

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

76 CRIMINAL WRIT PETITION NO.314 OF 2023

Digambar S/o. Sakharam Pawar, **...PETITIONER**
Age-67 years, Occu- Retired Bank Employee,
R/o. Bank Colony, Dargah Road,
Parbhani, Tq. & Dist. Parbhani

VERSUS

The State of Maharashtra **...RESPONDENTS**
Through I. O. Nava Mondha Police Station,
Parbhani Tq. & Dist. Parbhani,
in Crime No. 217/2011 dated 05/11/2011

Mr. Mahesh V. Ghatage, Advocate h/f Mr. Vaibhav U. Pawar,
Advocate for the petitioner
Mr. S. R. Yadav-Lonikar, APP for the respondents/State
Mr. Santosh Sampatrao Jadhavar, Advocate for the applicant in
Application No. 923/2023

CORAM : KISHORE C. SANT, J.

DATE : 17th APRIL, 2023

JUDGMENT :

1. Heard the learned advocate for the parties.
2. Rule.
3. Rule made returnable forthwith with the consent of

the parties.

4. The petition is directed against the order passed by the learned Additional Chief Judicial Magistrate, Parbhani below Exh.327 in RCC No. 158/2012 moved by learned Special Public Prosecutor seeking permission to lead secondary evidence by Special Public Prosecutor under signature of informant.

5. Facts in short are that:

a] The petitioner is accused No.2 facing prosecution for the offences punishable under Sections 409, 420, 467, 468, 471, 120-B read with Section 34 of the Indian Penal Code. He was a Managing Director of PDCC bank. The allegations are that some of the Directors have indulged into malpractices thereby collected amount for insurance premium and shown it to be paid to the company by the bank. It is alleged that said amount was shown to be paid to the company which was not in existence. However, it is not disputed that later on said amount is

recovered. In the said complaint the Special Public Prosecutor came to be appointed to conduct the prosecution. The learned Special Public Prosecutor filed an application Exh.326 under signature of her own and informant wherein a prayer is made to issue direction to Superintendent and Assistant Superintendent of CJM court to search and produce certain original documents and registers. This application moved on 05-08-2022 was not filed by the Investigating Officer or upon instructions of the Investigating Officer. It is stated that certain documents were seized and were part of the charge-sheet. However, while shifting of the court from one building to another building said documents have been lost. On the same day of his application Exh.327 came to be filed. It is stated that though the said documents and the registers are not in the charge-sheet but from the seizure panchanama it appears that the register was in record and permission was sought to lead secondary evidence. The learned court below passed an order to the clerk of the court to verify whether these documents are mentioned in the Muddemal or list of documents. A specific report came to be

filed by the Junior Clerk that those documents are not found in the record. The present petitioner filed say below Exh.344. He submits that the court had already passed the order on application below Exh.313 moved by the Special Public Prosecutor calling original documents from the bank. Said application was allowed and the record was found. It was further stated that as per Exh.315 even the summons was issued. Even the application was also filed under Section 311 of the Cr. P. C. to call records. It was submitted that therefore, there is no question of re-examination of any witness in this case and it is only after that application Exh.327 is moved by the Special Public Prosecutor. It was further submitted that in view of Section 173 of the Cr. P. C. documents are required to be sent alongwith its copies to be provided to the accused and since those were not supplied alongwith charge-sheet there is no question of not giving such documents which were not supplied alongwith chargesheet. It is also submitted that the application is filed by the Special Public Prosecutor under the signature of informant and same is not signed by the Investigating Officer.

There has to be strict compliance of section 65 of the Evidence Act. Accused Nos. 3 and 4 who are not before this court had also prayed for rejection of the application.

6. The learned trial court allowed the said application by observing that the necessary steps to search the original documents were taken. However, documents were not found by the prosecution and allowed the application.

7. The learned advocate for the petitioner strenuously argued that the court had specifically directed the clerk of the court to verify the existence of the documents. A specific report was submitted that these documents are not found to have been filed on record. The application was not moved by the Investigating Officer. It is the Special Public Prosecutor who moved an application under signature of the informant. There is no strict compliance of section 64 of the Evidence Act. The learned court has on assumption that the original documents were in the record and those are lost allowed the application.

From the order no satisfaction under Section 65 is reflected. He made certain submission on the merits of the case and about the interest of informant in the case which are not material for the purpose of deciding of this application.

8. Learned Public Prosecutor fairly accepts that Investigating Officer had not filed application seeking permission to lead secondary evidence. However, from the record it appears that initially the police had not taken cognizance of the complaint filed by the informant. The informant was required to file an application under Section 156(3). It is only upon his application a direction came to be issued to the police to investigate into an offence and thus FIR came to be registered and charge-sheet came to be filed. In the seizure panchanama the documents in the list of documents are seen to have been seized.

9. Learned advocate for the petitioner relied upon the judgment reported in *2016 (5) Mh L J 320 in the case of*

Prakash Gurudas Timblo and others Vs Hemlatabai Ravikant Darne and others. He also relied upon the judgment reported in *2007 AIR (SC) 1721 in the case of J. Yashoda Vs K. Shobha Rani.* He further relied upon the judgment reported in *2022 (4) Bom CR (Cri) 684 in the case of State of Goa Vs Rosario Ferrao Caitano Ferrao.*

10. In the judgment in the case of J. Yashoda (Supra) the Hon'ble Apex Court in para 7 has held that secondary evidence is a general rule & is admissible only in absence of primary evidence. If the original itself is found inadmissible through failure on the party, who fails it to prove it to be valid, the same party is not entitled to introduce secondary evidence or its contents. The Hon'ble Apex Court has considered that rule which is most universal namely that the best evidence in the nature of case will admit shall be produced.

11. From the judgment in the case of Prakash Gurudas Timbolo and others (supra) this court at Goa has considered the

contingency in Section 65 from 'a' to 'g' needs to be specified and satisfied before passing an order. In that case it was found that impugned order did not show that the learned trial court had adverted to the requirements of section 65 of the Evidence Act. In that case the court had considered the contentions raised on behalf of petitioner while ordering the documents to be treated as secondary evidence. It is held that even if the order passed is discretionary order it is expected of the trial court to record some reasons in support of exercise of such discretion in such manner.

12. After considering these judgments this court finds that when application Exh.326 was filed and when there was specific report by Junior Clerk that these documents are not found to have been filed on record assumes importance. The court has to satisfy itself that original documents are lost and now the same is not in existence. Court has also to record the satisfaction that documents are lost from a custody of person & secondly that the copy of the original is coming from the custody

of proper persons. Without satisfying the court need not allow such application. In this case the prosecution is being conducted by a State and Investigating Officer is the best person to instruct the Special Public Prosecutor. In this case it is seen that Special Public Prosecutor has not presented an application on the instructions of the Investigating Officer but has filed an application on the instructions of the informant without ascertaining the facts from the Investigating Officer.

13. This court finds that in such circumstances it appears that it is only assumption of the learned Public Prosecutor that the documents are in existence and were produced on record and are lost from the record while shifting of the court from one building to another building. Thus, such order could not have been passed without satisfying himself about condition under Section 65. Therefore, this court finds that there is substance in writ petition and the petition deserves to be allowed. Hence, the following order:-

ORDER

a] The writ petition is allowed in terms of prayer clause-C.

b] Needless to say that the parties are free to take recourse to provisions which are available under law.

[KISHORE C. SANT, J.]

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