

HIGH COURT OF CHHATTISGARH, BILASPURCriminal Misc. Petition No.1513 of 2017

Jaiprakash Gupta @ Prem Raghuni, R/o Village Seerma, PS
Patan, Distt. Palamu (Jharkhand)

(In Jail)

----- Petitioner

Versus

State of Chhattisgarh, Through the District Magistrate,
Raipur (C.G.)

----- Respondent

For Petitioner / Accused: -

Mr. N. Naha Roy, Advocate.

For Respondent / State: -

Mr. H.S. Ahluwalia, Dy. Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

03/01/2020

1. In compliance of the order passed and direction issued by the Hon'ble Supreme Court in Special Leave to Appeal (Crl.) No.9703/2019 (Pankaj Kumar Sharma v. State of Chhattisgarh) on 16-12-2019, the matter has been placed for consideration and with the consent of parties, the matter is heard finally.
2. The petitioner herein who is an accused standing trial for commission of offences punishable under Sections 302, 302 read with Section 34, 120B, 201 of the IPC and Sections 25 and 27 of the Arms Act, 1925, takes exception to the impugned order dated 31-7-2017 passed by the learned Sessions Judge,

Raipur in Sessions Trial No.197/2012 by which the application filed by the respondent / prosecution for taking secondary evidence has been allowed and the prosecution has been permitted to adduce secondary evidence of the receipt given by Lalaram Banjare – one of the co-accused, to deceased Dilip Advani, on the following factual background: -

3. It is the case of the prosecution that on 14-5-2012, Dilip Advani was assassinated by the petitioner along with other co-accused persons, as Dilip Advani and witness Rakesh Lakhwani advanced ₹ 1,75,00,000/- to Lalaram Banjare for executing sale deed for the land agreed to be sold to them, but sale deeds were not executed in their favour and when they sought refund of money, they made a conspiracy and killed Dilip Advani for which they were charge-sheeted on 24-9-2012. During the course of trial, the application filed by the prosecution under Section 91 of the CrPC was rejected on 11-8-2016. Thereafter, the prosecution filed supplementary charge-sheet on 7-11-2016 along with list of 21 additional witnesses and also one seizure memo along with receipt issued by Lalaram Banjare about the monetary transaction of ₹ 1,75,00,000/- was filed. The additional statement of Rakesh Lakhwani under Section 161 of the CrPC was also recorded on 14-9-2016 who stated that

original receipt was given on Supurdnama to him on 14-9-2016. The prosecution filed an application on 22-11-2016 for accepting the supplementary charge-sheet which the trial Court accepted by order dated 1-12-2016 rejecting the objections raised by the accused persons including the petitioner herein and supplementary charge-sheet was taken on record. Thereafter, Court statement of one of the witnesses Rakesh Lakhwani was recorded on 13-7-2017 where he had admitted the seizure of receipt and further stated that he had taken back its original on Supurdnama and also stated that the original was lost in change of his residence. On the same day, the prosecution, filed an application under Section 65 of the Indian Evidence Act, 1872 (for short, 'the Evidence Act') to adduce secondary evidence of that document which was opposed only by co-accused Lalaram Banjare other than the petitioner by filing written reply. No written reply was filed by any person including the petitioner. The learned Sessions Judge by its order dated 31-7-2017 allowed the application holding that since the original receipt is lost which was given on Supurdnama to Rakesh Lakhwani on 14-9-2016, therefore, the prosecution is permitted to adduce secondary evidence of that document. Questioning the order granting application under Section 65 of the

Evidence Act, this petition under Section 482 of the CrPC has been preferred by one of the accused / the petitioner herein.

4. Mr. N. Naha Roy, learned counsel appearing for the petitioner, would submit that the learned Sessions Judge is absolutely unjustified in granting application under Section 65 of the Evidence Act. He would further submit that photocopy of the said document / receipt is not prepared from the original as required under Section 63(2) of the Evidence Act and compliance of Section 65(c) of the Evidence Act is also not available, therefore, the learned Sessions Judge is absolutely unjustified in granting the application. He would rely upon the decision of the Supreme Court in the matter of H. Siddiqui (Dead) By LRs. v. A. Ramalingam¹ to buttress his submission. He would also refer to the statement of Rakesh Lakhwani made on 11-9-2013 and also referred to the order dated 11-8-2016 with reference to the statement of Rakesh Lakhwani to support his submission that the impugned order cannot sustain and is liable to be set aside.

5. Mr. H.S. Ahluwalia, learned Deputy Advocate General, appearing for the State/respondent, would submit that the State had filed supplementary charge-sheet on 7-11-2016 in which seizure memo –

¹ (2011) 4 SCC 240

receipt issued by accused Lalaram Banjare about the monetary transaction of ₹ 1,75,00,000/- was also filed in photocopy, as the original was handed over to Rakesh Lakhwani on Supurdnama on 14-9-2016 and the statement of Rakesh Lakhwani under Section 161 of the CrPC was also recorded on the same day and thereafter, the prosecution filed application for accepting the supplementary charge-sheet which was accepted on 1-12-2016 rejecting all the objections on the said charge-sheet and that order has become final, as the none of the accused persons has assailed the same before any higher forum and therefore the supplementary charge-sheet has already been taken into account by the learned Sessions Judge. As such, since the original has been lost as apparent from the Court statement of Rakesh Lakhwani recorded on 13-7-2017, it persuaded the prosecution to file application for adducing secondary evidence of that document which the trial Court has rightly granted and which is supportable in law in view of the decision rendered by the Supreme Court in the matter of Kaliya v. State of Madhya Pradesh². Mr. Ahluwalia, learned State counsel, would further submit that the petitioner was sitting in fence and did not raise any objection either at the time of examination of

² (2013) 10 SCC 758

Rakesh Lakhwani and did not oppose the application under Section 65 of the Evidence Act filed by the prosecution and only in order to delay the trial when the application under Section 65 of the Evidence Act was allowed, he has raised this objection by way of this petition, as such, the petition under Section 482 of the CrPC deserves to be dismissed.

6. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and also went through the material available on record with utmost circumspection.
7. The question for consideration is, whether the learned Sessions Judge is justified in granting the application under Section 65 of the Evidence Act permitting the respondent / State to lead secondary evidence of the contents of the receipt issued by Lalaram Banjare and seized from Rakesh Lakhwani on 14-9-2016?
8. It is not in dispute that the petitioner along with other five accused persons were charge-sheeted on 24-9-2012 and thereafter, on 11-9-2013, Rakesh Lakhwani was examined and on that day, the prosecution filed an application under Section 91 of the CrPC for production of document / receipt regarding the impugned transaction which was rejected by the trial Court on 11-8-2016, but the

other application filed under Section 91 read with Section 311 of the CrPC was partly allowed on 9-11-2016. Thereafter, the prosecution filed supplementary charge-sheet on 7-11-2016 with list of additional 21 witnesses and seizure memo showing the seizure of receipt from Rakesh Lakhwani relating to monetary transaction of ₹ 1,75,00,000/- executed by Lalaram Banjare clearly stating that the original receipt has been given to Rakesh Lakhwani on Supurdnama. For taking the supplementary charge-sheet on record, application was filed on 22-11-2016 and that was accepted by the trial Court on 1-12-2016 rejecting the objections raised on behalf of the accused persons including the petitioner. As such, the order taking supplementary charge-sheet by which the photocopy of receipt in question was produced (filed) giving the original receipt on Supurdnama vide Ex.P-95 to Rakesh Lakhwani, has become final.

9. Pursuant to the filing of supplementary charge-sheet, Rakesh Lakhwani was examined on 13-7-2017 before the Court of Session and when he was confronted with the photocopy of the receipt in question, he informed to the Court that the original copy of receipt which he had taken on Supurdnama vide Ex.P-95 is now lost on change of his residence. On this statement, immediately, on

the same day on 13-7-2017, the prosecution filed application under Section 65 of the Evidence Act stating inter alia that the original receipt was given on Supurdnama to Rakesh Lakhwani on 14-9-2016 and since has made statement on oath before the Court that the original receipt is lost, therefore, the prosecution be permitted to adduce secondary evidence of that document which was opposed by filing reply only by Lalaram Banjare and no such reply was filed even by the petitioner.

10. At this stage, it would be appropriate to notice Sections 63(2) and 65(c) of the Evidence Act which read as under: -

"63. Secondary evidence.—Secondary evidence means and includes—

(1) xxx xxx xxx

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) to (5) xxx xxx xxx

65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

(a) and (b) xxx xxx xxx

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) to (g) xxx xxx xxx

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

xxx xxx xxx"

11. The aforesaid provision — Section 65 of the Evidence Act enumerates the seven exceptional cases in which secondary evidence is admissible including clause (c) of Section 65 when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time. Clause (c) consists of two parts: the first part is an independent one, stating that when the original document had been destroyed or lost, he can produce secondary evidence; the second part comes when a party offering evidence of its contents cannot, for any other reason, not arising from his own default or neglect, produce it in reasonable time. The words in the second part "arising from his own fault or neglect" do not qualify the first part, but apply only to the second part.

12. In H. Siddiqui (supra), their Lordships of the Supreme Court have laid down the principles of law regarding granting of secondary evidence as under:-

"12. The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the

original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide *Roman Catholic Mission v. State of Madras*³, *State of Rajasthan v. Khemraj*⁴, *LIC v. Ram Pal Singh Bisen*⁵ and *M. Chandra v. M. Thangamuthu*⁶.) "

13. Similarly, in **Kaliya** (supra), the Supreme Court has held that the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced and held as under: -

"13. Section 65(c) of the 1872 Act provides that secondary evidence can be adduced relating to a document when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default, or neglect, produce it in reasonable time. The court is obliged to examine the probative value of documents produced in the court or their contents and decide the question of admissibility of a document in secondary evidence. (Vide *H. Siddiqui v. A. Ramalingam* (supra) and *Rasiklal Manikchand*

3 AIR 1966 SC 1457

4 (2000) 9 SCC 241

5 (2010) 4 SCC 491

6 (2010) 9 SCC 712

*Dhariwal v. M.S.S. Food Products*⁷.) However, the secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the court that it was not in his possession or control of it and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the party gives in evidence a certified copy/secondary evidence without proving the circumstances entitling him to give secondary evidence, the opposite party must raise an objection at the time of admission. In case, an objection is not raised at that point of time, it is precluded from being raised at a belated stage. Further, mere admission of a document in evidence does not amount to its proof. Nor mere marking of exhibit on a document does not dispense with its proof, which is otherwise required to be done in accordance with law. (Vide *Roman Catholic Mission v. State of Madras* (supra), *Marwari Khumhar v. Bhagwanpuri Guru Ganeshpuri*⁸, *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P. Temple*⁹, *Dayamathi Bai v. K.M. Shaffi*¹⁰ and *LIC v. Rampal Singh Bisen* (supra).)"

14. Reverting to the facts of the present case in light of the provisions contained in Sections 63 and 65(c) of the Evidence Act and the principles of law flowing from the decisions rendered by the Supreme Court in H. Siddiqui (supra) and Kaliya (supra), it is quite vivid that in the instant case, supplementary charge-sheet was filed by the prosecution on 7-11-2016 which was taken on record

7 (2012) 2 SCC 196

8 (2000) 6 SCC 735

9 (2003) 8 SCC 752

10 (2004) 7 SCC 107

by the Court of Session on 1-12-2016 and along with the supplementary charge-sheet, a seizure memo dated 14-9-2016 was filed by which it appears that a receipt in question was seized from Rakesh Lakhwani in which receipt has been issued by Lalaram Banjare that he has obtained ₹ 1,75,00,000/- from one Dilip Adwani – deceased. Photocopy of the receipt duly verified by the Police Station In-charge, Kotwali was attached with the seizure memo and also Supurdnama (Ex.P-95) by which that original receipt was given on Supurdnama to Rakesh Lakhwani was also filed. As already been held, the order taking aforesaid document along with supplementary charge-sheet has become final.

15. When Rakesh Lakhwani was examined on 13-7-2017 and when he was confronted with the said document by showing the photocopy, in paragraph 11, he has clearly stated that the document was returned to him on Supurdnama vide Ex.P-95 by the Station House Officer, but he has lost that document which led the prosecution to move application for secondary evidence. From the aforesaid statement of Rakesh Lakhwani and the application filed, it is quite vivid that the original, which was given on Supurdnama to Rakesh Lakhwani, has been lost and not in possession of Rakesh Lakhwani to whom it was given on Supurdnama vide Ex.P-95 by the prosecution

during investigation and it could not be produced. Therefore, it cannot be held that there is no foundation laid by the prosecution for adducing secondary evidence. There is material on record to hold that the prosecution has laid foundation and that is the statement on oath of Rakesh Lakhwani that the original is now lost on change of house by him. As such, there is sufficient foundational fact / material on record to hold that the original which was given on Supurdnama to Rakesh Lakhwani vide Ex.P-95 has been lost and which necessitated the prosecution to move application for adducing secondary evidence.

16.Their Lordships of the Supreme Court in the matter of Aher Rama Gova and others v. State of Gujarat¹¹ have held that when the original dying declaration was not available and lost, the prosecution is entitled to give secondary evidence of its contents, and observed as under: -

"2. ... At any rate, it was clearly proved that the original dying declaration was not available. In these circumstances the prosecution was entitled to give secondary evidence which consisted of the statement of the Magistrate as also of the Head Constable who had made a copy from the original and testified that the copy was a correct one. ..."

17.In the instant case also, the prosecution has clearly proved that the original document which was

11 AIR 1979 SC 1567

given on Supurdnama vide Ex.P-95 has been lost now by Rakesh Lakhwani and therefore permission to lead secondary evidence was sought for and that has been granted by the learned Sessions Judge. I do not find any illegality or perversity in the said order passed by the learned Sessions Judge.

18. The submission raised by the learned counsel for the petitioner that the photocopy of the said document is not prepared from the original one, also deserves to be noticed for rejection. Rakesh Lakhwani – prosecution witness has clearly stated in paragraph 11 of his statement recorded on 13-7-2017 on being shown the photocopy of the receipt in question that it is the photocopy of the original with which he had gone to the police station and the original was given to him on Supurdnama vide Ex.P-95 and that is not in dispute, as such, the plea based on Section 63(2) of the Evidence Act deserves to be rejected. It is appropriate to notice and mention here that the petitioner at the time when the application under Section 65 of the Evidence Act was filed and that was being considered, neither filed reply to that application nor took any objection expressly before the Court of Session questioning the grant of said application on any legally permissible ground. The only objection in that regard that was taken was by

accused No.1 Lalaram Banjare by filing reply that it should not be granted and after grant, that accused has not questioned that order. The petitioner having taken a calculated chance not to oppose the said application before the Court of Session. The objection now raised is an act of afterthought and has no merit and deserves to be rejected.

19.As a fallout and consequence of the aforesaid discussion, I am of the considered opinion that the learned Sessions Judge is absolutely justified in granting the application under Section 65 of the Evidence Act permitting the prosecution to lead secondary evidence of the document in question. I do not find any infirmity or illegality in the said order. The petition deserves to be and is accordingly dismissed reserving liberty in favour of the petitioner to raise all such permissible objections, if any, on the said document in question during the course of trial.

20.A copy of this order be sent to the Court of Session, Raipur for proceeding further and enabling him to expedite the trial, as it is pending consideration since 24-9-2012.

Sd/-
(Sanjay K. Agrawal)
Judge