

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 211 OF 2019

Socorro D'Souza & anr.

..... Petitioners

V e r s u s

The State of Goa,
Thr. The P.I.
Margao Town Police Station,
Margao.

.....Respondent

Mr. Nigel Da Costa Frias and Ms. Pratiksha Nagvekar, Advocates for the
Petitioners.

Mr. Pravin Faldessai, Additional Public Prosecutor for the Respondent-State.

CORAM : NITIN W. SAMBRE, J.

DATE : 23rd March, 2021

ORAL ORDER

Application, exhibit D-83, in C.C. No. 272/S/2008/A under the provisions of Section 65 of the Evidence Act, seeking permission to lead secondary evidence moved by the Respondent-Prosecution, came to be allowed vide order impugned dated 25.06.2019, passed by the learned Chief Judicial Magistrate, Margao.

2. The submissions of learned Counsel for the Petitioners-Accused are, the Respondents are initially required to lay foundation for loss of the document with a specific averment as to loss/missing of the document. Such prayer is required to be moved on an affidavit. In spite of above requirements in law as are held to be binding in the judgment of **Sandeep Komalsingh Rajput vs. State of Maharashtra**, reported in *2019 1 Mh.LJ 300*, it is claimed that the Court below committed an error in granting the prayer.

3. The learned Additional Public Prosecutor could urge that if the scheme of Sections 65 and 66 of the Evidence Act is appreciated, it was brought on record that the original document was lost. The communication, *inter se* between the Additional Public Prosecutor and the Investigating Officer, sufficiently establishes the foundation required. As such, having satisfied the very ingredients of Section 66 read with Section 65 of the Evidence Act, the order impugned in the facts of the case are justified.

4. This Court is not interested in going into the chequered history of the matter as regards allegations and counter allegations by the Accused and the Investigating Officer against each other.

5. We are more concerned about the justifiability of the order

impugned, thereby granting permission to the Respondent-Prosecution side to lead secondary evidence on the issue of the original complaint which is claimed to have been lost.

6. A perusal of the application, exhibit D-83, though speaks of invoking provisions of Section 65 of the Evidence Act, the necessary foundation as required therein, is absent. There is no mention about the loss of the document from the custody of either Additional Public Prosecutor or Investigating Officer or any other person who was handling the investigation papers at the relevant time. It also does not speak of efforts taken to search the document. The powers under Section 65 of the Evidence Act are sought to be invoked under the signature of the Additional Public Prosecutor that too on a vague contention that the original document (complaint) was lost.

7. The Court had an occasion to analyse the very requirement under Section 65 of the Evidence Act in the matter of **Sandeep** (supra). In Paras 8 and 9 of the said judgment, this Court has observed thus :

“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."

8. In the case in hand, as is observed herein in the application exhibit D-83, the very requirements as are contemplated under Section 65 of the Evidence Act are absent. To be more precise, there is no mention about the loss of the document from the custody of which Officer, efforts made to search such document, etc. The application moved was as vague as, as it could be. Apart from above, the application is neither moved by the Investigating Officer nor any person connected to the investigation under an affidavit but for the signature of the Additional Public Prosecutor. That being so, it could be inferred that the very ingredients of Section 65 of the Evidence Act cannot be inferred. The order impugned as such goes contrary to the very basic requirements under Section 65 of the Evidence Act and, that being so, cannot be justified.

9. In that view of the matter, order impugned dated 25.06.2019, passed by the learned Chief Judicial Magistrate, Margao, in C.C. No. 272/S/2008/A is hereby quashed and set aside.

10. The application, exhibit D-83, for the aforesaid cause, stands rejected. However, in view of the prayer made by the learned Additional Public Prosecutor, liberty is granted to move afresh thereby invoking the provisions of Section 65 of the Evidence Act after having satisfied the aforesaid requirements.

11. In case, if any such fresh application is moved on behalf of the Prosecution, it is expected of the learned Chief Judicial Magistrate to deal with the same in accordance with law.

12. The Petition stands allowed in above terms.

NITIN W. SAMBRE, J.