

AFR  
Reserved on 23.10.2019  
Delivered on 25.11.2019

**Court No. - 34**

**Case :-** FIRST APPEAL No. - 626 of 2015

**Appellant :-** Gulabpati

**Respondent :-** Smt. Pushpa Rani Pandey and 2 others.

**Counsel for Appellant :-** Ganesh Datt Mishra

**Counsel for Respondent :-** Manoj Kumar Singh

**Hon'ble Sudhir Agarwal,J.**

**Hon'ble Rajeev Misra,J.**

**(Delivered by Hon'ble Rajeev Misra, J)**

1. Present First Appeal under Section 19 of Family Court Act, 1984 (hereinafter referred to as 'Act 1984') has been filed by plaintiff-appellant challenging Judgment dated 28.10.2015 and decree dated 30.10.2015 passed by Principal Judge, Family Court, Basti dismissing O.S. No. 15 of 2010 (Gulabpati Vs. Smt. Pushpa Rani Pandey and others).

2. We have heard Mr. Ganesh Datt Mishra, learned counsel for plaintiff-appellant and Mr. Manoj Kumar Singh, learned counsel representing defendant-respondents 2 and 3. In spite of revision of cause list, no one has appeared on behalf of defendant-respondent 1, Smt. Pushpa Pandey.

3. Plaintiff-appellant Gulabpati (hereinafter referred to as 'appellant') filed O.S. No. 15 of 2010 (Gulabpati Vs. Smt. Pushpa Rani Pandey and others) for a decree of declaration declaring that plaintiff alone is legally wedded wife of Murli Prasad @ Murlidhar resident of Village Dubaul, Tappa, Hardi, Pargana Basti Pashchim, Tehsil Harraiya, District Basti, who worked in Air Force, as such, plaintiff alone is entitled to receive family pension.

4. According to plaint allegations, it was alleged that plaintiff is legally wedded wife of Murlidhar Pandey @Murli Prasad Pandey son of Chandra Prakash Pandey resident of Village Dubaul, Tappa, Hardi,

Pargana Basti Pashchim, Tehsil Harraiya, District Basti. Marriage of plaintiff with Murlidhar Pandey @ Murli Prasad Pandey was solemnized on 6.6.1965. From aforesaid wedlock and co-habitation of plaintiff and Murlidhar Pandey @ Murli Prasad Pandey, a daughter was born. Subsequently, Murlidhar Pandey @ Murli Prasad Pandey joined Air Force under the Ministry of Defence. Plaintiff being a simple and illiterate lady was ill-treated by Murlidhar Pandey @ Murli Prasad Pandey and his family members. After Murlidhar Pandey @ Murli Prasad Pandey joined Air Force, status of plaintiff was reduced to that of a domestic servant. Plaintiff is alleged to have complained about aforesaid conduct to Murlidhar Pandey @ Murli Prasad Pandey but no heed was paid. As plaintiff and her minor daughter were neglected by Murlidhar Pandey @ Murli Prasad Pandey, she accordingly initiated proceedings under Section 125 Cr.P.C. which was registered as Case No. 14 of 1981 and allowed, vide Judgment and order dated 9.1.1985. Murlidhar Pandey @ Murli Prasad Pandey was directed to make payment at the rate of Rs.250/- for plaintiff and Rs.150/- for minor daughter, per month. Against order dated 9.1.1985, Murlidhar Pandey @ Murli Prasad Pandey filed Criminal Revision No. 255 of 1985, which was allowed, vide order dated 11.4.1986. Against order dated 11.4.1986 passed by Revisional Court, i.e., Vth Additional District & Sessions Judge, Basti, plaintiff filed Criminal Revision No. 31 of 1981 (Smt. Gulabpati Vs. State of U.P.) before High Court, Allahabad, which was allowed, vide order dated 23.3.2005. Effect of same was that order dated 11.4.1986 came to be set aside resulting in restoration of earlier order dated 9.1.1985 passed by trial Court. Subsequent to Judgment of High Court, plaintiff filed an execution case and, accordingly, Murlidhar Pandey @ Murli Prasad Pandey started paying the arrears of maintenance due in instalments. On account of rise in cost of living, plaintiff filed application for enhancement of maintenance, which was allowed and accordingly, amount of maintenance was respectively enhanced to Rs.400/- and Rs.200/- per month. Daughter

of plaintiff, Shashibala got married with the help of family members of plaintiff's parental side as well as relatives. Subsequently, plaintiff again filed an application for enhancement which was allowed, vide order dated 15.11.2007, and maintenance payable to plaintiff was enhanced to Rs.2,000/- per month. In spite of fact that from wedlock of plaintiff and Murlidhar Pandey @ Murli Prasad Pandey, a daughter was born, yet Murlidhar Pandey @ Murli Prasad Pandey indulged in extra-marital affair by keeping Smt. Pushpa Devi as his kept. Plaintiff, therefore, filed Criminal Case No. 92 of 1984 (Smt. Gulabpati Vs. Murlidhar) in the court of IVth Additional Judicial Magistrate, Basti wherein Murlidhar Pandey @ Murli Prasad Pandey and other accused were summoned, vide summoning order dated 14.6.1984. Aggrieved by summoning order dated 14.6.1984, parents of Murlidhar Pandey @ Murli Prasad Pandey filed Criminal Revision No. 283 of 1984 (Chandra Prakash Vs. Gunjapati) which was allowed, vide order dated 26.2.1985. On aforesaid facts, it was alleged that plaintiff is legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey. During the life-time of plaintiff, defendant Smt. Pushpa Devi cannot be legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey and, therefore, she is kept of Murlidhar Pandey @ Murli Prasad Pandey. During pendency of execution proceedings regarding payment of maintenance amount, counsel for Murlidhar Pandey @ Murli Prasad Pandey informed Court, i.e., IIIrd Additional Chief Judicial Magistrate, on 18.7.2013 that Murlidhar Pandey @ Murli Prasad Pandey has died on 1.7.2009 and in proof of same also filed the condolence card. Upon death of Murlidhar Pandey @ Murli Prasad Pandey, plaintiff went to her marital home. Along with her mother-in-law Smt. Prem Rani, she performed all the rituals upon death of her husband. However, father-in-law of plaintiff refused to give share of late husband to plaintiff. Plaintiff had also filed O.S. No. 119 of 2004 for maintenance. On account of information, given by counsel for Murlidhar Pandey @ Murli Prasad Pandey that he has died, substitution application was filed,

which has been allowed. In spite of service of notice, defendants have not yet appeared on account of which suit has proceeded ex-parte against them. Even though, upon death of Murlidhar Pandey @ Murli Prasad Pandey, all rituals were performed by plaintiff as his widow with the consent of her father/mother-in-law but father/mother-in-law of plaintiff refused to maintain her. Subsequently, name of plaintiff was scored off from family register and name of Pushpa Rani was got incorporated even though she is not legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey. No marriage of Murlidhar Pandey @ Murli Prasad Pandey could take place with Pushpa Rani during life time of plaintiff. Husband of plaintiff was initially employed as Airman and upon superannuation, he started working at some other place, therefore, for grant of family pension, plaintiff submitted an application through District Basic Board, Basti, which was replied, vide letter No. R.O./2853/6{2182}/1807 stating therein that Murlidhar Pandey @ Murli Prasad Pandey has nominated Smt. Pushpa Pandey as his wife in records. It was also alleged that entry so made in official records is not binding upon plaintiff as Pushpa Devi could not be legally wedded wife of plaintiff. It was further alleged that on complaints made by plaintiff, martial proceedings were initiated against plaintiff but on account of order dated 11.4.1986 passed by Vth Additional District and Sessions Judge, aforesaid proceedings were stayed. Aforesaid order dated 11.4.1986 was set aside by High Court. Just on account of an illegal nomination in service records that defendant Pushpa Rani is wife of Murlidhar Pandey @ Murli Prasad Pandey, rights of plaintiff to receive family pension cannot be curtailed.

5. Defendant 1 Smt. Pushpa Pandey contested the suit of plaintiff. She, accordingly, filed a written statement whereby she not only denied plaintiff allegations but also raised additional pleas. Defendant 1 admitted the place of residence of Murlidhar Pandey @ Murli Prasad Pandey as stated in plaint but she denied status of plaintiff as legally wedded wife of

Murlidhar Pandey @ Murli Prasad Pandey. The factum regarding birth of Shashikala from wedlock and co-habitation of plaintiff and Murlidhar Pandey @ Murli Prasad Pandey was denied. Appointment of Murlidhar Pandey @ Murli Prasad Pandey in Defence Department was, however, admitted. Defendant 1 also denied the allegations made by plaintiff that she is a simple lady and only after Murlidhar Pandey @ Murli Prasad Pandey got employed, husband of plaintiff as well as his parents started neglecting plaintiff and reduced her status to that of a domestic servant. She also denied the alleged conduct of parents of Murlidhar Pandey @ Murli Prasad Pandey and also the fact that plaintiff was ousted from her marital home. It was also denied that plaintiff is incapable of maintaining herself. Judgment/order passed in proceedings under Section 125 Cr.P.C. are not binding as they have been rendered in summary proceedings. Factum regarding filing of criminal revision and it being allowed as stated in para 5 of plaint was admitted but rest of the averments were denied. Allegations made in plaint that defendant 1 is kept of Murlidhar Pandey @ Murli Prasad Pandey was completely denied and objection to the use of word 'kept' was seriously raised. It was also alleged that plaintiff was initially working in Montesary School and thereafter in a Nursing Home as maid. Factum regarding death of Murlidhar Pandey @ Murli Prasad Pandey was also denied. Allegation regarding performance of religious ceremony by plaintiff at her marital home upon death of Murlidhar Pandey @ Murli Prasad Pandey was also denied. It was further pleaded that name of defendant 1 is recorded in service records and, therefore, she is the legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey. Reference was also made to various documents in which name of defendant 1 is shown as wife of Murlidhar Pandey @ Murli Prasad Pandey. Plea regarding maintainability of suit was also raised. On the aforesaid defence, it was prayed that suit filed by plaintiff be dismissed.

6. Suit filed by plaintiff was also contested by defendants 2 and 3. Defence of defendants 2 and 3 was primarily based upon entry in service

records of Murlidhar Pandey @ Murli Prasad Pandey. After retirement, vide, Pension Payment Order no. 008/14/B/87892/91, pension was sanctioned in favour of Murlidhar Pandey @ Murli Prasad Pandey. Upon death of Murlidhar Pandey @ Murli Prasad Pandey on 31.8.1991, family pension was sanctioned in favour of Smt. Pushpa Rani Pandey as Smt. Pushpa Rani Pandey was nominated as wife of Murlidhar Pandey @ Murli Prasad Pandey, In the service records of Murlidhar Pandey @ Murli Prasad Pandey, it is mentioned that Murlidhar Pandey @ Murli Prasad Pandey married Pushpa Rani Pandey on 5.2.1980 and from aforesaid wedlock two children, namely, Master Sachin and daughter Sangeeta were born. However, in paragraph 24 of written statement, it was pleaded that though name of Pushpa Rani Pandey is mentioned in the records of Air Force as legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey, yet plaintiff has been informed that she can approach appropriate Court for redressal of her grievance. On aforesaid defence, it was pleaded by defendants 2 and 3 that suit for declaration filed by plaintiff is liable to be dismissed.

7. On these pleadings raised by parties, Court below framed following issues for adjudication:-

1. Whether plaintiff alone is legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey having service no.612182 C.P.L. Pandey, M.P. and, therefore, entitled to family pension?
2. Whether suit has been undervalued and court fees paid is deficient?
3. Whether suit is barred by Order 39 Rule 2 C.P.C.?
4. Whether plaintiff has the right to institute present suit?
5. Whether the plaint is not duly signed and verified?
6. Whether Court has jurisdiction to try the suit?
7. Whether plaintiff is entitled to any other relief?

8. Plaintiff in order to prove her case, adduced herself as P.W.1, Shashibala as P.W.2 and Umapati Mishra as P.W. 3. As per impugned judgement, Plaintiff also filed following documents in evidence:-

(i) Paper No. 41 (Ga) -certified copy of order dated 7.4.2010.

(ii) Paper No. 83 (Ga)-copy of order passed by High Court in Criminal Revision No. 31 of 1991.

(iii) Vide list of documents (Paper No. 9 (Ga)) eight documents, i.e., paper no. 10 (Ga) to 19(Ga) were filed. These are Paper Nos. 10(Ga) Reply dated 9.11.2002, sent by Wing Commander, OIC, P & W.W. (F.P), 11(Ga) Judgement dated 26.2.1985, passed in Criminal Revision No. 263 of 1984 (Chandra Prakash Pandey and Others Vs. Gulabpati), 12(Ga) Phot copy of judgement dated 23.3.1995, passed in Criminal Revision No. 31 of 1981, 13 (Ga) Certified copy of entry in Voter list, 14 (Ga) Reply dated 8.8.1980, issued by Sqn.Ldr Officer 1/c- P-10, 15 (Ga) Photo copy of letter 16.10.2019, 16 (Ga) Document not discernible, 17(Ga) Original post card/postal receipts, 18 (Ga) Photo copy of question-answer form, 19(Ga) Photo copy of application dated 18.7.2009 submitted by counsel for opposite party in proceedings under Section 128 Cr.P.C.

(iv) Vide list of documents (Paper No. 56 (Ga)) plaintiff filed following documents:- (a) Paper No. 57 (Ga)-certificate of Pradhan, Paper No. (66Ga to 83Ga)-copy of order sheet of Criminal Revision No. 124 /11/97 (Gulabpati Vs. Murlidhar), Paper No. 102(Ga)-photo copy of letter, Paper No.97Ga- extract of family register, Paper No. 98Ga-voter ID card, Paper No. 121(Ga)-report of Tehsildar

9. Defendant 1 filed paper no. 39 (Ga). Objections dated 4.3.2011, Paper No. 44 (Ga)-extract of family register, Paper No. 45 (Ga)-copy of

application for marriage, Paper No. 46 (Ga)- Identity Card as well as joint photograph, photo copy of Voter I.D. Card of Pushpa Rani and Voter I.D. Card of Sachin Kumar. After filing of written statement and upon submission of documents to be taken as documentary evidence on behalf of defendant 1, she abandoned proceedings of suit, consequently, suit proceeded ex-parte against defendant 1.

10. Defendants 2 and 3 filed attested copy of service book of Murlidhar Pandey @ Murli Prasad Pandey. No other document was adduced by defendants to be taken as documentary evidence nor defendants 2 and 3 adduced any witness on their behalf.

11. Upon consideration of pleadings of parties, Court below dismissed suit of appellant, vide Judgment dated 28.10.2015 and decree dated 30.10.2015.

12. Perusal of Judgment of Court below shows that upon evaluation of oral evidence, court below concluded that plaintiff and her witnesses failed to prove the place and time of marriage. Upon evaluation of documentary evidence in the light of Section 5 of Hindu Marriage Act, 1955, Court below arrived at the conclusion that plaintiff has failed to prove herself as legally wedded wife of Murali Prasad Pandey.

13. In respect of Issues 2 and 6, Court below held that aforesaid issues have already been decided, vide order dated 23.11.2011 and, therefore, order dated 23.11.2011 will be part of Judgment.

14. Issue No. 3 was decided in negative, but in favour of plaintiff as such it was held by Court below that suit of plaintiff is not barred by Order 39 Rule 2 C.P.C.

15. Regarding Issue No. 4, Court below held that defendants have failed to prove as to how plaintiff has no right to institute suit, as such, aforesaid issue was decided in negative and against defendants.

16. Court below upon evaluation of plaint held that plaint is duly signed and verified, as such, Issue No. 5 was decided in favour of plaintiff.

17. In respect of relief to which plaintiff was entitled, Court below held that since plaintiff has failed to prove herself to be legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey, she is not entitled to any relief. Accordingly, issue no. 7 was decided against plaintiff.

18. Mr. G.D. Mishra, learned counsel for appellant in challenge to impugned Judgment and decree passed by Court below has placed before us impugned Judgment passed by Court below. He submits that court below while deciding Issue No.1 has referred to various documents. However, perusal of original record shows that documents referred to by Court below have not been marked 'Exhibits'. According to counsel for appellant until and unless a document is admitted in evidence, it cannot be marked as exhibit and unless the aforesaid exercise is undertaken, there is no legally admissible evidence on record. Therefore, submission urged is that court below has conducted an erroneous trial and, therefore, Judgment and decree passed by court below is liable to be set aside.

19. Mr. Manoj Kumar Singh, learned counsel representing respondents 2 and 3, on the other hand, has supported impugned Judgment and decree by placing reliance upon findings recorded by Court below as well as observations made in impugned Judgment. According to Mr. Manoj Kumar Singh, findings recorded by Court below cannot be said to be illegal, perverse or erroneous, as such, same are not liable to be interfered with. Once findings recorded by Court below are maintained by this Court, then conclusion cannot be challenged. It is, thus, vehemently urged that present First Appeal does not involve any point of determination in law or fact. Hence, same is liable to be dismissed.

20. The issues involved in the present First Appeal can better be appreciated in the light of provisions contained in Order 13, Order 8

C.P.C and Chapter 3 Part C, Rules 40 to 69, General Rules (Civil).

21. When record of court below is scrutinized in the light of provisions noted hereinabove, we find that none of the documents produced by parties were either put for admission or denial. Consequently, none of the documents were either admitted in evidence or proved in evidence. As such, no document filed by either of the parties was marked as an exhibit. What will be the consequence when such a procedure is adopted has been adequately dealt with in **New Okhla Industrial Development Authority Vs. Kendriya Karamchari Sahkari Grih Nirman Samiti Ltd., (2017) 4 UPLBEC 3077**, wherein following has been observed in paragraphs 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79:-

“19. While advancing arguments, it was also submitted that a very strange procedure in this case was followed by Court below inasmuch as parties submitted documents which included original, photostate copies and true copies. All these documents were marked paper numbers. No exercise of admission or denial of documents admitting documents in evidence, marking of exhibits etc. was undertaken and only on the basis of paper numbers, Court below has proceeded to decide the matter. Infact there is not a single evidence admitted by Court in accordance with procedure prescribed in Order 13 CPC read with General Rules (Civil), 1957 (hereinafter referred to as, 'GR(C), 1957') applicable to Court below and therefore, judgement is based on no valid evidence at all, hence on this ground alone it is liable to be set aside.

20. The entire original record of Court below is before us. We have examined entire record and found that there is not a single document which Court has admitted in evidence and marked exhibit number. No document contains any endorsement of admission or denial. A list of documents alongwith documents is there which have been given paper numbers. Whenever documents were filed before Court, the office has given paper number and those documents have been treated as evidence by Court below in deciding suit.

21. When questioned, learned counsel appearing for plaintiff-respondent whether any document was admitted as evidence and exhibit numbers were marked, he fairly stated that no such procedure has been followed by Court below and this is also evident from impugned judgement of Court below.

22. In these circumstances, we have examined for deciding these appeals only one question for determination i.e. "whether without admitting documents filed by parties as evidence and exhibiting the same in accordance with procedure prescribed under Order 13 read with Rules 4 CPC, was permissible for Court below to decide suit relying on documents, which are not admitted in evidence at all and can be said to be a judgment based on valid evidence."

23. A perusal of impugned judgement shows that a large number of documents were filed, which included original documents, photostate copies and true copies. No document has been referred by Court below with exhibit number. All the documents are referred with paper number. After examination of original record, we find that no document has been marked as exhibit. There is no endorsement by Presiding Officer of Court below admitting any document in evidence and infact even there is no endorsement by parties regarding admission or denial of document(s) filed by other party.

24. It is now a well established principle that a document, not admissible in evidence is to be excluded and cannot be considered a valid evidence for deciding suit.

25. In Roman Catholic Mission Vs. State of Madras, 1966 SCR (3) 283 Court held that a document not admissible in evidence, though brought on record, has to be excluded from consideration.

26. Procedure for taking documentary evidence on record is provided in Order 13 CPC read with General Rule (Civil). It is no doubt true that it is a procedural law, but this procedure is consistent with the principles of natural justice so that no party may suffer in the assessment of evidence to prove a fact, if any documentary evidence is relied, which is either in admissible in evidence or has not been otherwise proved.

27. Section 3 of Indian Evidence Act, 1872 (hereinafter referred to as, 'Act, 1872') says that, "fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

28. It is evaluation of result drawn by applicability of rule. The evaluation obviously is based on the pleadings between parties and evidence, oral and/or documentary, led by respective parties. In several cases on preponderance of probability of evidence it can be held that a fact is proved and therefore to decide suit by holding that fact has been proved, legal evidence is of utmost importance.

29. Here is not a case, where Court has admitted documents and marked exhibits without any objection by either of parties but unfortunately here is a case where documents filed are different manner, i.e. original documents, photostate copies and true copies have been filed. At the time of filing the same were given paper numbers but thereafter no process whatsoever of admitting documents as evidence in accordance with procedure prescribed in statute has undergone. Suit has been decided on these documents as such without admitting even a single document as evidence.

30. At this stage, it would be appropriate to have a bird's eye view of relevant provisions laying down procedure for admitting documents as evidence and marking of same as exhibits.

31. Order XIII deals with production, impounding and return of documents. Rule 1 thereof as it stands today, substituted by CPC Amendment Act, 1999 (hereinafter referred to as "Amendment Act, 1999") w.e.f. 01.07.2002. Earlier Rule 1 reads as under:-

**"(1) Documentary evidence to be produced at or before the settlement of issues.--(1)** The parties or their pleaders shall produce, at or before the settlement of issues all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced: Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs."

32. The substituted Rule 1 which is effective from 01.07.2002, reads as under:

**"1. Original documents to be produced at or before the settlement of issues.--(1)** The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with the plaint or written statement.

(2) The court shall receive the documents so produced:

Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

(3) Nothing in sub-rule (1) shall apply to documents--

(a) produced for the cross-examination of the witnesses of the other party; or

(b) handed over to a witness merely to refresh his memory."

33. This is consistent with Order VII Rule 14 in respect of the documents of plaintiff and Order VIII Rule 1A in respect of the documents of defendants. Both these rules have also undergone amendment by substitution and Order VII Rule 14 and Order VIII Rule 1A as inserted by Amendment Act, 1999, read as under:-

#### **Rule 14 before Amendment**

**"Rule 14. Production of document on which plaintiff sues--**(1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

**List of other documents.--**(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint."

#### **Rule 14 after Amendment**

"14. Production of document on which plaintiff sues or relies--  
(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such documents not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court,

be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

Order VIII Rule 1A (inserted by Amendment Act, 1999)

**"1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him-** (1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter claim, he shall enter such document in a list, and shall produce it in court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents--

(a) produced for the cross-examination of the plaintiff's witnesses, or

(b) handed over to a witness merely to refresh his memory."

34. Order XIII Rule 1 now creates an obligation upon parties or their pleader to produce original documents on or before settlement of Issues. Order XIII Rule 2 earlier provided effect of non-production of documents but now by Amendment Act, 1999 it has been omitted. If primary evidence i.e. original document is not available and party intends to lead secondary evidence, then all conditions provided in Evidence Act have to be satisfied. Rule 3 permits a Court to reject a document at any stage of the suit which it considers irrelevant or otherwise inadmissible after recording grounds of such rejection. Rule 4 contemplates endorsement on the documents admitted in evidence and it has to be done by Court since such endorsement has to be signed or initialled by Presiding

Officer of the Court. It reads as under:-

**"4. Endorsements on documents admitted in evidence-** (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the Suit the following particulars, namely:--

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted; and the **endorsement shall be signed or Initialed by the judge.**

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialed by the Judge."

35. Order XIII Rule 5 provides for endorsement on copies of admitted entries in books, accounts and records. Rule 6 talks of endorsement of documents rejected as inadmissible. The Rules read as under:-

**"5. Endorsements on copies of admitted entries in books, accounts and records.-** (1) Save in so far as otherwise provided by the Bankers' Books Evidence Act, 1891 (XVIII of 1891), where a document admitted in evidence in the suit is an entry in a letter book or a shop book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the court may require a copy of the entry to be furnished--

- (a) where the record, book or account is produced on behalf of a party, then by that party, or
- (b) Where the record, book or account is produced in obedience to an Order of the court acting of its own

motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

**6. Endorsements on documents rejected as inadmissible in evidence.**- Where a document relied on as evidence by either party is considered by the court to be inadmissible in evidence, there shall be endorsed there or the particulars mentioned in clauses (a), (b) and (c) of Rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

36. Order XIII Rule 7 CPC provides that documents which are admitted in evidence shall form part of record of suit. The documents not admitted in evidence shall not form part of record and shall be returned to the persons respectively producing them.

37. Order XIII Rule 8 CPC empowers Court to impound a document and keep in the custody of officer of Court, if it sees sufficient cause, for such period and subject to such conditions, as Court thinks fit.

38. Rule 9 provides for return of admitted documents after suit is disposed of, and, either time for filing appeal has expired or appeal has been disposed of. Proviso covers a situation where a document may be returned at any time earlier than the period provided hereinabove in certain conditions. Rule 10 states that Court may, of its own motion, and its discretion, upon application of any of the parties to suit, send for, either from its own record or from any other Court, record of any other suit or proceeding, and inspect the same. Conditions applicable when such order is passed on the application, are contained in sub-rule 2 of Rule 10. Sub-rule 3 declares that Rule 10 shall not enable Court to use in evidence, any document which under the law of evidence would be inadmissible in suit. Rule 11 extends provisions relating to documents to all other material objects producible as evidence.

39. In exercise of supervisory powers under Article 227 of Constitution of India read with Section 122 CPC, GR (C), 1957 have been notified in supersession of all existing Rules on the subject. These Rules have 28 Chapters dealing with different aspects of procedure to be followed, not only in trial of civil suits

etc., but also tell subordinate Courts, manner of maintenance of record of various proceedings and other administrative aspects.

40. Part (A) deals with parties to the proceedings; (B) with applications and pleadings; (C) with Documents; (D) Commissions; (E) Affidavits; (F) Adjournments; (G) Hearing of suit; (H) Transfer or withdrawal of cases; and, (I) Judgment and decree.

41. For purpose of present matter we confine ourselves to Chapter III Part C which deals with documents and contains Rules 40 to 69.

42. Rule 40 of GR (C), 1957 specify the persons who may produce documents in the Court and says that it may be by parties, by persons, other than parties and on requisition issued by Court. Rule 41 imposes an obligation where the documents produced by party or his witness is in a language other than Hindi, Urdu or English and says that it shall be accompanied by a correct translation of the document in Hindi, written in Devnagri script. Such translation shall bear a certificate of party's lawyer to the effect that the translation is correct. If parties are not represented by a lawyer, Court shall have the translation certificate of any person appointed by it in this behalf at the cost of the party concerned.

43. Rule 42 of GR (C), 1957 contemplates that parties desiring to produce any document in Court, shall, before producing it in any Court, obtain admission or denial, recorded on back of the document by the opposite party's lawyer. If opposite party is not represented by lawyer, Court shall get admission or denial by the party in its presence and may, for the purpose, examine the party.

44. Rule 43 lays procedure of list of documents contemplated in Order VII Rule 14 and Order XIII Rule 1 CPC and says that such list of documents shall be in form (part IV-71). It further says that no document whensoever produced, shall be received unless accompanied by the said form duly filled up. In case a document is produced by a witness or person summoned to produce documents, form shall be supplied by the parties at whose instance the document is produced. It also requires that list as well as the documents shall be immediately entered in the general index.

45. If there is any erasures or additions in the documents, other than a registered documents or certified copy, Rule 44 of GR (C), 1957 states that such document shall be accompanied by a statement clearly describing such erasure, addition or interlineation and signed by such party. Reference to such statement shall be made in the list form (part IV-71) with which paper is filed.

46. Rule 45 is basically a provision for safety and convenience of

perusal of documents when it is a small piece of paper or of historic value or written on both sides. It reads as under:-

**"45. Small documents and documents of historic value.--**Small documents when filed in Court shall be filed pasted on a paper equal to the size of the record, and the margin of the paper should be stitched to the file so that no part of the document is concealed by the stitching. If a document contains writing both on the front and the back, it should be kept in a separate cover, which should be stitched to the file at the proper place leaving the main document untouched."

47. When a party require production of a public record, Rule 46 says that application shall be submitted by such party accompanied by an affidavit showing how such party requiring record has satisfied itself that it is material to the suit and why a certified copy of document cannot be produced or will not serve the purpose.

48. When a public record is ordered to be produced but its production require sanction of Head of Department, Rule 47 deals with such a situation and says as under:-

**"47. Documents for production of which sanction of head of department is necessary.--**When a Court decides that in the interests of justice it is necessary that it should have before it a document which cannot be produced without the sanction of the head of the department concerned, it shall in its order asking for such document set out as clearly as possible (a) the facts, for the proof of which the production of the document is sought; (b) the exact portion or portions of the document required as evidence of the facts sought to be proved. The Court summoning the document shall fix a date for its production, which should not be less than three weeks from the date of issue of summons."

49. Rule 48 deals with public record of different offices like Sub Registrar, Police, Municipal and District Board and Post Office and says as under:-

**"48. Registers from Sub-Registrar's office.--**(1) A summons for the production of any register or book belonging to the office of a Sub- Registrar shall be addressed to the District Registrar and not direct to the Sub-Registrar.

(2) Production of documents in police custody.-A summons for the production of documents in the custody of the police should be addressed to the Superintendent of Police

concerned, and not to the Inspector General.

**(3) Production of Municipal and District Board Records.**-When duly authenticated and certified copies of documents in the possession of Municipal and District Boards<sup>15</sup> are admissible in evidence, the Court shall not send for original records unless, after perusal of copies filed, the Court is satisfied that the production of the original is absolutely necessary.

(4) Post Office records not to be unnecessarily disclosed.-When any journal or other record of a post office is produced in Court, the Court shall not permit any portion of such journal or record to be disclosed, other than the portion or portions which seem to the Court necessary for the determination of the case then before it."

50. For summoning of settlement record, procedure is prescribed in Rule 49 and reads as under:-

**"49. Settlement Records.**--When a Court requires the production of any Settlement Record in which the Settlement Officer acted in a judicial capacity, it shall be summoned in the manner provided by Order XIII, Rule<sup>10</sup>. In other cases the procedure prescribed in Order XVI, Rule 6 shall be followed. The summons to produce such documents shall be issued to the Collector/Deputy Commissioner, who may send the document by messenger or registered post."

51. Rule 50 deals with payment of postage fee, travelling charges and other expenses for transmission or requisition of record etc. Rule 51 says that documents received by registered post, then the registered cover shall not be destroyed but shall be attached to the file of proceedings in the case to which the document is referred.

52. Then comes Rule 52 which says that all document received must be received by the Court and must be dealt with in one or the other of three means i.e. (a) returned; (b) placed on record; and (c) impounded.

53. Thereafter Rule 53 imposes a duty upon Court to inspect documents as soon as they are produced before Court. It says that documents which are proved or admitted by party against whom they are produced in evidence, shall be marked as exhibit in the manner prescribed in Rule 57 and this fact shall be noted in the record. The document which are not proved or not admitted by parties against whom they are produced in Court, shall be kept in record pending proof and shall be rejected at the close of evidence,

if not proved or admitted. Documents that are found to be irrelevant or otherwise inadmissible in evidence shall be rejected forthwith. There is a note under Rule 53 stating that no document unless admitted in evidence shall be marked as an exhibit.

54. Rule 54 of GR (C), 1957 clarifies that admission of genuineness is not to be confused with admission of truth of contents and reads as under:

**"54. Admission of genuineness not to be confused with admission of truth of contents.**-(1)When a certified copy of any private document is produced in Court, inquiry shall be made from the opposite party whether he admits that it is a true and correct copy of the document which he also admits, or whether it is a true and correct copy of the document which he denies, or whether it is a true and correct copy of the document the genuineness of which he admits without admitting the truth of its contents, or whether he denies the correctness of the copy as well as of the document itself. Admission of the genuineness of a document is not to be confused with the admission of the truth of its contents or with the admission that such document is relevant or sufficient to prove any alleged fact.

(2) A Sessions Clerk who fails to furnish security as required by the preceding sub-rule shall not be allowed to hold that most and also other posts of equivalent status.

**Explanation.**--Posts of Suits Clerk, Execution Clerk, Appeals Clerk and Readers of the courts of Judge, Small Causes, Civil Judges and Munsif shall, for purposes of this rule, be deemed to be in status equivalent to that of a Sessions Clerk."

55. The expression which are to be used by parties while admitting or not admitting documents, is provided in Rule 55 and reads as under:

**"55. Proper expression about admissions of documents.**-Admission of a document by a party shall be indicated by the endorsement "Admitted by the plaintiff" or "Admitted by the defendant". Admission of a document in evidence by the Court shall be indicated by the endorsement "Admitted in evidence". If any question is raised as to the correctness of a copy and the correctness of its is admitted, the endorsement shall be "correctness of copy admitted". The use of the expression "Admitted as a copy" in endorsement on document is prohibited."

56. Rule 56 talks of documents filed in suits which are compromised or dismissed in default and says:

**"56. Endorsement on documents in suits compromised or dismissed for default.**-Documents filed in suits, which are dismissed for default or compromised, shall, before being dealt with in the manner provided in Rules 59 and 60 be endorsed with the particulars mentioned in Order XIII, Rule 4(i) and the result of the suit."

57. Rule 57 provides the manner in which marking is to be made in documents and reads as under :

**"57. Marking of documents.**-(1) Documents produced by a plaintiff and duly admitted in evidence shall be marked with a number, and documents produced by a defendant shall be marked with a number and the letter A, or, where there are more than one set of defendants by the letter A for the first set of defendants, by the letter B for the second, and so on. Where a document is produced by order of the Court and is not produced by any party, the serial number shall be prefaced by the words "Court Exhibit" or an abbreviation of the same.

(2) Where a document is produced by a witness at the instance of a party, the number of the witness shall be endorsed thereon, e.g., Ex.P.W.1 if it is produced by the plaintiff's first witness, and Ex.-A/D.W.1 if it is produced by the defendant's first witness.

(3) The party at whose instance a document is produced by a witness shall deposit the cost of the preparation of a certified copy of that document before it is placed on the record. The office shall then prepare a certified copy and keep it with the original document. If the witness wants to take back his document it shall be returned to him unless there are special reasons for keeping the original on the record.

Provided that a certified copy shall not be necessary where the document is written in a language other than Hindi or English, and a translation has been filed as prescribed by Rule 41.

(4) Every exhibit-mark shall be initialed and dated by the Judge."

58. If a number of documents of same nature are admitted than the manner in which such documents are marked, is provided in Rule

58 as under:

"58. Marking of documents.- Where a number of documents of the same nature are admitted, as for example, a series of receipt for rent, the whole series should bear one figure or capital letter or letters, a small figure or letter in brackets being added to distinguish each paper of the series."

59. Rule 59 states that documents which are rejected as irrelevant or otherwise inadmissible under Order 13 Rule 3 CPC or not proved, unless impounded under Order 13 Rule 8 or rendered wholly void or useless by force of decree, be returned to the person producing it or to the pleader and such person or pleader shall give a receipt for same in column 4 of list (Form Part IV-71).

60. Rules 60 and 61 of GR (C), 1957 deal with retention of impounded and certain other documents and care of impounded documents. Rule 63 talks with the manner in which documents are to be returned. Rule 64 specifically concerned with books of business and read as under:

**"64. Books of business.**-If a document be an entry in a letter book, a shop book, or other account in current use or an entry in a public record, produced from a public office or by a public officer, a copy of the entry, certified in the manner required by law, shall be substituted on the record before the book, account or record is returned, and the necessary endorsement should be made thereon, as required by Order XIII, Rule 5."

61. It is true that these are the provisions relating to procedure and have been designed to facilitate procedure for imparting justice. The procedural law is not to be dealt as a penal enactment and too technical construction thereof is not needed. This is what has been said by Hon'ble Vivian Bose, J in Sangram Singh vs. Election Tribunal, Kotah and another, 1955(2) SCR 1 and we quote relevant observation as under:

"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends : not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it."

62. Evidence is the foundation of every case since in our system of justice disputes are decided, whether Civil or Criminal, on the basis of evidence which may be oral or documentary or both. Therefore, rules dealing with procedure as to how a document will become an evidence is of great importance and such procedure must be adhered. Normal requirement under Rules is that provisions relating to endorsement of document admitted in evidence should be strictly followed.

63. In the past, Courts, on different occasions and in particular, in the light of facts of those cases, deviation in process of marking of evidence or admitting of documents has allowed to stay. Such deviation and has not vitiated proceedings but a close scrutiny of such matters will reveal that such occasions existed due to peculiar facts of those matters. In order to avoid injustice to one or the other party, Courts have not held a document inadmissible at a later stage but in general, law is that in order to make a document, 'exhibit' the procedure prescribed under rules should be adhered to. However, such authorities are mostly in relation to civil matters instituted and proceeded in Courts below prior to amendment of order 13 Rule 1 by C.P.C. Amendment Act, 1999, which came into force on 1.7.2004

64. Legislature has intervened by amending Order 13 Rule 1 and now parties have to file documentary evidence in original. This is clearly with the intention to avoid scope of fictitious, manufactured or otherwise documents, particularly when scientific development has made things much easier to create any kind of manipulation in a document very conveniently. Courts are under a duty that before it treat a document, evidence, it should follow the procedure strictly and unless document is admitted as evidence and marked as exhibit, same obviously cannot be relied to decide a dispute. Marking of mere paper number and decision of a case on that basis is not correct. It may amount to render decision on the basis of documents inadmissible in evidence.

65. In *Sadik Husain Khan vs Hashim Ali Khan and others*, 1916 ILR (38) All 627, Judicial Committee said:

"Their Lordships, with a view of insisting on the observance of the wholesome provisions of these Statutes, will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required."

66. In *Secretary of State vs. (Shrimati) Sarla Devi Chaudhrani*, AIR 1924 Lahore 548 followed in *Hari Singh vs. Firm Karam Chand-*

Kanshi Ram, AIR 1927 Lahore 115 and Imam-ud-Din and Anr. vs. Sri Ram Perbhu Dial, AIR 1928 Lahore 142, it was said that documents admitted on record without making endorsement prescribed by Rules cannot be regarded as having been brought on record legally, before Court.

67. In Feroze Din and Ors. vs. Nawab Khan and others, AIR 1928 Lahore 432, Court said that documents should not be endorsed until they are proved. Sometimes the Court may mark a document as an exhibit without having it proved.

68. In Sait Tarajee Khimchand and others vs. Yelamarti Satyam alias Satteyya and others, AIR 1971 SC 1865, Court said that merely marking of an exhibit does not dispense with the proof of documents. It was followed in Sitaram vs. Ram Charan and Ors. AIR 1995 MP 134.

69. In the present case, documents have been filed as original documents, photocopies and true copies. Photocopies and true copies are in nature of secondary evidence and therefore would be admissible in evidence under Section 65 of Act, 1872 in case conditions therein are satisfied.

70. In J. Yashoda Vs. K. Shobha Rani (2007) 5 SCC 730, Court held :-

"The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it."

71. Section 63 of Act, 1872 talks about what secondary evidence is and reads as under :-

**"63. Secondary evidence.**-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."

72. Section 65 of Act, 1872 deals with cases in which secondary evidence may be given. It reads as under :-

**"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 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 consists 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."

73. In *J. Yashoda (Supra)*, Court said :-

"Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section."

74. In *Ashok Dulichand Vs. Madahavlal Dube (1975) 4 SCC 664* Court said :-

"According to clause (a) of section 65 of the 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 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. Clauses (b) to (g) of section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of section 65, the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying

that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case respondent No. 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was, however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of respondent No. 1. There was also no other material on the record to indicate that the original document was in the possession of respondent No. 1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession of or having anything to do with such a document. The photostat copy appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court."

75. A Division Bench of Madhya Pradesh High Court (Indore) in Food Corporation of India Vs. Dena Bank AIR 2004 MP 158 said:-

"It is evident from the above discussion that there is no legal evidence to arrive at the conclusion at which learned Lower Court has arrived. No evidence of any kind has been adduced even the written statement was not filed while the defendant was directed to file written statement. Any document has not been proved. The finding of the learned Lower Court seems to be based on the photostat copies of the award and the order of the Delhi High Court, which have not been even exhibited. Thus, the order passed by the learned Lower Court is not based on any legal evidence and is liable to be set aside."

76. The above observation that photocopy of a document is not a evidence to pass a decree has been affirmed by Supreme Court in Neebha Kapoor Vs. Jayantilal Khandwala (2008) 3 SCC 770 wherein Court referring to judgement of Madhya Pradesh High Court in Food Corporation of India (Supra) said :-

"A decree could not have been granted on the basis of even photostat copies of the documents. Presumption in regard to a

negotiable instrument or a bill of exchange in terms of Section 118 of the Act is also an evidence. It is true that a presumption can be raised that a bill of exchange was correctly stamped as provided for under Clause (f) of Sub-section (2) of Section 128 of the Code but a decree is to be passed by a court of law upon application of mind."

77. In *R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P Temple and Another* (2003) 8 SCC 752 referring to Order 13 Rule 4 CPC, Court said :-

"every document admitted in evidence in suit being endorsed by or on behalf of the Court, which endorsement signed or initialled by the Judge amounts to admission of document in evidence. Having said so, Court said, "an objection to the admissibility of the document should be raised before such endorsement is made and the Court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the Court to the person from whose custody it was produced." Further Court said that, "ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered. Once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit." Court said that, "later proposition is a rule of fair play."

78. In *H. Siddiqui Vs. A. Ramalingam*, (2011) 4 SCC 240 considering the admissibility of secondary evidence Court said :-

"secondary evidence relating to contents of a document is

inadmissible, until non-production of original is accounted for, so as to bring it within one or other of the cases provided for in the Section. Secondary evidence must be authenticated by foundational evidence that alleged copy is in fact true copy of the original. Mere admission of a document in evidence does not amount to its proof, therefore, documentary evidence is required to be proved in accordance with law. Court has an obligation to decide question of admissibility of a document in secondary evidence before making endorsement thereon."

79. Photostate copies and true copies which have not even been marked as exhibit and there is no endorsement by Presiding Judge of Court on document admitting the same as evidence in the case in hand, brings a very difficult situation before us to consider as to which evidence was admitted and which was not and what document was proved and whether judgement is founded only on admissible evidence or inadmissible evidence or unproved document, hence unreliable. The question of any objection by party, it appears, has lost its significance since procedure of admitting of document and marking of evidence has been given a complete go bye by Court below and in absence of ascertaining as to which document is admissible, we find no option but to remand the matter by setting aside the judgement dated 10.9.2008 and decree dated 24.9.2008, directing Court below to first observe the procedure of admission of documents in evidence and thereafter decide the matter afresh, in accordance with law. The point for determination formulated above is answered by holding that the judgement and decree passed by Court below is not founded on valid evidence and Court below has erred in law in not following the procedure prescribed for admitting documents in evidence."

22. In the present case also, documents filed by parties have not been marked, 'exhibits'. There is no endorsement made personally by Presiding Judge of Court below on the documents so filed, admitting them in evidence. Thus, what was the evidence which was relied upon by Court below is shrouded in obscurity. Therefore, Judgment passed by Court below is upon basis of such documents which did not form part of documentary evidence adduced by parties. In fact, there was no such document which was legally admitted in evidence. Procedure adopted by court below is in total ignorance of Order 13, Order 8 C.P.C. as well as Rules 40 to 69 of Chapter 3 Part C of General Rules (Civil). In the result,

trial of Original Suit No. 15 of 2010 (Gulabpati Vs. Smt. Pushpa Rani Pandey is held to be erroneous.

23. Consequently, present First Appeal succeeds and is allowed. Judgment dated 28.10.2005 and decree dated 30.10.2005 passed by Principal Judge, Family Court, Basti in O.S. No. 626 of 2015 (Gulabpati Vs. Smt. Pushpa Rani Pandey and others) are hereby set aside. Matter is remanded to Court below for decision afresh keeping in mind the observations made hereinabove.

24. In the facts and circumstances of the case, we make the cost easy.

**(Rajeev Misra,J.)      (Sudhir Agarwal,J.)**

**Order Date :-25.11.2019**  
Ram Murti