



ORDER

1. Petitioner is before this Court under Article 227 of the Constitution of India read with Section 482 of Cr.PC with a prayer to set aside the order dated 29.12.2022 passed in C.C.No.343/2021 pending before the Court of Prl. Civil Judge & JMFC, Belthangady, D.K. District, wherein the prayer made by the petitioner to mark the Photostat copy of an unregistered agreement to sell dated 23.03.2021, was rejected.
2. Heard the learned Counsel for the petitioner.
3. Petitioner herein is being tried before the Trial Court in C.C.No.343/2021 for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. During the course of cross-examination of PW-1, learned Counsel for the accused/petitioner herein had shown the Photostat copy of an unregistered agreement to sell dated 23.03.2021 and PW-1 had admitted his signature on the said document. The said document is an insufficiently stamped document. Learned Counsel for the accused had requested the Trial Court to permit him to mark the said document. However, learned Counsel for the complainant had opposed the same on the ground that it is



a Photostat copy and also insufficiently stamped document. The Trial Court vide the order impugned rejected the prayer made by the accused to permit him to mark the Photostat copy of the document on the ground that it does not come within the purview of secondary evidence, and therefore, the same cannot be marked. Being aggrieved by the said order, the accused is before this Court.

4. Learned Counsel for the petitioner submits that since the respondent/complainant has admitted his signature in the document, the Trial Court ought to have permitted him to mark the same. He submits that since the signature in the document is admitted, there is no requirement for filing an application seeking permission of the court to adduce secondary evidence. He submits that even insufficiently stamped document can be marked in criminal proceedings and even if the complainant had raised an objection, the document could have been marked subject to objections which could have been considered at the final stage. In support of his arguments, he has placed reliance on the judgments of the Hon'ble Supreme Court in the case of **BIPIN SHANTILAL PANCHAL VS STATE OF GUJARAT & ANOTHER - AIR 2001 SC 1158**, and **DHANPAT VS SHEO RAM**



(DECEASED) THROUGH LRS. & OTHERS - (2020)0 AIR (SC) 2666.

5. The document which is sought to be marked in the present case is an agreement for sale dated 23.03.2021 and undisputedly the same is an insufficiently stamped document. For the reason that the complainant had admitted his signature on the said document, the accused has made a prayer before the Trial Court to permit him to mark the Photostat copy of the document.

6. In almost identical circumstances, the Hon'ble Supreme Court in the case of **H.SIDDIQUI (DEAD) BY LRS. VS A.RAMALINGAM - (2011)4 SCC 240**, wherein a prayer was made to permit the party to mark the document on the ground that the other side had admitted the signature on the Photostat copy of the document, the Hon'ble Supreme Court in paragraphs 12, 14 & 17 has observed as under:

"12. The provisions of Section 65 of the 1872 Act 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 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. 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.

14. In our humble opinion, the trial court could not proceed in such an unwarranted manner for the reason that the respondent had merely admitted his signature on the photocopy of the power of attorney and did not admit the contents thereof. More so, the court should have borne in mind that admissibility of a document or contents thereof may not necessarily lead to drawing any inference unless the contents thereof have some probative value.



17. Therefore, it is the duty of the court to examine whether the documents produced in the court or contents thereof have any probative value."

7. It is trite that secondary evidence must be authenticated by factual foundation laid and in normal circumstances an application is required to be filed before the court, after laying down necessary foundation for permitting the party to adduce secondary evidence. Secondary evidence can be introduced if primary evidence is not available and the reasons for its absence is satisfactorily explained. The party is required to explore all possibilities to secure the primary evidence and in spite of the same, if primary evidence is not available, court can permit adducing secondary evidence. The party is required to explain the circumstances under which the copy of the primary evidence was made and also about his custody of the same. The party is also required to provide foundational evidence to show that the alleged copy is a true copy of the original.

8. In Dhanpat's case supra, the Hon'ble Supreme Court has observed that an application for leading secondary evidence is



not required if the foundation for the same is laid in the plaint or evidence. But in the case on hand, there is no such foundation available on record based on which permission can be granted to adduce secondary evidence to the petitioner herein.

9. In Bipin Shantilal Panchal's case supra, the Hon'ble Supreme Court in a case where the Trial Court stopped further trial on the ground that objection was raised by a party for marking of certain documents, has observed in paragraph 14 as under:

"14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However,



we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)"

10. The Hon'ble Supreme Court in the aforesaid said case has very clearly stated that if the document is insufficiently stamped, the court has to decide the objections first before proceeding further. In the said case, the Hon'ble Supreme Court was not considering the question of permitting the party to mark a Photostat copy of the document in the absence of necessary foundation for granting such permission.

11. In the case of **VIJAY VS UNION OF INDIA & OTHERS - 2023 SCC OnLine SC 1585**, the Hon'ble Supreme Court in paragraphs 34 & 35 has observed as under:

"34. After perusing various judgments of this Court, we can deduce the following principles relevant for examining the admissibility of secondary evidence:

33.1 Law requires the best evidence to be given first, that is, primary evidence.



33.2 Section 63 of the Evidence Act provides a list of the kinds of documents that can be produced as secondary evidence, which is admissible only in the absence of primary evidence.

33.3 If the original document is available, it has to be produced and proved in the manner prescribed for primary evidence. So long as the best evidence is within the possession or can be produced or can be reached, no inferior proof could be given.

33.4 A party must endeavor to adduce primary evidence of the contents, and only in exceptional cases will secondary evidence be admissible. The exceptions are designed to provide relief when a party is genuinely unable to produce the original through no fault of that party.

33.5 When the non-availability of a document is sufficiently and properly explained, then the secondary evidence can be allowed.

33.6 Secondary evidence could be given when the party cannot produce the original document for any reason not arising from his default or neglect.

33.7 When the copies are produced in the absence of the original document, they become good secondary evidence. Still, there must be



foundational evidence that the alleged copy is a true copy of the original.

33.8 Before producing secondary evidence of the contents of a document, the non-production of the original must be accounted for in a manner that can bring it within one or other of the cases provided for in the section.

33.9 Mere production and marking of a document as an exhibit by the Court cannot be held to be due proof of its contents. It has to be proved in accordance with the law.

35. A reading of Section 65(a) of the Evidence Act displays the following:

a. Secondary evidence can be presented as a substitute when the original document/primary evidence is in the possession of the opposing party or held by a third party;

b. Such a person refuses to produce the document even after due notice,

c. It must be ensured that the alleged copy is a true copy of the original.

12. In the aforesaid judgment, the Hon'ble Supreme Court has observed that if a document that is required to be stamped, is not sufficiently stamped, then the position of law is



well settled that a copy of such document as secondary evidence cannot be adduced.

13. Under the circumstances, I am of the opinion that the Trial Court was fully justified in rejecting the prayer of the petitioner to permit him to mark the Photostat copy of the document merely for the reason that the complainant had admitted his signature in the said document.

14. For the reasons aforesaid, I do not find any good ground to interfere with the order passed by the Trial Court. Accordingly, petition is dismissed.

**Sd/-
JUDGE**

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