IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2040 OF 2016

Himanshu Suresh Gandhi ..Petitioner
V/s.
The State of Maharashtra & Anr. .. Respondents

Mr.Shirish Gupte, Senior Advocate a/w Mr.Subodh Deasai, Mr.Tejashree Gawade, Mr.Abbas Zohair h/f M/s.Zohair & Co., for the Petitioner.
Mr.V.H.Venegaonkar for CBI.
Ms.A.A. Mane, APP for the Respondent-State.

CORAM : RAVINDRA V. GHUGE, J.

DATE : 05th JULY, 2016.

P.C.

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is seeking quashing of the order dated 28-03-2016 passed by the learned Special Judge (CBI) by which application Exh.369 filed by the prosecution for leading secondary evidence on the basis of the certified copy of the complaint dated 07th May 2003, has been allowed. So also, the informant Mr.Maheshkumar Dubey was directed to be

recalled to lead evidence.

3. Shri.Gupte the learned senior Advocate appearing on behalf of the petitioner submits in nutshell that the issue is that because the complaint, lodged by the complainant purportedly on 05-04-2002 with the Superintendent of Police (CBI), Bank Securities and Fraud Cell, has been lost, would it entitle the prosecution to lead secondary evidence under Section 65 of the Evidence Act by relying upon a certified copy of the office copy of the said complaint.

4. He submits that in this matter, the process of law was set into motion by the complainant namely Mr.M.K. Dube, General Manager Vigilance and Chief Vigilance Officer of the State Bank of Saurashtra by lodging a complaint on 05-04-2003. After the trial of the matter commenced, the prosecution realized after the examination of PW-7 that the copy of the complaint was not on record. Shri.Gupte has specifically indicated from the deposition of Mr.Dubey that the Special Judge, considering the admission of the learned SPP

that the inspection reports and the complaint of the year 1998 were not on record, discharged PW-7. There is no dispute on this count in between the litigating sides.

5. Shri.Gupte has raised a serious grievance that after PW-7 was discharged on 15-11-2013, an application was filed at Exh.369 by the prosecution on 04-01-2016, which is practically after about 2 years and two months from the date of discharge of PW-7, praying for permitting the prosecution to place on record the certified copy of the complaint dated 05-04-2003. He therefore, submits that the delay caused cannot be ignored or treated lightly.

6. He further submits that the purported certified copy of the complaint dated 05-04-2003, which is placed on record before the Special Court, does not tally with the copy that was served on the petitioner/accused several years ago. The copy supplied to the petitioner runs into 8 pages whereas the certified copy now placed on record runs into 11 pages. The font and the spacing in the matter printed on the two

documents are also different, though one can state that there may not be any difference in the actual words used in the two documents. He however, makes a grievance as regards the truthfulness of the certified copy on the ground that the certified copy cannot be different than the original or the office copy.

7 He has placed reliance upon the judgment of this Court in the following cases:-

(i) *Yashwant Rambhau Chonde*
V/s.
Vilas Bapurao Shinde
(2007(5) ALL MR 554)

(ii) *Bank of Baroda*
V/s.
Shree Moti Industries, Bombay & Ors.
(2009(1) Mh.L.J. 282)

(iii) *Geeta Marine Services Pvt. Ltd., & Anr.*
V/s.
State & Anr.
(2009(2) Mh.L.J. 410)

8. He therefore, submits that in the light of the ratio laid down by this Court which is on the basis of several judicial pronouncements of the Hon'ble Supreme Court, allowing a

party to lead secondary evidence would have far reaching consequences for either of the parties. He therefore prays that the impugned order be quashed and set aside.

9. The learned counsel Shri.Venegaonkar appearing on behalf of the respondents has strenuously supported the impugned order. His contention is that there is not an iota of difference in so far as the matter typed on the office copy and the copy supplied to the petitioner. It is only that there is a difference in the font and the spacing which has led to the office copy running into 11 pages, as against the 8 pages document supplied to the petitioner.

10. He however, is unable to justify as to why the copy of the complaint filed with the Superintendent of Police CBI which was supplied to the petitioner, could be different than the original and as to why the complainant State Bank of Saurashtra retained a somewhat different office copy, meaning to say the number of pages and not with regard to the matter typed in the said copy.

11. He further submits that the prosecution has established before the Special Court that the original copy was lost and could not be traced. Based on these premises, the Special Court has rightly invoked Section 65 of the Evidence Act and has permitted the prosecution to lead secondary evidence. He further submits that merely granting liberty to lead secondary evidence would not mean that the document has been proved and as such, the prosecution will have to follow the procedure as is laid down the Evidence Act to prove the document, if at all the said document is to be held admissible in evidence and is to be considered while deciding the case. He therefore, prays for the dismissal of the petition.

12. I have considered the submissions of the learned advocates as have been recorded above.

13. There is no dispute that the certified copy of the original, has to match with the original and any difference in the two copies would lead to suspicion. A document which is suspected for its probative value, therefore, can not be

considered to be admissible in evidence.

14. Though it appears from comparing the copies of the said document at page 65 and 91 of the petition paper book, that there is a difference in the number of pages, the font and the spacing in the material that has been typed, it also appears that the material found in this two documents is word to word identical.

15. In the above background, I am of the view that ends of justice would be met by directing the Special Court to consider the certified copy placed on record by the prosecution for the purpose of adjudicating over the matter, only if the said document is proved by following the procedure and the scheme in the Evidence Act. The Special Court should also allow the accused to confront the said document and for which purpose the contention of the petitioner that the certified copy placed on record is not the copy of the original and therefore inadmissible in evidence, deserves to be kept open. This exercise can be undertaken by the Special Court after recording

of the oral and documentary evidence and at the stage of considering the probative value of the said document dated 05-04-2003.

16. As such, this petition is disposed of with the direction to the Special Court that the contention of the accused with regard to the probative value of the document dated 05-04-2003 shall be considered in accordance with the scheme under the Evidence Act. The objections and contentions of the accused shall therefore be considered while deciding whether the said document can be held admissible in evidence and could be relied upon by the Court.

17. Rule is discharged.

(RAVINDRA V. GHUGE, J.)