IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

CIVIL REVISION NO. 1253 of 2019

In the matter of:

An Application under Section 115(1) of the Code of Civil Procedure, 1908.

And

In the matter of:

Rokeya Haider

…….. Petitioner.

Vs.

Hasan Shareef Ahmed and others.

… opposite parties.

Mr. M.I Farooqui, Senior Advocate with
Ms. Nazneen Nahar, Advocate (Appearing Virtually).

….For the petitioner.

Mr. Hasan Tareq, Advocate (Appearing Virtually).

..For the opposite party No.1-4 & 6.

Heard on 09.02.2022 and 23.02.2022.
Judgment on 24.02.2022.

Present (Physically in Court Room):
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Ahmed Sohel

SHEIKH HASSAN ARIF, J

1. At the instance of the plaintiff in Title Suit No. 90 of 2005 pending before the Fifth Court of Joint District Judge, Dhaka, Rule was issued calling upon the opposite parties to show cause as to why the order dated 18.03.2019 passed by the said Court in the said suit rejecting the application filed by the plaintiff under Order XIII of the Code of Civil Procedure seeking endorsement and marking of the

documents mentioned in the application, should not be set-aside.

2. <u>Background Facts:</u>

2.1 Facts, relevant for the disposal of the Rule, in short, are that the petitioner, as plaintiff, filed the said Title Suit No. 90 of 2005 before the Fifth Court of Joint District Judge, Dhaka seeking declaration that her father and the predecessors of the defendants, Al-haj A.T. M. Abdul Mateen, was the absolute owner of the 'B'-schedule property and that defendant No. 6 was the benamder of her father in respect of 'C'- schedule property and that the plaintiff is entitled to rents as heir of her father in respect of 'B' and 'C'-schedule properties and that defendant Nos. 1-4 and 6 are benamders in respect of 275 shares in defendant No. 7-company etc. with a further prayer of partition of the properties by metes and bound etc.

2.2 The case of the plaintiff, in short, is that:

(a) Her late father and the predecessor in interest of the defendants was the absolute owner of the properties mentioned in the schedules to the plaint and that her father, in order to get tax relief, made a sham transaction

by way of executing an affidavit on 25th June, 1988 showing transfer by heba in respect of seven katha land in favour of defendant Nos. 1-4. That their late father Abdul Mateen, while in possession of schedule A property with two storied building thereon, entered into an agreement with defendant No. 8 (Eastern Housing) for construction of building thereon. Accordingly, an agreement was executed between the parties and, accordingly, her late father received certain amount of signing money. That as per the said agreement, her late father was entitled to get four apartments. That defendant No. 8 constructed a seven storied building thereon with 22 apartments and handed over possession of four apartments, as mentioned in schedule B, in favour of her late father and, subsequently, he mortgaged one apartment in favour of Uttara Bank Limited for securing loan and thereby authorized the bank, by executing special power of attorney, for inducting tenants and realizing rents from the tenants till the loan money was adjusted. That he kept the remaining three apartments in his possession and control.

(b) That, subsequently, the defendant No. 8-developer allotted two apartments (apartment Nos. 202 and 203) in favour of defendant Nos. 1 and 2 and apartment No. 302 and 303 in the benami of defendant Nos. 3 and 4, but her late father directed the developer to substitute the names in his favour and in favour of his wife in respect of the said apartments and, accordingly, the developer substituted the names. That the developer recorded the names of her mother, Sharifunessa, in respect of apartment Nos. 202 and 203 and recorded late Abdul Mateen's name in respect of apartment Nos. 302 and 303. That the late Abdul Mateen, subsequently, requested the developer to cancel all previous arrangements with regard to the allotment of the said four flats. Therefore, late Abdul Mateen maintained his position as absolute owner in possession of the properties till his death and that the defendant Nos. 1-4 were benamders in respect of schedule 'B' properties. That to the utter surprise of the plaintiff, defendant Nos. 1-4 claimed, in the first week of January, 2005, that they had purchased the said four flats under tripartite agreement dated

30.05.1999 for valuable consideration from late Abdul Mateen. That such claim of defendant Nos. 1-4 caused anxiety and, accordingly, the plaintiff made query with the developer, who supplied photocopies of relevant documents in their custody upon getting them attested by notary public. That the said documents revealed that the defendant Nos. 1-4 created fictitious anti-dated unregistered deeds in their names and, accordingly, got the said apartments mutated in their favour in the assessment roll of the Municipal Corporation without any notice on the plaintiff.

(c) That another property of Abdul Mateen, as mentioned in schedule-‘C’, was purchased by him in the benami of his wife Sharifunessa and the same was rented in favour of the government, namely Deputy Chief Inspector General, Factories and Organization Inspection Directorate, Dhaka Division, who paid rents regularly, and the plaintiff and defendant Nos. 1-6 obtained succession certificates in respect of such rents after the death of late Abdul Mateen. That another property left by Abdul Mateen, namely the property mentioned in schedule ‘D’, should also be

partitioned between the heirs. That Abdul Mateen became very sick in the last part of 2000 and he eventually died on 5th March, 2001. That during his such ailment, defendant Nos. 1-4 obtained a false affidavit in the name of his wife showing that his wife transferred a portion of schedule ‘C’ property in their favour and that they obtained a signature of late Abdul Mateen during his such illness as attesting witness on the said declaration of gift. That defendant No. 6, wife of Abdul Mateen, was simply a benamder and she had no right to transfer the schedule ‘C’ property. That after the death of Abdul Mateen, defendant No. 1 collected all original documents and papers relating to schedule B, C and D properties including the share certificates and other related documents of M/S Book Promotion Limited (defendant No. 7) from the vault of their late father in Dhaka and they were kept by them in trust. That defendant Nos. 1-4 have been realizing rents from schedule ‘B’ properties and so far, they have realized a huge amount of money as mentioned in the plaint and as such the share of the plaintiff in the usufructs of schedule B, C and D properties should be

protected. That after the death of her father, late Abdul Mateen, the plaintiff has been requesting and demanding the defendants for partition of the said immovable properties and usufructs and rents as per Muslim Personal Law, but they have been refusing to do so. Accordingly, the plaintiff filed the said suit with the aforementioned prayers.

2.3 Defendant Nos. 1-4 and 6 filed written statement to contest the said suit denying the material statements in the plaint, thereby, basically claiming that some of the said properties were transferred in their favour by their late father Abdul Mateen and the rest by their mother, who was authorized to do so. In paragraph 20 of the said written statement, it has been stated by the defendants that after transferring the landed properties by Abdul Mateen and defendant No. 6 in favour of their sons, they handed over all original documents to them in order to enjoy the said properties without any disturbance.

2.4 On such contesting pleadings, the Court below framed issues and proceeded with the trial of the suit. During such trial, some witnesses were produced by the parties and

they were examined and cross-examined. At this stage, plaintiff filed two applications: one seeking amendment of plaint and the other seeking endorsement and marking on the documents filed by the P.W. 1 during her deposition in view of the provisions under Order XIII of the Code of Civil Procedure. The defendants also filed an application for recalling a witness. The plaintiff filed the said application under Order XIII of the Code on the ground that the P.W. 1 submitted twelve notarized photocopy documents during her deposition without any objection being raised by the defendants' side. This being so, it was contended by the plaintiff that the said documents should have been endorsed and marked as exhibits by the Court below at the time of recording such deposition. The same having not been done, it was contended, the Court should now endorse and mark them as exhibits. The said application was opposed by the defendants by filing written objection mainly contending that the said documents, being photocopies, were not admissible in evidence and that they did not fall under any categories of either primary or secondary evidence.

2.5 The Court below then after hearing the parties, allowed the application filed by the plaintiff seeking amendment of plaint and the application filed by the defendants for recalling witness, but rejected the application filed by the plaintiff seeking endorsement and marking on the documents submitted by the P.W. 1 vide impugned order dated 18.03.2019 mainly on the ground that they were photocopies. Being aggrieved by this part of the order dated 18.03.2019 refusing to endorse and mark the said documents, the plaintiff invoked civil revisional jurisdiction of this Court and obtained the aforesaid Rule. At the time of issuance of the Rule, this Court, vide ad-interim order dated 12.05.2019, stayed all further proceedings of the said Title Suit No. 90 of 2005 for a period of six (06) months, which was, subsequently, extended for further periods in due course.

2.6 The Rule is opposed by defendant Nos. 1-4 and 6 (opposite party Nos. 1-4 and 6), who also filed a counter affidavit and supplementary-affidavit.

3. <u>Submissions:</u>

3.1 Mr. M.I Farooqui, learned senior counsel appearing for the plaintiff-petitioner, has made the following submissions:

(a) That the originals of the said notarized photocopies were admittedly lying with the custody of the defendants and as such they were admissible in evidence, the same having been submitted by P.W. 1 during her depositions without any objection being raised by the defendants' side. Thus, it was incumbent upon the Court below to put endorsement and marking on them as exhibits in view of the provisions under Order XIII, rule 4 of the Code of Civil Procedure.

(b) By referring to the provisions under Section 8(1)(a) of the Notary Ordinance, 1961 (Ordinance No. XIX of 1961), he submits that since the photocopies in question were duly notarized under the said provision of law by the authorized notary public licensed under the said law upon comparing the said photocopies with the originals, the same became admissible secondary evidence in view of the provisions under Section 65, Clause (a), read with Section 63(2) of the Evidence Act. Therefore, the Court below committed illegality

occasioning failure of justice in not allowing the said application filed by the plaintiff seeking endorsement and marking on the said documents.

(c) By referring to a decision of our Appellate Division in **Joynul Abedin vs. Mofizur Rahman, 44 DLR (AD)-162,** in particular paragraph 8 of the reported case, he submits that once a document is admitted by the Court without any objection being raised by the other side in the course of recording deposition, such document has to be marked as exhibit and as such the Court below has committed illegality in not putting endorsement and exhibit marks on the said documents.

(d) That after admission of the said notarized photocopy documents without any objection being raised by the other side, the only thing to be done was a mere formality by the Court by putting endorsement and exhibit marks on the said documents. Therefore, since such endorsement and marking were not done at the time of admission of the said documents, it was incumbent upon the Court below to put such

endorsement/marks upon allowing the said application filed by the plaintiff.

(e) That, admittedly, the plaintiff filed the said documents in a Firisti at the time of filing of the suit and as such the filing of such Firisti was sufficient notice to the defendants as provided by Section 66 of the Evidence Act. In this regard, he has referred to the provisions under Order VII, rule 9 of the Code of Civil Procedure along with the provisions under Section 66 of the Evidence Act.

3.2 As against above submissions, Mr. Hasan Tareq, learned advocate appearing for the contesting defendant-opposite parties, has made the following submissions:

(i) That the Evidence Act has provided specific procedure for admission of any secondary evidence in that the parties seeking to admit such documents as evidence is required to give prior notice to the other side for producing the originals in view of the provisions under Section 66 of the said Act. The said procedure having not been followed in the instant case by the plaintiff, no illegality has been committed by the Court below in

refusing the application filed by the plaintiff seeking such endorsement/marks on the said photocopy documents.

(ii) By referring to two decisions of the High Court Division in **Bangladesh vs. Mirpur Semipucca Kalayan Samity, 54 DLR-364** and **Monjurur Rahman vs. Naimur Rahman, 50 DLR-266,** he submits that in **Mirpur Semipucca Case,** the High Court Division has categorically held that photocopy documents cannot be admitted as evidence without specific compliance of the provisions under Section 66 of the Evidence Act. That this Court also held in **Monjurur Rahman's Case** that it is difficult for a Court to admit in evidence a notarized photocopy.

(iii) By referring to the relevant provisions of the Code of Civil Procedure as regards discovery and inspection, in particular Order XI, rule 14 of the Code, he submits that the plaintiff still can invoke this provision seeking production of the originals of the said photocopies. Therefore, according to him, the plaintiff has not been

prejudiced, in any way, because of the impugned order.

4.<u>Deliberations, Findings and Orders of the Court:</u>

4.1 Admittedly, the twelve documents listed in the application filed by the plaintiff are notarized photocopy documents. According to the plaintiff, the originals of those photocopies are lying in the custody of the defendants. The plaintiff has made specific statement in the plaint in this regard under paragraph 20 of the plaint and such statement of the plaintiff has been impliedly admitted by the defendants in paragraph 20 of their written statement. Now, it is the plaintiff who will decide as to the strategy of proving her case. Whether or not she will take recourse to the provisions of the Code under Order XI for production of the original documents referred to in paragraph 20 of the plaint is absolutely within the domain of the plaintiff. Neither the Court nor the defendants can dictate the plaintiff as to which course she will adopt. In the instant case, it appears that although there are provisions under Order XI, rule 14 of the Code for production of the said original documents, the plaintiff has not taken recourse to such provisions. Rather, she

has submitted the said notarized photocopies of the said twelve documents before the Court through her deposition as P.W.1.

4.2 In this regard, we have examined the deposition of P.W. 1 and have found that in fact the said documents were submitted by the P.W. 1 during her deposition and such recorded deposition shows that no objection was raised from the defendants' side at the time of submitting them. Although, learned advocate for the opposite parties submits that the Court did not endorse the said documents because of the objection raised by the learned advocate for the defendants, we do not see any such indication in the deposition of P.W. 1 as recorded by the Court below. The said deposition of P.W. 1 and the orders of the Court below also do not suggest that the plaintiff took any immediate steps for endorsement or marking them as exhibits. However, after completion of the deposition of P.W. 1, P.W. 2 and some of the D.Ws, the plaintiff filed the said application on 07.02.2019 (Annexure-B) under Order XIII of the Code seeking endorsement and marking on the said notarized photocopies listed in the said application.

4.3 Now, the question before us is, whether the Court below should have allowed the said application filed by the plaintiff. To address this issue, we need to do little exercise on the relevant provisions of law relating to the admission of evidence. Order XIII, rule 4 of the Code provides that subject to the provisions of sub-rule (2), every document, which has been admitted in evidence in a suit, shall be endorsed with some particulars, namely the number and title of the suit, the name of the person producing the document, the date on which it was so produced and a statement that it has been so admitted and that such particulars shall be endorsed, signed or initialed by the trial judge concerned. It appears from this provision that for putting such endorsement and marking, the first condition is that the document has to be admitted in evidence. Thus, when a document is admitted as evidence, only then the trial Judge is required to put such endorsement and marks with particulars on the said document in view of the provisions under Order XIII, rule 4.

4.4 Now, the next question before us is whether the said twelve notarized photocopy documents, as submitted before the Court below by the P.W. 1 during her deposition, were in fact admitted as evidence as per law. To address this issue, we will have to examine the definition of the terms “document” and “evidence” as provided by the Evidence Act, 1872 as well as the relevant provisions for admitting such documents as evidence as provided by Sections 63, 65 and 66 of the said Act. To do such examination, let us first reproduce the definitions of the terms “document” and “evidence” as provided by Section 3 of the Evidence Act:-

> ***“Document”*** *means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.*
>
> *Illustrations*
>
> *A writing is a document:*
> *Words printed, lithographed or photographed are documents:*
> *A map or plan is a document:*
> *An inscription on a metal plate or stone is a document:*
> *A caricature is a document.*

"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 facts under inquiry:
Such statements are called oral evidence;

(2) all documents produced for the inspection of the Court;
such documents are called documentary evidence.

4.5 It appears from the above definition of the term 'document' that the said definition is in wider sense in that any matter expressed or described upon any substance by means of letters etc. fall under the definition of the term 'document'. Illustrations to the said definition even clarify that a writing in a document which is words printed or photographs on a substance do also come within the ambit of such definition. Accordingly, it appears that the notarized photocopy documents, as listed in the application filed by the plaintiff before the Court below (Annexure-B), are in fact documents in view of the said definition. It further appears from the above quoted definition of the term 'evidence', in particular Clause (2) of the same, that all documents produced for

the inspection of the Court are also evidence. However, they are called ‘documentary evidence’.

4.6 Now, Chapter V of the Evidence Act contains the relevant provisions in accordance with which such documentary evidence may be proved or admitted in evidence before a Court. Relevant provisions in such case are the provisions under Sections 63, 65 and 66 under the said chapter inasmuch as that the plaintiff has filed the said application for endorsement on the said twelve documents listed in her application on the ground that they have been admitted in evidence in view of the provisions under Order XIII, rule 4. This being so, we need to examine whether those documents have in fact been admitted in evidence in accordance with the relevant provisions of the Evidence Act, namely the provisions under Sections 63, 65 and 66 of the said Act.

4.7 Let us first examine the purport of ‘secondary evidence’ in view of the provisions under Section 63 of the Evidence Act. Section 63 is reproduced below:

*“**63**. Secondary evidence means and includes-*

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical process 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 documents 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.

4.8 It appears from the above quoted provisions under Section 63 of the Evidence Act that it has given the meaning of the term ‘secondary evidence’ and, according to sub-section (2) of Section 63, copies made from the original by mechanical process may also be regarded as ‘secondary evidence’ which themselves insure the accuracy of the copy. Therefore, the notarized photocopies in question, as listed in the application of the plaintiff, may come within this definition of ‘secondary evidence’. Sub-section (3) of Section 63 further includes copies made from or compared with the originals as ‘secondary evidence’. Therefore, on a joint reading of sub-sections (2) and (3) of Section 63, we may hold that the said notarized photocopies, as listed in the application filed by the plaintiff, may be regarded as ‘secondary evidence’ if it can be shown that the copies themselves ensure the accuracy of such copy through mechanical process or that the copies have been made from or compared with the originals. However, in the instant case, since the photocopies have been notarized by a notary public licensed under the Notaries Ordinance, 1961 and such documents having been

verified and authenticated by such notary public in view of the provisions under Section 8(1)(a) of the said Ordinance, we may safely hold that the said photocopies were in fact compared with the originals at the time of verification, authentication and certification by the said notary public under the said Ordinance and, in such case, decisions of Indian superior Courts suggest that the notary public is not required to be produced before the Court to prove that he has compared the photocopies with the originals at the time of such certification [see **Banarsi Dass vs. Maman Chand, AIR 1992 P & H - 145**].

4.9 It may be noted that a notary public, licensed under the Notary Ordinance, is an authorized person to verify, authenticate, certify or attest, amongst others, the execution of any instrument (see Sec.8 of the Notary Ordinance, 1961). Therefore, when a notary public is authorized under a legislation, namely the said Ordinance, to authenticate and verify execution of some instruments and, accordingly, certify on the photocopies of the same upon comparison with the originals, such photocopies should be regarded as ‘secondary evidence’

within the meaning of Section 63 of the Evidence Act. Therefore, from this point of view, we hold that the said notarized photocopies, as listed in the application of the plaintiff, are in fact 'secondary evidence', which may be produced before the Court as evidence. However, whether such evidence will be admitted by the Court as such is a different question altogether. As because, Section 65 has provided some conditions upon fulfillment of which such secondary evidence may be given as regards existence, condition or contents of the original documents. In addition to Section 65, Section 66 of the Evidence Act has provided certain formalities to be adopted before tendering such secondary evidence. Accordingly, Sections 65 and 66 of the Evidence Act are quoted below for our ready reference:

> ***65.*** *Secondary evidence may be given of the existence, condition or contents of a documents 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 Bangladesh 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.

66. *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 Advocate, 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".

(Underlines supplied)

4.10 It appears from Clause (a) of the above quoted Section 65 that such secondary evidence may be tendered in evidence if the originals are shown or appear to be in the possession or power of the person against whom the said documents are sought to be proved and that such person are out of the reach of the Court or not subject to the process of the Court or that such person is not producing them even after notice under Section 66. In the instant case, it has specifically pleaded by the plaintiff in the plaint that the relevant original documents are lying in the custody of defendant Nos. 1-4 and, as stated above, this position has been admitted by the said defendants by way of written statement. It is further pleaded by the plaintiff that the notarized photocopies have been obtained by her from the officials of the Eastern Housing (defendant No. 8), who supplied them after notarial attestation. Therefore, it is apparent that the original copies of the said twelve documents, as listed in the application of the plaintiff, are either in the custody of

the defendant Nos. 1-4 or in the custody of the defendant No. 8 (developer). It is not the case of the plaintiff that these defendants are out of the reach of the Court or that they are not subject to the process of the Court or that the defendants are not producing them even after notice under Section 66. Rather, certified copies of the orders of the Court below, as annexed to the revisional application, suggest that they are very much present before the Court. Other situations, as mentioned under clauses (b) to (g) of Section 65, are also not available in this case. Therefore, the secondary evidences in question cannot be given as per the provisions under Section 65 of the Evidence Act.

4.11 There is another hurdle in tendering such secondary evidence. Section 66 of the Evidence Act mandates that such secondary evidence, as referred to under Section 65, Clause (a), shall not be given unless the party proposing to tender such secondary evidence has previously given a notice upon the party in whose possession such documents are lying to produce the same before the Court and only when such notice is not complied with, the right to tender secondary evidence

arises (see **Nityananda Roy Vs. Rashbehari Roy, AIR 1953 Cal 456 and Krishna Appala Vs. B. Sohan Lal, AIR 2004 AP 439**). Pertinent to mention that the procedure for production of such document is provided in the Code under Order XI, rule 14 and such steps requiring the other party to produce such documents may be taken by any party to a suit at any stage of such suit. There is nothing in the materials on record which suggests that the plaintiff has ever taken any such steps before the Court below requiring the defendants concerned to produce the said original documents.

4.12 As regards prior notice to be issued on the other side as provided by Section 66 of the Evidence Act, Mr. M.I Farooqui has referred to the provisions under Order VII, rule 9(1) of the Code of Civil Procedure which refers to the procedure of admitting a plaint. According to him, since the plaintiff is required to endorse on the plaint or annex thereto a list of documents which he has produced along with it and since the plaintiff in the instant case has complied with the said provision and, accordingly, annexed various documents including the said twelve documents by way of Firisti at the time of filing of the

plaint, that filing of such Firisti containing those notarized photocopy documents is sufficient notice in view of the provisions under Section 66 of the Evidence Act and as such, according to him, no separate notice under Section 66 is required to be given by the plaintiff prior to tendering the said documents as secondary evidence.

4.13 To address this issue, we have examined the provisions under Order VII, rule 9 of the Code. It appears that the said provision in fact deals with the procedure of admission of plaint and it does not have any apparent relation with the admission of any document as secondary evidence. Not only that, if such filing of documents in a Firisti is taken to be a sufficient notice as required by Section 66 of the Evidence Act, Section 66 itself will become redundant. We are unable to allow such consequence. This being so, we are humbly unable to accept the said submission of Mr. Farooqui. This being so, the plaintiff having neither issued any prior notice as provided by Section 66 of the Evidence Act requiring the

defendants concerned to produce the original documents nor having filed any application under Order XI, rule 14 seeking production of such documents through the process of the Court, we are of the view that, although the said documents are secondary evidence, the same cannot be admitted as evidence, and since the said documents cannot be admitted as evidence, the procedural requirement of Order XIII, rule 4 is uncalled for inasmuch as that, under the said provision, a document is required to be endorsed or marked only when such document is “admitted in evidence”. Besides, no prejudice has been caused to the plaintiff by the impugned order. If such documents are felt to be necessary for proving the case of the plaintiff, she will still have the opportunity to seek production of the original documents concerned under Order XI, rule 14 of the Code, as such steps may be taken at any stage of the suit.

4.14 In view of above facts and circumstances as well as discussions of law, we do not find any merit in the Rule and as such the same should be discharged.

4.15 In the result, the Rule is discharged. The ad-interim order, if any, thus stands recalled and vacated.

Communicate this.

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(Sheikh Hassan Arif, J)

I agree.

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(Ahmed Sohel, J)