

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

CRIMINAL WRIT PETITION 220 OF 2013

Zumbar s/o Trimbak Aarde
Age 55 years, Occu-Contractor
and Trader, R/o Prabhat Colony
Burudgaon Road, Behind hotel
Vaibhav, Ahmednagar
Dist. Ahmednagar

.. PETITIONER
[ORIG.COMPLAINANT]

Versus

Sahyadri Builders,
Through its Proprietor,
Ravindrea s/o Manohar Dasatwar
Age : Major, Occu. Contractor &
Trader, Shop No.56 to 58,
Jai Towers, Padampura,
Station Road, Aurangabad.

.. RESPONDENT
[ORIG.ACCUSED]

Mr.N.V.Gaware, Advocate for petitioner.
Mrs.Monika Purnapatre, Adv. (appointed) for Respondent Sole.

CORAM : MANGESH S. PATIL, J.

RESERVED ON : 03/08/2018.

PRONOUNCED ON : 07/08/2018.

JUDGMENT :

Rule. Rule is made returnable forthwith. Mrs.Purnapatre, learned Advocate waives service for respondent. By consent, the matter is taken up for hearing and final disposal.

2] Alleging that the respondent had engaged the petitioner as a contractor for performance of some work allotted to the respondent, the latter had allegedly issued a cheque for an amount of Rs.3,42,410/- in favour of the petitioner. However, it was dishonoured and the petitioner filed a proceeding under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the N.I. Act for short) in the Court of Judicial Magistrate, First Class bearing S.T.C.No.2810/2005. It appears that after the deposition of the petitioner was over, he submitted application (Exh.41) and alleged that the transaction between the two was in fact entered into and witnessed by a notarized agreement dated 29/12/2003 and it is pursuant to such agreement, the work was discharged and towards such legally enforceable debt the respondent had issued the cheque. It was alleged that the original agreement was in the custody of the respondent whereas the petitioner had retained its true copy. Therefore, an order was solicited from the Magistrate directing the respondent to produce the original agreement.

3] The application (Exh.41) was opposed by the respondent by contending that no such agreement was ever entered into and therefore, there was no question of respondent producing it and the attempt was being made to fill up the lacunae.

4] It appears that the learned Magistrate after hearing both the sides rejected the application (Exh.41) *inter alia* on the ground that the respondent was denying the fact that the

original agreement was in his custody and there was no evidence to show that it was given in his custody.

5] The petitioner thereafter tendered another application (Exh.49) and mentioning the aforementioned facts solicited order of the Magistrate for reading the copy of the agreement produced by him as a secondary evidence.

6] The respondent opposed the application (Exh.49) on the ground that already the earlier application (Exh.41) was rejected. There was no agreement ever entered into between the two. The application was moved without following the procedure required by the Indian Evidence Act and the copy of the agreement could not be read in evidence.

7] The learned Magistrate after hearing both the sides rejected the application (Exh.49) on the ground that the earlier application (Exh.41) was a similar type of application which was already rejected. The cross examination of the petitioner was already over. The attempt that was being made to lead secondary evidence was not in accordance with law. It is this order which is under challenge in this Writ Petition.

8] The learned advocate for the petitioner vehemently submitted that the existence of the agreement was clearly brought on record by the petitioner during his deposition. By moving earlier application (Exh.41) a direction was solicited

against the respondent to produce the original and he having failed to do so, the second application (Exh.49) was filed soliciting order of the Magistrate to read the copy of the agreement as a secondary evidence. The learned advocate therefore submitted that a foundation was already laid before the Magistrate which had enabled the petitioner to lead secondary evidence of the agreement in the form of its photo copy. The earlier application (Exh.41) constitutes a notice to produce the original as is required by Section 66 of the Indian Evidence Act and the respondent having failed to produce the original, a copy of the agreement was sought to be read in evidence as a secondary evidence under the provisions of Clause (a) of Section 65 of the Indian Evidence Act. According to the learned advocate, the Magistrate ignored all these facts and circumstances and has rejected the application (Exh.49). The order is illegal and arbitrary and has the effect of preventing the petitioner from leading evidence to substantiate his allegation that the cheque was issued towards a legally enforceable debt.

9] The learned advocate for the petitioner then sought to rely upon the observations of the Single Judge of this Court in the case of **Karthik Gangadhar Bhat V/s Nirmala Namdeo Wagh and another in Writ Petition No.11151/2017** (Principal seat) dated 3/11/2017 and submitted that in fact no leave or permission of the Court is necessary to lead secondary evidence and therefore, the learned Magistrate ought not to have refused the petitioner to lead the secondary evidence. Therefore, even

for this reason the impugned order is not sustainable in law.

10] The learned advocate for the respondent submitted that there was no material before the Magistrate to form an opinion that there was a document in the form of an agreement in existence and further there was no material to show that the original was in possession of the respondent. Even there was no notice issued by the petitioner to the respondent under Section 66. It is a condition precedent for leading secondary evidence. She therefore, submitted that the facts and circumstances obtaining before the Magistrate were such that the petitioner could not have been allowed to read a copy of the agreement as secondary evidence.

11] Before approaching the facts it would be apposite to recapitulate the relevant provisions contained in Chapter V of the Indian Evidence Act. Section 61 requires that the contents of a document can be proved either by primary or secondary evidence. Section 62 lays down as to what a primary evidence of a document means, whereas Section 63 lays down as to what secondary evidence means. Section 64 then states that a document must be proved by primary evidence. Section 65 is in the form of an Exception to Section 64 and lays down the instances in which a secondary evidence in respect of the contents of a document can be given. In Clauses (a) to (g) of Section 65 instances have been given which would enable a secondary evidence of a document to be given. Clause (a) of

Section 65 reads as under :

“(a) When the original is shown or appears to be in the possession or power -

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in Section 66, such person does not produce it;”

12] As is apparent from the wordings, the party seeking to lead secondary evidence of contents of a document by resorting to this Clause is entitled to do so after he issues a notice to the other side as is required by Section 66 and when the person to whom such a notice is issued does not produce the original. Section 66 then lays down that secondary evidence of the contents of document referred to in Clause (a) of Section 65 shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession the document is, a notice to produce it as is prescribed by law or such notice as the Court considers reasonable. Proviso to this Section also contains an Exception when no such notice is necessary.

13] Bearing in mind these provisions if one examines the facts obtaining in the matter in hand, it was incumbent on the part of the petitioner so as to make him entitled to lead secondary evidence of the agreement when he was resorting to Clause (a) of Section 65 to have shown or demonstrate that apparently the original document was in the custody of the respondent. It was thereafter incumbent on his part to have issued a notice to the respondent under Section 66 of the Indian Evidence Act. [However, apparently, the petitioner does not seem to have complied with these precursors which could have enabled him to lead secondary evidence].

14] It is pertinent to note that precisely for this reason, since incidentally the testimony of the petitioner was also recorded, this Court had directed him to produce a certified copy of the deposition. Accordingly a certified copy of his deposition (Exh.18) has been produced. In his examination in chief in Paragraph no.3, he has specifically alleged that an agreement was entered into between him and the respondent on 29/12/2003 and pursuant to such agreement he had completed the work towards the consideration of which respondent had issued him the cheque. More importantly during his cross examination on behalf of the respondent further information was solicited. A suggestion was put to him that the respondent had not executed any agreement on 29/12/2003 which suggestion the petitioner denied. It was further solicited that the original document was in possession of the respondent and therefore he

was unable to produce it. It was also solicited from him that he did issue a notice to the respondent asking him to produce the original agreement but he did not remember the date of the notice. He further stated that he was ready to produce acknowledgment of the notice served to the respondent.

15] Based on this testimony, the learned Advocate for the petitioner vehemently submitted that since the information was elicited during the cross examination to the effect that the original agreement was in the custody of the respondent, this was sufficient for the Magistrate to have concluded that the original agreement appeared to be in possession of the respondent and thereby the petitioner could have been held to have fulfilled the precondition under Clause (a) to Section 65 of the Indian Evidence Act.

16] The learned advocate for the petitioner further tried to submit that though there is no material to show that any notice under Section 66 was issued by the petitioner to the respondent, application (Exh.41) filed by the petitioner before the Magistrate would fulfill the letter and spirit of that requirement of law. By submitting that application, petitioner had specifically solicited the direction of the Magistrate to the respondent for producing the original agreement. When a specific direction was solicited asking the respondent to produce the original agreement, he was put to notice and was clearly made aware that he was being asked to produce the original agreement. Therefore, according to

the learned advocate even the second condition which entitles the petitioner to lead secondary evidence was duly complied with.

17] As is laid down in the case of Karthik Bhat (supra) by referring to several other decisions of this Court no leave or permission of the Court is necessary to lead secondary evidence and one need not repeat the observations and the conclusions therein. However, as can be noticed, the facts circumstances in the matter in hand are completely different. Neither by application (Exh.41) nor by second application (Exh.49) any permission or leave of the Magistrate was being solicited to lead secondary evidence. What was actually prayed for was that by application (Exh.41), a direction was sought against the respondent to produce the original agreement. He having denied the existence of the agreement and even his custody of the original that application was rejected. By the second application (Exh.49) by referring to such application filed earlier, a direction was sought to read a copy of the agreement as a secondary evidence. It is thus apparent that no leave of the Court for leading secondary evidence was sought at all, as was the case in the case of Karthik Bhat (supra). In fact according to the petitioner, the foundation was already laid which enabled the petitioner to lead secondary evidence of the agreement and he further wanted that to be read in evidence.

18] Conspicuously it was not disclosed in the application

(Exh.49) as to the manner in which the copy of the agreement was going to be proved. Apparently without there being any evidence attempted to be led to prove the copy of the agreement directly, a direction was solicited to read it in evidence. In my considered view, when the deposition of the petitioner was already over, and it is thereafter that this copy of the agreement was sought to be read in evidence as a secondary evidence, one can comprehend couple of situations. Either the petitioner was of the view that the document in the form of copy of the agreement could have straightway gone in evidence as it is, without which it could not have been read in evidence as he had prayed or one can comprehend a second situation wherein after tendering the copy of the agreement, he wanted to prove it by leading further evidence. One cannot really make out what the petitioner was intending to do. Whatever may be the case, since he had already sought to read copy of the agreement as a secondary evidence, by soliciting an order to that effect, by the application (Exh.49), he was expected to have already complied with the necessary concomitants for leading secondary evidence contained in Sections 65(a) and 66 of the Indian Evidence Act.

19] Since the petitioner was unable to satisfy the Magistrate that the original was in the custody of the respondent which observation has come in the order of the Magistrate passed on the first application (Exh.41), without seeking to lead further evidence to demonstrate as to how there was material to show that the original agreement was in the custody of the

respondent, a second attempt was made by moving application (Exh.49) seeking a direction to read a copy of the agreement as a secondary evidence.

20] Fortunately for him during his cross examination information was elicited on behalf of the respondent tht the original agreement was in possession of the respondent. This was indeed sufficient evidence to form an opinion that apparently the original was in his custody. This indeed constituted compliance with the first condition required under Clause (a) of Section 65 of the Indian Evidence Act.

21] Since the law does not lay down any form in which a notice under Section 66 of the Indian Evidence Act should be given in a case of this nature, in my considered view, the first application (Exh.41) by which the petitioner had solicited a direction of the Magistrate to the respondent to produce the original agreement was sufficient compliance of the second requirement of issuing notice, in spirit if not in letters.

22] It is thus apparent that the petitioner had duly complied with both the requirements which had enabled him to lead secondary evidence of the agreement. Still the learned Magistrate has without considering the above aspects, facts, evidence and law has summarily rejected the application (Exh.49) simply by observing that the earlier application (Exh.41) was for the same p[urpose when it was not the case.

The order is not sustainable in law.

23] However as is pointed out hereinabove the petitioner wanted the copy of the agreement to be read in evidence which presupposes that it was already proved when that was not the case. In view of such peculiar statement of affairs interest of justice demands that the copy of the agreement can be allowed to be produced on record and leaving it thereafter for the parties to prove or disprove it by necessary evidence.

24] The Writ Petition therefore, deserves to be allowed but only partly. The impugned order of the Magistrate is quashed and set aside. He shall allow the copy of the agreement dated 29/12/2003 to be placed on record and tendered in evidence. It is clarified that no opinion is being expressed about the evidenciary value of the agreement.

25] The Writ Petition is accordingly disposed of .

26] The Rule is made absolute in above terms.

27] Advocate Mrs.Monika Purnapatre has been appointed by this Court to defend the respondent. She may be paid Rs.5,000/- as her professional fees.

(MANGESH S. PATIL,J.)

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