

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

CRIMINAL WRIT PETITION NO. 498 OF 2021

Dhananjay S/o. Balasaheb Kanakdande,
Age-35 years, Occu-Agri,
R/o. Berali, Tq. Loha,
Dist. Nanded

...PETITIONER
(ori. Respondent)

VERSUS

1. Sow Sarita Dhananjay Kanakdande,
Age-38 years, Occu-Household,
R/o. Berali, Tq. Loha, Dist. Nanded,
Presently residing Mantri Nagar,
Bhavasari Chowk, Dist. Nanded
2. Aakanksha Dhananja Kanakdande,
Age-17 years, Occu-Nil,
3. Brijesh S/o. Dhananjay Kanakdande,
Age-14 years, Occu-Nil,
4. Aarati D/o. Dhananjay Kanakdande,
Age-11d years, Occu-Nil,

...RESPONDENTS
(Ori. Petitioners)

The respondent Nos. 2 to 4 are minor through
their mother Sarita Dhananjay Kanakdande

Mr. Pavan P. Uttarwar, Advocate for the petitioner
Mr. Ramesh I. Wakade, Advocate for the respondent No.1

CORAM : SURENDRA P. TAVADE, J.

RESERVED ON : 10-08-2021

PRONOUNCED ON : 20-08-2021

JUDGMENT :

. Rule. Rule made returnable forthwith. With the consent of the parties, the petition is taken up for final hearing.

2. In this petition the petitioner is challenging the order dated 01-03-2021 passed by the learned Family Judge, Nanded below Exh.1 in petition No. E 237 of 2014. It is contended that the respondent No.1 has filed the petition for maintenance bearing No. 237 of 2017 before the Family Court, Nanded. The Family Court granted maintenance to the respondent Nos. 2, 3 and 4. Maintenance allowance was not granted to the respondent No.1 on the ground that she was able to maintain herself.

3. The respondent No.1 led her evidence in the said case. Thereafter, present petitioner led his evidence and relied on the evidence of his brother Sanjay Kanakdande who produced memory card of his mobile phone. The case of petitioner is that his brother Sanjay Kanakdande recorded conversation between himself and respondent No.1 wherein respondent No.1 made disclosure that she has sexual relation with many persons. The petitioner submitted an application for sending the said memory card for the forensic examination. Said application was allowed by the trial court. Said order was challenged by the respondent No.1 before this court by Criminal Writ Petition No. 239 of 2016. The said petition came to be dismissed on 08-03-2017 with direction that petitioner shall comply with the requirement Section 65(2) of Evidence Act. It is contended

that the petitioner has complied with the provision of Section 65(2) of the Evidence Act. Thereafter, he filed an application for sending sample of voice of respondent No. 1 to Forensic Lab. Said application was allowed. Said order was challenged by the respondent No.1 by filing writ petition No.1389 of 2017. Said writ petition was dismissed and respondent No.1 was directed to give her sample of voice before the forensic lab. The memory card was sent as per the order to the Forensic Lab, Pune. But, the Forensic Lab sent back the memory card with advise, that it may be sent to the Forensic Lab, Aurangabad. But, meantime, the memory card was lost in the transit. The petitioner filed copy of memory card for sending it for analysis. It was allowed. Due to pandemic copy of memory card was not sent to the lab. On 01-03-2021 the trial court passed an order wherein it was observed that duplicate memory card is not admissible in the evidence. Therefore, it should not be sent to the Forensic Lab for analysis. Said order is challenged in this petition.

4. Heard learned counsel for the petitioner and learned counsel for the respondents.

5. The respondents also filed an affidavit wherein it is contended that the provision of sub-section 2 and 65 B of the Evidence Act is not applicable to the electronic record for filing secondary evidence. It is also contended that only the original memory card can be sent to analysis not duplicate memory card.

6. The learned counsel for the petitioner submits that the petitioner was not at fault for loss of memory card. While submitting the original memory card, the petitioner had prepared duplicate memory card which is produced on record.

7. On the other hand learned counsel for the respondent No.1 relied on the ratio laid down in the case of Anvar P.V. Vs P. K. Basheer and others in civil appeal No. 4226 of 2012. In the said case the Supreme Court in paragraph Nos. 22,23 and 24 has observed as under:

22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in *Navjot Sandhu Case (supra)* does not lay down the correct legal position. 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.

23. The appellant admittedly has not produced any certificate in terms of section 65B in respect of the CDs, Exhibits-P4, P8, P9, P10, P12, P13, P15, P20 and P22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in the court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory

requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.

8. In the present case the petitioner had produced original memory card alongwith certificate under Section 65B of the Evidence Act. The said memory card was lost in the transit hence the petition has produced. It is not the case that the conversation recorded in the original memory card was transferred in CD or Pendrive. Authenticity of copy of memory card can be verified by the process of forensic analysis. Thereafter, memory card can be admitted in the evidence. It is not on record whether the petitioner had submitted certificate under Section 65B regarding copy of memory card before the trial court. If, he files the same, there is no hitch to refer the copy of memory card to forensic lab for analysis.

9. I must mention here that after receipt of report from the forensic lab, the trial court still can go into the admissibility of the electronic record namely copy of memory card. The trial court has opined and observed that a witness Sanjay Kanakdande had obtained the conversation clandestinely. It is also observed that

Sanjay Kanakdande had caused prejudice to the respondent No.1 and by taking disadvantage of the situation respondent No.1 spoke to him certain facts which are incriminating against her. Said evidential value of the conversation can be decided by the trial court at appropriate time after receipt of forensic report. Earlier petition was allowed to produce the memory card. The trial court has also directed to respondent No.1 to give her sample of voice before the forensic lab. Unfortunately, the original memory card was lost in transit. Therefore, copy of memory card can be sent to forensic lab. After receipt of the report, its evidential value can be considered by the trial court. Before imparting the order, I made it clear that the observations made in this petition are in prima-facie in nature, therefore, those should not be considered at the time of deciding the petition. Hence, I pass the following order.

ORDER

- i. The petition is allowed.
- ii. The impugned order dated 01-03-2021 passed by the learned Family Judge, Nanded below Exh.1 in Petition No. 237 of 2014 is hereby quashed and set aside.
- iii. The Family Court is directed to send the copy of memory card to Forensic Lab, Aurangabad for analysis.

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- iv. The respondent No.1 is directed to give her sample of voice before the Forensic Analyzer within two weeks.
- v. Rule is made absolute.
- vi. All the contention of the parties are kept open.

[SURENDRA P. TAVADE, J.]

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