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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.76 OF 2016

Kiran s/o Narendra Pawar ...Applicant
Versus
The State of Maharashtra ...Respondent

Mr.Pawan Mali, for the Applicant

Mr.Arfan Sait, A.P.P for the Respondent-State

Kishor More, Dy.Sp. ACB, Nashik.

CORAM : REVATI MOHITE DERE, J.

DATE : 6th APRIL, 2016

P.C. :

1. Heard learned counsel for the Applicant and learned APP for the Respondent - State.

2. By this application, the applicant seeks quashing and setting aside of the order dated 10th December, 2015, passed by the learned Additional Sessions Judge, Nashik, below Exhibit – 61 in Special Case No.2 of 2007 and seeks permission to lead documentary evidence by way of secondary evidence in respect of H.P.File Nos.129, 204, 205 along with

loan recovery of roznamas, which were maintained in the office of the Chairman, of the Liquidator Board of Nashik Co-operative Credit and Capital Society Limited (hereinafter referred to as 'the Society').

3. The Complainant is one Shashikant Sitaram Pandit, a Civil Contractor who had filed a complaint with the Anti-Corruption Bureau, Nashik on 6th July, 2006. According to the complainant, his wife had taken a loan of Rs.6 lacs, from the Nashik Co-operative Credit and Capital Society Limited, Nashik, for purchase of a truck. It is stated that as the said loan amount was not paid, the Society filed a Suit in the Co-operative Court, Nashik for recovery of the said amount. The Co-operative Court was pleased to allow the Suit and a decree was passed against the complainant's wife. Thereafter, as the Society went into liquidation, a Liquidator was appointed for the said Society and the applicant was appointed as a Recovery Officer of the Liquidator Board. The applicant in his capacity as a Recovery Officer, issued notice to the complainant's wife for attachment of the property, pursuant to the decree of the Co-operative Court. It is alleged that on 30th June, 2006, some accused in the aforesaid case, demanded a sum of Rs.35,000/- from the complainant. On 6th July, 2006, a

trap was laid and the accused came to be arrested. After completion of the investigation, charge-sheet was filed. Thereafter, charge was framed as against the applicant and other accused. During the course of trial, the complainant was summoned and his examination-in-chief was conducted by the learned Assistant Public Prosecutor. During the cross examination of the complainant, certain questions were put not only with respect to the loan transactions of the complainant's wife but also with regard to the loan taken by the complainant's sister-in-law. According to the applicant, the Investigating Officer had seized only some documents which were in favour of the prosecution and that some documents which were in favour of the applicant, were deliberately not seized from the office of the Liquidator Board. The applicant informed his Advocate about the said documents, which he had received under the Right to Information Act, from the Liquidator Board and brought the same to the notice of his Advocate. The documents received under the RTI were attested copies of the original documents i.e. the Roznamas maintained in respect of the recovery of the loan amounts. It was contended by the applicant, that the roznamas of the recovery of the loan amounts were signed by the complainant, however, the original documents were not seized by the Investigating Officer during investigation. As the applicant wanted to confront the complainant with the contents of the roznama and the signatures appearing thereon, he preferred an application, being Exhibit – 55 under Section 91 of the Code of Criminal Procedure. The said application is at page 20 of the application. It is stated in the said application that the applicant wanted to cross examine and confront the complainant with the said original documents, pertaining to loan H.P.File Nos.129 and 204 relating to Kavita S. Pandit and loan of H.P.File No. 205 of Lalita S. Pandit. It is stated in the said application that original documents including the roznamas are in the custody of Mr.D.R.Shinde, Chairman of the Liquidator Board of the Society and that the said documents were necessary for the just decision of the case, since they were primary evidence. Accordingly, the applicant prayed that D.R.Shinde, Chairman of the Liquidator Board of the Society be summoned to produce the aforesaid documents. Although, the learned APP resisted the said application, the learned Sessions Judge was pleased to allow the said application vide order dated 1st July, 2015. The said order dated 1.7.2015, reads thus:-

> "Perused application. I say. Heard Ld.Adv.Sengaonkar and Adv.Nimbalkar. It appears that the original loan H.P. matter no.129, 204 & 205 along with Roznama is necessary for the purpose of this

> trial. So issue summons to Mr.D.R.Shinde, Chariman of Liquidator Board of Nashik Co-operative Credit and Capital Limited, Nashik, situated at 28/29, Marketyard, Shopping Centre, Dindoshi Road, Panchavati, Nashik to produce those documents on or before 1.7.2015."

4. Pursuant to the said order, the Chairman of the Liquidator Board of the Society filed his say on 29th July, 2015 stating therein, that he is unable to produce the said documents, as some of the original documents i.e. roznamas were completely burnt in a fire incident, however, partially burnt documents of loan documents were available. The Chairman of the Liquidator Board filed his own affidavit, a copy of the FIR reporting the fire incident in 2010 and an affidavit of Ajit Ashok Jadhav, who lodged the FIR. As the documents which were permitted to be produced under Section 91 of Cr.P.C. could not be produced as they were burnt/partially burnt, the applicant filed an application seeking permission to lead secondary evidence of the aforesaid documents. The said application, Exhibit – 61 is on page 29 of the application. In the said application it is stated that, since the Chairman of the Liquidator Board of the Society had filed his say along with two affidavits stating therein, that the original loan records were partially burnt and the recovery roznamas were completely burnt, the

applicant be permitted to lead secondary evidence under Section 65 of the Evidence Act, of the documents which were procured by him, under the Right to Information Act. The prayer made in the said application reads thus :-

> 'In the interest of justice the accused may be allowed to lead secondary evidence in respect of record pertaining to Loan H.P.file No.129, 204 and 205 alongwith the Loan recovery Rojnama and confront the complainant on the basis of documents which the accused has received under the Right to Information Act and oblige."

5. The said application was filed on 4th August, 2015. The said application seeking permission to lead secondary evidence was opposed by the learned APP and after hearing the parties, the learned Additional Sessions Judge, Nashik was pleased to reject the said application vide order dated 10th December, 2015. The said order is impugned in this application.

6. Learned Counsel for the applicant submitted that the learned Judge allowed the applicant's application under Section 91 of the Cr.PC, by observing that the documents were necessary for the purpose of this trial pursuant to which, Shri D.R.Shinde, Chairman of the Liquidator Board and Ajit Jadhav filed their affidavits stating therein, that some documents

were partially burnt and some were completely burnt. According to the learned counsel, in these circumstances, the learned Judge ought to have permitted the applicant to lead secondary evidence of the documents sought by him. He submitted that the said documents were obtained by the applicant, under the Right to Information Act and as such were certified copies of the said documents. According to him, there was no justification for the learned Judge to refuse the application stating that the stage for the applicant to produce the documents will be at the stage of 313 of Cr.PC.

7. Learned APP opposed the application. He submitted that the applicant will get an opportunity at the stage of 313, to examine any witness and to produce documents, which he intends to produce today.

8. Perused the papers. The learned Sessions Judge, vide order dated 1st July, 2015 allowed the applicant's application under Section 91 of the Code of Criminal Procedure, seeking to summon Shri D.R.Shinde, Chairman of the Liquidator Board of the Society, to produce the documents i.e. H.P. File No.129 & 204 alongwith roznama relating to Kavita Pandit and original H.P.File No.205 alongwith roznama relating to Lalita Pandit,

after coming to a conclusion that the said documents were necessary for the purpose of this trial. This order dated 1st July, 2015, has gone unchallenged. Thereafter, the Chairman of the Liquidator Board filed his say, alongwith his affidavit and the affidavit of Ajit Jadhav stating therein, that the original documents were burnt in a fire accident and for which an FIR was lodged with the Panchavati Police Station. It is stated in the said affidavit that some partially burnt documents were available, however, all other documents were completely burnt in the fire. It is pertinent to note, that Ajit Jadhav in his affidavit dated 29th July, 2015 has specifically stated in para 3 that he had issued certified true copies of the roznamas and the documents of loan H.P.File Nos.129, 204, 205 under his own signature to the present applicant in 2007, under the Right to Information Act. The learned Judge under this circumstances after allowing the application under Section 91 of Cr.PC, after perusing the affidavits ought to have granted the application (Exhibit – 61) seeking secondary evidence of the said documents. The affidavits on record clearly revealed that the original documents sought were not available as they were completely burnt/partially burnt and that certified true copies of the very same documents was made available to the applicant, in 2007, under the Right to Information Act in 2007, by Shri

Ajit Jadhav. Under these circumstances, there was no justification for refusing the application for permission to lead secondary evidence of these very documents. No doubt, the applicant has a right under Section 313 of Code of Criminal Procedure, to examine his own witnesses and produce necessary documents, if any, but then the applicant would again have to recall the complainant and again cross-examine and confront him, which would lead to further delay in the trial.

9. In the peculiar facts and circumstances of this case, the application is allowed and the impugned order dated 10th December, 2015, passed by the learned Additional Sessions Judge, Nashik, below Exhibit – 61 in Special Case No.2 of 2007 is quashed and set aside and the applicant is permitted to lead secondary evidence of the documents which are stated in the application filed under Section 91 of the Code of Criminal Procedure.

10. The application is accordingly disposed of.

11. It is made clear, that the observations are prima-facie, for the purpose of deciding this application and the learned Judge to consider the

evidentiary value of these documents and its relevancy on its own merits, in accordance with law.

12. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.