



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Criminal Misc(Pet.) No. 2320/2024

Avinash Kumar Panday S/o Shri Narendra Pandya, Aged About 40 Years, R/o Near Ganpati Temple, Bhiluda, Teh Sagwara, Dist Dungarpur.

-----Petitioner

Versus

1. State Of Rajasthan, Through Pp
2. Navin Pandya S/o Shri Keshav Lal Pandya, resident of Gamada, at present Pandva, Tehsil Sagwara, Distt. Dungarpur, Rajasthan

-----Respondents

For Petitioner(s) : Mr. Ravindra Paliwal through VC
For Respondent(s) : Mr. Gaurav Singh - PP

HON'BLE MR. JUSTICE ARUN MONGA

Order (Oral)

26/07/2024

1. Grievance of the petitioner is against an order dated 18.01.2024 passed by learned Judicial Magistrate, Aspur, District Dungarpur, vide which, application filed under Section 65 of the Evidence Act, 1872 (for short 'Evidence Act') for adducing secondary evidence in pending proceedings under Section 138 of the Negotiable Instruments Act, 1881 (for short 'N.I. Act') for dishonour of the cheque issued by the petitioner to the complainant has been dismissed.

2. Without adverting to the facts of the case, which are not necessary for disposal of the present petition, suffice to note that the order impugned herein is premised on the reasoning that the document sought to be adduced as secondary evidence was executed on 05.09.2015, relevance thereof has not been



established, whereas, the proceedings under Section 138 of the N.I. Act were initiated before trial court way back in the year 2021. No notice under Section 66 of the Indian Evidence Act, which is mandatory in nature for adducing such document under Section 65 of the Evidence Act, was issued to the complainant. It was also opined that due to the lack of relevance of the document to the case coupled with absence of a notice under Section 66 of the Indian Evidence Act, accepting the application would not be justifiable. Hence, the same was dismissed.

3. In the aforesaid backdrop, I have heard learned counsel for the petitioner and learned Public Prosecutor, who appears for the State though State is a formal party. Being an officer of the Court he has drawn my attention to Section 66 of the Evidence Act and would argue that benefit of Section 65 of the Evidence Act cannot be given de hors the mandate contained in Section 66 of the Evidence Act.

4. Having read Section 65 vis-a-vis 66 of the Evidence Act, I am also of the same view as canvassed by learned Public Prosecutor. Both the Sections have to be read harmoniously. Benefit of Section 65 cannot be given in isolation as Sections 65 and 66 both go hand in hand as is borne out from the plain reading thereof. For ready reference Sections 65 and 66 of the Evidence Act are reproduced hereinbelow:-

“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.

66. Rules as to notice to produce - Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, [or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:-

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court."

5. It is not shown if the case falls in any of categories (1) to (6) of the proviso to Section 66 *ibid*. This being the situation, as per the mandate therein unless the party, who is in possession of the primary evidence i.e. document sought to be produced, is given a prior notice of producing the same, the secondary evidence qua the same cannot be adduced.



6. The aforesaid caveat contained in Section 66 of the Evidence Act is mandatory in nature and not directory.

7. In the premise, the application of the petitioner to adduce secondary evidence without complying with Section 66 of the Evidence Act, for which prior notice to the complainant was required but not given, has rightly been dismissed. No grounds are thus made out to interfere in the impugned order.

8. In the parting, I may also hasten to add here that the application filed by the petitioner seems to be a dilatory tactic merely to delay the trial.

9. Dismissed.

10. All the pending application(s) shall also stand dismissed.

(ARUN MONGA),J.

9-AK Chouhan/-

Whether fit for reporting : Yes / No