

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No. 1616 of 2020 (O&M)

Date of Decision:12.11.2021

Neha

.....Petitioner

Versus

Vibhor Garg

..... Respondent

AND

CR No. 2538 of 2020 (O&M)

Vibhor Garg

.....Petitioner

Versus

Neha

..... Respondent

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr.Rajan Bansal, Advocate
for the petitioner (in CR No. 1616 of 2020) and
for the respondent (in CR No. 2538 of 2020).

Mr. Sumeet Goel, Sr. Advocate
with Mr. Anubhav Bansal, Advocate
for the petitioner (in CR No. 2538 of 2020) and
for the respondent (in CR No. 1616 of 2020).

LISA GILL, J(Oral).

This matter is being taken up for hearing through video conferencing due to outbreak of the pandemic, COVID-19.

This order shall dispose of CR No.1616 of 2020 and CR No. 2538 of 2020.

CR No. 1616 of 2020 has been filed by the petitioner (wife) arrayed as respondent in the petition under Section 13 of the Hindu Marriage Act, 1955 (for short 'the Act') filed by the husband before the learned

District judge, Panchkula, challenging order dated 29.01.2020, passed by the learned Principal Judge/Family Court, Bathinda, whereby the husband has been allowed to prove the Compact Disc (for short 'CD') pertaining to conversation between him and the wife subject to the condition of its correctness.

CR No. 2538 of 2020 has been filed by the husband, seeking direction to the learned Family Court to expedite proceedings in the petition under Section 13 of the Act, in a time bound manner. This revision petition was directed to be listed along with CR No. 1616 of 2020.

Brief facts of the matter as emanating from CR No. 1616 of 2020 are that petition under Section 13 of the Act was filed by the respondent-husband seeking divorce on various grounds. Marriage between the parties was solemnized on 20.02.2009. A daughter was born out of the wedlock on 11.05.2011 and petition seeking divorce filed in the year 2017. An amended petition was filed on 03.04.2018. Husband submitted his affidavit by way of evidence in chief on 07.12.2018. When the matter was listed for cross-examination, an application was moved by the husband on 09.07.2019 seeking permission to submit his supplementary affidavit by way of examination-in-chief along with CD and transcriptions of conversations so recorded in the memory cards/chips of the respective mobile phones. Reply was filed to the application. Application dated 09.07.2019 was allowed by the learned Family Court vide impugned order dated 29.01.2020 while observing that the husband is allowed to prove the CD pertaining to the conversations between him and his wife subject to the condition of correctness and that strict principles of evidence are not applicable to the proceedings before the Family Court keeping in view Section 14 and 20 of the Family Court Act.

Aggrieved therefrom, CR No. 1616 of 2020 has been filed by the wife.

Learned counsel for the petitioner-wife has vehemently argued that the evidence sought to be led by the husband is completely beyond pleadings, therefore, absolutely impermissible. It is contended that the pleadings do not refer to any such conversations which are sought to be proved. Therefore, this evidence has been wrongly accepted. Furthermore, the said CD's are a clear cut infringement and downright invasion of the wife's privacy thus a violation of Article 21 of the Constitution of India, as the conversations have been recorded without knowledge, what to say of consent of the petitioner. It is further contended that the learned Family Court has given a complete go bye to Section 65 of the Indian Evidence Act, because if recording has been done through a mobile phone, CD's of the recording and transcripts thereof in any case, cannot be accepted as evidence thereof. Moreover, there is non-compliance of Section 65-B of the Evidence Act.

Learned counsel for the petitioner reiterates that the respondent-husband being very well aware of the conversations allegedly held years prior to filing of the divorce petition was at liberty to have incorporated the same in his pleadings at the very first instance. Furthermore, though, veracity of such conversations cannot be vouched for, even if taken to be correct, the same are not admissible in evidence having been recorded without the consent or knowledge of the petitioner. It is thus prayed that this petition be allowed.

Per contra, learned counsel for the respondent while refuting arguments raised by learned counsel for the petitioner, while referring to Section 122 of the Evidence Act submits that there is no question of any

infringement of right of privacy and in any case, husband can always be subjected to cross-examination. It is vehemently argued that conversations so recorded, are not beyond pleadings as it has always been the case of the husband that he was treated with cruelty by his wife. Though, specific conversations are not mentioned in the petition, it has been clearly mentioned that the wife used to treat the husband in a cruel manner. Conversations so recorded are only an attempt to prove the same, therefore, it cannot be said that the same are beyond pleadings. It is further urged that in view of Section 14 and 20 of the Family Courts Act, Family Court is not bound by the strict rules of evidence. Therefore, learned Family Court has correctly allowed the application filed by the petitioner. Learned counsel for the respondent further submits that certificate dated 16.12.2019 was submitted before the learned Family Court, therefore there is sufficient compliance of Section 65-B of the Evidence Act.

Mr. Goyal, learned senior counsel, further argues that the application for placing on record the supplementary affidavit along with CD was filed well before cross-examination of the husband. Therefore, no prejudice was caused to the petitioner. It is thus prayed that the impugned order be upheld. Learned counsel further submits that the learned Family Court should be directed to conclude the proceedings in a time bound manner.

I have heard learned counsel for the parties and have gone through the files with their able assistance.

Respondent-husband in this case filed a petition under Section 13 of the Act, seeking dissolution of marriage by decree of divorce on various grounds. Admittedly, there is no mention of the conversations recorded by the husband between the years 2010 to 2016 in the said petition.

There is no mention on these conversations in the amended petition filed on 03.04.2018 as well. It is further a matter of record that in the affidavit filed by the husband by way of examination-in-chief, there is again no mention of these conversations. It is only on 09.07.2019 that an application is moved by the husband to submit his supplementary affidavit by way of examination-in-chief along with memory cards/chips of the respective mobile phones, CD and transcript of alleged conversation/s so recorded in memory cards/chips of the respective mobile phones. It is stated in application dated 09.07.2019 that various conversations between the husband and his wife from November 2010 to December 2010, August 2016 to December 2016, were recorded and stored/procured by him. These conversations were further recorded on CD for convenience. It is further averred that due to inadvertence, specific mention of these conversations has not been made in the earlier affidavit. It is thus evident that the husband was well aware of these conversations which could very well have formed part of the pleadings at the very outset, but clearly did not find mention. Furthermore, there was no averment regarding these conversations in the amended petition or even in the affidavit dated 07.1.2018 tendered in examination-in-chief. Moreover, even if it is accepted that the general averments in the petition regarding cruelty would very well cover the evidence sought to be produced, in my considered opinion the CD's in question cannot be permitted in evidence. This is so for various reasons as dileanated in the following paras.

Before proceeding further it is relevant to note that without doubt provisions of the Indian Evidence Act, 1872, have been diluted by Section 14 of the Family Court Act, which reads as under:-

“A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist

it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act.”

Clearly, the technicalities and procedures otherwise followed by the Civil and Criminal Courts may not be applicable to proceedings before the Family Court. There is in-fact no quarrel with argument of learned counsel for the respondent that a Family Court is not bound by strict rules of evidence.

At the same time, it cannot be ignored that acceptance of the CD in question shall amount to a clear breach of fundamental right of the petitioner-wife i.e., her right to privacy, as has been upheld in various judicial pronouncements. The Hon’ble Supreme Court in **People’s Union for Civil Liberties Vs. Union of India, (1997)1 SCC 301**, has observed as under:-

“18. The right to privacy- by itself- has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone-conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.”

Thus, recording of telephonic conversation of the wife without her knowledge, is a clear cut infringement of her privacy.

Furthermore, it cannot be said or ascertained as to the circumstances in which the conversations were held or the manner in which response elicited by a person who was recording the conversations, because it is evident that these conversations would necessarily have been recorded surreptitiously by one of the parties. A Coordinate Bench of this High Court in **Deepinder Singh Mann Vs. Ranjit Kaur, 2015 (5) RCR (Civil) 691** in this respect has observed as under:-

“3. As an aside I would say that there are voice changing software available on the Net waiting to be downloaded to be applied in hiding or creating identities, creating true or false evidence, making room for impersonation, deceit and the like, which may be hard to crack without special detection by experts specially trained in this evolving field of investigation when experts are not easily found or available presently in courtrooms which remain severely handicapped and ill equipped with newfangled tools for use or misuse of modern science and technology and to easily apply to a case in hand the repercussions of which may be far reaching and beyond one's ken. It would be a rather dangerous trend to allow people to be fixed or exposed on Audio CDs obtained by malfeasance, in its object of collecting evidence and the secretive means adopted to achieve a lawful or an unlawful end. The computer age is a dangerous age. The mobile phone or electronic gadgets should not be readily allowed to be used as an instrument of torture and oppression against a wife in a matrimonial action unless the court is satisfied that it might tilt the balance between justice and injustice in its cumulative judicial experience, wisdom and discretion in decision making. A married woman too has a valuable right to her privacy of speech with her husband in the confines of the bedroom. Couples speak many things with each other unwary that every word would be weighed one day and

put under the judicial scanner. Courts should be very circumspect in such matters before allowing such applications as presented in this case. The Courts cannot actively participate in approving mischief and invite invasion of privacy rights not called for in deciding a case where parties are free to adduce evidence aliunde which may or may not be sufficient to obtain a decree of dissolution of marriage. Fools rush in where angels fear to tread.”

The caution which has been sounded is indeed to be heeded. To permit a spouse to record conversations with an unsuspecting partner and to produce the same in a court of law, to be made the basis of deciding a petition under Section 13 of the Act, would indeed not be feasible. It is rightly observed in **Deepinder Singh’s case (Supra)** that couples speak many things with each other, unaware that every word would be weighed in a Court of law. Moreover, the court would be ill-equipped to assess the circumstances in which a particular response may have been illicit from a spouse at a given point of time, notwithstanding the right of cross-examination.

In **Dr. Tripat Deep Singh Vs. Dr (Smt.) Paviter Kaur, 2018 (3) RCR (Civil) 71**, it was held that conversations between husband and wife in daily routine cannot be made the basis of or considered for deciding a petition under Section 13 of the Act. The Coordinate Bench of this High Court in the said case has observed as under:-

“16 The conversation between husband and wife in daily routine, in the considered opinion of this court, cannot be made basis or can be considered for deciding the petition under section 13 of the Hindu Marriage Act, inasmuch as quarrel on trivial matters between them in our Society is a routine matter. More so, recording of conversation between the husband and wife and production of a CD thereof, would not be sufficient to ascertain as to under what circumstances, the

conversation was recorded, what was the atmosphere and circumstances prevailing in the family at that moment, would be relevant to take into consideration the conversations recorded in the CD to extract the truth.”

Andhra Pradesh High Court in **Smt. Rayala M. Bhuvaneswari Vs. Napaphander Rayala, 2007 (31) RCR (Civil) 664**, specifically held that the act of recording conversation without knowledge of the wife is illegal and amounts to infringement of right to privacy and even if, the chips in question are true, they are not admissible in evidence. Similar was the view expressed by the Madhya Pradesh High Court in **Anurima @ Abha Mehta Vs. Sunil Mehta s/o Chandmal, 2016 AIR (M.P) 112**.

Argument raised by learned counsel for the respondent with reference to Section 122 of the Indian Evidence Act, has been succinctly dealt with by the Rajasthan High Court in **Vishal Kaushik Vs. Family Court and another 2015(9) R.C.R (Civil) 831** while observing as under:-

“22. Aspect about admissibility of evidence with reference to provisions of Indian Evidence Act, 1872 has indeed been diluted by Section 14 of the Family Court Act. The question, which still arises in the present case, is whether conversation tape recorded by the husband without wife’s consent or without her knowledge, can be received in evidence and be made use of against her? That question has to be answered in an affirmative no, as recording of such conversation had breached her "right to privacy", one of the facets of her ‘right to liberty’ enshrined under Article 21 of the Constitution of India. The exception to privileged communication between husband and wife carved out in Section 122 of the Indian Evidence Act, which enables one spouse to compel another to disclose any communication made to him/her during marriage by him/her, may be available to such spouse in variety of other situations, but if such communication is a tape recorded conversation, without the knowledge of the other spouse, it cannot be, admissible in

evidence or otherwise received in evidence. The argument that this would defeat right of fair trial of the petitioner-husband, proceed on the fallacious assumption of sanctimony of the method used in such recording and in that process, ignores the right of fair trial of the respondent-wife. In a case like present one, husband cannot be, in the name of producing evidence, allowed to wash dirty linen openly in the Court proceedings so as to malign the wife by producing clandestine recording of their conversation.”

Keeping in view the factual matrix of the case, it cannot be said that as the Family Court is not bound by strict rules of evidence, it is at liberty to accept the CD in evidence which is a clear cut infringement of the right of privacy of the wife. The decision of Rajasthan High Court in **Preeti Jain Vs. Kunal Jain and another, 2016 AIR (Rajasthan) 153**, relied upon by learned counsel for the respondent-husband is not relevant in the given facts and circumstances of this case, as the same relates to a matter where the husband sought to adduce video clippings recorded through pinhole camera for establishing extra marital affair of his wife. Moreover the aspects as discussed in the foregoing paras have not been discussed therein. Therefore, acceptance of the CD by the learned Family Court allegedly containing conversations between the husband and wife recorded surreptitiously without the consent or knowledge of the wife and allowing the husband’s application is unjustified.

No other argument has been raised.

Accordingly, impugned order dated 29.01.2020, Annexure P-4, passed by the learned Family Court, Bathinda, is set aside. Consequently, application dated 09.07.2019 filed by the respondent-husband, is dismissed.

Keeping in view the facts and circumstances, learned Family Court is directed to take steps for expeditious disposal of the petition filed

under Section 13 of the Act, preferably within six months from the date of receipt of certified copy of this order.

Accordingly, CR No. 1616 of 2020 filed by petitioner-wife is allowed and CR No. 2538 of 2020, filed by respondent-husband, is disposed of.

12.11.2021
s.khan

[LISA GILL]
Judge

Whether speaking/reasoned : Yes/No.
Whether reportable : Yes/No.