

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

CRIMINAL WRIT PETITION NO. 620 OF 2020

Sudhir s/o Shivilal Jaybhaye,
Age 36 years, Occ. Agriculture,
R/o. Vitthal Nagar, Talwada,
Tq. Georai, Dist. Beed.

... **Petitioner.**

VERSUS

The State of Maharashtra,
Through Investigating Officer,
Talwada P.S. Tq. Georai, Dist.
Beed.

... **Respondent.**

...

Advocate for the Petitioner : Mr. Savant Vilas P.
Advocate for the Respondent/State : Mr. P.G. Borade.

CORAM : **MANGESH S. PATIL, J.**
DATE : **08.02.2021.**

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. The learned A.P.P. waives service for the respondent/State. With the consent of both the sides the matter is heard finally at the stage of admission.

2. The petitioner who is accused in the original proceeding is challenging the order passed by the learned Magistrate on the application (Exhibit 18) of the prosecution purportedly filed under Section 65 of the Evidence Act, seeking permission to lead secondary evidence of an Isar Pawati and a Non Cognizable case report.

3. The learned advocate for the petitioner would submit that without disclosing the grounds as is required by Section 65 of the Indian Evidence Act the prosecution had made the request. The application was vague. The

original Isar Pawati alleged to be a forged one was produced by the informant while seeking direction under Section 156(3) of the Code of Criminal Procedure. It is stated that it was forwarded to the Investigating Officer when the Magistrate allowed that application and issued a direction under Section 156(3) of the Code of Criminal Procedure. However, there is no record to substantiate this averment. There is also no record to show that any efforts have made to trace out the original Isar Pawati. In the facts and circumstances the Magistrate was not justified in directing secondary evidence of the Isar Pawati to be led. He would cite the decision of this Court in the case of **Om Health Centres Pvt. Ltd and Anr. Vs. Ratanshi Premji Charitable Trust & Ors; 2015(3) Mh. L.J. 954.**

4. The learned advocate for the petitioner would further submit that the learned Magistrate also committed a gross error in even granting permission to lead secondary evidence in respect of a Non Cognizable report stated to have been filed by the informant with the police. He would submit that the original record and even its certified copy could easily be produced. However, the Magistrate without application of mind even allowed that prayer as well. The impugned order is grossly illegal and be quashed and set aside.

5. The learned A.P.P. would submit that the learned Magistrate has taken a pragmatic view. The original Isar Pawati stated to be a forged one is not forth coming. That being a vital document to establish the charge, he has granted permission strictly within the four corners of Section 65(c) of the Indian Evidence Act.

6. I have carefully gone through the papers. The parameters for grant of permission to lead secondary evidence are well set out under the provision of Section 65 of the Indian Evidence Act. Though the application (Exhibit 18) filed by the prosecution does not refer to the provision and though the application is not happily worded one can easily appreciate that the

prosecution wanted to demonstrate its inability to procure the original Isar Pawati which according to it was annexed to the proceeding filed by the informant seeking direction under Section 156(3) of the Code of Criminal Procedure but is not finding place in the charge-sheet wherein only a photo copy is available. One can easily comprehend that the prosecution was seeking to make out a case under clause (c) of Section 65 of the Evidence Act which contemplates that the original is either destroyed or lost or were for any other reason not arising from its own default or negligent a party is unable to produce it in reasonable time. The contents of the application (Exhibit 18) clearly demonstrate that the prosecution was expressing its inability to produce the original Isar Pawati. The learned Magistrate having considered such fact situation was clearly justified in granting permission to lead secondary evidence in respect of the Isar Pawati.

7. The decision in the case of **Om Health Centre Pvt. Ltd. (supra)** was rendered in the peculiar facts and circumstances of the case. The document was stated to have been lost in an accident but such a loss was reported to police belatedly, after 26 days and in the circumstances this Court dismissed the Writ Petition of the plaintiffs challenging the order of the Civil Court refusing to grant permission under Section 65(c) of the Indian Evidence Act. *Ex facie* the facts obtaining before this Court are peculiar. The original Isar Pawati was annexed to the proceeding initiated by the informant under Section 156(3) of the Code of Criminal Procedure but is not finding place in the charge-sheet.

8. Besides, the petitioner has also not demonstrated as to how he is likely to face any prejudice if the secondary evidence of the Isar Pawati is led. Therefore to the extent the impugned order grants permission to lead secondary evidence of Isar Pawatri there is no merit in the Writ Petition.

9. However, one fails to understand as to how the learned Magistrate has even granted permission to lead secondary evidence in respect of the Non

Cognizable case report, the original of which must be in the police station. Without there being any ground made out by the prosecution under Section 65 of the Evidence Act the learned Magistrate has erroneously and illegally accepted even that request as well. Therefore the impugned order to that extent is not sustainable in law and liable to be set aside.

10. The Writ Petition is partly allowed. The impugned order to the extent it allows the prosecution to lead secondary evidence of Non Cognizable case report is quashed and set aside.

11. The Writ Petition to the extent it challenges the impugned order granting permission to lead secondary evidence of the Isar Pawati is dismissed.

12. The Rule is accordingly made absolute.

(MANGESH S. PATIL, J.)

mkd/-