



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.

...

CRIMINAL WRIT PETITION NO. 618/2023

Ramesh s/o Fulchand Baheti

..PETITIONER

v e r s u s

Purushottam s/o Kamalkishor Sharma
and three others

..RESPONDENTS

.....
Mr. PK.Mohta, Advocate for the petitioner
.....

CORAM: ANIL L. PANSARE, J.

DATED: 4th September, 2023

PC:

Heard Mr. PK. Mohta, the learned counsel for the petitioner,
at length.

2. The petitioner/original accused no.3 has filed the instant petition challenging the order dated 5th June, 2023 passed by the learned Judicial Magistrate, First Class, Akola, by which the application filed by the respondent no.1/original complainant to lead secondary evidence, was allowed. The learned Magistrate has, by the impugned order, permitted the respondent no.1 to rely upon the photo-copy of the partnership-deed. The respondent Nos. 2 to 4 are the original accused nos. 1, 2 and 4 respectively.

3. It appears that the respondent No.1 has filed the complaint under Section 138 of the Negotiable Instruments Act, 1881 against the petitioner and the respondent nos. 2 to 4. The case of the respondent no.1 was that the respondent no.2 is a partnership firm and respondent

nos. 3, 4 and the petitioner are the partners. The respondent no.1 intended to rely upon the partnership-deed. He has examined a bank employee, the Bank in which the respondent no.2 had an account. The witness produced the photo-copy of the partnership-deed. Thereafter, the respondent no.1 issued a notice to the respondent no.2 to 4 to produce the original partnership-deed. They failed to produce. They, however, have not denied the contents of the photo-copy of the partnership-deed produced by the Bank witness. It was the case of the respondent no.1 that the photocopy was furnished to bank by the respondent no.2 to procure loan and that the original partnership-deed is with the partners of respondent no.2. Considering the aforesaid set of facts, the learned Magistrate has allowed the application, by observing that the accused persons before him will get an opportunity to cross-examine.

4. The impugned order has been challenged on the ground that the application to lead secondary evidence is not supported by an affidavit. The learned counsel for the petitioner has relied upon the judgment, in the case of State of Rajasthan & others vs. Khemraj & Others, reported in (2000) 9 SCC 241. The application therein was rejected on the ground that it was not supported by any affidavit and the averments contained in the application were vague. The Apex Court has dismissed the appeal on the ground that the defects noticed by the trial court cannot be faulted with. The Apex Court, however, granted liberty to the petitioner to file a fresh application supported by proper affidavit and by giving full details necessary to attract the provisions of Section 65 of the Evidence Act. It appears that the trial Court has rejected the application on the count that there was a chequered history and the

averments made in the application to lead secondary evidence in respect of map, the attested copy of which was filed along with the application, ought to have been made on affidavit. The judgment, however, is not a *ratio decidendi* that while filing application u/s 65 of the Evidence Act the affidavit in support is mandatory.

5. Mr.P.K. Mohta, the learned counsel has then relied upon the judgment dated 6th June 2017 passed by the co-ordinate Bench of this Court in the case of Ramesh Baheti vs. Sandesh Randad in Writ Petition No.917/2016. He has also relied upon another judgment of the co-ordinate Bench of this Court, in the case of Maharashtra State Seeds Corpn. Limited vs. Nagorao Jibhkate and another, reported in 2012 (4) Bom C.R.(Cri) 51 and the judgment delivered by the single Bench of Madras High Court, in the case of R.Dhanasekaran vs. N. Dhakshinamoorthy reported in 2012 ACD 1222 (MAD).

6. In these judgments, reference has been made to the judgment of the Hon'ble Supreme Court in the case of *State of Rajasthan (supra)*.

7. Mr. Mohta, the learned counsel for the applicant doubles down with his argument that the application to lead secondary evidence ought to be supported by an affidavit.

8. I do not find that the judgments relied upon by the petitioner lays down a law, as contended. In the first judgment, the application was filed u/s 91 of the Code. This Court, by relying upon the judgment of the Apex Court, has held that the accused can be

directed to produce on record the partnership-deed. This judgment is not relevant for prerequisite to lead secondary evidence. In the second judgment, the facts were such that the original document was not available with the accused and secondly that no notice u/s 66 of the Act was given. The full particulars were not given. The application was allowed without giving opportunity to other side to file say. In the third judgment, the case of the complainant was that original cheque was misplaced and a police report was lodged. The complainant therein intended to rely upon the photocopy of the cheque. In the aforesaid backdrop, this Court has held that the application for production of secondary evidence ought to have been supported by an affidavit.

9. It is well settled that where the original document belonging to a party is misplaced or lost or for some other reasons cannot be produced, the facts in support of such difficulty is expected to be supported by the affidavit. In the present case, the original was not in the custody of Respondent No.1. He has called upon other side to produce original partnership-deed. In the circumstances, the application to lead secondary evidence need not be supported by affidavit. The rulings, therefore, will not assist the petitioner.

10. An useful reference can be made to the judgment in the case of *Dhanpal vs. Sheo Ram :Th: LRs: (2020) 16 SCC 209*, where the Hon'ble Supreme Court has held that where the foundational facts have been incorporated in the pleadings, no separate application to lead secondary evidence is required.

11. In the present case, the bank witness has produced the

photocopy. The respondent no.1 has issued notice to the accused firm to produce the original partnership-deed. The accused failed to produce the same. The contents of the partnership-deed were not denied. In the circumstances, the learned Magistrate has rightly granted permission to lead secondary evidence. I do not find any reason to disapprove the findings.

12. There is, thus, no merit in the Writ Petition. The same is dismissed *in limine*.

(ANIL L. PANSARE, J.)