

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

+ Criminal Petition No.5195 of 2014

%22.04.2015

Between:

Enkay Texofood Industries Ltd, Mumbai

Rep. by its Managing Director Tulsi Goyal

and another Petitioner

AND

The State of Andhra Pradesh

Rep. by Public Prosecutor,

and another. Respondents

! Counsel for Petitioners : Sri I.V.Ramesh

^ Counsel for Respondent No.1 : Addl. Public Prosecutor

^ Counsel for Respondent No.2 : Sri M. Shiva Kumar

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? Cases referred:

1. AIR 2007 SC 1721
2. (2010) 8 SCC 423
3. AIR 1959 AP 568
4. AIR 1958 AP 418
5. (2013) 10 SCC 758

THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

CRIMINAL PETITION No.5195 of 2014

ORDER:

In this petition filed under Section 482 Cr.P.C., the petitioners/A1 and A2 seek to quash the order dated 10.02.2014 in CrI.R.P.No.40 of 2012 passed by learned Metropolitan Sessions Judge, Cyberabad at L.B.Nagar, Hyderabad confirming the order dated 11.01.2012 in CrI.M.P.No.1 of 2011 in C.C.No.184 of 2011 passed by II Special Magistrate, Hasthinapuram, Ranga Reddy District.

2) The complainant filed C.C.No.184 of 2011 against A1 to A3 for the offence under Section 138 of Negotiable Instruments Act, 1881 (for short "NI Act"). In the said case he filed CrI.M.P.No.1 of 2011 under Section 63 of Indian Evidence Act to permit him to mark photostat copy of cheque bearing No.074191 dated 27.10.1999 as secondary evidence. His case was that at the time of filing the case his previous counsel filed original cheque and after taking cognizance, the counsel took back the original cheque to be produced at the time of trial by replacing with a photostat copy. However, the original cheque was misplaced in the office of his counsel and in spite of his best efforts the original cheque could not be traced till date. Hence, he may be permitted to mark the photostat copy of the cheque available in the Court records as secondary evidence. The respondents/accused opposed the petition. The trial Court after enquiry allowed the petition permitting the complainant to mark the photostat copy as secondary evidence.

3) Aggrieved, A1 and A2 preferred CrI.R.P.No.40 of 2012 but the same was dismissed by Metropolitan Sessions Judge, Cyberabad by confirming the order of the lower Court.

Hence, the instant Criminal Petition.

4) Learned counsel for petitioners contended that Courts below grossly erred in allowing the complainant to adduce the photostat copy of cheque as secondary evidence without the complainant establishing the facts that the cheque sought to be marked is the photostat copy of the original cheque and that the original cheque was lost. He contended that as per best evidence rule, the primary

evidence has to be adduced for appreciation of Court and secondary evidence can be adduced only in very limited and exceptional circumstances as narrated in Section 65 of Indian Evidence Act and party who proposed to lead secondary evidence must cogently and convincingly establish the existence of circumstances narrated in Section 65. In the instant case, he argued, the complainant utterly failed to establish that there existed original cheque which was filed into Court and later it was replaced by photostat copy by his counsel and the same was lost in his office. The complainant has neither examined the advocate nor produced his affidavit in proof of such plea but still the Courts below on presumptions and assumptions accepted the alleged loss of cheque and permitted him to produce the copy of the cheque purported to be the photostat copy of the original. He vehemently contended that by the orders of the Courts below, great prejudice is caused to the defence of accused inasmuch as their plea before the trial Court was that they never issued cheque and if the photostat copy of the cheque were to be marked as secondary evidence, it cannot be sent to the FSL for comparison of the handwritings of the accused. He thus prayed to allow the petition and set aside the impugned order. He relied upon the following decisions.

1. J.Yashoda vs. K.Shobha Rani

2. Shalimar Chemical Works Ltd. vs. Surender Oil and Dal Mills

3. Bobba Suramma vs. Peddireddi Chandramma

4. Jaldu Ananta Raghuram Arya vs. Rajah Bommadevara Naga Chayadevamma

5) Per contra, opposing the petition, learned counsel for 2nd respondent/complainant submitted that the original cheque issued by the accused was filed before the trial Court at the time of filing the criminal case and then only the trial Court, upon scrutiny, registered the criminal case and subsequently his counsel took return of the cheque by replacing the same with photostat copy and thereafter the original cheque was misplaced and lost in the office of his previous

counsel and could not be traced out and therefore, complainant had to request the Court to permit him to mark photostat copy of the original cheque available in the Court record as evidence on his behalf and taking these circumstances into consideration, the Courts below have rightly permitted him to do so. He contended that if the cheque was not lost there was no reason for him to withhold it to his disadvantage in the light of contention of accused that they did not issue any cheque. Learned counsel further argued that what the complainant proposed to produce as secondary evidence is not a document which he brought forth all of a sudden so as to criticize as being manipulated, but he only proposed to mark the document which was already lying in the Court record and out of his reach. He contended that the orders of the Courts below were perfectly right and need not be reconsidered.

6) In view of rival submissions, the point for determination is:

“Whether there are merits in this petition to allow?”

7) **POINT**: Section 65 of the Evidence Act is the enabling provision for adducing secondary evidence. For our present context sub-section (c) of Section 65 is important which reads thus:

***“Section 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) x x x

(b) x x x

(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.”

So, one of the enabling circumstances for adduction of secondary evidence is the *loss or destruction of original evidence*.

8) The Apex Court in the decision reported in ***Kaliya vs. State of Madhya Pradesh*** happened to discuss about what has to be established by a party to seek production of secondary evidence

under Section 65(c) of the Evidence Act. In that case which was a bride burning and death case, the original dying declaration recorded in the hospital could not be traced and upon the evidence of concerned doctors about misplacement of original dying declaration, a carbon copy of the dying declaration was allowed to be produced by the Courts below and approved by the Apex Court. In that context, Apex Court observed as follows:

*“10. Section 65(c) of the Act 1872 provides that secondary evidence can be adduced relating to a document 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. The court is obliged to examine the probative value of documents produced in court or their contents and decide the question of admissibility of a document in secondary evidence. (Vide: **H. Siddiqui (dead) by L.Rs. v. A. Ramalingam** MANU/SC/0174/2011 : AIR 2011 SC 1492; and **Rasiklal Manikchand Dhariwal and Anr. v. M.S.S. Food Products** MANU/SC/1408/2011 : (2012) 2 SCC 196). However, the secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the court that it was not in his possession or control of it and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the party gives in evidence a certified copy/secondary evidence without proving the circumstances entitling him to give secondary evidence, the opposite party must raise an objection at the time of admission. In case, an objection is not raised at that point of time, it is precluded from being raised at a belated stage. Further, mere admission of a document in evidence does not amount to its proof. Nor, mere marking of exhibit on a document does not dispense with its proof, which is otherwise required to be done in accordance with law.”*

a) From the above decision it is clear that before a party is eligible to produce secondary evidence under Section 65(c), he has to account for the non-production of original document in one of the ways envisaged in that section i.e. he has to prove before the Court that the original is not in his possession or control as it was lost and that he has done what could be done to procure the production of it. Thus, he has to lay a factual foundation to establish the right to give secondary evidence. It can also be learnt from the above decision that mere admission of the secondary evidence does not amount to

its proof but it is required to be proved in accordance with law.

9) Coming to the instant case, the complainant seeks to adduce secondary evidence under Section 65(c) of Evidence Act on the plea that the original cheque filed in Court and taken return by his counsel was misplaced and lost in his hands. Hence, the questions are whether the complainant could satisfactorily establish firstly, that he in fact, filed the original cheque in Court and secondly, that the said cheque was replaced with an exact copy by his counsel and taken return of the same and lost.

10) Regarding above questions, since the trial Court will not number the criminal case without production of original cheque at the time of filing the case, it can be presumed that original cheque must have been filed into Court. Further, as per the observation of learned Metropolitan Sessions Judge, it was not the contention of the accused before him that the original cheque was not filed at all into Court. So, by this count also it can be held that original cheque was indeed filed into Court. Then, at the time of withdrawing original cheque concerned Court staff will return the original cheque only on comparison of original with photostat copy. Therefore, the photostat copy now available in the Court can be presumed as exact copy of original cheque. Then loss of cheque is concerned, no doubt, except the affidavit of complainant he has not produced any supporting evidence or affidavit of his previous counsel. In the considered view of this Court, that is not the big lapse to reject his request. If the original were in his possession certainly the complainant would have produced the same at the time of his evidence and he would not gain by withholding it deliberately. So, the loss of cheque can be accepted to be true. When that is the fact, the complainant is squarely entitled to adduce secondary evidence. As rightly argued by learned counsel for 2nd respondent/complainant the document sought to be produced is not brought forth all of a sudden, but is available in the Court itself. Therefore, the Courts below were right in permitting him to adduce

the secondary evidence. Therefore, the contention of the accused that original cheque was not filed into Court and its loss was not proved cannot be appreciated.

11) The next contention of the petitioners/accused is that photostat copy of the cheque is easily tamperable by mechanical process and if the same is allowed to be marked as exhibit, accused may not be able to send the document for comparison to FSL to establish their defence plea. It must be said that mere allowing the complainant to mark the photostat copy of the cheque does not mean accepting its contents to be true. The burden is on the complainant to prove the contents of the cheque. It is only after the complainant discharges his evidentiary burden then the onus shifts to accused. The accused can establish their defence by various other means which are legally permissible to them. So, merely on the apprehension that the accused will lose the opportunity to send the document to FSL, the complainant cannot be restrained from establishing his case by producing the secondary evidence. Therefore, this contention also cannot be accepted.

12) The cited decisions will not improve the case of the petitioners/accused as they can be distinguished on facts.

a) In **J.Yashoda's** case (1 supra) the facts are that appellant sought to produce photostat copy of a document on the plea that the original was with respondent No.1 but respondent No.1 denied the same. In that context, secondary evidence was refused by the High Court and confirmed by Supreme Court. It was a case under Section 65 (a) of Evidence Act but not under Section 65(c).

b) In the case of **Shalimar Chemicals Works Ltd.** (2 supra) the Apex Court deprecated the practice of trial Court marking Xerox copies as exhibits and leaving the discussion on admissibility of documents hanging till the end of trial.

c) In **Bobba Suramma and Jaldur Ananta Raghuram's** cases (3 and 4 supra) what was observed was that in order to claim benefit under

Section 65 of Indian Evidence Act there should be credible evidence about the loss of original. In the instant case, having regard to the factual circumstances, loss of original copy can be believed.

13) In the result, I find no merits in the Criminal Petition and the same is accordingly dismissed.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

U.DURGA PRASAD RAO,J

Dt. 22-04-2015

Note: LR Copy to be marked: Yes / No

Murthy