

**THE HON'BLE DR JUSTICE B. SIVA SANKARA RAO**

**CRIMINAL PETITION No.7238 of 2015**

**ORDER:**

The petitioners are A.1 to A.3. Respondent No.2 is the de facto complainant of Crime No.148 of 2002 of Pattabhipuram Law and Order Police Station of Guntur Town, registered for the offences punishable under Sections 120-B, 420, 468, 409, 471, 472, 473, 175 and 182 IPC. The police after investigation filed a final report that was taken cognizance by the learned VI Additional Judicial Magistrate of First Class, Guntur, for the offences supra, by allotting C.C.No.26 of 2007. The petitioners are seeking to quash the said proceedings.

Heard learned counsel for the petitioners/accused and learned counsel for the second respondent.

The averments in the quash petition are that the de facto complainant and the accused persons carried tobacco business under the name and style of 'M/s. Sri Sanjay Tobaccos' at Chilakaluripeta. The accused persons by entering into criminal conspiracy, diverted the funds and misappropriated the same and even induced the de facto complainant to deliver her share capital for establishing M/s. Sri Sanjay Tobaccos and clandestinely got cancelled the original export order received by M/s. Sri Sanjay

Tobaccos and got it assigned to M/s. Sanjay Agro Traders, Guntur, by obtaining her signatures on blank papers, and created fake business firms and rubber stamps on their names and also issued cheques in the name of fake firms and misappropriated more than two crores by fabrication of records.

Earlier, the petitioners filed Criminal Petition No.2149 of 2012 to quash C.C.No.26 of 2007 and the same was allowed to the extent of offences under Sections 175 and 182 IPC which cannot be taken cognizance by the learned Magistrate because of bar under Section 195(1)(a) Cr.P.C. In the course of trial, in support of its case, the prosecution filed a memo seeking permission to file certain copies attested by the Investigating Officer and for its marking, the petitioners said to have objected for non-compliance with the mandatory requirements of Sections 65 and 66 of the Indian Evidence Act, 1872 (for short 'the Act'), for there is nothing to show that the original documents were not in existence or lost, to adduce secondary evidence and in the course of arguments, learned counsel for the prosecution stated, original documents are with the accused and learned counsel for the accused stated, there is no whisper in the memo filed by the prosecution to that effect and it has not given any notice to the accused if at all true to produce those documents allegedly in

their custody before adducing so called secondary evidence and thereby, the copies of documents cannot be filed through a memo without any application to receive them. The learned Magistrate passed order dated 20.04.2015 in C.C.No.26 of 2007 granting permission to the prosecution to file the documents, without assigning reasons, contrary to the settled law and without any foundation.

On 11.08.2015, this Court passed interim order of stay of accepting the documents for a period of four weeks, after hearing learned counsel for the petitioners/accused and learned Public Prosecutor and perusing the memo, by which, the Assistant Public Prosecutor sought permission of the learned Magistrate to file some documents, referred in the memo, alleged to have been secured by the de facto complainant recently, and to recall P.W.1 to produce and to exhibit the same in her further examination.

In the vacate petition filed by the second respondent/complainant, it is contended that the impugned order no way requires interference as the evidence of P.W.1 in the case is in progress and at that stage, on 20.04.2015, the learned Magistrate permitted the prosecution to file copies of the documents.

In fact, the Apex Court in **Bipin Shantilal Panchal v. State of Gujarat and another**<sup>1</sup> held, the documents for secondary evidence can be marked subject to objection to be decided ultimately. It is contending that the accused had adopted silly tactics to procrastinate the trial that to be conducted day-to-day under Section 309 Cr.P.C., hence, to dismiss the petition.

The impugned order discloses, the learned Assistant Public Prosecutor through a memo contends, the documents to be filed attested by the Investigating Officer were filed long back along with charge sheet, and they sought receiving of xerox copies, attested by the Investigating Officer, of the same documents, and that the same was objected by the defence counsel saying, no whisper to the existence of originals for receiving xerox copies and there is no explanation with regard to non-availability of originals to receive and that the learned Assistant Public Prosecutor contends that as the original documents are with the accused, it is difficult for them to produce and the accused were non-cooperative. Having considered the same, the trial Court held, the documents can be received but the same cannot be marked through P.W.1 but through the Investigating Officer.

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<sup>1</sup> (2001) 3 SCC 1

This is a warrant case and based on the final report filed by the police in Crime No.148 of 2002, the learned Magistrate has taken cognizance of offences supra. As per Section 242(2) Cr.P.C., the Magistrate may on the application of prosecution, issue a summons to any of its witnesses directing him to attend or to produce a document or any other thing. In the present case, since the evidence of the prosecution already commenced, the recourse left open to the Assistant Public Prosecutor is to file a petition under Section 242(2) Cr.P.C. There is no such application filed. The Assistant Public Prosecutor cannot file any document with memo, much less, the learned Magistrate to pass orders to receive it.

There is ample power to the Court under Section 311 Cr.P.C., where it is essential of such evidence for just decision of a case, the Court shall summon or examine, or recall or re-examine any person, and also under Section 165 of the Evidence Act, to produce any document even.

Here, it is not the case of *suo motu* power exercised by the Court either under Section 165 of the Indian Evidence Act, 1872 or even under Section 311 part II Cr.P.C. with any observation. A basic foundation is essential for adducing secondary evidence undisputedly about the existence of original without which

admitting secondary evidence does not arise for secondary evidence must be only from the original and it is to be shown, very original is not available and it is in the custody of the opposite party and despite notices, they failed to produce, that is the procedure contemplated under Sections 65 and 66 of the Act, undisputedly. Even the fact remains that once the documents are received by way of filing an application under Section 242 Cr.P.C., marking of any such document as secondary evidence would be subject to objection. It is clear from the expression of the Three Judge Bench of the Apex Court in **Bipin Shantilal Panchal** (supra), in which, it is observed, instead of deciding instantaneously on the admissibility, relevancy and proof but for touching stamp duty and registration, the marking can be subject to objection but ultimately decide it at the stage of judgment. This expression no way dispenses with the statutory requirements or the foundation for adduction of secondary evidence, though instantaneously, it can be marked subject to objection.

Having regard to the above, the Criminal Petition is allowed by setting aside the order, dated 20.04.2015, passed by the learned VI Additional Judicial Magistrate of First Class, Guntur, and it is left open to the prosecution, if at all chooses, to file an application as contemplated under Section 242 Cr.P.C. It

is for the learned Magistrate to receive, hear and pass orders thereon and once a document is received, then marking would be subject to objection regarding admissibility, relevancy including proof as secondary evidence.

Pending miscellaneous applications, if any, shall also stand closed.

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**Dr. B. SIVA SANKARA RAO, J**

11<sup>th</sup> OCTOBER, 2017.

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