

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1907 OF 2019

Chetan S/o Dhondiram Mirkale,
Age : 31 Years, Occ. Business,
R/o. Chetan Niwas, Behind Narhare
Classes, Praksh Nagar, Latur. ..Petitioner

Versus

Rohit S/o Namdeorao Gomade,
Age : 35 Years, Occ. Business,
R/o. Sambhaji Nagar, Latur .. Respondent

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Advocate for the petitioner : Mr. B. M. Dhanure
Advocate for the respondent : Mr. S. S. Panale
Advocate for respondent No.2 : Mrs. J. S. Aute
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CORAM : SURENDRA P. TAVADE, J.

DATE : 23.08.2021

JUDGMENT :-

Rule. Rule made returnable forthwith with consent of the learned counsel for the parties, heard finally at the stage of admission.

2. The petitioner prays for quashing and setting-aside the impugned order dated 19.08.2019 passed beow Exh.70 by the learned Judicial Magistrate, First Class, Latur in STC No. 1043 of 2015 and also prays for permission to lead

secondary evidence of document/diary as requested by him in the application in S.T.C No. 1043 of 2015 below Exh.70.

3. It is contended that the petitioner was prosecuted for the offence punishable under Section 138 of the Negotiable Instrument Act by the respondent. It is defence of petitioner that he repaid the loan amount taken from the respondent. It is also the defence of the petitioner that whenever he used to repay the amount respondent used to acknowledge it in diary. After recording the plea the respondent filed his affidavit of evidence. At the time of cross-examination, the petitioner filed an application for issuance of notice to the respondent for production of diary. The Trial Court obtained say of the respondent, who objected the application on the ground that it is imaginary, baseless and concocted. It is also contended by the respondent that petitioner did not replied the notice. He ought to have had contended the theory of repayment in his reply notice. It is also contended that the respondent never gave financial loan to the petitioner. By considering the facts of the application and the reply, the application came to be dismissed.

4. It is contended that the petitioner also filed application

for production of the diary. The trial Court has rejected the said application on the ground that the similar prayer was made in the earlier application. Thereafter, petitioner submitted another application for leading secondary evidence of the alleged diary. The said application was also rejected by the trial Court, hence the present Writ Petition is filed.

5. It is contended that the trial Court has not considered the provisions of Section 65 and 66 of Indian Evidence Act in proper perspective. The respondent was called upon to produce the document, which he failed, therefore, the trial Court should have allowed the petitioner to lead secondary evidence of the diary. It is contended that the petitioner is having xerox copies of the diary, with the help of the same he could prove the theory of repayment. It is also contended that the petitioner is not allowed to lead the secondary evidence and due to that he would suffer injustice. Hence prayed that the impugned order be set-aside.

6. On the other hand, the learned counsel for the respondent submits that the complaint was filed by the respondent in the year 2015. The respondent filed evidence -

of-affidavit. On 7.8.2015 the petitioner conducted the cross-examination of the respondent on 19.11.2016. Thereafter he filed an application for calling upon the respondent to produce diary on 18.11.2015. The said application was rejected on 14.01.2016. Again similar application was submitted by the petitioner on 19.11.2016, which came to be rejected on 16.02.2018. Thereafter, the petitioner submitted an application dated 7.2.2019 for permission to lead secondary evidence of the contents of the alleged diary. The said application was rejected on 19.08.2011, which is impugned in the present petition.

7. It is contended on behalf of the respondent that on dishonour of cheque the respondent had issued notice to the petitioner calling upon him to pay the amount of cheque. The said notice was not replied by the petitioner. Had he been repaid the amount of cheque, then he should have replied the notice contending the fact of repayment of cheque amount but no such action was taken by the petitioner, therefore, the theory of repayment is afterthought. The petitioner never called upon the respondent to produce the diary. The petitioner has not established the existence of diary at all, therefore, trial Court has rightly considered the

application submitted by the petitioner and accordingly rejected the same. To appreciate the submission of rival parties the provisions of Section 65 and 66 are required to be enumerated as under :-

“Section 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 documents 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 consist 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 documents 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.

Section 66 :- Rule as to notice to produce- Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is (or to his attorney or pleader) such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case.

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases or in any other case in which the

Court thinks fit to dispense with it :-

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to the process of the Court. "

8. On perusal of Section 65 of the Act makes it clear that the secondary evidence may be given with regard to existence, condition or the 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, or of any person legally bound to produce it, and when, after notice mentioned in Section 66, such person does not produce it. It is settled position of law that for secondary evidence to be admitted foundational evidence the person has to be given the reason as to why the

original evidence has not furnished.

9. In present case the petitioner had given cheque of Rs. 1, 92,500/- dated 10.01.2015. The said cheque was returned unpaid/dishonoured on 30.01.2015. The respondent issued demand notice to the petitioner dated 25.02.2015, calling upon him to pay the amount of the cheque. The said notice was received by the petitioner on 02.03.2015, but he did not reply the said notice. It was expected from the petitioner to contend the theory of repayment and it's procedure in the reply notice itself, so that it could have been said that the petitioner has lead foundation that he used to repay the amount of loan, every month to the respondent and used to obtain his acknowledgment in the diary. But such foundation was never lead by the petitioner. After filing evidence of affidavit by the respondent the petitioner came with theory of repayment of loan and alleged acknowledgment of the respondent to that effect. He simply submitted an application dated 18.11.2015 and requested to the learned Magistrate to issue notice calling upon the respondent to produce the diary. The said application was rejected on 14.01.2016 wherein, the trial Court has observed that the contentions raised by the petitioner therein were vague and no complaint was lodged

by the petitioner for alleged fraudulent act of taking away diary from his possession. The said order was not challenged by the petitioner. On the contrary, he submitted another application of similar nature on 19.11.2016. The said application also came to be rejected on 14.06.2018, thereafter, on 07.02.2019 an application for leading secondary evidence was filed, which came to be rejected on 19.08.2019. The petitioner never set up theory of repayment, when he had chance to do so. The existence of diary itself is in doubt. The said defence taken by the respondent while replying the first application of the petitioner dated 18.11.2015. The respondent entered into witness box for cross-examination on 19.11.2016. Since the issuance of notice dated 25.02.2015, till 18.11.2015, the petitioner has not raise the defence of repayment. The said fact was within his knowledge, therefore it can be said that the petitioner has not lead foundation for leading the secondary evidence with the help of Sections 65 and 66 of the Evidence Act. The trial Court has rightly rejected the application and passed impugned order. Hence in my opinion the petition has no merit. Hence, I pass the following order

ORDER

- (i) Petition is dismissed.
- (ii) Rule is discharged.

(SURENDRA P. TAVADE)
JUDGE

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