

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.08.2015

Coram

THE HONOURABLE MR. JUSTICE B. RAJENDRAN

Criminal Revision Case No.575 of 2015

Vidhya

.. Petitioner

v.

R.Gurumoorthy

.. Respondent

Criminal Revision Petition filed under Section 397 and 401 of Cr.P.C. to set aside the order dated 28.01.2015 made in C.M.P.No.102 of 2014 in C.M.P.No.97 of 2014 in C.M.P.No.67 of 2014 in M.C.No.18 of 2014 on the file of the Family Court, Erode.

For Petitioner : Mr.M.Guruprasad
For Respondent : Mr.G.Suryanarayanan

ORDER

The petitioner has filed this Criminal Revision seeking to set aside the order dated 28.01.2015 passed in C.M.P.No.102 of 2014 in C.M.P.No.97 of 2014 in C.M.P.No.67 of 2014 in M.C.No.18 of 2014 on the file of the Family Court, Erode.

2.1 Originally, the petitioner-wife filed M.C.No. 18 of 2014 claiming maintenance. The respondent-husband though admitted the relationship between them, disputed the maintainability of the petition on very many grounds. According to the respondent, the petitioner engaged herself with some conversation with him and with other persons which are relevant for the purpose of deciding the dispute to show her conduct and other relevant facts. The respondent produced a Compact Disc containing some conversation between some persons.

2.2 According to the respondent-husband, voice in the compact disc is that of the petitioner and so the CD must be admitted in evidence. Hence, the respondent-husband filed a petition viz., C.M.P.No.67 of 2014 under section 65B of the Indian Evidence Act, to permit him to file the compact Dic,. Thereafter, the respondent-husband filed a petition, viz., C.M.P.No.97 of 2014 under section 45A of the Indian Evidence Act and Section 79-A of the Information and Technology Act, 2000 along with 5 audio compact disc to show the conversation between the petitioner and the respondent. C.M.P.No.102 of 2014 is a Memo filed by the respondent-husband to permit him to display the CD and memory card and to display the sound and speech available in the CD before the court.

2.3 Along with the petition, the respondent-husband has produced the CD and the memory card. The CD was played in the open court and the petitioner-wife was called upon to identify her voice in the conversation. But, she denied that she is not involved in the conversation and disputed and denied the voice. According to the respondent, as per the settled procedure, before making the disputed CD, the voice must be identified and if the party denies the voice then voice sample must be taken and it must be sent to the expert for the purpose of comparison and if a party refuses to give any sample voice then adverse inference has to be drawn. Hence, the respondent-husband sought for a direction to give sample voice for further proceedings and the court below.

2.4 The petitioner-wife filed her counter wherein it has been stated the respondent-husband cannot file the memo and seek such a relief. She has also stated that the respondent-husband cannot compel her to give her voice to record the voice and hence submitted that the Memo compelling the petitioner to give her voice is liable to be rejected.

2.5 After taking into consideration the case of both the parties, by order dated 28.01.2015, the Trial Court, allowed the C.M.P.No.102 of 2014 finding that the grounds raised by the respondent-husband are maintainable.

3. Aggrieved over the said order, this Criminal Revision Case has been filed by the petitioner.

4. According to the learned counsel for the petitioner, the direction given by the Trial Court is not legally sustainable as the petitioner disputes the voice in the disputed CD. The learned counsel further submitted that as per section 65-B(4), CD has not been accompanied with proper certificate and hence, submitted that without the certificate, direction given to the petitioner-accused to give her evidence is unsustainable and it is violative of Article 20 of the Constitution of India. He also submitted that no accused would be compelled to give evidence as against him/her. He further submitted that when steps have not been taken as contemplated section 65-B(4), the order dated 28.01.2015, passed by the Trial Court, in the memo is liable to be set aside.

5. Per contra, learned counsel appearing for the respondent relying on paragraph No.14 of the judgment reported in 2014(10) SCC 473 (Anvar P.V. v. P.K.asheer and others), submitted that any documentary evidence by way of an electronic record under the Evidence Act, can be proved only in accordance with the procedure prescribed under section 65-B. Section 65-B deals with the admissibility of the electronic record. The very admissibility of such document depends on the satisfaction under section 65-B(2). Further, the learned counsel relying on paragraph No.20 of the above said judgment submitted that proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with sections 59 and 65-B is sufficient to hold that the special provision of evidence relating to electronics record shall be governed by the procedure prescribed under section

65-B of the Evidence Act. That is a complete code in itself. Being a special law the general law under section 63 and 65 has to yield. Hence, the learned counsel submitted that the Court below has rightly allowed the petition and therefore, the revision has to be dismissed.

6. Heard both sides and perused the materials available on record.

7. On a careful reading of the entire order, it is seen that the lower court has held that the marking of the disputed CD voice must be identified and if the party denies the voice, then the voice sample must be taken and it must be sent to the expert for the purpose of comparison. Since it is only a summary procedure, the court below should have given an opportunity to the revision petitioner to put-forth his case.

8. As per the judgment of Hon'ble Supreme Court reported in 2014(10) SCC 473 (cited supra), any documentary evidence by way of an electronic record can be proved only in accordance with the procedure prescribed under section 65-B. The following five conditions are important under section 65-B(4) of the Evidence Act pertaining to an electronic record as held by the Hon'ble Supreme court in the judgment cited supra:-

- (a) There must be a certificate which identifies the electronic record containing the statement;
- (b) The certificate must describe the manner in which the electronic record was produced;
- (c) The certificate must furnish the particulars of the device involved in the production of that record;
- (d) The certificate must deal with the applicable conditions mentioned under section 65-B(2) of the Evidence Act ;
- (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

9. The Hon'ble Supreme Court in the judgment cited supra has clearly pointed out that the very inadmissibility of such document depends upon the satisfaction of the above said five conditions. Only if the electronic record is duly produced in terms of section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to section 45-A opinion of Examiner of electronic evidence. The Evidence Act does not contemplate or permit the proof of a electronic record by oral evidence if requirements under section 65-B of the evidence act are not complied with, as the law now stands in India.

10. In view of the same, without going into the merits of the case, the impugned order passed by the Family Court, Erode in C.M.P.No.102 of 2014 in C.M.P.No.97 of 2014 in C.M.P.No.67 of 2014 in M.C.No.18 of 2014 is set aside in so far as it relates to the direction given to the petitioner to compel him to give audio recording in view of the order passed by the The Hon'ble Supreme

court in the judgment cited supra and the matter is remitted back to the court below for fresh consideration. The learned Trial Judge shall decide the matter afresh, after providing opportunities to both the parties and dispose of the same on merits and in accordance with law.

Accordingly, the Criminal Revision Case is allowed.

Sd/-

Assistant Registrar

True Copy

Sub Assistant Registrar

Rj

To

The Family Court,
Erode.

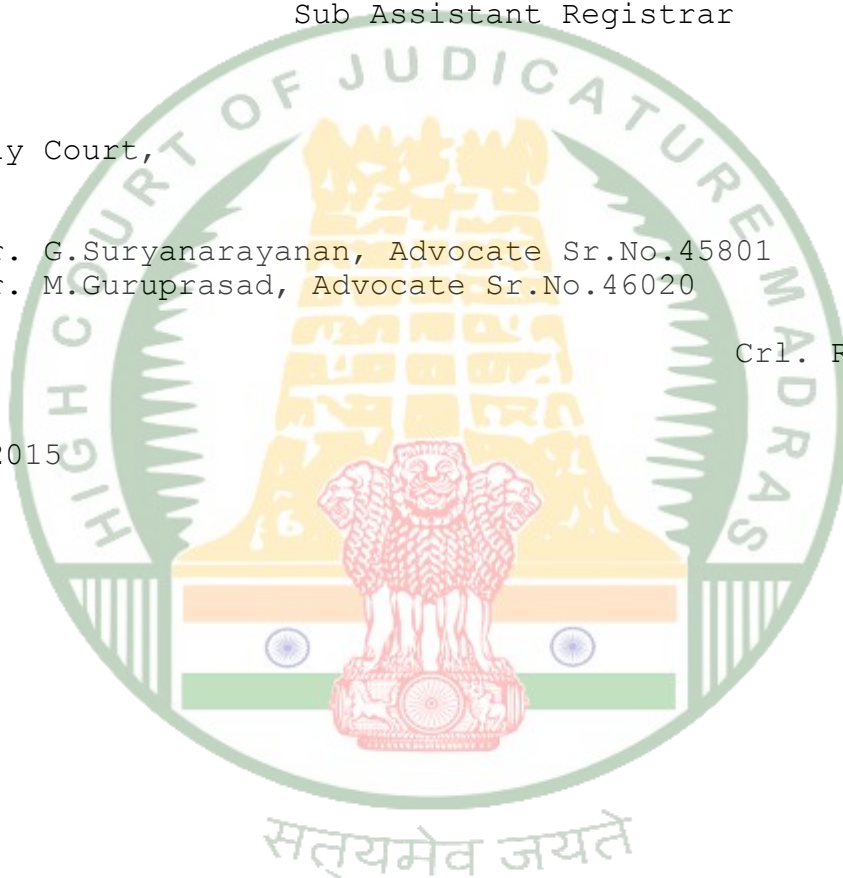
1 cc to Mr. G.Suryanarayanan, Advocate Sr.No.45801

1 cc to Mr. M.Guruprasad, Advocate Sr.No.46020

Crl. RC No.575 of 2015

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pmk.29.9.2015



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