

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.12764 OF 2018

**DIGVIJAY DILIP PAWAR
VERSUS
POONAM DIGVIJAY PAWAR**

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Advocate for the Petitioner : Shri M. G. Kochar h/f.
Shri V. A. Bagdiya
Advocate for the Respondent - sole : Shri A. M. Gholap

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 08th APRIL, 2019.

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PER COURT :

1. This matter was heard for some time.
2. The learned Advocate for the petitioner seeks leave to withdraw this petition.
3. The petitioner had filed an application Exhibit 118 seeking permission to lead secondary evidence. The justification for leading secondary evidence, in order to bring a compact disc containing audio recordings on record, put forth by the petitioner - original respondent husband, was as follows
:-

That, the applicant is respondent in the above said. That the conversation between the witness Jayesh Salunkhe & Poonam Pawar was recorded in witness Jayesh mobile. But as the Mobile due to old as it is of 2013 is not working & so lost/misplaced. The was recorded in CD's Lia laptop. That under such circumstance the CD's may be treated as secondary evidence in the interest of justice".

4. Pursuant to the above, the following prayer was put forth by this petition :-

*"That permission may kindly be granted to lead secondary evidence of CD's and oblige".
(reproduced verbatim)*

5. After considering the above, the learned Judge has passed the following order which is reproduced verbatim :-

"(i) The respondent has produced the complaint copy showing that the mobile is lost.

(ii) Considering the above fact permission granted for leading secondary evidence"

6. No doubt the abovesaid order is not challenged in this petition. However, the said order is the basis of the impugned

order.

7. It is quite obvious that the above stated order has been passed by the learned Judge, very casually and without even considering the law under Sections 65-A and 65-B of the Indian Evidence Act, which read as under :-

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

65-B. 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."

8. I find that the order passed by the learned Judge is not only cryptic, but is casually passed without application of mind and without going through the provisions of law. Permission to allow recording of secondary evidence cannot be casually granted. I, therefore, record my displeasure the said order.

9. The Registrar (Judicial) shall place a copy of this order before the learned Judge Shri S. A. More and shall also place the same before the learned Guardian Judge, Family Court, Maharashtra.

10. This petition is disposed off as withdrawn on instructions.

(RAVINDRA V. GHUGE, J.)

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