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WP-5807-2017

IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE AMIT SETH

WRIT PETITION No. 5807 of 2017

*SMT. SHOBHA VASHISHTHA THR. POWER OF ATTORNEY SHRI
MAHENDRA SINGH*

Versus

ALLAHABAD BANK THR. AND OTHERS

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Appearance:

Shri Rohit Bansal - Advocate for the petitioner.

Shri Harshavardhan Topre - Advocate for the respondents.

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Reserved on : 26/09/2025

Delivered on : 04/11/2025
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ORDER

1. With the consent of parties, the matter is heard finally.
2. The instant writ petition under Article 227 of the Constitution of India challenges the order dated 24.08.2017 passed by the learned trial Court whereby, the application preferred by the petitioner under Section 65 of the Indian Evidence Act, seeking permission to prove the photocopy of the draft lease agreement as secondary evidence, has been rejected.
3. Brief facts leading to filing of the instant writ petition are as under:-
 - 3.1 The petitioner/plaintiff instituted a suit for recovery of sum of Rs.14,41,561/- along with interest against the respondents/defendants on the ground that a hall admeasuring 1700 sq.ft. situated at Jal Mandir Road, New Block Shivpuri, belonging to the petitioner, was agreed to be taken on rent



by the respondents.

3.2 As per the case of the petitioner, she spent a considerable amount of money in making the premises adequate for being rented out to the respondents, such as installation of meter and electric connection along with certain other civil works.

3.3 It is further the case of the petitioner that the possession of the premises was taken over by the respondents on 3.8.2011, but they refused to execute a formal lease agreement and on 14.10.2013, the respondents allegedly refused to continue with the petitioner's premises and for this, the suit for recovery of arrears of rent and other expenses incurred by the petitioner was filed against the respondents.

3.4 As per the petitioner, a draft lease agreement was executed between her and the respondents under which, the possession of the premises was taken by the respondents and therefore, based upon the said draft lease agreement, the civil suit was filed by her.

3.5 On the other hand, the civil suit was opposed by the respondents on the ground that no draft lease agreement as contended by the petitioner was ever executed between the petitioner and the respondents. The respondents have not taken the possession of the premises from the petitioner and therefore, not liable to pay anything to the petitioner.

3.6 An application under Order 11 Rule 16 read with Section 151 CPC came to be filed by the petitioner before the learned trial Court seeking summoning of the original draft lease agreement. The said application was opposed by the respondents on the ground that they don't possess any such



draft lease agreement and on the basis of the reply submitted by the respondents, the learned trial Court passed the order dated 13.07.2017 whereby, the application under Order 11 Rule 16 read with Section 151 CPC filed by the petitioner was rejected stating that the defendants cannot be compelled to produce a document which is stated to be not possessed by them.

3.7 After declaring the evidence closed by the petitioner on 21.06.2017, on the date fixed for defendants' evidence i.e. 27.07.2017, she moved an application under Section 65 of the Indian Evidence Act read with Section 151 of the Code of Civil Procedure, seeking permission to prove the photocopy of the draft lease agreement as secondary evidence. It appears that on the same date, the petitioner pressed her said application contending that prior to proceedings with the evidence of defendant, her application under Section 65 of the evidence Act be considered, but trial court observed that since the date is fixed for the evidence of the defendant, the same cannot be deferred/stayed till the disposal of the application filed by the petitioner. Time was though granted to the petitioner for the cross examination of the defendant's witness and the case was therefore fixed for 03.08.2017 for reply to the application under section 65 of the Evidence Act and for defendants' evidence as per order dt.27.07.2017 passed by the trial court.

3.8 After the closure of the defendant's evidence, the application under Section 65 of Evidence Act filed by the petitioner came to be rejected by the learned trial Court vide order dated 24.08.2017 on the ground that the defendants have declined the possession of any such draft lease agreement



and the evidence of defendants is closed, and the plaintiff declared her evidence closed on 21.06.2017, and therefore in view of the earlier orders dated 21.06.2017 and 13.07.2017, the application cannot be allowed. Accordingly, the matter was fixed for final arguments.

4. The learned counsel appearing for the petitioner submits that the learned trial Court has erred in non-suiting the petitioner on her application under Section 65 of the Evidence Act. He points out that by order dated 27.07.2017, the adjudication of the said application was declined on the ground that the defendant's evidence could not be stayed till adjudication of the application, and the matter was directed to be fixed for defendants' evidence. Thereafter, upon conclusion of defendants' evidence, the application was rejected on the ground that there cannot be a retrial.

5. He further submitted that the draft lease agreement was filed along with the plaint itself and was tentatively marked as Ex.D/4 when the defendants' witness, Ritesh Shivhare, was confronted with the said document during his evidence on 03.08.2017. Learned counsel for the petitioner further submits that in terms of Section 65(a) and 65(b) of the Indian Evidence Act, the photocopy of the draft lease agreement can lawfully be permitted to be adduced as secondary evidence, as the defendants herein, though being in possession of its original, have deliberately not produced it. Accordingly, he prays for allowing of the writ petition.

6. On the other hand, the learned counsel appearing for the respondents submits that the learned trial Court has not rejected the



application filed by the petitioner solely on the ground that there cannot be a retrial but the learned trial Court had assigned other reasons as well. It is contended that the trial Court in the impugned order noted that the possession of the original document has been denied by the defendants and that the application was moved by the petitioner only after declaring her evidence was closed on 21.06.2017.

7. It is further submitted that vide order dated 13.07.2017, the petitioner's application under Order 11 Rule 16 CPC read with Section 151 CPC was rejected and the said order has attained finality. The learned counsel appearing for the respondents places reliance upon the order dated 02.11.2022 passed by the Coordinate Bench of this Court at Jabalpur in M.P. No.1352/2020 to contend that unless and until, the requirements of taking photocopy of a document as secondary evidence are fulfilled, the same cannot be considered as in secondary evidence. He further places reliance upon the judgment of this Court in the case of *Mohd. Islam and ors. vs. Asgar Ali and others: AIR 2007 MP 157*, *Tulsiram & Ors. Vs. Rajaram & Ors.: AIR 2023 MP 29*, *Gwalior Development Authority Vs. Dushyant Sharma & Ors.: 2013 (3) MPLJ 172*, *Sangita Malviya Vs. Santosh Malviya: 2017 (3) MPLJ 108*, *Narendra Kumar Vs. Deepchand & Ors., M.P. No. 1971/2023 (MPHC Bench at Indore)*.

8. No other point has been pressed by the learned counsel appearing for the parties.

9. Heard learned counsel for the parties and perused the record.

10. As a general rule, documents are proved by leading primary



evidence. Section 64 of the Evidence Act provides that documents must be proved by the primary evidence except in cases mention in Section 65 of the Evidence Act. In the absence of primary evidence, documents can be proved by secondary evidence as contemplated under Section 63 of the Act which reads as under:-

“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 ensure 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 documents given by some person who has himself seen it.

Illustration:

- (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 he 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.”

11. Section 65 of the Act deals with the circumstances under which secondary evidence relating to documents may be given to prove the existence, condition or contents of the documents. For better appreciation



Section 65 of the Act is quoted herein below:-

“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 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 40[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 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.”

12. 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.

13. The Apex Court in the case of **Jagmail Singh and another vs. Karamjit Singh and others**, reported in (2020) 5 SCC 178 has held as under:-

"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 it was held as under :-

"7.....According to Clause (a) of Section 65 of 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** 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 document 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 be accepted.”

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 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.

14. In the case in hand, the record indicates that the foundational evidence being the reason as to why the primary evidence could not be given has been pleaded by the petitioner in the application filed under Section 65 of the Evidence Act read with Section 151 CPC filed before the trial Court.

15. The petitioner, by way of an affidavit filed along with the said application, has disclosed the source of obtaining the photocopy of the draft lease agreement and stated that the document sought to be produced is a true copy of the original draft lease agreement, bearing the signatures of the Manager of the respondent/Bank as well as that of the petitioner which aspects required consideration by the learned trial Court.

16. The said draft lease agreement has been tentatively marked as Ex-D/4 when the said document was confronted to the defendant's witness Ritesh Shivare. Just because the respondents have denied the possession of the original draft lease agreement, the same may not constitute sufficient reason to reject the application preferred by the petitioner.

17. It is also noteworthy that the said application was filed by the



petitioner prior to the commencement of the defendants' evidence. The evidentiary value or effect of the secondary evidence, if permitted, could remain open for consideration by the learned trial Court even at the stage of final judgment as has been held by the Apex Court in the case of **Dhanpat vs. Sheo Ram (deceased) through Legal Representatives and others, (2020) 16 SCC 209**.

18. Thus, in the considered opinion of this Court, the reasons assigned by the learned trial Court for rejecting the application filed by the petitioner in the given facts and circumstances of the case does not appear to be in conformity with the requirements of law as interpreted by the Hon'ble Supreme Court in the case of **Jagmail Singh (Supra)**.

19. The judgments relied upon by the respondents to oppose the petition have no applicability in the given facts and circumstances of the case as in the case in hand, the learned trial Court has not rejected the application filed by the petitioner on the ground that the requirements of permitting photocopy of the draft lease agreement as secondary evidence are not meted out.

20. In view of the above discussion and consideration, the writ petition is partly allowed. The order dated 24.08.2017 passed by the learned trial Court is set aside, and the matter is remitted to the learned trial Court to reconsider the application filed by the petitioner under Section 65 of the Evidence Act read with Section 151 of CPC afresh in accordance with law before proceeding further in the suit.

21. With the aforesaid direction, the petition stands partly allowed and



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disposed of. No order as to costs.

22. All pending interlocutory applications, if any, stand closed.

(AMIT SETH)
JUDGE

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