

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Crl. Revision No.4195 of 2015 (O&M)
Date of Decision: 03.02.2016

Rakesh Jain

...Petitioner

Versus

State of Haryana

...Respondents

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

1. Whether Reporters of local papers may be allowed to see the judgment? Yes/No
2. To be referred to the Reporters or not? Yes/No
3. Whether the judgment should be reported in the digest? No

Present: Mr. Parminder Singh, Advocate and
Mr. Sumit Gupta, Advocate
for the petitioner(s).

Ms. Mahima Yashpal, AAG, Haryana.

Mr. Ajay Saini, Advocate
for respondent no.2.

ANITA CHAUDHRY, J.

1. This revision is directed against the order dated 07.10.2015, passed by the SDJM, Samalkha in FIR No.68 dated 07.03.2008.

2. The background is necessary. An application had been filed by the accused to examine the author of Mark DW4/A to DW4/H. The petitioner claims that CCTV camera had been installed at Jain Sathanak, 50, Sector 14, Urban Estate, Karnal and the memory card of the mobile phone for the audio recording is under the control and custody of one Lovely Arora. He had prepared CDs by taking the storage from

the CCTV camera through a pen drive and which was transferred to a laptop and it was in his possession. It was pleaded that DW4 - Sadhvi Jain Ananta had appeared as a defence witness and she was in conversation with Ramesh Jain and it was recorded in the audio and video which was placed in the Court file when Sadhvi Jain Ananta was under examination on 15.05.2015. One set of 8 CDs was handed over to the complainant in the Court and the accused had played the audio and video CDs on the computer and laptop. It was pleaded that in order to prove the electronic evidence, they want to examine Lovely Arora who was maintaining and controlling the CCTV camera and had taken the storage from the DVR to the pen drive which was transferred to the laptop and through laptop, CDs were prepared. Similarly, he had taken the memory card from the mobile and then transferred it from the memory card to laptop and then from laptop to the audio CDs and these are relevant pieces of evidence and in order to prove the same, they want to examine the person under whose care and custody the DVR was kept in the Sathanak. It was pleaded that it was necessary to examine him in the interest of justice and equity. The concluding paragraph of the application reads as under:-

"It is, therefore, prayed that application for allowing the applicant-accused to examine the author of documents Mark-DW4/A to DW4/H by producing the original DVR of CCTV camera recording for video installed at Jain Sathanak, 50, Sector-14, Urban Estate, Karnal, and memory card of mobile

phone for audio recording which is under the control and custody of Lovely Arora, who has prepared the CDs Mark-DW4/A to DW4/H by taking the storage in the CCTV camera through pan drive and after that preparing the same through laptop which is in possession of Lovely Arora. In the interest of justice and equity proper orders may kindly be passed."

3. Reply was not filed by the complainant. The trial Court dismissed the application and noted the following:-

"After hearing counsel for the parties and going through the contents, the facts of the application are same as of the application filed on 24.07.2015 wherein permission was sought to place the detail of abstracts/contents of recording of audio and video cassettes CD and the said application was dismissed on 11.09.2015 after seeking reply from the complainant and after detailed arguments. Same facts have been alleged in the application filed today. Furthermore, the defence evidence has already been closed on 11.09.2015. Therefore, the order passed on 11.09.2015 cannot be altered by allowing the application filed today in view of Section 362 Cr.P.C."

4. It is necessary to mention that the petitioner had earlier moved an application (Annexure P-4) which was decided on 11.09.2015 (Annexure P-5). The prayer made in the application (Annexure P-4), was for permission to bring the contents of the audio and video CDs already placed on the file in the examination-in-chief of DW-4 and for playing the same in the Court. The petitioner therein had referred to the provisions of Sections 65-A and 65-B of the Evidence Act as well to the Information Technology Amendment Act, 2008.

5. That application was dismissed. Para no.4 & 5 of the order read as under:-

"5. After hearing counsel for the parties and going through the contents, the applicant/accused has merely stated in their application that they want to place on record the details of abstracts/contents of recordings of audio and video cassettes/CDs which are marked documents placed on record by DW4 whereas as per sub clause (a) of sub section (2) of Section 65-A and 65-B of the Indian Evidence Act, it is clearly stated "the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information....", whereas neither the person who has prepared the alleged CD or video cassette has been examined by the defence in their evidence **nor any certificate has been produced on record to prove that whether the information was genuine one which has allegedly been produced through that computer.**

6. Furthermore, the defence counsel has got opportunity to produce their defence since 13.10.2012 when the statement of accused persons have been recorded under Section 313 Cr.P.C. and thereafter matter went for DWs till 16.09.2013. Thereafter, on allowing application under Section 311 Cr.P.C. again the statement under section 313 Cr.P.C. was recorded on 19.09.2014 and thereafter, since 17.10.2014 the defence counsel has got several effective opportunities to conclude their examination. Further if the defence counsel has found alleged Ramesh Jain so important in their defence, they had every opportunity to examine

him by filing list of witnesses when they have sought opportunity for producing their defence evidence i.e. From 17.10.2014. The defence counsel has neither tendered any list of witness nor given any list of documents on which they want to rely. The accused/applicant has filed the present application on 24.07.2015 after more than one and half years. If such kind of application is allowed on every stage of proceedings, there will be no end of any case either it be of prosecution or it be of defence. The defence must have file any list of witness so that the prosecution/complainant would have opportunity to rebut the same by cross-examination but if this kind of application is filed on every date just to clarify the examination-in-chief of other DW, and the case would become unending. Moreover, the present case is 6 years old and the defence has not shown as how these contents of CDs are important for the decision of the present case especially when said Ramesh Jain is neither a prosecution witness nor related to the complainant or accused directly.” (emphasis is mine)

6. This order was not challenged. Another application was moved on 07.10.2015 which was dismissed and is under challenge.

7. I have heard both the sides.

8. The counsel for the petitioner contends that since the order under Section 311 Cr.P.C. is not revisable, therefore, the petition under Section 482 Cr.P.C. was filed.

The counsel contends that it is necessary to prove the CD and the audio recording and Lovely Arora was maintaining and controlling the CCTV camera who had transferred the recording in the pen drive and then to the laptop from which it was transferred to CD which had been produced in the Court in the statement made by Sadhvi Jain Ananta. It was urged that the yearly maintenance contract had been given to Lovely Arora. Reliance was placed upon ***Sanjay and another Vs. State of Haryana and another 2005(1) RCR (Criminal), Rajaram Prasad Yadav Vs. State of Bihar and another CCJ 2014(1) 644, Natasha Singh Vs. CBI (State) CCJ 2013(3) 650, Jaspal Singh Vs. M/s. Balwant Brothers Pvt. Ltd. CCJ 2013(2) 397, Yeshwant Namdeorao Zade & Anr. Vs. Anup & Ors. 2011(1) CCJ 477.*** It was urged that the Court has wide powers and when the evidence is necessary which throws light on the facts, the evidence can be brought in at any stage.

9. The submission on the other hand was that resort to Section 311 Cr.P.C. cannot be made to fill up the lacuna and if any more evidence is sought to be produced after the defence had been closed, it would result in serious prejudice. It was urged that so called recording was allegedly made when the defence was going on and the prosecution has closed its evidence some time in 2011 and the statement of the accused had been recorded thereafter and the case remained fixed for defence evidence till 16.09.2013. It was

stated that an application had been moved by the prosecution under Section 311 Cr.P.C. which was allowed and the statement of the accused was again recorded on 19.09.2014 and the case is being fixed for defence evidence and the application was moved at belated stage. It was urged that even otherwise the conversation between two strangers is not important nor it is an admission by the complainant or his witnesses and Ramesh Jain is not a prosecution witness and in any case it would have no bearing to the case.

10. While dealing with the application under Section 311 Cr.P.C., the Apex Court in numerous decisions had laid down the principles which are to be borne in mind by the Courts. Wide discretionary powers had been given under Section 311 Cr.P.C. to ensure that the judgment is not rendered on in-choate, inconclusive speculative presentation of facts and the Court can allow a witness to be examined if it is essential for the just decision of the case. Resort to the exercise of power under Section 311 Cr.P.C. is to be made with the object of finding of proof which will lead to a just and correct decision. Before allowing the application, the Court has to satisfy itself that it was in every respect essential to examine such a witness. The object is to determine the truth and to render a just decision. Exigencies of the situation, fair play and good sense are a safeguard while exercising the discretion. Additional evidence cannot be and must not be received as a disguise or to change the nature of the case

against any of the parties. The power under Section 311 Cr.P.C. must, therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons.

11. Coming to the present case, the orders available on record show that the case was fixed for defence evidence in October, 2012. The trial is not concluding as the defence has been moving one application or the other and delaying the trial. The FIR was registered in 2008. The record reveals that when the case was fixed for defence evidence, the prosecution had moved one application under Section 311 Cr.P.C., which was allowed and again statement of the accused was recorded in September, 2014. The case was again fixed for defence evidence. The defence did not tender any list of witnesses and their evidence was closed and thereafter applications are being filed. The trial Court in its order dated 11.09.2015 had noted that there was no relevance of the conversation between the Sadhvi and Ramesh Jain who was not a prosecution witnesses nor related to the accused. With that background, it is now necessary to notice the provisions contained in Section 65-A and 65-B of the Evidence Act, which are as under:-

"65A. Special provisions as to evidence relating to electronic record: *The contents of electronic records may be proved in accordance with the provisions of section 65B. Section 65B reads as follows:*

"65B. Admissibility of electronic records:

(1) Notwithstanding anything contained in this 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 (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely: -

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer.

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether –

(a) by a combination of computers operating over that

period; or

(b) by different computers operating in succession over that period; or (c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any

official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation: *For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process. These are the provisions under the Evidence Act relevant to the issue under discussion.....*

12. *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). Following are the specified conditions under Section 65B(2) of the Evidence Act:*

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(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 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

13. 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.

14. 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.

15. The petitioner failed to produce the certificate along with the CD, audio recording in terms of Section 65-B of the Evidence Act. This fact was also noticed in the order dated 11.09.2015. Therefore, the question of resort to Section 45-A

is irrelevant. The oral admission as to the contents of the electronic record are not relevant unless the genuineness of the electronic record is proved. That stage never arose. Importantly, the so called conversation is not between the complainant or his witnesses or the accused. The attempt by the accused appears to be only to delay the trial and nothing more. There is no merit in the petition and is dismissed.

**(ANITA CHAUDHRY)
JUDGE**

03.02.2016

'Sunil'