

**COMMON ORDER BELOW EXH. 210 AND 198 RESPECTIVELY IN
R.C.C. 1936/2012 AND RCC 1937/2012.**

1) Both the applications are filed by the complainant requesting to permit him to lead secondary evidence in respect of Exhs. 89 to 93 and 96 to 100 in RCC No. 1936/2012 and Exhs. 130 to 155 in RCC No. 1937/2012 (hereinafter referred as the said documents). Previously, my learned Predecessor by order dated 30/06/2017 was pleased to reject both the applications. Against the said order, the complainant filed two separate criminal writ petitions before the Bombay High Court, Bench at Aurangabad, respectively wherein criminal writ petition No. 1631/2017 and 1630/2017. The Hon'ble Bombay High Court, Bench at Aurangabad, was pleased to allow both the writ petitions and had directed this Court to decide both the applications afresh by giving opportunity of being heard to the parties within one month of the said order. Accordingly, heard both the sides.

2) It is the case of the complainant that, the accused in furtherance of their common intention, have prepared forged experience certificates. The complainant has received the said documents as per the provisions of the Right to Information Act. The originals of the said documents are in custody of the accused. A notice under section 66 of the Evidence Act was given to the accused to produce the originals of the said documents. The accused have refused

to produce the same. As, the documents are in custody of the accused and as those are not produced, the complainant can lead secondary evidence of those documents.

3) The accused have objected the applications contending that, the prosecution has not laid any foundation to lead secondary evidence. Nobody has stated on oath or on affidavit that, the copies filed on record are copies of the originals, he has seen the originals and has read the contents of the originals, the originals had lost or could not be produced, the originals documents are in custody of the accused.

4) The learned advocate for the complainant while referring section 63, 65 (a) and 66 of the Evidence Act submitted that, the forged experience certificates are issued by the accused. Those are with the accused. They have not produced though a notice was given to them to produce the documents. He submitted that, the accused have not stated that, the originals are not with them. He submitted that, the documents are with the accused only.

5) He further submitted that, the documents are in custody of the adverse party, they have not produced the documents though notice was sent to them and thus, the complainant has laid the

foundation to lead secondary evidence. He submitted that, the complainant is not compelling the accused to produce the documents, he is just exercising his right under the relevant provisions of the Evidence Act. He submitted that, the complainant needs to lead evidence in respect of the documents, however, as the originals are not produced, the complainant is entitled for leading the secondary evidence in respect of the said documents.

6) The learned advocate for accused no. 1, whose arguments are adopted by the learned advocates of the other accused, submitted that, the original documents are in existence, however, those are not in possession of the accused no.1. He submitted that, there is nothing on record to show as to in whose possession the original documents are.

7) The learned advocate while referring to section 63 of the Evidence Act and the evidence on record, submitted that, the evidence shows that the original documents were not find before the concerned authority, from whom the copies of the true copies are received by the complainant under the Right to Information Act. The learned advocate submitted that, as the documents filed on record are not the copies made from the originals, they cannot be termed as secondary evidence. He submitted that, therefore, the application cannot be allowed.

8) The learned advocate further submitted that, according to complainant, the documents are in possession of the accused, they have prepared the forged documents. He submitted that, the accused cannot be compelled to lead self incriminating evidence against them. The complainant by calling upon the accused to produce the original documents has tried to compel the accused to produce the documents.

9) According to the complainant, the school i.e. Jia Ul Ulum, Boys School, Town Hall, Aurangabad, is a school only up to 4th standard. The accused in furtherance of their common intention have prepared forged experience certificates stating that, the accused nos. 3 to 5 worked in the Jia Ul Ulum Boys School as Teachers for the standard 5th to 7th. Thus, the accused prepared forged documents.

10) The complainant has filed the said documents. The learned advocate for the complainant has placed his reliance in case of **2012 BCI 448, Eslie Noronha Vs. J. Lambert Almeida & Anr (The Hon'ble Bombay High Court)**. In that case, the petitioner had filed an application for leading secondary evidence in respect of measurement sheets and bills, which were with the respondents. In those circumstances, the Hon'ble Bombay High Court had set aside the order of rejection of the said application.

11) The present case is a criminal case. In the ruling cited above, the matter pertained to civil matter. Therefore, the said ruling is not applicable to the present case.

12) The learned advocate for the complainant has also placed his reliance in case of **W.P. 11151/2017, Karthik Gangadhar Bhat Vs. Nirmala & anr. (The Hon'ble Bombay High Court)**. In this ruling the Hon'ble Bombay High Court has held that, the filing of applications for permission to lead secondary evidence are misconceived and not maintainable.

13) The learned advocate for the complainant has also placed his reliance in case of **Rajendra Mahadev Todkar Vs. M/s. Paranjpe Schemes (construction) Company Limited & ors. (The Hon'ble Bombay High Court)**.

14) In that case, the original plaintiff had filed application vide Exh. 33 seeking permission to lead secondary evidence in respect of 12 letters produced along with list Exh. 32. It was contended that, the original letters were with the petitioner i.e. defendant. The application was allowed by the trial court. The Hon'ble Bombay High Court had

dismissed the writ petition.

15) The said ruling is also in respect of a civil case. In that case application for permission to lead secondary evidence was filed. Therefore, the learned advocate will not get help either of this ruling or of the ruling of the Hon'ble Bombay High Court in case of Karthik referred above.

16) The learned advocate for the complainant has also placed his reliance in case of **Mst. Bibi Aisha & ors Vs. The Bihar Subai Sunni Majlis, AVAQAF & ors, Civil Appeal No. 323/1965, D.O.D. 24/07/1968.** In this ruling as the original documents were not produced, the copy of the deed and translation were exhibited.

17) This case was also in respect of civil dispute, therefore, it is not applicable to the present case.

18) The learned advocate for the accused No. 1 has placed his reliance in case of **2016 STPL 7043 Hyderabad, Datti Kameswari Vs. Singam Rao.**

19) In that case, the documents obtained under the Right of Information Act, 2005, were sought to be read in evidence as

secondary evidence. The Hon'ble Hyderabad High Court in para 18 has observed as follows :-

In view of the above analysis, the xerox copy certified by the designated Public Information Officer under Right to Information Act of the private documents are not certified copies within the meaning of the provisions of Section 65 of the Evidence Act. They are merely true copies of the private documents available in the records of the particular Department. The production and making of such copies is permissible only after laying a foundation for acceptance of secondary evidence under clauses (a) (b) or (c) of Section 65 of the Act.

20) In this case the said documents are secured by the complainant under the Right to Information Act. Except this similarity there is nothing common in between the said ruling and the present case, therefore, it is not applicable to the present case.

21) The learned advocate for the accused No. 1 has also placed his reliance in case of **1964 CJ (SC) 299, State of Gujrath Vs. Shyamlal Mohanlal Choksi.**

22) The respondent i.e. Shyamlal was a registered moneylender. He was required to maintain books according to the provisions of the Moneylender's Act and Rules made thereunder. He was prosecuted for failing to maintain the books in accordance with the provisions of the Act and Rules. In that case, the prosecutor filed an application requesting to order the respondent to produce daily account book and

ledger for the Samvat year 2013-2014. The said application was rejected. The matter reached upto the Hon'ble Supreme Court. The Hon'ble Apex Court ruled that, Section 94 of the Code of Criminal Procedure does not apply to an accused person.

23) In this ruling the Hon'ble Apex Court has referred it's ruling in case of **The State of Bombay Vs. Kathi Kalu Oghad & ors, Criminal Appeal No. 146/1958, decided on 4th August, 1961.**

24) This Court invited the attention of both the learned advocates. The learned advocate for the complainant submitted that, the complainant is not compelling the accused to produce the documents. He submitted that, if, a person fails to comply the order passed under section 91 of the Code of Criminal Procedure, then he is liable for penal action. He submitted that, here in this case, the complainant is only seeking permission to lead secondary evidence.

25) He further submitted that, there is no compulsion i.e there is no duress, there is no physical injury to the accused, therefore, the rights of the accused under Article 20 (3) of the Indian Constitution are not violated.

26) In that case, the Hon'ble Apex Court has held as follows :-

Broadly stated the guarantee in Art. 20(3) is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal important. So to limit to would (1) [1954] S.C.R. 1077.

be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in article 20(3) is "to be a witness". A person can, "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see section 119 of the Evidence Act) or the like. "To be a witness" is nothing more than "to furnish evidence", and such evidence can be furnished through lips or by production of a thing or of a document or in other modes. So far as production of documents is concerned, no doubt, section 139 of the Evidence Act says that a person producing a document on summons is not, a, witness. But that section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the word "witness", which must be understood in its natural sense, i.e. a referring to a person who furnishes evidence. Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so: procured is confined to what transpires at the trial in the court room. The phrase used in article 20(3) is " to be a witness" and not to "appear as a witness". It follows that the protection afforded to an accused in so far as it is related to the phrase " to be a witness" is not merely in respect of testimonial com-pulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available therefore, to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is avail-able to other persons in other situations does not call for decision in this case.

"To be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or gingers or specimen writing or exposing a part of the body by an accused person for purpose of identification. "Furnishing evidence" in the latter sense could not have been within the contemplation of the Constitution - makers for the

simple reason that-though they may have intended to protect an accused person from the hazards of self - incrimination, in the light of the English Law on the subject-they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. Further more it must be assumed that the Constitution-makers were aware of the existing law, for example, s. 73 of the Evidence Act or ss.5 and 6 of the Identification of prisoners Act (XXXIII 1920). Section 5 authorises a Magistrate to direct any person to allow his measurements or photographs to be (1) A.I.R. 1960 Kerala 392(2) [1954] S.C.R. 1077, taken, if he is satisfied that it is expedient for the purpose of any investigation or proceeding under the Code of Criminal Procedure to do so Measurements include finger impressions and foot-print impression. If any such person who is directed by a Magistrate under s. 5 of the Act, to allow his measurements or photographs to be taken resists or refuses to allow the taking of the measurements or photographs, it has been declared lawful by s. 6 to use all necessary means to secure the taking of the required measurements or photographs. Similarly, s. 73 of the Evidence Act authorises the Court to permit the taking of finger impression or a specimen handwriting or signature of a person present in Court, if necessary for the purpose of comparison.

27) The complainant has issued notice under section 66 of the Evidence Act to the accused to produce the originals of the said documents. As, the accused have refused to produce the same, these applications came to be filed. Thus, the complainant by taking recourse to section 65(a) of the Evidence Act, wants to take the back door entry to lead the evidence in respect of the said documents, which according to him are forged by the accused and thus, squarely the complainant wants to lead incriminating evidence against the accused for their failure to produce the originals of the said documents. The

complainant cannot be permitted to do so. If, these applications are allowed, then it will amount to compel the accused to face the consequences of their refusal to produce the originals of the said documents. That, cannot be allowed by the Court.

28) Thus, firstly, the complainant has not laid the foundation for leading the secondary evidence and secondly, if the applications are allowed, then the accused will be squarely compelled to face the consequences of their refusal to lead evidence, which is incriminating against them. Therefore, by placing reliance in case of State of Gujrath Vs. Shyamlal and the State of Bombay Vs. Kathi Kalu, it is held that, the applications cannot be allowed and those deserves to be rejected. Hence, following order is passed.

Order

- 1) Both the applications are rejected.
- 2) Copy of this order be kept in RCC No. 1937/2012.

Date : 26.09.2018

Sd/-
(M. N. Patil)
Chief Judicial Magistrate,
Aurangabad.

CERTIFICATE

I affirm that the contents of this P.D.F. file Judgment are same, word to word, as per the original Judgment.

Name of the Stenographer	: R. S. Choudhari
Court	:C.J.M., Aurangabad
Date	: 26.09.2018
Judgment signed by the presiding officer on	: 26.09.2018
Judgment uploaded on	: 26.09.2018.