

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

CRIMINAL WRIT PETITION NO.499 OF 2023

BHIMASHANKAR DEVIDAS BOLEGAVE
VERSUS
BALASAHEB MAHADEVRAO MOHITE

...

Advocate for Petitioner : Mr. A. A. Joshi h/f Mr. S. V.
Natu

Advocate for Respondents : Mr. A. P. Deshmukh h/f Mr. S.
S. Deshmukh

...

CORAM : R.M. JOSHI, J

DATE : AUGUST 23, 2023

PER COURT :

1. This Petition takes exception to the order dated 06.03.2023 passed below Exh. 27 in S.C.C. No. 950/2017 whereby the complainant was permitted to lead secondary evidence in respect of cheque in question.

2. Learned Counsel for the Petitioner submits that from complaint made before learned Magistrate it appears that photocopy of the cheque was placed on record and at no point of time original cheque was brought on record before learned Magistrate and hence, it is not open for the complainant to lead secondary evidence. He further submits that there is no affidavit filed in support of the application nor there is any

pleading about there being no default or neglect on the part of the complainant any misplacement of the cheque in question. On these grounds, he seeks quashment of the impugned order.

3. Learned Counsel for the Respondent/Original complainant drew attention of the Court to the impugned order wherein it is specifically observed by learned Magistrate that original cheque was brought before the Court. Thus, according to him, there is no substance in contention of Petitioner that cheque was never produced before trial Court. He supports impugned order.

4. Section 65 of Evidence Act deals with secondary evidence, which reads thus:

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) xxx

(b) xxx

(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) xxx

(e) xxx

(f) xxx

(g) xxx

This provision clearly permits leading of secondary evidence in cases provided in clause (a) to (g). As far as present case is concerned, clause (c) would have application. In order to enable complainant to seek leading of secondary evidence, it is sufficient for him to plead that the cheque in question is lost/misplaced. The application made before the trial Court demonstrates so.

5. The submission of learned Counsel for Petitioner that the original cheque was not brought before the learned Magistrate and therefore, secondary evidence cannot be led is misplaced on facts as well as law. It is specifically observed by learned Magistrate in the impugned order that original cheque was brought before it. Even if it was not so produced at any time before the trial Court, the complainant could not have been precluded from leading secondary evidence. There is no condition precedent of filing of document in

Court to lead secondary evidence. Accepting interpretation sought to be canvassed by Petitioner would amount to rewriting of statute which is not permissible. The compliance of the necessary requirements as contemplated by Section 65 of the Evidence Act would only be relevant to permit or not leading of secondary evidence.

6. In the instant case, there is specific application made before learned Magistrate with averment that the original cheque is lost. This averment is more than sufficient to cover case of the present complainant under Section 65(c) of the Evidence Act. It is also necessary to note that cheque in question was deposited in bank, it was dishonored and memo to that effect was issued by bank. All these facts would be available to prove or disprove the existence of original cheque. This Court, therefore, finds no substance in the contention of learned Counsel for the Petitioner that secondary evidence cannot be permitted to be led in respect of the cheque in issue.

7. It is also sought to be argued that complainant is the Manager of the Bank and there is

apprehension of manipulation of record. At this stage trial Court was not required to consider as to whether complainant would be in a position to prove the said cheque by leading secondary evidence. At this stage what is relevant for the consideration of the Court is that a case is made out under Section 65(c) of the Evidence Act that cheque is lost to enable complainant to seek permission to lead secondary evidence. Apprehensions raised by the Petitioner about admissibility of such evidence to be led is premature.

8. Having regard to the provision of Section 65(c) of Evidence Act and facts and circumstances of the case, there is no merit in the challenge to impugned order. Hence, Petition is dismissed.

(R.M. JOSHI, J.)

Malani