

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 07-06-2021

Pronounced on 22 -06-2021

WPCR No. 864 of 2019

- Gurusharan Sahu S/o Late Awadh Ram Sahu Aged About 48 Years R/o Qr. No. Med-03, Civil Line Dhamtari, Tahsil And District- Dhamtari, Chhattisgarh.

---- Petitioner

Versus

- Chumman Lal Sinha S/o Late Khamhan Lal Sinha Aged About 34 Years R/o Village Sarbada, Police Station And Tahsil Gurur, District- Balod, Chhattisgarh.

---- Respondent

For Petitioner	: Shri Kunal Das, Adv.
For Respondent	: Shri Sunil Sahu, Adv.

Hon'ble Shri Justice Narendra Kumar Vyas

C.A.V. ORDER

1. The petitioner has filed this writ petition (Cr) under Article 226 of the Constitution of India challenging the legality and propriety of the order dated 18.03.2019 passed in Criminal Revision No. 26/2019 in the case of *Gurusharan Sahu vs Chumman Lal Sinha* passed by learned Sessions Judge, Dhamtari as well as order passed by learned Chief Judicial Magistrate, First Class Dhamtri (C.G) rejecting the application on 26.10.2018 in Criminal Case No. 183/2014 by recording a finding that photocopy of cheque cannot be taken as secondary evidence.
2. The brief facts, as projected in the writ petition (criminal) are that the respondent took loan of Rs. 1,00,000/- from the petitioner on 04.07.2012 and in lieu of that he has given cheque No. 286705 drawn in HDFC Bank to the respondent on 25.07.2012. The petitioner submitted the said cheque on 31.07.2012 for clearance in the bank account No. 1947051791 maintained with the Central Bank of India, Branch Dhamtari. The cheque was

dishonored on account of insufficient balance on the same day by the bank. Thereafter, the respondent requested him to give one month's time so that he may deposit the entire amount before the bank so the cheque can be honored. The petitioner again submitted the cheque on 18.09.2012 which was again dishonored on account of insufficient balance.

3. The petitioner sent a notice to the respondent as required under Section 138 of the Negotiable Instruments Act, 1881 (herein after referred to as 'the N.I. Act') which was neither replied nor payment was made to the petitioner. Thereafter, he filed a complaint under Section 138 of the N.I. Act before the learned Chief Judicial Magistrate on 05.11.2012. Before registration, as required under Section 200 of the Cr.P.C., the petitioner exhibited the documents namely the cheque, cheque forwarding memo and intimation by the bank regarding dishonored of the cheque. Learned trial Court taking cognizance of the complaint issued summons to respondent who appeared before the learned Chief Judicial Magistrate, Dhamtari.
4. During trial of the case, when evidence was being recorded, the original cheque and other relevant documents were lost. The petitioner filed an application on 14.08.2012 for permitting him to submit secondary evidence as provided under Section 65 of the Indian Evidence Act, 1872, mainly contending that he has already submitted photocopy of the cheque, return memo issued by the Central Bank, Branch – Dhamtari, memorandum given by the H.D.F.C. Bank with regard to dishonored of the cheque along with the complaint, but the original documents have been misplaced, despite sincere efforts being made by him, the original document is not traceable, therefore, he prayed that photocopy of said documents may be taken on record as secondary evidence.
5. The application was rejected by the learned trial Court on 26.10.2018 by recording the finding that photocopy cannot be termed as secondary evidence. The learned trial Court has also

recorded the finding that petitioner has not followed the procedure as provided under Section 65 of the Indian Evidence Act for recording of secondary evidence as it is necessary that there must be sufficient materials on record which shows that despite due diligence original documents could not be traced out. Thereafter, he filed the criminal revision No. 26/2019 before Learned Sessions Judge Dhamtari. Learned Sessions Judge vide its order dated 18.03.2019 has dismissed the said criminal revision. Both the orders have been assailed by the petitioner under Article 226 of the Constitution of India in writ petition (criminal) before this Court. During course of hearing of writ petition, two issues have been raised by the parties and they are as under :-

(i) Whether, writ petition (criminal) assailing legality and propriety of the order passed by the Revisional Court is maintainable?

(ii) Whether, the photocopy of the document can be taken as secondary evidence as provided under Section 65 of the Evidence Act?

6. With regard to Issue No. (i) learned counsel for the respondent raised objection on maintainability of the writ petition (criminal) mainly contending that the Code of Criminal Procedure is a complete code which petitioner has exhausted by filing revision before the learned Sessions Judge. Once, the petitioner has exhausted remedy under the Code of Criminal Procedure he should exhaust remedy available under the Code of Criminal Procedure only i.e. he should have filed petition under Section 482 Cr.P.C. in place of writ petition (criminal) under Article 226 of the Constitution of India. Learned counsel while refuting the said contention would submit that the power exercised by this Court under Article 226 of the Constitution of India and under Section 482 Cr.P.C. are one and the same as both the powers have to be exercised rarely and sparingly to prevent abuse of process of any court or to secure the ends of justice, therefore, the writ petition

(criminal) assailing the orders passed by the learned Session Judge as well as learned Magistrate First Class is maintainable.

7. The issue raised by the respondent is no more *res-integra* as the Hon'ble Supreme Court has already concluded the issue in case of *Girish Kumar Suneja vs Central Bureau of Investigation*¹ and has held in paragraph No. 38 as under :-

“38. The Cr.P.C. is undoubtedly a complete code in itself. As has already been discussed by us, the discretionary jurisdiction under Section 397(2) of the Cr.P.C. is to be exercised only in respect of final orders and intermediate orders. The power under Section 482 of the Cr.P.C. is to be exercised only in respect of interlocutory orders to give effect to an order passed under the Cr.P.C. or to prevent abuse of the process of any Court or otherwise to serve the ends of justice. As indicated above, this power has to be exercised only in the rarest of rare cases and not otherwise. If that is the position, and we are of the view that it is so, resort to Articles 226 and 227 of the Constitution would be permissible perhaps only in the most extraordinary case. To invoke the constitutional jurisdiction of the High Court when the Criminal Procedure Code restricts it in the interest of a fair and expeditious trial for the benefit of the accused person, we find it difficult to accept the proposition that since Articles 226 and 227 of the Constitution are available to an accused person, these provisions should be resorted to in cases that are not the rarest of rare but for trifling issues.”

8. In view of the law laid down by the Hon'ble Supreme Court in *Girish Kumar Suneja* (supra), I am of the considered view that writ petition (criminal) is maintainable assailing the order passed by the learned Sessions Judge in the criminal revision. Therefore, issue number 1 raised by the respondent goes against him and this Court finds that the writ petition (criminal) is maintainable.
9. With regard to issue No. (ii) – for deciding issue No. 2 it is necessary to reproduce the provisions of Sections 63 and 65 of the Indian Evidence Act, 1872.

Section 63 of the Indian Evidence Act is extracted below :-

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

¹ 2017(14) SCC 809

- (1) Certified copies given under the provisions hereinafter contained;
- (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) Copies made from or compared with the original;
- (4) Counterparts of documents as against the parties who did not execute them;
- (5) Oral accounts of the contents of a document given by some person who has himself seen it.

Section 65 of the Evidence Act is extracted below :-

“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) 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;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(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) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may

be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.”

10. From perusal of the provisions, it is quite crystal clear that following may be included as secondary evidence:-

7.1 If it is certified copy

7.2 Copies made from the original by mechanical process which ensure accuracy of the copy and copies compared with such copies

7.3 Copies made from or compared with the original

7.4 Counterfeit of the documents as against the parties who did not execute.

7.4 Oral accounts of the contents of the document given by some persons who has himself seen the same.

11. From perusal of Clause 2 and 3 of the Section 63 of the Indian Evidence Act it can be said that by some mechanical process copy of the document may be obtained but the petitioner shall ensure its correctness and accuracy by sufficient placing materials on record. It is pertinent to mention here that there is no whisper in the application filed by petitioner before Trial Court which shall indicate that it has been obtained by mechanical process to ensure its accuracy. Even if for the sake of argument, if we presume that accurate photocopy has been obtained by mechanical process, it is a matter of common parlance that by inter-plotting some other photocopy on the said photocopy, photocopy can be obtained, so the accuracy of the photocopy is always surrounded by dark clouds of doubt. In the present application since there is no averment under Section 65 of the Indian Evidence Act that photocopy was compared with the original and it was accurate photocopy of the original and further have not filed with affidavit with regard to person who has obtained the said photocopy. From record it is difficult to hold the hallmark, authenticity and accuracy of the photocopy.

12. In the case of *United India Insurance Co. Ltd. Vs Anbari and Others*² Hon'ble Supreme Court has held in para 3 as under :-

“3. Learned counsel for the appellant submitted that the point regarding validity of the driver's licence was raised by the appellant before the Motor Accidents Claims Tribunal and the Tribunal in accepting photocopy of a document purporting to be the driver's licence and recording a finding that the driver had a valid licence, has committed a grave error of law. He also submitted that the High Court has not dealt with the said contention of the appellant and without giving any reason has dismissed the appeal. The Tribunal and also the High Court have failed to appreciate that production of a photocopy was not sufficient to prove that the driver had a valid licence when that fact was challenged by the appellant and genuineness of the photocopy was not admitted by it. Therefore, the judgment and order passed by the High Court in FAO No. 2368 of 1998 deserves to be set aside. We accordingly, allow this appeal and remit the matter back to the High Court for deciding the said appeal afresh after giving an opportunity of hearing to the parties.”

13. In the case of *J. Yashoda vs. K. Shobha Rani*³ Hon'ble Supreme Court has held in paragraphs No. 7,8 and 9 as under :-

“7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence.

9. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however permits secondary evidence to be given of the existence,

² 2000 (10) SCC 523

³ 2007 (5) SCC 730

condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section. In *Ashok Dulichand v. Madahavlal Dube and Another* [1975(4) SCC 664], it was *inter alia* held as follows:

"After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in 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 of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed Photostat copy. Prayer was also made by the appellant that in case respondent no. 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the Photostat copy had been filed by the appellant was in the possession of Respondent No. 1. There was also no other material on the record to indicate the original document was in the possession of respondent no.1. The appellant further failed to explain as to what were the circumstances under which the Photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession appeared to the High Court to be not

above suspicion. In view of all the circumstances, the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the Photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court."

14. From perusal of the law laid down by the Hon'ble Supreme Court in *Anbari and Others* (supra) and *J. Yashoda* (supra) it is crystal clear that clause (a) of the Section 65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a document 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 any person out of reach, or not subject to, the process of the Court or of any person legally bound to produce it. Clause (b) to (g) satisfies some other contingencies wherein secondary evidence relating to document may be taken.
15. The petitioner failed to explain as to what were the circumstances under which photocopy was prepared and who was in possession of the original document at the time of photocopy being prepared. In view of these circumstances, this Court comes to conclusion that no foundation has been laid for leading secondary evidence in the shape of photocopy. Thus, it can be established that photocopy is neither primary evidence nor secondary evidence because the parties are required to prove whether the photocopy taken is the exact copy of the original., therefore, in view of Section 65 of the Indian Evidence Act the Revisional Court as well as the Judicial Magistrate First Class have not committed any error while rejecting the application.
16. The learned Judicial Magistrate First Class and learned Revisional Court have not committed any illegality or irregularities while rejecting the application for permission to lead secondary evidence which warrants interference by this Court exercising power under Article 226 of the Constitution of

India.

17. Accordingly, the writ petition (criminal) being devoid of merit is liable to be and is hereby dismissed.

18. No order as to costs.

Sd/-

(Narendra Kumar Vyas)
Judge

Kishore