

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

Criminal Writ Petition No. 01673 of 2016

District : Ahmednagar

Bhanudas s/o. Bhaguji Zarekar,
Age : 45 years,
Occupation : Agriculture,
R/o. Ghospuri,
Taluka & Dist. Ahmednagar.

.. Petitioner
(Original complainant)

versus

1. Balasaheb @ Babasaheb Sakharam
Dhage,
Age : 40 years,
Occupation : Agriculture,
R/o. State Transport Co-op.
Bank Ltd.,
Old Bus Stand, Maliwada,
Ahmednagar,
Taluka & Dist. Ahmednagar.

2. The State of Maharashtra. .. Respondents.

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Mr. Rajendra S. Kasar, Advocate, for the petitioner.

Mr. R.P. Phatke, Advocate, for respondent no.01.

*Mr. S.P. Sonpawale, Addl. Public Prosecutor, for
respondent no.02.*

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving the
judgment : 23rd November 2017.**

**Date of pronouncing the
judgment : 20th December 2017.**

JUDGMENT :

01. Rule. Rule made returnable forthwith. Taken up for final disposal by consent of both the parties.

02. Present petitioner is the original complainant who has filed a private complaint bearing S.C.C. No. 1506 of 2014 before learned Judicial Magistrate (First Class), Ahmednagar, contending that the present respondent no.01 - original accused has committed offence punishable under Section 138 of the Negotiable Instruments Act, 1881. After the service of summons to the respondent no.01, he appeared in the matter. His plea has been recorded and thereafter the matter was for evidence. Affidavit in examination in chief has been filed by the complainant and thereafter he also filed an application at Exhibit 45 for the permission to adduce secondary evidence in respect of agreement dated 03.12.2014 and notice dated 06.06.2014. It has been stated in the application, that the said agreement has been notarized which was executed between complainant and accused. The agreement is in

the custody of the accused so also the copy of the notice is with the accused. Photo-copies of both the documents have been produced by the complainant on record. Under that circumstance, he prayed for the permission to lead secondary evidence.

03. Accused filed say at Exhibit 47 stating that the grounds for leading secondary evidence have not been mentioned in the application. According to him, the photo-copy of the notice is a tampered document. It is also stated that the original copy of the contract is not in possession of the accused. Further, no affidavit has been filed by the complainant in support of the application.

04. After hearing both sides, the learned Judicial Magistrate (F.C.) has rejected the application on the count that notice under Section 66 of the Indian Evidence Act has not been issued by the complainant and, therefore, the said application cannot be considered.

05. It has been submitted by the learned Counsel appearing for the petitioner - original complainant, that the original document of the agreement is with the accused. The said document was a notarized document. Notice under Section 66 of the Indian Evidence Act is not at all necessary under such circumstance. Further, as regards notice is concerned, when the document itself is a notice, then it comes under the exception and, therefore, the

notice is not required.

06. Per contra, it has been submitted on behalf of respondent no.01, that the learned Magistrate has rightly considered that the notice as contemplated under Section 66 of the Indian Evidence Act has not been given, the question of permitting the complainant to lead secondary evidence under Section 66 of the Indian Evidence Act does not arise. The complainant has not explained as to where is the original document or has not come with a case that the document is either stolen or lost or destroyed.

07. Here, in this case, the complainant has sought permission to lead secondary evidence in respect of two documents, one is agreement dated 08.12.2014 and another the notice dated 06.06.2014. The case in respect of both these documents is required to be considered separately. As regards the agreement is concerned, it has been specifically stated in the application Exhibit 45, that the original agreement is with the accused. If we consider the contents of the complaint, the copy of the notice which is on record and the verification of the complainant, we can find that there is no mention of any such agreement. However, the copy of the agreement appears to have been produced along with the complaint itself. It appears from the said document, that the agreement is actually a compromise deed. Now, the accused is denying the fact that he possesses the original. However, it is to be noted

that in his say at Exhibit 47, he has not denied the existence thereof nor in any way it suggests that he has denied the execution thereof also. Under such circumstance, the learned Judicial Magistrate (F.C.) ought to have considered the point as to who would have been naturally in possession of the document. If we consider the photo-copy of the agreement dated 08.12.2014, then the present complainant has been shown as executant of the document and it has been got executed by respondent no.01 - original accused. Under such circumstance, the original would have been in possession of the accused. However, he is now denying the same. Yet, he cannot be asked to produce the original since he is an accused and there is a constitutional right available in him under Article 20 of the Constitution of India. He cannot be asked to produce any piece of evidence which will incriminate him. Under such circumstance, the learned Judicial Magistrate (F.C.) ought to have given permission to the complainant to lead secondary evidence in respect of the agreement.

08. Now, as regards the notice dated 06.06.2014 is concerned, as per the procedure, the original should have been sent to the accused and a copy thereof would have been with the complainant. However, in application Exhibit 45, it is stated that the accused is having true copy. Unless that fact is got clarified, any order could not have been passed. Now, the accused has come with a case that the photo-copy of the notice is a tampered document. On what

basis the said statement is made, has not been elaborated. When a copy of the notice is with the complainant and as per the contents of the complaint and verification, he has stated that the said notice is received by the accused, there was no reason for the learned Judicial Magistrate (F.C.) to reject the application. In fact, the application Exhibit 45 ought to have been allowed. But it seems that there was a misconception of law, that unless the notice under Section 66 of the Indian Evidence Act is issued, permission under Section 65 of the Indian Evidence Act to lead secondary evidence cannot be granted. Under such circumstance, for the above reasons, the writ petition deserves to be allowed.

09. Hence, the following order :

Order

(a) The writ petition is allowed.

(b) The order passed by the Judicial Magistrate (First Class), Court No.6, Ahmednagar, in S.C.C. No. 1506 of 2014, on 18.11.2016, below Exhibit 45, is hereby set aside. The said application Exhibit 45 stands allowed. The complainant is allowed to lead secondary evidence regarding the documents namely, agreement dated 08.12.2014 and notice dated 06.06.2014.

(c) Taking into consideration the fact, that the said complaint was filed in 2014, the learned Judicial

Magistrate (F.C.) is directed to expedite the matter and dispose of by the end of February 2018.

(d) Rule made absolute in the above terms.

(Smt. Vibha Kankanwadi)
JUDGE

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