

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.01.2018

CORAM

THE HON'BLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.390 of 2014
& M.P.Nos.1 of 2014

P.C.Murugeasan .. Petitioner

Vs.

S.Prabhakaran .. Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decretal order dated 20.11.2013 made in I.A.No.347 of 2013 in O.S.No.381 of 2011 on the file of the II Additional Subordinate Judge, Erode.

For Petitioner : Mr.T.Balaji

For Respondent : Mr.V.P.Sengottuvel

ORDER

This Civil Revision Petition is filed to set aside the fair and decretal order dated 20.11.2013 made in I.A.No.347 of 2013 in O.S.No.381 of 2011 on the file of the II Additional Subordinate Judge, Erode.

2.The petitioner is plaintiff and respondent is the defendant in O.S.No.381 of 2011 on the file of the II Additional Subordinate judge, Erode. The petitioner filed the said suit against the respondent for recovery of money. The respondent filed written statement on 10.02.2012 and is contesting the suit. The petitioner was examined as P.W.1 and was cross examined by the counsel for the respondent. At that stage, the respondent filed I.A.No.347 of 2012 under Section 39 of the Evidence Act and Section 151 of C.P.C for permission to mark the documents such as Memory Card which contains the conversation between the petitioner and respondent on 02.02.2012, 17.02.2012 and 04.07.2012 and the CD containing the contents of the memory card as evidence on the side of the respondent. According to the respondent, the conversation took place in the cell phones of the petitioner and respondent on various dates such as 02.02.2012, 17.02.2012 and 04.07.2012, wherein the petitioner has admitted that he had never before seen the respondent and that whatever amounts the respondent owed, he would talk with V.P.Rathinasamy and settle the differences amicably. The respondent also in his affidavit has provided the cell phone numbers of petitioner and his number, through which the conversations took place. He also states that the above

conversations were naturally recorded in the memory card in his cell phone, which he has recorded in the CD and would produce during his examination as D.W.1.

3.The learned counsel for the petitioner filed counter affidavit and opposed the same and contended that he never had any conversation with the respondent on the dates mentioned by the respondent in his affidavit. The cell phone number mentioned by the respondent does not belong to the petitioner. The respondent did not mention the above conversation in the written statement filed by him or did not even whisper about the same during the cross examination of the petitioner as P.W.1. The conversation would have been recorded through the mimicry experts and prayed for dismissal of the application.

4.The learned Judge played the CD in the open Court in the presence of the counsel for both the parties and considering the materials on record, allowed the application on the ground that the said documents are admissible as per Section 65A of the Indian Evidence Act (herein after referred to as the Act).

5. Against the said order dated 20.11.2013 made in I.A.No.347 of 2013 in O.S.No.381 of 2011, the present Civil Revision Petition is filed by the petitioner.

6. The learned counsel for the petitioner contended that unless the conditions contemplated in Section 65B of the Act is complied with, the electronic record is inadmissible as the same is secondary evidence. The respondent did not comply with the condition contemplated under Section 65B of the Act. The learned counsel for the petitioner, in support of his contentions, relied on the judgments report in:

(i) 2009 (2) CTC 419 (A.R.Periyasamy Vs. G.Karunakaran):

"Evidence Act, 1872 (1 of 1872), Section 7 - Whether Tape recorded conversation admissible as evidence? - Applicant directed to file necessary application for comparison of recorded voice by expert - Trial Court directed to ensure accuracy of record through direct or circumstantial evidence to rule out possibility of tampering of record - Trial Court's observation "presently an individual can speak with the same voice that of another and in this regard many are talented and available, etc.""

"13. On a careful consideration of respective contentions, this Court is of the considered view that the tape itself is a primary and direct evidence as to what has

been said and picked up by the recorder and can only be an corroborative evidence and in that view of the matter, the revision petition/defendant is directed by this Court to file necessary fresh interlocutory application before the Trial Court to file necessary fresh recorded voice found in the cassette with that of the evidence of P.W.3 to be recorded by the Trial Court, to be compared by an expert as per rules of relevancy found in the Indian Evidence Act and that the Trial Court is to ensure that accuracy of what has to be recorded, has to be proved by the maker of the record with due identification through direct or circumstantial evidence so as to rule out the possibility of tampering with the record and in this regard, the Trial Court shall provide opportunity to both parties including the filing of counter if any and to dispose of the matter on merits, uninfluenced with any of the observations made by this Court in this revision...."

(ii) AIR 2015 SC 180 (Anvar P.V. Vs. P.K.Basheer):

"13. 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)..."

"22.....It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

(iii)AIR 2017 SC 3441 (Sonu Vs. State of Haryana):

"31.Electronic records play a crucial role in criminal investigations and prosecutions. The contents of electronic records may be proved in accordance with the provisions contained in Section 65B of the Indian Evidence Act. Interpreting Section 65B(4), this Court in Anvar's case

held that an electronic record is inadmissible in evidence without the certification as provided therein. Navjot Sandhu's case which took the opposite view was overruled."

7.Per contra, the learned counsel for the respondent contended that any record by electronic evidence is admissible in evidence as per Section 65A of Indian Evidence Act. In the present case, the learned Judge played the said CD in the open Court and allowed the application. There is no error in the order of the learned Judge. A qualified person recorded the conversation between the petitioner and respondent in a C.D. The petitioner has only raised his objection in the Revision and not before the lower Court. The respondent will examine the person who recorded and issued certificate to prove the genuineness of the documents. In support of his contentions, the learned counsel for the respondent relied on the judgment reported in **(2017) 8 SCC 570 (Sonu alias Amar Vs. State of Haryana):**

"32.It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the trial court without a certificate as required by Section 65-B(4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof

has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 CrPc, 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65-B(4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof."

8. Heard the learned counsel for the petitioner as well as the respondent, perused the materials available on record and considered the judgments relied on by the learned counsel for both the parties.

9. The respondent is seeking permission to mark the documents such as Memory Card which contains the conversation between the petitioner and respondent on 02.02.2012, 17.02.2012 and 04.07.2012 and the CD containing the contents of the memory card as the evidence on the side of the respondent. According to the respondent, the documents contain the conversation that took place between the petitioner and respondent, which is admissible under Section 65A of the Act. Per contra, the contention of the learned counsel for the petitioner is that unless the conditions mentioned in Section 65B of the Act is complied with, an electronic record cannot be admitted as evidence. The said contention has considerable force. In the judgment relied on by the learned counsel for the petitioner, the Hon'ble Apex Court has held that unless a party who seeks to mark the electronic record complies with the conditions contemplated under Section 65B of the Act and produces certificate under Section 65 of the Act, the electronic records are inadmissible as evidence. The Hon'ble Apex Court in the judgment reported in ***AIR 2017 SC 3441 (Sonu Vs. State***

of Haryana) in paragraph 31, relied on by the learned counsel for the petitioner and in paragraph 32 in **(2017) 8 SCC 570 (Sonu alias Amar Vs. State of Haryana)** relied on by the learned counsel for respondent, held that unless the conditions in Section 65(B) of the Act are complied with and a certificate is produced, electronic evidence cannot be marked. This Court also in the judgment reported in **2009 (2) CTC 419 (A.R.Periyasamy Vs. G.Karunakaran)** has taken a similar view and held that without comparison of voices of the parties in the CD, the same cannot be marked as evidence. In the present case, the respondent has not complied with the conditions contemplated under Section 65B of the Act and has not produced any certificate as held by the Hon'ble Apex Court. There is also no comparison of voices as held by this Court in decisions referred to above. In view of the same, the impugned order of the learned Judge is liable to be set aside and is hereby set aside. It is open to the respondent to file fresh application after complying with the conditions mentioned under Section 65B of the Act and produce certificate to substantiate the genuineness of the electronic records sought to be marked as evidence. If the respondent produces any such certificate in fresh application, the learned Judge is directed to take into consideration the judgment of the Hon'ble Apex Court and this Court referred to above in this order and pass orders in

accordance with law without being influenced by the impugned order already passed. It is open to the respondent to examine the person who recorded the conversation in CD if he so desires.

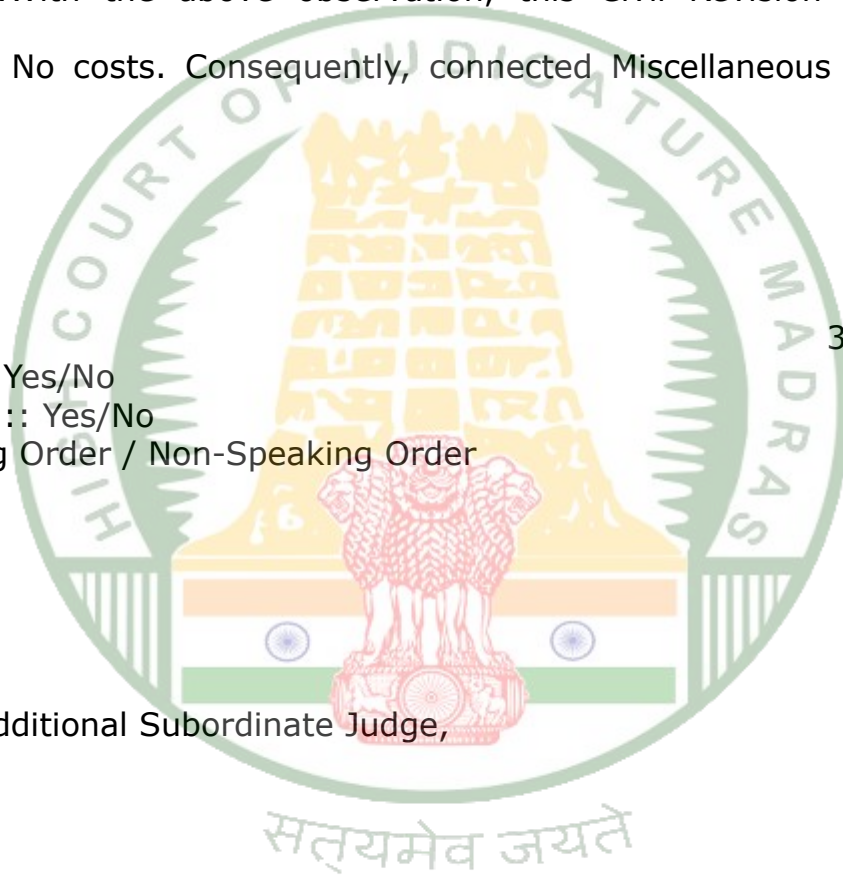
10. With the above observation, this Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

30.01.2018

Index :: Yes/No
Internet :: Yes/No
Speaking Order / Non-Speaking Order
gsa

To

The II Additional Subordinate Judge,
Erode.



WEB COPY

V.M.VELUMANI,J.
gsa



For-orders in
C.R.P.(PD)No.390 of 2014
& M.P.Nos.1 of 2014

WEB COPY

30.01.2018