

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION (ST) NO. 32042 OF 2016**

|                          |                |
|--------------------------|----------------|
| Ashish Harshad Thaker    | ... Petitioner |
| Vs.                      |                |
| Mrs. Jenis Ashish Thaker | ... Respondent |

....

Mr. Mayur Khandeparkar and Mr. Gauraj Shah i/b Mr. Vishal Gupta for the Petitioner.

Mr. P.K. Dhakephalkar, Senior Counsel i/b Mr. Jaydeep Deo for the Respondent.

**CORAM : A.A. SAYED, J.  
DATE : 16 DECEMBER 2016**

**JUDGMENT:**

1 By this Petition under Article 227 of the Constitution, the Petitioner husband has impugned an interlocutory order dated 11 November 2016 passed by the Family Court, Mumbai, whereby the Interim Application (Exhibit 189) filed by the Petitioner husband came to be rejected.

2 The Petitioner husband has filed a Petition for divorce primarily on the ground of cruelty. In the Petition, the Petitioner husband has alleged that the Respondent wife has suicidal tendencies and also homicidal behavior. The aforementioned Interim Application (Exhibit 189) was filed by the Petitioner husband almost at the fag-end of cross-

examination of the Respondent wife. The examination in chief and cross-examination of the Petitioner husband is already over and his evidence is closed.

3 In the Interim Application (Exhibit 189) the Petitioner husband has made the following prayers:

- “a) The original SD Card be taken on record and compared with the CD already produced in evidence.*
- b) The voice of Respondent be recorded for comparing the voice in the CD produced by the Petitioner in his evidence.*
- c) That admitted voice and the CD be sent to expert for voice identification.*
- d) That permission to confront Respondent with the CD already produced in evidence be given.*
- e) That after comparison of SD Card with CD, the SD Card be returned for safe custody.*
- f) For further order.”*

4 So far as the SD Card (Secured Digital Card) of the Petitioner husband's mobile phone which allegedly contains the recordings of admissions of the Respondent wife before doctors regarding her suicidal tendencies are concerned, I do not see how such prayer that “the original SD Card be taken on record” - as innocuous as sought to be portrayed – can be entertained at this stage after his evidence is closed. There appears to be no mention of such SD Card or the device

(mobile phone) containing such SD Card even in his own evidence.

5      So far as the CD (Compact Disk) is concerned, the same was produced at the time of his evidence by the Petitioner husband without following the procedure contemplated under Section 65-B of the Indian Evidence Act. The CD was not proved. According to the Petitioner husband he has copied the contents of the SD Card of his mobile phone on his CD through his laptop which allegedly contains the aforesaid recordings.

6      The parties are represented by their respective Counsel before the Family Court. The procedure for proving the CD under the Indian Evidence Act has not been followed by the Petitioner husband. The Respondent wife has right from the beginning denied that the voice recordings in the CD are hers. It is her contention that the CD is manipulated and fabricated. Though the Petitioner husband has produced the transcripts of the recordings and it was sent for verification by a marriage counselor under order of the Family Court to the limited extent of ascertaining whether the contents of the recording matched the transcripts, the fact remains that the CD itself was not proved by the Petitioner husband.

7 In the impugned order, the learned Judge of the Family Court has rightly observed in paragraph Nos. 13 and 36 as follows;

“13. The Petitioner has produced the said CD and transcript along with list Ex. 53. The Respondent has specifically denied CD and the said transcript. Therefore, it could not be exhibited though the said transcript was verified by the learned marriage counsellor. Even before the learned marriage counsellor, the Respondent wife did not admit the said conversation, her voice and voice of Dr. Joy Desai and specifically denied it. The Respondent wife has given her specific objection which attached to Counsellors report Vide Exh. 117, wherein she has specifically stated that it is manipulated and fabricated audio CD. In such circumstances, it was for the Petitioner to prove the said conversation and CD by examining the necessary witnesses / or by following provisions of law.

36. In addition to that, this is not a simple application for production of SD Card for confrontation of Respondent. There are various other prayers to compare it with CD, to send it to an expert for voice identification which he was suppose to do before closing his side of evidence. This would certainly amount to reopening of the Petitioner's case, which case not be allowed specifically when no sufficient reason are shown by the Petitioner for non producing it on record at the time of his evidence. It is not the case of Petitioner that it was not available or he could not produce it inspite of due diligence. Hence, I find that no sufficient grounds are shown by the Petitioner to allow this application.”

8 Pertinently, there is no explanation by the Petitioner husband why the SD card was not produced during his evidence and why the procedure for proving the CD was not followed before closing his

evidence. As mentioned in the impugned order in paragraph 13, the Respondent wife has specifically denied the conversation and her voice and the voice of the Doctors. The Respondent wife has given her specific objection attached to the report of the counselor and she has categorically stated that it is a manipulated and fabricated audio CD.

9 Learned Counsel for the Petitioner husband has placed reliance upon the following judgments:

- 1) Hemendra Rasikala Ghia Vs. Subodh Mody, 2008 (6) MhLj 886 of Full Bench of this Court.
- 2) Maria Margarida Sequeria Fernandes v/s. Erasmo Jack de Sequeria, Manu/SC/0225/2012 of Supreme Court.
- 3) K.K.Velusamy v/s.N.Palanisamy in Civil Appeal Nos.2795-2796 of 2011 of Supreme Court.
- 4) Salem Advocate Bar Association, Tamil Nadu v/s. UOI, AIR 2005 SC 3353.
- 5) Sou Pramila Shankar Ghante vs. Shri Shankar Vishwanath Ghante, Family Court Appeal No. 100 of 1996 of Division Bench of this Court.
- 6) Geeta Marine Services Pvt.Ltd v/s. The State and another Judgment of the learned judge of this Court in Criminal Application No.2633 of 2008 in Criminal Writ Petition No. 311 of 2008 of Single Judge of this Court.
- 7) Mrs.Havovi Kersi Sethna v/s. Mr.Kersi Gustad Sethna in Notice of Motion No.8 of 2010 in Suit No. 16 of 2008 of the Single Judge of this Court.

10 Learned Senior Counsel for the Respondent wife has cited the following judgments:

- 1) Anvar R.V. Vs. P.K. Basheer, (2014) 10 SCC 473 of 3-Judge Bench of Supreme Court.
- 2) Melappa and Another Vs. Guramma, AIR 1956 Bom 129 of Division Bench of this Court.
- 3) Vishal Kaushik Vs. Family Court & Another, AIR 2015 Raj 146 : (2016) 1 RLW 693, of Single Judge of Rajasthan High Court.
- 4) Rayala M.Bhuvaneswari Vs. Nagaphanender Rayala, 2008 0 AIR(AP) 98 of Single Judge of Andhra Pradesh High Court.
- 5) Purushottam Shankar Ghodgaonkar v/s. Gajanan Shankar Ghodgaonkar, 2012(6) Mh.L.J.648 of Single Judge of this Court.

11. In **Hemendra Rasikala Ghia** (supra), the Full Bench of this Court has in paragraphs 64, 66, and 68 observed as follows:

“64. Order VII deals with construction of the plaint. Rule 14 thereof provides for production of documents on which plaintiff sues along with list of other documents relied upon in support of the claim. This is a first opportunity in the lis to the plaintiff to produce documents on record.

66. Under Order XIII Rule 1, one more opportunity is available to the parties to produce documentary evidence at or before settlement of issues. Order 12 Rule 2 provides for notice to admit documents calling upon the opponent to admit documents. This is an additional stage to admit or deny or object to the admissibility of the document. Rule 2A thereof provides for deemed admission, if documents are not denied within stipulated time-frame after service of notice to admit documents.

68. Order XVIII, Rule 4(1) of the C.P.C. clearly provides that the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls the witness for evidence; provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with the affidavit shall be subject to the orders of the Court. At this stage, one more opportunity is provided to the party to produce documents.”

Thus, as observed by the Full Bench, there are three opportunities which are available to produce documents. Despite that, in the present case, the Petitioner husband has failed and neglected to produce the SD card/device (mobile phone with SD Card). So far as CD is concerned, the Petitioner husband has produced the same alongwith transcript, however, the same has not been proved and cannot read in evidence in the absence of the Petitioner husband having proved the CD by following the procedure under section 65-B of the Evidence Act. This was not done despite the Petitioner husband being fully aware of the Respondent wife’s contention that the CD was manipulated and fabricated.

12. In **Anvar R.V.** (supra), a 3-Judge Bench of the Supreme Court has held in paragraph 7, 14,16,17,18 as under:-

“7. Electronic record produced for the inspection of the court is documentary evidence under Section 3 of the Evidence Act, 1872 (hereinafter referred to as “the Evidence Act”). The Evidence Act underwent a major amendment by Act 21 of 2000 (the Information Technology Act, 2000 (hereinafter referred to as “the

IT Act”). Corresponding amendments were also introduced in the Penal Code (45 of 1860), the Bankers Books Evidence Act, 1891, etc.

14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2).

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to

the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

13. I have perused the other judgments cited by the learned Counsel as well as the relevant provisions under the Evidence Act, CPC and Family Courts Act. Section 10 of the Family Courts Act, 1984 provides that subject to the other provisions of this Act and Rules, the provisions of CPC, 1908 and all other law for the time being in force shall apply to the suits and proceedings before the Family Court (other than the proceedings under Chapter IX of CrPC). Section 14 of the Family Courts Act states that the Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act. Inviting my attention to section 14 as well as the judgments cited, the learned Counsel for the Petitioner husband sought to contend that the strict rules of evidence are not required to be followed and that the SD card and CD being material evidence are required to be brought on record in support of the case of the Petitioner

husband and the Family Court ought not to have rejected the Application of the Petitioner husband. I am unable to accede to the request. True that in view of section 14, the rules of evidence may be diluted to certain extent, however, that does not mean that the electronic records, which are disputed, can be allowed to be taken on record, unless the procedure under section 65-B of the Evidence Act is followed. As stated by the Supreme Court in **Anvar R.V's** case, electronic records being most susceptible to tampering, alteration, transposition without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. Even assuming that the CD can be "shown" to the Respondent wife during her cross-examination as suggested in the written Note filed on behalf of the Petitioner husband in view of Order XIII Rule 1(3) and Order VII Rule 14(4) of CPC, in the facts and circumstances of the present case, the Respondent wife having disputed the CD right from the beginning and having clearly stated in her evidence also that she was not aware of any such conversation and that all those conversations filed on record are manipulated and fabricated by the Petitioner husband, I am unable to find fault with the impugned order of the Family Court in not permitting the Petitioner husband to confront the Respondent wife with the CD and rejecting the Application of the Petitioner husband. The learned Judge of the Family Court has exercised her discretion, which

cannot be said to be injudicious in the facts and circumstances of the present case. The burden was clearly on the Petitioner husband to prove the CD, which he has failed to discharge. It is, therefore, apparent that the Petitioner husband is now attempting to produce SD Card and prove CD through the Respondent wife in her cross-examination so as to read them in evidence, which ought to have been done before closing his evidence. This is nothing but a back door method by the Petitioner husband to read the SD card/CD in evidence. It needs to be borne in mind that it is only when the electronic record is in the first instance duly produced in terms of section 65-B of the Evidence Act that the question thereafter arises as to its genuineness, etc. The Petitioner husband has clearly failed to prove the electronic record and is now attempting to prove them through the Respondent wife, which cannot be permitted. The cross-examination of the Petitioner husband is also closed and therefore even assuming the case of the Petitioner husband were to be accepted, there would be no occasion for the Respondent wife to cross-examine the Petitioner husband and if the Petitioner husband was to be recalled for cross-examination, this would be nothing but opening the entire case.

15. However, quite apart from the above, it is noticed that in the Divorce Petition itself, there is no mention of any voice recordings of

the Respondent wife by the Petitioner husband. It is well settled that evidence beyond pleadings are not admissible in evidence. If the recordings were so material as suggested by the learned Counsel on behalf of the Petitioner husband, the same ought have been mentioned in the pleadings. In **R. M. Malkani vs State of Maharashtra, 1973 AIR 157**, it was held that contemporary electronic recording of conversation is a relevant fact. Under Order VI Rule 2 it is provided that every pleading shall contain and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defense, as the case may be, but not the evidence by which they are to be proved. Even if it is assumed that SD card and the CD need not have been referred to in the pleadings, the fact of the voice recordings of the Respondent wife by the Petitioner husband ought to have been pleaded in the Divorce Petition itself. Rule 9 of Order VI provides that wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

15. The alleged conversations between the Respondent wife and her Doctors appear to have been recorded superstitiously by the Petitioner husband. It was only out of the trust that the Respondent

wife had reposed on the Petitioner husband that he was present during the consultations of the Petitioner wife with the Doctors. Therefore, there can be no doubt that issues of right to privacy would also be involved. However, that need not be elaborated as the earlier discussion is sufficient to reject the Application of the Petitioner husband. It is also noticed that the Supreme Court has given time-frame for disposal of the Divorce Petition. This is also not a fit case to exercise powers under section 151 of the CPC as sought to be suggested in the closing of the arguments on behalf of the Petitioner husband. In any case, this was not even urged before the learned Judge of the Family Court. The learned judge has rightly exercised her discretion in rejecting the Application of the Petitioner husband.

16. In light of the above discussion, no case is made out to warrant interference with the impugned order of the Family Court in the exercise of writ jurisdiction under Article 227 of the Constitution. The Petition shall accordingly stand dismissed. No order as to costs.

17. Learned Counsel for the Petitioner husband states that the Petitioner husband would like to challenge this judgment and order before the higher Court and the evidence of the Respondent wife which is almost over, should not be allowed to be closed for a period of eight

weeks. Learned Counsel for the Respondent wife opposes the said request.

18. On a query made to the learned Counsel for the Respondent wife, he has informed the Court that there are couple of more witnesses who are yet to be examined on her behalf. Inasmuch as, the Supreme Court has given a time-frame for disposal of the proceedings, it is directed that the evidence of other witnesses may be completed first, and so far as the evidence of the Respondent wife is concerned, the same may be continued after the evidence of said witnesses are recorded.

19. It is clarified that the observations in this judgment shall not influence the Family Court in its final decision in the Divorce Petition.

**( A.A. SAYED, J.)**