 and the said A.No.4055 of 2024 has been dismissed on 22.11.2024. The appeal filed challenging the said order in O.S.A.No.221 of 2025 has also been dismissed on 03.07.2025. Hence, the



photocopies of the above documents should be permitted on the side of the plaintiff as secondary evidence on his side.

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4. The prayer now sought by the applicant / plaintiff is vehemently objected by the respondents / defendants by stating that these applications have been filed just to pass off the laches in the evidence of the applicant / plaintiff. The applicant has also filed an another application in A.No.6972 of 2018 to issue subpoena for the Sub Registrar, Egmore calling upon him to produce all the documents required for the case. The Sub-Registrar appeared and reported that he is not in possession of those documents. Subsequently, the Sub-Registrar, Periyamedu was summoned and from the office of Sub-Registrar, Periyamedu, two power of attorney documents were produced before this Court. For the reasons best known to the applicant, those documents were not marked as his evidence.

5. In respect of two documents listed in the Judges summons attached to the application in A.No.4978 of 2025, an application in A.No.4055 of 2024 has already been filed to issue subpoena to V.N.Devadoss, S/o.Late P.V.Narasimhan and the said application was dismissed and the appeal filed by the applicant challenging the same also got dismissed *vide* the common order of the Division



Bench made in OSA.Nos.221 & 223 of 2025 dated 03.07.2025. Now, the copies of the very same documents were sought to be adduced as secondary evidence.

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6. It is submitted that the plaintiff has produced the photocopies of those documents as plaint documents, even at the time when the plaint was presented. Infact these three documents have already been mentioned by the plaintiff in his proof affidavit filed in the year 2014 and by showing them against S.Nos.9, 13 and 14. The Hon'ble Division Bench has also made the above observations in its order dated 03.07.2025 in paragraph No.12 about its availability on record:

“12.We agree with the observations as well as the conclusion in the impugned order. The suit has been filed by the appellant seeking a partition and is of the year 2004. The proof affidavit has been filed in 2014 and at Serial Nos.9,13 and 14 thereof reference is made to the documents, which the appellant now seeks to have marked through V.N.Devadoss, S/o.LateP.V.Narasimhan residing in Chennai. According to the appellant, only a copy of those documents is available with her.”



7. The applicant was not permitted to summon V.N.Devadoss, who allegedly have the custody of the original documents. As per Sec. 65 of the Evidence Act (Sec.60 of BSA) secondary evidence can be given during the circumstances enlisted therein. For a better understanding the provision of Section 65 of the Evidence Act is given below:

“Section 65 of the Evidence Act

65. Cases in which secondary evidence relating to document 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 consist 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 documents 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.”



8. In the judgment of the Supreme Court in the case of ***Jagmail Singh and another Vs Karamjit Singh and Others, reported in (2020) 5 SCC 178***, it is held

that it is trite rule that under the evidence act, facts have to be established by primary evidence and the secondary evidence is only an exception and the foundational facts for laying the secondary evidence should also be established and only then the secondary evidence can be permitted. It is worthwhile to extract the relevant paragraphs of the above judgment as below:

“ 11. A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, 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 notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original Evidence has not been furnished.

12. The issue arising out of somewhat similar facts and circumstances has been considered by this Court in Ashok



Dulichand Vs. Madahavlal Dube and Anr. , and it was held as under :-

“7. ... 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.”

13. In the matter of Rakesh Mohindra vs. Anita Beri and Ors. this Court has 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 cannot accepted.”



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14. *It is trite that under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. In the case of H. Siddiqui (dead) by LRs Vs. A. Ramalingam , this Court reiterated that where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for the court to allow a party to adduce secondary evidence.*

15. *In the case at hand, it is imperative to appreciate the evidence of the witnesses as it is only after scrutinizing the same opinion can be found as to the existence, loss or destruction of the original Will. While both the revenue officials failed to produce the original Will, upon perusal of the cross-examination it is clear that neither of the officials has unequivocally denied the existence of the Will. PW- 3 Rakesh Kumar stated during his cross-examination that there was another patwari in that area and he was unaware if such Will was presented before the other patwari. He went on to state that this matter was 25 years old and he was no longer posted in that area and, therefore, could not trace the Will. Moreover, PW- 4 went on to admit that, “there was registered Will which was entered. There was a Katchi (unregistered) Will of Babu Singh was handed over to Rakesh Kumar Patwari for entering the mutation...”. Furthermore, the*



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prima facie evidence of existence of the Will is established from the examination of PW-1, Darshan Singh, who is the scribe of the Will in question and deposed as under :-

“I have seen the Will dated 24.01.1989 which bears my signature as scribe and as well as witness.”

16. In view of the aforesaid factual situation prevailing in the case at hand, it is clear that the factual foundation to establish the right to give secondary evidence was laid down by the appellants and thus the High Court ought to have given them an opportunity to lead secondary evidence. The High Court committed grave error of law without properly evaluating the evidence and holding that the pre-requisite condition i.e., existence of Will remained unestablished on record and thereby denied an opportunity to the appellants to produce secondary evidence.

17. Needless to observe that merely the admission in evidence and making exhibit of a document does not prove it automatically unless the same has been proved in accordance with the law.”

9. So the secondary evidence can be presented in the Court when procuring the original documents is beyond the control of the party intending to produce the secondary evidence and that he had taken all possible steps to bring the originals.



When the original document is with a person against whom it has to be proved or if is available with a person who is beyond the reach of the Court, the secondary evidence can be produced.

10. This applicant has already taken steps to procure the original documents by seeking permission to issue summon to the person who is said to be in possession of the same, but he was unsuccessful. In such case, the only course open to the applicant is to produce the secondary evidence and seek leave to mark them in evidence. Admittedly, the originals are not with the applicant.

11. The application in A.No.2732 of 2025 has been filed seeking permission to mark certain documents as secondary evidence which were extracted above. The learned counsel for the applicant submitted that these documents have already been produced in the plaint as plaintiff side documents in S.Nos.5,6,8,10 and 11. It is further submitted that the originals were not in his possession and it is lying with the custody of the defendants.



12. On 30.10.2014, the applicant has given notice to the defendants to produce the originals and the defendants did not produce the same. The general power of attorney dated 04.03.2002 (Document No.143 of 2002) and another power of attorney dated 04.03.2002 (Document No.144 of 2002) are already available on the file of the Court, as they have been produced by the Sub-Registrar Periyamedu. If the photocopies of those documents are found among the documents in S.Nos.5,6,8,10 and 11 of the plaint documents, the same can be compared with the documents produced by the Sub-Registrar and marked by making due endorsement to this effect on the documents sought to be admitted in evidence.

13. But in respect of other three documents, it may not be possible for the Court to make such endorsements, without having the advantage of comparing it with the originals, because they are unregistered ones. So, it is not possible to get the originals from the Sub-Registrar office. When the notice to produce the documents was issued to the defendants, they have stated that those documents are not in their custody. When the plaintiff claims that the three original documents



are in the custody of the defendants, but the defendants have denied the same, he has no other alternate except to seek permission to mark the secondary evidence.

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14. Even if the plaintiff is allowed to mark the copies of the subject documents as secondary evidence, in view of the non-availability of the originals, the plaintiff will continue to have the burden to prove about the possibility of the availability of the originals with the defendants or any other person whom he claims to have the possession and that they had wantonly refused / are unable to produce them before the Court.

15. All these exercises can be done only by allowing the plaintiff to reopen the evidence and recall PW1 and mark the copies of the documents sought to be produced as secondary evidence. In fact, the plaintiff has shown his interest in having these documents as evidence and he has produced the copies of the same at the earliest instance. As the plaintiff has taken steps to cause the originals to be produced before the Court and become unsuccessful, he has now come out with these applications. The delay in filing these applications to a limited extent is self-explanatory. Further, the delay alone cannot be the reason for denying the



applicant to produce his best or relevant evidence, unless the delay is crooked and wanton for causing harassment to the other side.

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16. The learned counsel for the respondents submitted that the applicant cannot be allowed to do indirectly what he was not able to do directly, in view of the order rejecting his earlier application in A.No.4055 of 2024. In the said application, the applicant has not sought permission to mark the secondary evidence. The said application has been filed to summon one V.N.Devadoss to produce the originals. The above action of the applicant is only a penultimate step taken by him before seeking permission for marking the secondary evidence. In other words, by filing such applications for causing the originals produced before the Court, the applicant has demonstrated the foundational facts that he had taken necessary steps to procure the originals, but failed, and hence, he is placed in one of the circumstances listed under Section 65 of the Evidence Act for adducing secondary evidence. In the earlier order rejecting the A.No.4055 of 2024, the Court has not adverted into the relevancy or proof of the documents sought to be summoned by the applicant. Hence the submission of the learned counsel for the respondents that the applicant tries to achieve indirectly what he cannot achieve directly, cannot be countenanced.



17. In view of the above stated reasons, all the Applications in A.No.2732 of 2025, A.No.4976 of 2025, A.No. 4977 of 2025 and A.No. 4978 of 2025 are allowed. No costs.

31-10-2025

Index: Yes

Speaking order

Neutral Citation: Yes

GSK



To

1. Mrs.N.Madan Bai
No.156, Trunk Road, Poonamallee,
Trivellore District 600 056.

2.Mr.N.Ajit Kumar
S/o.Nemichand Jain No.156 Trunk Road
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DR.R.N.MANJULA, J.

gsk

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