

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI.

Present:-

Mr. Justice Muhammad Iqbal Kalhoro.
 Mr. Justice Shamsuddin Abbasi

C.P.No.D-5923 of 2019

Mst. Nasreen Akhtar & others

Versus

Chairman, NAB & others

Priority

1. For order on office objection
2. For hg. on Misc. No.25443/2020
3. For hg. of main case

Date of order

& hearing : **12.02.2021**

Mr. Rehman Ghous, advocate for Petitioner
 Mr. Shahbaz Sahotora, Special Prosecutor, NAB

ORDER

Muhammad Iqbal Kalhoro, J:- Petitioners standing a trial in Reference No.15/2017 before the learned Accountability Court Sindh at Karachi objected to an application filed by Learned Prosecutor, NAB under section 76 Qaunun-e-Shahdat Order, 1984, (the Order) seeking production of photocopies of documents as secondary evidence collected through a seizure memo dated 04.02.2017 during investigation. This application and objection to it have culminated into impugned order allowing the prayer.

2. Learned defence counsel while relying upon the case laws reported in **1990 SCMR 1259** and **1995 SCMR 1237** has contended that unless damage or loss to the original copy of document is established, the secondary evidence in the shape of photostate copy would be inadmissible and would not be allowed to be produced in the court; that preconditions set out in Article 76 and 77 of the Order were not fulfilled by NAB before seeking production of photostat copies of documents in the court; that producing photostate copies of documents in absence of any evidence establishing loss or damage to the original copies of documents is against the right of the petitioners to a fair trial guaranteed under Article 10-A of the Constitution.

3. On the other hand, learned Special Prosecutor, NAB has supported the impugned order.

4. We have considered submissions of the parties and perused the material available on record including the case law cited at bar. Article 76 envisages at least 9 cases/circumstances, from (a) to (i), in which secondary evidence relating to documents can be given. NAB's application to produce secondary evidence in the case is mainly premised on a case obtaining under clause (c), which stipulates production of secondary evidence when the original document 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.

5. It is not disputed that documents sought to be produced were seized by the Investigating Officer (IO) during investigation and are part of the record of which the petitioners have sufficient knowledge having received the same in compliance of section 265-C Cr.P.C. Petitioners entire emphasis is on the ground that prosecution has not been able to establish either loss or damage to original copies of documents to maintain application under Article 76 of the Order. Such contention, however, in view of material available on record does not seem to be sustainable. Before seeking permission to produce secondary evidence, the prosecution had filed an application under section 94 Cr.P.C. requesting for a direction from the court to Deputy Commissioner (DC) Korangi to produce the original record. But, when efforts made in such direction and reports filed in compliance thereof did not bear the fruit, learned Accountability Court ultimately passed an order dated 30.10.2019 directing the Deputy Commissioner to produce the original record. Nonetheless, out of all, only seven original copies of documents were submitted, regarding remaining documents, either loss or damage during creation of a new District (Korangi) was asserted by the relevant authorities, as noted by the learned trial court in the impugned order. Failure of serious efforts of the court and the prosecution to lay hands on the original copies of documents has undoubtedly led to a construction confirming loss of original copies creating an inability for prosecution, not arising of its own default or neglect, to produce the same within reasonable time. The precondition encapsulated in clause (c) of Article 76 is attracted and further it has not been disputed by the defence that those copies have been made by means of modern devices.

6. With due deference, we may observe that the case law relied upon by learned defence counsel has been rendered on final adjudication of the

matter where admissibility and proof of contents of documents produced as secondary evidence were disputed. In the present case, the trial court has yet to decide admissibility and prosecution's liability to prove contents of those documents in accordance with law. Their production therefore is not likely to prejudice defence of the petitioners or their right to a fair trial. The record made available before us further reflects that the trial having made progress otherwise was stuck up for want of production of original copies of these documents.

7. This being the position, we do not find any merits with this petition and dismiss it along with pending applications.

JUDGE

JUDGE

Rafiq/P.A.