# In what Circumstances, a Secondary Evidence is Admissible in Evidence and Notice to Produce

#### Evidence: Meaning of

#### **Section 3 Indian Evidence Act, 1872**

"Evidence" means and includes — (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence; (2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

## Proof of Contents of Documents

#### **Section 61 Indian Evidence Act, 1872**

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

#### **Section 62 Indian Evidence Act, 1872**

**Primary evidence** means the document itself produced for the inspection of the Court.

Explanation 1. —Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2. — Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

#### **Section 63 Indian Evidence Act, 1872**

**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

#### **Section 64 Indian Evidence Act, 1872**

Documents must be proved by primary evidence except in the cases hereinafter mentioned.

## Cases in Which Secondary Evidence Relating to Documents May be Given

#### **Section 65 Indian Evidence Act, 1872**

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 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.

## Rules as to Notice to Produce

#### **Section 66 Indian Evidence Act, 1872**

Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it: —

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

# How and when to Lead Secondary Evidence: Relevant Case Laws

#### Rakesh Mohindra vs Anita Beri & Ors 2015 AIR SCW 6271

"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."

### M. Chandra vs. M. Thangamuthu, (2010) 9 SCC 712

Apex Court considered the requirement of Section 65 of the Evidence Act 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."

#### Saudul Azeez vs District Judge, Gorakhpur And Others, 1997 (17) LCD 1356

Photocopy of the document is neither primary evidence not secondary evidence and therefore not admissible in evidence.

#### Marwari Kumhar And Ors vs Bhagwanpuri Guru Ganeshpuri And Anr, AIR 2000 SUPREME COURT 2629

The ordinary copy of the judgment which is a public document is admissible in evidence when the case of the party that the original was no longer available in court records and the certified copy was lost has been disbelieved.

## The End

Avinash Kumar Shrivastava Civil Judge (Senior Division) Tehri Garhwal