

**HIGH COURT OF MADHYA PRADESH : PRINCIPAL SEAT AT
JABALPUR**

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| 1. | Case Number | MCRC No.52754/2021 |
| 2. | Parties name | Shiv Kumar Singh and another Vs. State of M.P. |
| 3. | Date of Order | 16/12/2021 |
| 4. | Bench Constituted of | Hon. Shri Justice S.A.Dharmadhikari |
| 5. | Order passed by | Hon. Shri Justice S.A.Dharmadhikari |
| 6. | Whether approved for reporting | Yes |
| 7. | Name of the counsel for the parties | Shri Priyank Agrawal, Advocate for the applicants. Shri Akshay Pawar, Panel Lawyer for the respondent/State. |
| 8. | Law laid down & Significant paragraphs number | (paragraphs No.11 & 12) For the purpose of invoking the provisions of Section 65 of Indian Evidence Act, 1872, the conditions of Section 63 has to be satisfied first then only secondary evidence can be allowed. |

ORDER
(16.12.2021)

In this petition filed under Section 482 of the Code of Criminal Procedure, 1973, the legality, validity and propriety of the order dated 28.09.2021 (Annexure P/4) has been questioned, whereby the application filed by the Additional Public Prosecutor in Sessions Case No.176/2012 under Section 63 of the Indian Evidence Act, 1872 (hereinafter referred to as “Act”) has been allowed by the learned Court below and permitted to produce the photocopy of cheques and photocopy of a complaint as secondary evidence.

2. The prosecution case, in brief, as reflected from the charge sheet and the impugned order is that an FIR dated 26.03.2012 was registered on the basis of a complaint made by one Munni and Anarkali against the applicants and another co-accused for offences punishable under Sections 420, 409, 468, 471 and 34 of the Indian Penal Code. On completion of investigation, charge sheet was filed against the applicants and another co-accused. One of the co-accused persons died in an accident. Thereafter, charges were framed against the applicants which were

denied by them and as such, they were put on trial. During the course of the trial, an application was moved by the Additional Public Prosecutor under Section 63 of the Act since the original copy of the complaint and the seized cheques were not available on record. Thereafter, the learned Court also sent various letters directing the authorities to produce the original copy of the said documents. However, it was informed by the In-charge of the police station that the original copies of the cheques are not available in the Bank. The present application was allowed and the account statement showing withdrawal of the amount mentioned in the cheque, photocopy of the complaint and the photocopies of cheques are admitted in evidence as secondary evidence. The applicants filed reply to the application filed by the Additional Public Prosecutor under Section 63 of the Act clearly stating that the photocopies of the cheques of the Union Bank of India through which amount was transferred were not seized by any police officer from any person or institution. Further no such seizure memorandums have been annexed alongwith the charge sheet. As such, it is clear from the charge sheet that the aforesaid documents were in whose possession at the relevant point of time. It is also not known as to whether the photocopy was done from the original copy of the documents by mechanical process and the copies compared with such copies. The prosecution, in its application, has also not stated that the documents as mentioned above have been lost or destroyed and therefore, Section 65(c) of the Act has no role to play in the instant case.

3. Learned counsel for the applicants submitted that in view of the aforesaid, the existence of the original has not been proved. It is also not known as to who possessed the original or the photocopies of the relevant documents. No seizure memo with regard to photocopies finds place in the charge sheet. He further submitted that the conditions enumerated in Section 63 of the Act were not satisfied. Therefore, the learned trial Court could not invoke Section 65(c) of the Act.

4. Whether any evidence can be treated as secondary evidence, it has to satisfy the conditions laid down in Section 63 of the Act. For the purpose of convenience, Section 63 of the Act is reproduced hereinbelow:

63. Secondary evidence.—*Secondary evidence means and includes—*

- (1) Certified copies given under the provisions hereinafter contained;*
- (2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;*
- (3) Copies made from or compared with the original;*
- (4) Counterparts of documents as against the parties who did not execute them;*
- (5) Oral accounts of the contents of a document given by some person who has himself seen it.*

5. The instant case falls within sub-sections (2) and (3) of Section 63 of the Act. Once the conditions enumerated in Section 63 of the Act has been satisfied, then only Section 65 of the Act can be invoked which provides for the situation in which the secondary evidence can be laid before the Court. Section 65 of the Act is reproduced below:

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) When the original is shown or appears to be in the possession or power—*
of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it,
and when, after the notice mentioned in section 66, such person does not produce it;
- (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;*
- (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) when the original is of such a nature as not to be easily movable;*
- (e) when the original is a public document within the meaning of section 74;*
- (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;*
- (g) when the originals consists of numerous accounts or other documents*

which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

6. On the other hand, Shri Akshay Pawar, learned Panel Lawyer appearing for the State supported the impugned order and submitted that the learned Court below has come to correct conclusion. He relied on the judgment rendered by this Court in the case of **Kaliya Vs. State of Madhya Pradesh, (2013) 10 SCC 758** by contending that in the instant case, Court only on being satisfied that original dying declaration was not traceable, rightly permitted prosecution to lead secondary evidence by way of production of its carbon copy.

7. In rebuttal, learned counsel for the applicants relied on the judgments of the Coordinate Bench of this Court in the cases of **Gwalior Development Authority Vs. Dushyant Sharma and others reported in (2013) 3 MPLJ 172, Makhanlal Vs. Balaram and others reported in I.L.R. (2018) M.P. 94** and **Santosh Kumar Vs. Prabha Bai reported in 2017 SCC Online MP 750** in support of his contention.

8. Heard learned counsel for the parties and perused the record.

9. From the record, it is apparent that by filing application under Section 63 of the Act, the Additional Public Prosecutor had sought production of original copy of the complaint and the seized cheques. Section 63 of the Act contains the inclusive definition of secondary evidence and sub-section (2) covers copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies and sub-section (3) includes copies made from or compared with the original.

10. Section 65(c) of the Act provides that secondary evidence may be given of the existence, condition, or contents of a document 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.

11. In view of above, the relevant paras mentioned in the case of **Makhanlal (supra)** are reproduced hereinunder:

10. When a photocopy of the document is produced, then in order to get the benefit of the Section 65, the party concerned is required to lay a factual foundation for giving the secondary evidence. The party concerned may be required to explain the circumstances under which the photocopy was prepared and who was in possession of the original at the time of preparing the same. The secondary evidence must be authenticated by the foundation evidence that copy sought to be produced is in fact true copy of the original. Permitting a party to lead secondary evidence is exception and not the rule.

11. The supreme court in the matter of *H. Siddiqui (Dead) by Lrs v. A. Ramalingam*, (2011) 4 SCC 240 while considering the issue of admissibility of photocopy of the power of attorney in evidence and in the light of scope of Sec 65 of the Evidence Act has held:—

“12— The Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

(Vide *Roman Catholic Mission v. The State of Madras*, *State of Rajasthan v. Khemraj*, *Life Insurance Corporation of India v. Ram Pal Singh Bisen*, and *M. Chandra v. M. Thangamuthu*.)”

12. In the matter of *U. Sree v. U. Srinivas*, (2013) 2 SCC 114 while considering the issue of admissibility of the photocopy of the letter allegedly written by the wife to her father has noted the earlier judgments on the point and has held as under:—

“14— In this context, we may usefully refer to the decision in *Ashok Dulichand v. Madhavlal Dube* wherein it has been held that : (SCC p. 666, para 7)

“7According to clause (a) of Section 65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it.

Thereafter, the Court addressed to the facts of the case and opined thus:—

“7In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on 4-7-1973, before Respondent 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case Respondent 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit-in support of his applications. It was, however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of Respondent 1. There was also no other material on

the record to indicate that the original document was in the possession of Respondent 1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent 1 in his affidavit denied being in possession of or having anything to do with such a document.” Be it noted, in this backdrop, the High Court had recorded a conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy and this Court did not perceive any error in the said analysis.

15. In *J. Yashoda v. K. Shobha Rani*, after analyzing the language employed in Sections 63 and 65(a), a two-Judge Bench held as follows (SCC p. 733, para 9):—

“9Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section.”

16. In *M. Chandra v. M. Thangamuthu*, It has been held as follows; SCC pp. 735-36, para 47:—

“47It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary

evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party.”

17. Recently, in *H. Siddiqui v. A. Ramalingam*, while dealing with Section 65 of the Evidence Act, this Court opined though the said provision permits the parties to adduce secondary evidence, yet such a course is subject to a large number of limitations.

“12In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original.”
(*H. Siddiqui case*, SCC pp. 244-45, para 12).

It has been further held that mere admission of a document in evidence does not amount to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

18. In the case at hand, the learned Family Judge has really not discussed anything relating to foundational evidence. The High Court has only mentioned that when the letter was summoned and there was a denial, the secondary evidence is admissible. In our considered opinion, such a view is neither legally sound nor in consonance with the pronouncements of this Court and,

accordingly, we have no hesitation in dislodging the finding on that score.”

13. Same is the view taken by this court in the matter of *Ramrao Karuji Baghale v. Natthu son of Karuji Baghale*, AIR 2011 MP 195. This Court in the matter of *Aneeta w/o Ramkesh Rajpoot v. Saraswati w/o Chhatradhari Gupta*, (2012) 4 MP LJ 56 has held that for admitting the document as secondary evidence not only the satisfaction of Sec. 65 is required, but it is also required that photocopy was compared with the original in terms of Sec. 63(3).

12. In the present case, if examined in the light of the aforesaid judgments and the application under Section 63 of the Act as well as the provisions of Section 65 of the Act, it is nowhere stated that the photocopies in question were made by mechanical manner from the original and it was compared with the original. Thus, the prosecution has completely failed to establish as to whether the produced documents satisfy the conditions enumerated in Section 63 of the Act. Therefore, question of invoking the provisions of Section 65(c) of the Act does not arise.

13. Having regard to the aforesaid, this Court is of the considered opinion that the learned trial Court committed an error in allowing the application filed by the Additional Public Prosecutor under Section 63 of the Act. Accordingly, the order dated 28.09.2021 passed in Sessions Case No.176/2012 by the First Additional Sessions Judge, District Sidhi is hereby set aside. As a consequence, the application filed by the Additional Public Prosecutor under Section 63 of the Act stands rejected. Accordingly, the petition is **allowed**.

14. Trial Court is directed to proceed with the trial in accordance with law as expeditiously as possible. No order as to costs.

(S.A.Dharmadhikari)
Judge