

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

CRIMINAL WRIT PETITION NO. 666 OF 2018

Sandeep Komalsingh Rajput ..PETITIONER

VERSUS

State of Maharashtra ..RESPONDENT

Mr. R.S. Wani, Advocate for petitioner.

Ms. R.P. Gaur, A.P.P. for respondent - State.

CORAM : SANGITRAO S. PATIL, J.

DATE : 21th JUNE, 2018

ORAL JUDGMENT :-

Rule, returnable forthwith. With the consent of the learned Counsel for the petitioner and the learned A.P.P., heard finally.

2. The petitioner (accused no.7) in Regular Criminal Case no. 337 of 2009, which is pending before the learned Chief Judicial Magistrate, Nanded, has taken exception to the order dated 02nd April, 2018 passed below Exhibit 329, whereby permission has been granted to the prosecution to produce secondary evidence of the audit report.

3. The learned Counsel for the petitioner submits that the application (Exh. 329) is very vague and general. There is no specific mention as to what efforts were made to search out the original document. Moreover, the said application is not supported by the affidavit of the Investigating Officer. He pointed out to certain judgments in support of his contention that unless the conditions mentioned under Section 65 of the Evidence Act are fulfilled, secondary evidence cannot be produced. He submits that even the copy of the audit report which was proposed to be produced, was not annexed with the application (Exh.329). He submits that the impugned order is a cryptic one. There is absolutely no mention whether the conditions mentioned in Section 65 of the Evidence Act have been fulfilled. According to him, the impugned order is totally unsustainable. He, therefore, prays that the impugned order may be set aside.

4. The learned A.P.P. opposed the writ petition. She submits that the audit report is a public document. The copy of the audit report has already been given to the accused persons along with charge-sheet. Since the

original was lost, the copy thereof was proposed to be produced by way of secondary evidence. According to the learned A.P.P., the learned Chief Judicial Magistrate has rightly allowed the prosecution to produce secondary evidence of the audit report.

5. In the case of **State of Rajasthan and Ors. Vs. Khemraj and Ors. (2000) 9 SCC 241**, cited by the learned Counsel for the petitioner, the Hon'ble the Apex Court upheld the order passed by the Trial Court rejecting the application for production of secondary evidence on the ground that it was not supported by any affidavit and further that the averments contained therein were vague.

6. The learned Counsel for the applicant further produced a judgment in the case of **The Maharashtra State Seeds Corporation Ltd. Vs. Nagorao Raghunath Jibhkate and Anr. 2012 (4) Bom.C.R. (Cri.) 51**, wherein it is observed in paragraph 11 of the judgment that the application for production of secondary evidence must give full details and must be supported by a proper affidavit.

7. The learned Counsel then relied on the judgment in the case of **Hira Singh and Anr. Vs. Ajit Singh 2017 (4) PLR 446**, wherein it is observed in paragraph 15 as under :-

"15. It is well settled proposition of law that in case the party wants to lead secondary evidence, the Court is to examine the probative value of the document to be produced in the Court or to decide the question of admissibility of a document in a secondary evidence. The party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. Simply by saying that original document has been lost, is not sufficient to allow the party to lead secondary evidence."

8. In the present case, the application (Exh.329) is totally vague. There is absolutely no mention as to how the audit report got lost and what efforts were made by the Investigating Officer to search out the audit report. The copy of the audit report proposed to be produced also was not annexed to the application (Exh.329). The said application was not supported by the affidavit of any responsible officer. The impugned order is totally

unsatisfactory. It is a non-speaking order. It does not contain the reasons why the learned Chief Judicial Magistrate granted permission to produce secondary evidence. There is no mention whether the pre-conditions, mentioned in Section 65 of the Evidence Act, have been fulfilled by the prosecution for producing secondary evidence. The impugned order is not at all sustainable and is liable to be quashed and set aside.

9. In the case of **State of Rajasthan and Ors. Vs. Khemraj and Ors. (supra)** the Hon'ble Apex Court permitted the prosecution to file a fresh application in the Trial Court for seeking permission under Section 65 of the Evidence Act to lead secondary evidence supported by a proper affidavit and giving full details necessary to attract the provisions of Section 65 of the Evidence Act. In my view, in the present case also, it would be appropriate to give the same liberty to the respondent in the interest of justice.

10. In the result, I pass the following order :-

ORDER

(1) Criminal Writ Petition is allowed.

(2) The prosecution is at liberty to file a fresh application before the Trial Court for production of secondary evidence under Section 65 of the Evidence Act giving all necessary details and supported by proper affidavit.

(3) In case such an application is filed, the Trial Court shall decide it according to law after giving both the parties an opportunity of hearing.

(4) Rule is made absolute in the above terms.

(5) No costs.

[SANGITRAO S. PATIL]
JUDGE