

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

CRIMINAL WRIT PETITION NO. 308 OF 2018

Sau Anjali Prafulla Shivale **... Petitioner**
Age 31 years, Occu: Agri. &
Household, R/o At Village
Vadhu(BK) Taluka Shirur,
District Pune

VERSUS

1. Shri Vijay Murlidhar Shevale
Age 50 years,
Occu: Agriculture & Business
R/o Near Rammandar, Wadgaon
Guta, Tq. & Dist. Ahmednagar

2. The State of Maharashtra

... Respondents

Mr. Mukul S. Kulkarni, Advocate for the petitioner,
Mr. N. V. Gaware, Advocate for respondent No.1.
Mr. A. P. Basarkar, APP for respondent No.2

CORAM : K. L. WADANE, J.

DATE: : 25th APRIL, 2018

JUDGMENT:

1. Rule. Rule made returnable forthwith. With consent of parties, the petition is taken up for final disposal.

2. The petitioner/original accused has challenged the order passed below Exh.22 in SCC No.2183/2016 dated 11.01.2018, by which the application submitted on behalf of respondent No.1/original complainant seeking

permission to lead secondary evidence is allowed.

3. The petitioner accused purchased property vide registered sale deed from respondent No.1/complainant. It is mentioned in the registered sale deed that cheque bearing No.013686 for Rs.16,00,000/- is issued by the present petitioner. According to the petitioner, that cheque was issued by the petitioner in favour of one Ramesh Bora and present respondent has no concerned with the said cheque. On 21st October, 2015 cheque was presented for encashment in the concerned bank by respondent No.1. The cheque was returned with remark "Funds Insufficient". On 10th May, 2016, the concerned Bank informed to respondent No.1 that the cheque was lost.

4. Thereafter, respondent No.1 filed Criminal case against the petitioner for the offence punishable under section 138 of the Negotiable Instruments Act, i.e. SCC No.2183/2016, in which, respondent No.1 filed an application Exh.22 seeking production of secondary evidence in respect of the cheque in question. The learned trial court has allowed the same. Hence the present petition.

5. Heard Mr. Mukul S. Kulkarni, learned counsel for

the petitioner, Mr. N. V. Gaware, learned counsel for respondent No.1 and Mr. A. P. Basarkar, learned APP for respondent No.2 State.

6. Mr. Kulkarni, the learned counsel for the petitioner submits that document which is sought to be proved by way of filing secondary evidence is not covered under the provisions of section 63 and 65 of the Evidence Act. In support of his contention, the learned counsel relied on the observation of the Apex Court in the case of **J. Yashoda Vs. K. Shobha Rani, reported in (2007) 5 Supreme Court Cases 730.**

7. As against this, Mr. Gaware, the learned counsel for respondent No.1 points out from the contents of the sale deed, that the purchaser is accused/petitioner to whom respondent No.1 had sold land Gat No.853 to the extent of 82 R. Learned counsel further refers to the consideration mentioned in the sale deed and payment by way of issuing two cheques by the petitioner, i.e. No.13685 dated 25.09.2015 for an amount of Rs.15,00,000/- and the second cheque bearing No.013686 for Rs.16,00,000/-.

8. From the record it appears that sale deed was executed on 22nd September, 2015. When the cheque

was presented in the bank for encashment, it was returned unpaid with the endorsement "Funds Sufficient". Subsequently, the concerned Bank informed the respondent that cheque is lost. So, the respondent No.1 is seeking permission to adduce secondary evidence.

9. Mr. Gaware, the learned counsel for the petitioner submits that from the contents of sale deed, it appears that cheque No. and date is mentioned and the same cheque was given in favour of respondent No.1 i.e. Vendor of the land. From the initial contents of the sale deed, it appears that vendor is present respondent No.1. On perusal of provisions of Section 63 of the Evidence Act, it appears that the present case is squarely covered under sub section 3, which can be termed as secondary evidence, i.e. copies made from or compared with original. So, the present respondent seeks to produce secondary evidence i.e. copy of the original cheque in view of the provisions of section 65 of the Evidence Act. Mr. Gaware, in support of his submission, has relied on the case of **Anil Balasaheb Murde Vs. Adinath Trimbak Bodkhe**, reported in 2007(2) Bom.C.R. (Cri) 76.

10. Mr. Gaware, further submits that for leading secondary evidence, even permission of the Court is not necessary and in support of such contention, relied upon the observation of this Court in the case of **Prasanbai Dhanraj Jain & Ors. Vs. Sunanda Madhukar Jadhav in Civil Revision Application No.82/2016.**

11. In view of the above, if original is lost, then the respondent can very well lead secondary evidence to prove it, by way of filing copy of the same. Therefore, there is there is no substance in the writ petition. It is liable to be dismissed and accordingly it is dismissed.

12. Rule discharged. No costs.

(K. L. WADANE, J.)

JPC