

* HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

+ CRP No.4959 of 2018

% 23-11-2018

Mutchi Sanni Babu,
s/o. late Sanni, Hindu, Age: 57 years,
r/o. Tamarapalli Village, L. Kota Mandal,
Vizianagaram District.

... Petitioner/
Plaintiff

Vs.

\$ Melastri Atchem Naidu,
s/o. Maridi Babu, Hindu, Age: 41 years,
r/o. Kothavalasa Village & Mandal,
Vizianagaram District.

.. Respondent/
Defendant

! Counsel for the appellant: Sri M. Rammohan

Counsel for the Respondent: Sri G. Ramagopal

< Gist:

> Head Note:

? Cases referred:

¹ (1973) 1 SCC 471

² Manu/SC/0992/1987

³ AIR 1964 SC 72

⁴ AIR 1968 SC 147

⁵ AIR 1973 SC 157

⁶ AIR 1975 SC 1788

⁷ 1962 SCC OnLine Cal 147

⁸ 2012 (4) CTC 743

⁹ (2015) 1 ALD (Cri) 416

¹⁰ 1983 (1) APLJ 197



HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**CRP No.4959 of 2018****ORDER:**

This Civil Revision Petition is filed questioning the order dated 26.07.2018 in IA No.1390 of 2017 in OS No.57 of 2015 passed by the I Additional District Judge, Vizianagaram. The said Interlocutory Application is filed under Section 45-A of the Indian Evidence Act read with Section 151 of the Civil Procedure Code seeking permission to play a conversation recorded in a cell phone and copied on to the pen drive to enable the defendant/petitioner in IA to prove his contention in the suit.

The suit is filed for recovery of an amount of Rs.15,34,000/- based on a promissory note. The defendant in the suit took a plea of material alteration in the promissory note. According to him, the sum of Rs.3 lakhs was altered as Rs.13 lakhs in promissory note. According to the averments in the affidavit, just prior to the cross-examination of PW.1/plaintiff, a meeting was held on 12.08.2017 between the plaintiff, defendant and responsible mediators who wanted to settle the dispute. In that meeting, according to the affidavit, the plaintiff admitted that he borrowed a sum of Rs.3 lakhs only and

not Rs.13 lakhs. This discussion was purportedly recorded by the petitioner/defendant in his cell phone and copied on to a pen drive, which were filed into the Court. During the course of examination, the defendant's counsel wanted to confront the witness with this conversation and he wanted to play the recorded conversation. This was objected by the learned counsel for the plaintiff. Therefore, the application IA No.1390 of 2017 was filed u/s.45-A of the amended Evidence Act read with Section 151 CPC seeking permission to play the conversation recorded in the cell phone and copied into the pen drive so as to enable the defendant to prove the contentions raised by him. This was opposed by the plaintiff by filing a counter.

After hearing both the counsel, the lower Court allowed IA No.1390 of 2017 and permitted the defendant to play conversation in the open Court. This order is now questioned in the CRP by the plaintiff in the suit who is the respondent in the said IA.

For the sake of convenience and in order to avoid confusion, they are referred to as plaintiff and defendant only.

This Court has heard Sri M. Rammohan, learned counsel for the revision petitioner/plaintiff and Sri G.

Ramagopal, learned counsel for the respondent/defendant.

The first and foremost objection raised by the plaintiff/revision petitioner is that Section 45-A of the Indian Evidence Act does not apply to the facts and circumstances of the case, because it deals with opinion of an expert etc. It is a fact that Section 45-A is not applicable to the facts of IA No.1390 of 2017. Nevertheless the mere mentioning of a wrong provision of law is not very relevant provided that the prayer made is appropriate. The prayer in the said IA is to play the conversation recorded in the cell phone and copied on to the pen drive in the Court. The purpose is to confront the witness and to prove the case of the defendant. Therefore, the mere mention of Section 45-A of Indian Evidence Act in the IA is not a factor to reject the prayer.

The second objection raised by Sri M. Rammohan, learned counsel for the plaintiff is that the said fact about the recording of the conversation is not pleaded and that therefore, no evidence can be introduced unless it is supported by pleading.

This Court notices that this meeting is supposed to have taken place just in August 2018, just before the cross-examination of the plaintiff. After the pleadings

were filed, PW.1's evidence was being recorded when this meeting purportedly took place. This is an event that occurred subsequent to the pleading and as such pleading about the existence of the conversation and its recording cannot arise in the circumstances of the case. It is a subsequent event that took place after the pleadings were filed. This is the exact argument advanced by Sri G. Ramagopal, learned counsel for the defendant in this matter. He argued that subsequent events which occurred after the pleadings were filed cannot obviously mention in the written statement.

The next objection raised by the learned counsel for the plaintiff/revision petitioner is that the said voice recording was obtained illegally. The learned counsel submits that the privacy of the plaintiff has been invaded by making this illegal recording of conversation. In addition, he also points out that the foundation of receiving the so-called recording has not been actually laid during the course of the cross-examination for the same to be received in evidence. These are issues of importance which are being answered later in the matter.

In reply to this, the learned counsel for the defendant/respondent argues that the order passed is a reasoned order. He points out that the right to privacy

argument that was considered in the lower Court (as can be seen from paras-11 and 12) related to the cases in which a husband and wife were involved. Therefore, these conversations can amount to privileged conversations. The lower Court distinguished the cases on the ground that in the case on hand, the plaintiff and the defendant are not husband and wife. Therefore, the principles laid down in these decisions cannot be made applicable. This Court after examining the impugned order notices that the cases cited in the lower Court related to the certification now required under Section 65-B of the Indian Evidence Act, which deals with the electronic evidence and also are cases relating to matrimonial matters. The relevant case law on the subject which is referred to later in this order has not been really relied upon in the lower court.

(A) This Court after hearing both the learned counsel, is of the opinion that the issues raised by the plaintiff/ revision petitioner as respondent in the lower Court had touched upon certain important aspects. Para-3 of the counter affidavit filed in the lower Court does raise some important issues which have a bearing on the matter.

(B) EVIDENCE OBTAINED ILLEGALLY / WITHOUT CONSENT – As far as the submission made about the obtaining evidence illegally, this issue is no longer *res integra*. Even if the evidence is obtained by illegal means, if the same is relevant for the point in issue it cannot be rejected outright and can be received in evidence. The decisions of the Hon'ble Supreme Court of India in ***R.M. Malkani v. State of Maharashtra***¹ and ***Pushpadevi M. Jatia v. M.L. Wadhavan***² are important in this context. The mere fact that the evidence is obtained by illegal means does not make it inadmissible provided its relevance and genuineness is proved. The weight to be attached to the evidence is a matter to be decided by the Court, but merely on the ground that evidence (which is otherwise relevant) has been obtained illegally cannot be a ground to rule it out totally more so in civil cases.

(C) TAPED EVIDENCE / RECORDED EVIDENCE:

As far as the recording is concerned, this Court is of the opinion that a few decided cases on the subject would clarify the position.

¹ (1973) 1 SCC 471

² Manu/SC/0992/1987

In ***S. Pratap Singh v. the State of Punjab***³, five learned judges of the Hon'ble Supreme Court laid down on the tests for receiving the same:

“the written statement of the State was filed in February 1962 only after they had thus their own copies of the tape-records, so that there were in a position to verify (a) whether the voice recorded was that of the person whose voice it professed to be; (b) whether there had been any interpolations or omissions; and (c) whether there had been any other tampering with the records.” (emphasis supplied)

In ***Yusufalli Esmail Nagree v. the State of Maharashtra***⁴ while dealing with tape recorded evidence, the Hon'ble Supreme Court held as follows:

“The contemporaneous dialogue between them formed part of the *res gestae* and is relevant and admissible under section 8 of the Indian Evidence Act. The dialogue is proved by Shaikh. The tape record of the dialogue corroborates his testimony. The process of tape recording offers an accurate method of storing and later reproducing sounds. The imprint on the magnetic tape is the direct effect of the relevant sounds. Like a photograph of a relevant incident, a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under section 7 of the Indian Evidence Act.

³ AIR 1964 SC 72

⁴ AIR 1968 SC 147

..... If a statement is relevant, an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with.” (emphasis supplied)

In ***R.M. Malkani v. State of Maharashtra***⁵, the Hon’ble Supreme Court held as follows:

“Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under section 8 of the Evidence Act. It is *res gestae*. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible.”

In ***Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra***⁶, three learned Judges of the Hon’ble Supreme Court held as follows:

⁵ AIR 1973 SC 157

“We think that the High Court was quite right in holding that the tape records of speeches were "documents", as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions

(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who knew it.

(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

(c) The subject matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act.

The High Court had also relied on ***Yusufalli Esmail Nagree v. State of Maharashtra*** 1968 (Vol.70) Bombay Law Reporter 76 @ 78 to hold that a contemporaneous tape record of a relevant conversation or speech would be part *res gestae*. In this case, Court, while laying down requirements of admissibility of tape records as evidence, also pointed out that the case with which the recording on a tape could be erased by subsequent recording, so that insertion could be superimposed, made it necessary to receive such evidence with caution, and it said that the Court should be satisfied, beyond reasonable doubt, that the record had not been tampered with.

⁶ AIR 1975 SC 1788

The High Court also referred to **V. Sri Rama Reddy and Ors. v. V.V. Giri** Manu/SC/0333/1970: [1971] 1 SCR 399 for the proposition that, like any document, the tape record itself was "primary and direct evidence admissible of what has been said and picked up by the receiver". In other words, its use was not confined to purposes of corroboration and contradiction only, but, when duly proved by satisfactory evidence of what was found recorded and of absence of tampering, it could, subject to the provisions of the Evidence Act, be used as substantive evidence. Thus, when it was disputed or in issue whether a person's speech, on a particular occasion, contained a particular statement there could be no more direct or better evidence of it than its tape record, assuming its authenticity to be duly established."

Therefore, from a reading of these judgments, it is clear that a tape recorded conversation is admissible in evidence subject to the tests that have been prescribed viz., a) that the voice of the person alleged to be speaking has been identified with clarity; b) accuracy of what was actually recorded has to be proved by the person who recorded the conversation c) the possibility of any tampering should be ruled out; and d) the subject matter should be shown to be relevant for the matter at the end. Therefore, this Court is of the opinion that the matter said to be recorded in a device can be received in

evidence subject to the tests laid down by the Hon'ble Supreme Court in the decisions mentioned above.

In ***Mahindra Nath Sadhukhan v. Biswanath Kundu***⁷, the Hon'ble Supreme Court after referring to the case law held that the tape recorded evidence made behind the back and without knowledge of the party by itself is not a ground to set it out. By following the other judgments, the objection about the right to privacy was overruled.

(D) PROCEDURE TO BE FOLLOWED:

The other important question that survives for consideration is what should be done in cases like this when a conversation was recorded and the same is sought to be produced in the court during the course of the evidence or examination of witnesses.

In similar circumstances, a learned single Judge of Madurai Bench of Madras High Court in a case reported in ***Essaki Ammal @ Chitra v. Veerabhadra @ Kumar***⁸, after following the tests laid down by the Hon'ble Supreme Court and after considering Section 65 (A) and (B) of the Indian Evidence Act on admissibility in evidence came to a conclusion that certain conditions have to be satisfied. In that case, the conversation was

⁷ 1962 SCC OnLine Cal 147

⁸ 2012 (4) CTC 743

recorded and transferred into a CD. In the case on hand, the conversation was recorded on a cell phone and put into a pen drive both of which are in the custody of the lower Court. Nevertheless, the procedure prescribed by a learned single Judge of Madurai Bench, is correct in the opinion of this Court.

In addition, in a criminal revision filed before this Court, a learned single Judge in the decision reported in ***S. Krishnaiah v. Guru Raghavendra Traders***⁹ examined the relevant provisions of Indian Evidence Act. In the case before the learned single Judge a video CD was sought to be played to contradict the witness. The learned single Judge after considering the various objections held that recorded conversion of an event is admissible in evidence. But in order to confront a witness, the learned single Judge held that a precisely typed copy of the conversation in the recording should also be filed along with the CD and other material into the Court.

Therefore, after considering the judgment of the learned single Judge of Madurai Bench of Madras High Court and of the Learned Judge of this Court, this Court is of the opinion that the following factors must be

⁹ (2015) 1 ALD (Cri) 416

present a) the device on which the recording is made should be in the safe custody of the lower Court; b) the foundational facts for receiving the evidence and for proving that the plaintiff/party had spoken in the meeting dated 12.08.2017 should be established by appropriate witnesses who were present in the meeting to show that conversation was recorded; c) a person connected with the alleged recording of the conversation or by others, who knew the voice of the party should be examined to identify the voice; d) there should be evidence to establish the authenticity of the recording and also ruling out of the possibility of tampering of record; e) the relevancy of the said recording to the issue on hand has also to be established. Therefore, all these foundational facts for receiving the cell phone and pen drive containing the recording should be established before the same can be used to confront the witness. A precisely typed copy of the conversation must be filed to enable the Court to appreciate the recording better.

If the situation warrants just like signatures and the finger prints are obtained in the Court, the Court should direct the person whose voice is recorded to give a voice sample of similar matter on a very similar instrument or a recording device which can be sent to an expert for

comparison. If the expert also comes to the same conclusion that the recorded voice is that of the party, then his tape can be played. This additional safeguard has been suggested in view of the fact that the tape recorder or other devices including a cell phone can record a particular matter which can be erased and further recording can be done on the same device. Recorded conversations can be spliced; added/deleted and also edited. Therefore to eliminate the chance of fraud particularly in case of recording which are made without the consent of the party, this additional safeguard is suggested. If the party does not wish to submit a standard recording; the Court can draw the appropriate inference as the situation warrants.

Lastly, the question arises as to what is to be done in the present case in the lower Court, since in the impugned order the lower Court directed the playing of the tape in the open court. In similar circumstances, in a judgment reported in **J. Thirupathaiah v. K. Subba Rao**¹⁰, a learned single Judge of this Court carried out a study of the case law on tape recorded conversation, their admissibility in evidence etc., and came to a conclusion that a tape recorded evidence can be received

¹⁰ 1983 (1) APLJ 197

in evidence. The learned Judge considered Indian and English case laws in order to come to his conclusions. It was also noticed that the foundational fact for receiving the tape recorded evidence into the court is not established. The learned single Judge then directed that the evidence that is being recorded at that stage should be postponed till someone connected with the alleged recording of the message is examined and other tests are fulfilled.

Therefore, in the case on hand, if any one connected with the recording is not yet examined and other foundational facts like authenticity etc., are not introduced into the evidence, the cross-examination of PW.1 on this aspect has to be postponed till the other facts are brought on record.

The Civil Revision Petition is therefore disposed of with the directions as mentioned above.

This Court concurs with the fact that conversation recorded on a cell phone is admissible in evidence but in line with the judgments of the Hon'ble Supreme Court of India and other High Courts, this Court is of the opinion that this can be received in evidence only if all the above mentioned pre-conditions are fulfilled.

In the circumstances of the case, there shall be no order as to costs. Miscellaneous Petitions, if any, pending in this revision, shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 23.11.2018

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