

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

CRIMINAL WRIT PETITION NO. 1375 OF 2015

Digambar s/o Mallaji Ibatwar,

Age : 47 yrs., Occu. Service,

R/o. Sidharth Nagar,

Basmath, Tq. Basmath,

Dist. Hingoli.

... Petitioner

VERSUS

The State of Maharashtra

... Respondent

.....

Mr S. S. Rathi, Advocate for petitioner

Mr U. S. Mote, APP for respondent/State

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CORAM : **INDIRA K. JAIN, J.**

DATE : **17TH DECEMBER, 2015.**

ORAL JUDGMENT:

. Rule. Rule made returnable forthwith. Heard finally with the consent of parties.

2. This petition takes an exception to the order dt. 24.8.2015 passed by the learned Judicial Magistrate First Class (Court No. 2), Basmath, Dist. Parbhani below Exh. 184 in RCC No. 2 of 2011.

3. One Shankar Muttu was an accused in RCC No. 259 of 2005 pending before the learned Judicial Magistrate First Class, Basmath. He moved an application to the learned Principal District and Sessions Judge Parbhani stating therein that he had received a notice from Basmath Court directing him to deposit an amount of Rs. 4,000/- per month in RCC No. 259 of 2005. On inquiry learned Principal District and Sessions Judge Parbhani found that no such notice was ever issued by any Court in the district.

4. As it was revealed that some serious mischief has been played the learned Judicial Magistrate First Class, Basmath reported the matter to police station Basmath on the basis of which crime was registered. Investigation was conducted. Charge-sheet was filed. The trial court framed charge and evidence of the prosecution witnesses commenced.

5. During evidence of the learned Principal District Judge PW12 Radheshyam Babuji Patle photocopy of the notice on the basis of which application was moved to the Principal District and

Sessions Judge Parbhani, was referred. The learned counsel for defence strongly objected to exhibit photocopy of notice. The learned Magistrate on hearing the parties decided the objections and held that photocopy of notice was submitted along with the application addressed to the learned Principal District and Sessions Judge and therefore same is primary evidence.

6. It appears that before the photocopy of notice was referred to PW12 the same was shown to complainant PW3 Ku. Sarika Sarani the learned Judicial Magistrate First Class, Basmath and the photocopy of notice was marked as Article 'A'. The learned Magistrate found that the objections raised by the defence do not sustain and marked photocopy of notice Article A as Exh. 188. It is this order which is the subject matter of present writ petition.

7. Needless to state that the contents of a document under the Evidence Act can be proved by proving the document in usual manner. If the original document itself is produced it is a primary evidence under Section 62 of the Indian Evidence Act. In case

photocopy of original document is produced, it can be treated as secondary evidence under Section 65 of the Indian Evidence Act.

8. Under Section 65(b) of the Indian Evidence Act the party seeking to produce secondary evidence should prove the existence, condition or contents of the original and should plead and prove all the attendant circumstances so as to invoke the discretion of the Court permitting him to lead secondary evidence. In the absence of such a proof of special circumstances for leading secondary evidence, the party cannot be permitted to lead secondary evidence. It means prior permission of the court is required to be taken for producing secondary evidence of the document on the grounds prescribed in Section 65 of the Evidence Act.

9. In the present case admittedly no such move was there at the end of the prosecution. No prior permission was sought to lead secondary evidence. The photocopy of notice was treated as primary evidence only on the ground that the said copy of notice was accompanied with the application submitted to the learned Principal District and Sessions Judge, Parbhani.

10. In this premise the order passed by the learned Magistrate exhibiting photocopy of notice without proper compliance is *per se* contrary to the provisions of the Evidence Act. The said order does not sustain in law and therefore interference is warranted in the writ jurisdiction. Hence the following order.

ORDER

- (i) Criminal Writ petition No. 1375 of 2015 is partly allowed.
- (ii) Rule is made absolute in terms of prayer clause 'C' of the petition with a direction to the learned Judicial Magistrate First Class (Court No. 2), Basmath, Dist. Parbhani to decide the objections raised by the defence afresh in accordance with the provisions of law without being influenced by the observations made herein-above.

**[INDIRA K. JAIN]
JUDGE**

sgp