

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 991 of 2020

M/s. Dream Mills

Vs.

State of West Bengal & Anr.

For the Petitioner : Mr. Subir Banerjee,
Mr. Tanweer Ahmed Khan.

For the State : Ms. Puspita Saha.

For the Opposite Party : None.
No. 2

Heard on : 18.07.2023

Judgment on : 09.08.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against an order dated January 28, 2020 and the examination in chief as recorded by the Learned 9th Metropolitan Magistrate, Calcutta in G.R. No. 212 of 2015.
2. The petitioner's case is that the instant application is filed challenging the order of the Learned Trial Court allowing admission of secondary

evidence despite the availability of the primary evidence in the criminal proceeding.

3. On December 26, 2013, a memorandum of understanding was executed by and between the petitioner and the opposite party no. 2 for the release of a movie “The Light – Swami Vivekananda” (herein referred as “the said movie”).
4. In the arrangement as entered into by and between the petitioner and the opposite party no. 2 under the said agreement, the petitioner provided the service of assistance in release of the movie in a particular territory while the opposite party no. 2 was the producer of the said movie.
5. The petitioner took due steps for the discharge of his duties under the said agreement and appointed one Nikita Singh as manager for the release of the said movie. The plan for release was however shifted to a later date by the opposite party no. 2 due to the festival of Guru Gobinda Jayanti and placed on the next date.
6. During the course of his pursuit, the petitioner came to know and understand that the opposite party no. 2 had already given all the distribution rights to another distributor, M/s. Venkatesh Films and Hansa Movies and the same was not disclosed to the petitioner. Such action on the part of the opposite party no. 2 was against the spirit of the said agreement and amounted to fraud on the part of the opposite party no. 2.

- 7.** On getting such information, the petitioner had raised a protest before the opposite party no. 2 for such fraudulent activities committed by the opposite party no. 2 by his letter dated January 17, 2014.
- 8.** The petitioner over telephone requested the opposite party no. 2 to cancel the distributor's right with Shri Venkatesh Films Pvt. Ltd. However, the opposite party no. 2 failed to do so and continued with such fraudulent intent in distribution of the said movie.
- 9.** In spite of that, the petitioner released the poster for 'Patna hoarding' of the said movie and this was confirmed by one Sanjeev Singh to the petitioner by sending picture via email.
- 10.** The release of the said movie was also circulated in the news paper by the petitioner. In this context the paper cutting containing such release date of the said movie was also communicated to the petitioner by the said person.
- 11.** The distribution rights of the said movie in favour of Venkatesh were still not cancelled by the opposite party no. 2. In such circumstances, the petitioner requested the opposite party no. 2 through his letter sent through mail dated 31.01.2014 for exclusive right.
- 12.** Thereafter the opposite party no. 2 wanted to know the detail and terms and condition of the different distributors for release of 'the movie The Light of Swami Vivekananda'.
- 13.** Finally, on or about February 3, 2014 the opposite party no. 2 intimated to the petitioner that a letter for cancellation of the distribution license has been sent to Venkatesh Films.

- 14.** That Preeti Raj Films Entertainment, another distributor engaged by the petitioner, wrote a letter to the petitioner regarding delay in content providing from the opposite party no. 2 for releasing of the movie.
- 15.** The petitioner informed by sending the consolidated report for the activity to the opposite party no. 2 on 20.02.2014 via email.
- 16.** The opposite party no. 2 wrote an email to the petitioner and discussed about the releasing of the movie, phase by phase on 01.03.2014.
- 17.** Thereafter the petitioner communicated to the opposite party no. 2 via email dated 13th May 2014, stating all the facts regarding the distribution of right with M/s. Venkatesh Films and Hansa Movies and requested by the petitioner to cancel the distribution right with M/s. Venkatesh Films and Hansa Movies.
- 18.** The petitioner was then informed regarding the release of the said movie 'The Light of Swami Vivekananda' on 17.12.2015 and confirmation of the release of the said movie in the different theatres for such period.
- 19.** The said movie was released by the distributors as per the memorandum of understanding dated 26th December 2013 and thereafter the petitioner raised Tax-Invoice in the name of the opposite party no. 2 and sent it to the opposite party no. 2 by email and the same was received by opposite party no. 2.
- 20.** During the business transaction, a dispute cropped up between the parties.

- 21.** The opposite party had thus become indebted to the petitioner for a huge sum of money as the consideration sum for the said services advanced by the petitioner to the opposite party no. 2.
- 22.** On the contrary, the opposite party no. 2 has proceeded to institute the present criminal proceeding against the petitioner for fraud on the ground of delay in release of the said movie.
- 23.** That the delay had been caused due to the fraudulent activities and non-cooperation of the opposite party no. 2. The proceeding has been instituted by the opposite party no. 2 only to avoid responsibilities and safe guard himself from any litigation.
- 24.** It is submitted that the trial in the said criminal proceeding has already commenced. In course of trial, the opposite party no. 2 has produced a copy of the said agreement dated December 26, 2013 as evidence in the said criminal proceeding. The said copy of said document was allowed to be marked as exhibit by the Learned Trial Court by the impugned order and the impugned deposition in this regard.
- 25. That the original of the said agreement is in the custody/possession of the opposite party no. 2. No case is made out by the opposite party no. 2 that the said original is lost or is not in his possession. In such circumstances, the secondary evidence of the said agreement ought not be admitted and exhibited.**
- 26.** It is thus submitted that it is the cardinal principle of law that when the original is available, a copy of such document ought not be allowed to be used in evidence and exhibited.

- 27.** The above proceeding in any case is an abuse of the process of law as the disputes raised by the opposite party therein are civil in nature.
- 28.** The impugned order allowing the opposite party no. 2 to depose and exhibit secondary evidence is bad in law and on facts.
- 29.** That the Learned Judge failed to appreciate that no deposition was given by the opposite party regarding the source of the said copy or to the effect that the copy of the said agreement sought to be exhibited was compared with the original.
- 30.** The impugned order is thus bad in law and on facts and liable to be set aside.
- 31.** The relevant portion of the evidence is as follows:-

GR-212/15

“Further Examination-in-Chief of P.W.-1, Dypayan Dutta resumes on 01.10.2018

This is the photocopy of memorandum of understanding and the same is marked as ‘X’ for identification. On 26.12.2013 a memorandum of understanding was executed between both the companies. It was agreed that in the memorandum of understanding the accused company will release a movie in exchange of same remuneration. The movie was “The light of Swami Vivekananda”. But the accused company breached the terms and condition of MOU and did not release the movie where it was supposed to be released.

.....

Further examination in-chief of P.W. 1, Daipayan Dutta is taken on 28.01.2020 :-

(Produces the original Power of Attorney). The director, Jagdish Mishra Tricolour Productions Pvt. Ltd. executed this Power of Attorney dated 17.01.2015 and authorized me to represent the

company which is marked as **Exhibit-2 (with objection). (Produces the memorandum of understanding dated 26.12.2013 which was earlier marked as 'X' for identification).** This memo was executed between Tricolour Productions Pvt. Ltd. represented by Director Mr. Jagdish Mishra and M/s Dream Mills represented by proprietor Mr. A.F. Inam **which was executed via e-mail** and marked as **Exhibit-3 (with objection).** (Produces a letter). This is the notice dated 27.03.2017 drafted by our lawyer Mr. Priyabrata Mukherjee to the proprietor Mr. A.F. Inam of M/s Dream Mills **where the former asked the latter to produce documents i.e. memo of understanding dated 26.12.2013** between the two of them u/s 66 Indian Evidence Act which is marked as **Exhibit-4 (with objection).....”**

**Sd/-
Metropolitan Magistrate,
9th Court, Calcutta**

32. In Smt. J. Yashoda vs. Smt. K. Shobha Rani reported in **2007(3)**

ALL MR 823 (S.C.), the Supreme Court held:-

“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.”

33. In the present case it is clearly stated by P.W. 1 in his examination chief on 28.01.2020 “.....*This is the notice dated 27.03.2017 drafted by our lawyer Mr. Priyabrata Mukherjee to the proprietor Mr. A.F. Inam of M/s Dream Mills where the former asked the latter to produce documents i.e. memo of understanding dated 26.12.2013 between the two of them u/s 66 Indian Evidence Act which is marked as Exhibit-4 (with objection).....*”.

Thus prima facie it appears that a proper explanation of the absence of original memorandum of understanding (MOU) has been stated on oath being that the document is in the custody of the petitioner and the opposite party has asked for such production and on being satisfied the learned Magistrate has marked the document as exhibit.

More so it appears from the said deposition that the said MOU was executed via e-mail.

34. Thus the order dated 28.01.2020 in G.R. No. 212 of 2015 passed by the learned 9th Metropolitan Magistrate, Calcutta under revision, and the evidence adduced on 01.10.2018 and 28.01.2020 being in accordance with law requires no interference by this Court.

35. The revisional application being CRR 991 of 2020 is accordingly dismissed.

36. The Learned Magistrate shall proceed with the trial expeditiously.

37. All connected applications, if any, stands disposed of.

38. Interim order, if any, stands vacated.

39. Copy of this judgment be sent to the learned Trial Court for necessary compliance.
40. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)