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C.R.P.(PD) No.3307 of 2022



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.10.2022

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THE HONOURABLE Mr. JUSTICE S.SOUNTHAR

C.R.P.(PD).No.3307 of 2022

and

C.M.P.No.17554 of 2022

Dr.M.Sudheer

... Petitioner

Vs.

M.Kamaraj

... Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal order passed in I.A.No.03 of 2022 in O.S.No.2267 of 2020 on 14.09.2022 by the learned XVII Additional Judge, City Civil Court, Chennai.

For Petitioner : Mr.A.K.Sriram

For Mr.A.S.Kailasam

For Respondents : Mr.P.Satheesh Kumar

For Mr.Preethi Raj



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ORDER

This Civil Revision Petition has been filed, challenging the order passed by the Court below dismissing the petition filed by the revision petitioner seeking to send the pen drive allegedly containing the conversation between the petitioner and the respondent for comparison of the admitted voice of the respondent.

2. The respondent has filed a suit for recovery of money. Inter alia the petitioner had been resisting the same by raising a plea of discharge. The trial in the suit has already been commenced. When the matter was posted for recording the evidence on the side of the petitioner/defendant, the petitioner has come up with the instant application seeking to send the pen drive for comparison. The said application was dismissed. Aggrieved by that, the petitioner is before this Court.

3. The learned counsel for the petitioner assailing the order of the Court below submitted that the petition filed by the revision petitioner was dismissed by the Court below mainly on the ground that the petitioner has failed to comply the provisions of Section 65-B of the Evidence Act, by



producing the certificate along with the electronic evidence (pendrive). The

learned counsel by relying on the judgment reported in **2020 7 SCC page 1**

[Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal] submitted

that the certificate under Section 65-B of the Evidence Act need not be

accompany the electronic evidence as it can be produced subsequently. In

other words, the learned counsel for the petitioner submitted that the non

production of certificate under Section 65-B of the Evidence Act is only a

curable defect. The learned counsel for the petitioner further submitted that

the dismissal of the application on the ground that the petitioner is dragging

on the matter cannot be accepted and the learned counsel for the petitioner

further submitted that the petitioner is ready to cooperate for the disposal of

the suit within a time limit as fixed by this Court.

4. Per-contra, the learned counsel for the respondent submitted that the

pen drive now produced by the petitioner for comparison of voice was not

produced along with the written statement or marked at the time of trial.

Therefore, it is the contention of the learned counsel for the respondent that a

document which has not come on record cannot be compared. Further, the

learned counsel for the respondent submitted that the petitioner seeks a



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direction to send the disputed pen drive to a private lab of his choice and the same is not permissible in law. It is also submitted by the learned counsel for the respondent that earlier, leave to defend petition filed by the petitioner was dismissed and it was set aside in the appeal. The Hon'ble High Court directed the Court below to dispose the suit within a time frame. Even thereafter the revision petitioner was set exparte. On his application, the exparte order was set aside. Therefore, the present application filed by the revision petitioner, when the matter is posted for advancing the arguments is nothing but only an attempt to drag on the proceedings.

5. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondent and also perused the typed set of papers.

6. As far as the legal position argued by the learned counsel for the petitioner is concerned, the certificate under Section 65-B of the Evidence Act need not be produced along with the electronic record. Law in this regard is no longer Resintegra. It would be appropriate to refer to the observations of the Apex Court in a case law reported in **2018 16 SCC page**



273 [Union of India & others v. CDR.Ravindra V.Desai] wherein, the

Apex Court has held that the non-production of certificate under Section 65-B of the Evidence Act is a curable defect. The relevant observation of the Apex Court is as follows:

"21.We are in agreement with the aforesaid findings. The learned counsel for the appellants rightly argued that non-production of the certificate under Section 65-B of the Evidence Act, 1872 on an earlier occasion with a curable defect which stood cured. Law in this behalf has been settled by the judgment of this Court in Sonu v. State of Haryana, which can be traced to the following discussion in the said judgment: (SCC pp. 584-85, para 32)

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.



7. The above view was affirmed by a larger Bench of the Apex Court

reported in **2020 7 SCC page 1** [Arjun Panditrao Khotkar v. Kailash

Kushanrao Gorantyal and the same is extracted hereunder:

"52. We may hasten to add that [Section 65B](#) does not speak of the stage at which such certificate must be furnished to the Court. In *Anvar P.V. (supra)*, this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the person/persons referred to in [Section 65B\(4\)](#) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the [CrPC](#).

53. In a recent judgment, a Division Bench of this Court in *State of Karnataka v. M.R. Hiremath* (2019) 7 SCC 515, after referring to *Anvar P.V. (supra)* held: (*M.R.Hiremath* case, SCC p.523, paras 16-17)

"16. The same view has been reiterated by a two- Judge Bench of this Court in *Union of India v. Ravindra V. Desai* [(2018) 16 SCC 273]. The Court emphasised that non-production of a certificate under [Section 65-B](#) on an earlier occasion is a curable defect. The Court relied upon the earlier decision in *Sonu v. State of Haryana* [(2017) 8 SCC 570], in which it was held:

"32. ... The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the



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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.”

17. Having regard to the above principle of law, the High Court erred in coming to the conclusion that the failure to produce a certificate under [Section 65-B\(4\)](#) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.”

54. It is pertinent to recollect that the stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet. When a criminal court summons the accused to stand trial, copies of all documents which are entered in the charge-sheet/final report have to be given to the accused. [Section 207](#) of the CrPC, which reads as follows, is mandatory⁶. Therefore, the electronic evidence, i.e. the computer output, has to be furnished at the latest before the trial begins. The reason is not far to seek; this gives the accused a fair chance to prepare and defend the charges levelled against him during the trial. The general principle in criminal proceedings therefore, is to supply to the accused all documents that the prosecution seeks to rely upon before the commencement of the trial. The requirement of such full disclosure is an extremely valuable right and an essential feature of the right to a fair trial as it enables the accused to prepare for the trial before its commencement.

55. In a criminal trial, it is assumed that the investigation is completed and the prosecution has, as such, concretised its case against an accused before commencement of the trial. It is further settled law that the prosecution ought not to be allowed to fill up any lacunae during a trial. As recognised by this Court in *Central Bureau of Investigation v. R.S. Pai* (2002) 5 SCC 82, the only exception to this general rule is if the prosecution had ‘mistakenly’ not filed a document, the said document can be allowed to be placed on record. The Court held as follows:

“7. From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant



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documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court.”

56. Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under [Sections 91 or 311 of the CrPC](#) or [Section 165 of the Evidence Act](#). Depending on the facts of each case, and the Court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the Court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case - discretion to be exercised by the Court in accordance with law.

57. The High Court of Rajasthan in [Paras Jain v. State of Rajasthan](#) 2015 SCC OnLine Raj 8331, decided a preliminary objection that was raised on the applicability of [Section 65B](#) to the facts of the case.

57.1. The preliminary objection raised was framed as follows:

“3. (i) Whether transcriptions of conversations and for that matter CDs of the same filed alongwith the charge-sheet are not admissible in evidence even at this stage of the proceedings as certificate as required u/Sec. 65-B of the Evidence Act was not obtained at the time of procurement of said CDs from the concerned service provider and it was not produced alongwith charge-sheet in the prescribed form and such certificate cannot be filed subsequently.”

57.2. After referring to Anvar P.V. (supra), the High Court held: (paras Jain case, SCC Online Raj paras 15-23)



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“15. Although, it has been observed by Hon'ble Supreme Court that the requisite certificate must accompany the electronic record pertaining to which a statement is sought to be given in evidence when the same is produced in evidence, but in my view it does not mean that it must be produced alongwith the charge-sheet and if it is not produced alongwith the charge-sheet, doors of the Court are completely shut and it cannot be produced subsequently in any circumstance. [Section 65-B](#) of the Evidence Act deals with admissibility of secondary evidence in the form of electronic record and the procedure to be followed and the requirements be fulfilled before such an evidence can be held to be admissible in evidence and not with the stage at which such a certificate is to be produced before the Court. One of the principal issues arising for consideration in the above case before Hon'ble Court was the nature and manner of admission of electronic records.

16. From the facts of the above case it is revealed that the election of the respondent to the legislative assembly of the State of Kerala was challenged by the appellant-Shri Anwar P.V. by way of an election petition before the High Court of Kerala and it was dismissed vide order dated 16.11.2011 by the High Court and that order was challenged by the appellant before Hon'ble Supreme Court. It appears that the election was challenged on the ground of corrupt practices committed by the respondent and in support thereof some CDs were produced alongwith the election petition, but even during the course of trial certificate as required under [Section 65-B](#) of the Evidence Act was not produced and the question of admissibility of the CDs as secondary evidence in the form of electronic record in absence of requisite certificate was considered and it was held that such electronic record is not admissible in evidence in absence of the certificate. It is clear from the facts of the case that the question of stage at which such electronic record is to be produced was not before the Hon'ble Court.

17. It is to be noted that it has been clarified by Hon'ble Court that observations made by it are in respect of secondary evidence of electronic record with reference to [Sections 59, 65-A](#) and [65-B](#) of the Evidence Act and 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 with the conditions in [Section 65-B](#) of the Evidence Act.

18. To consider the issue raised on behalf of the petitioners in a proper manner, I pose a question to me whether an evidence and more particularly evidence in the form of a document not produced alongwith the charge- sheet cannot be produced subsequently in any circumstances. My answer to the question is in negative and in my opinion such evidence can



be produced subsequently also as it is well settled legal position that the goal of a criminal trial is to discover the truth and to achieve that goal, the best possible evidence is to be brought on record.

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19. Relevant portion of sub-sec. (1) of Sec. 91 *Cr.P.C.* provides that whenever any Court considers that the production of any document is necessary or desirable for the purposes of any trial under *the Code* by or before such Court, such Court may issue a summons to the person in whose possession or power such document is believed to be, requiring him to attend and produce it or to produce it, at the time and place stated in the summons. Thus, a wide discretion has been conferred on the Court enabling it during the course of trial to issue summons to a person in whose possession or power a document is believed to be requiring him to produce before it, if the Court considers that the production of such document is necessary or desirable for the purposes of such trial. Such power can be exercised by the Court at any stage of the proceedings before judgment is delivered and the Court must exercise the power if the production of such document is necessary or desirable for the proper decision in the case. It cannot be disputed that such summons can also be issued to the complainant/informer/victim of the case on whose instance the FIR was registered. In my considered view when under this provision Court has been empowered to issue summons for the production of document, there can be no bar for the Court to permit a document to be taken on record if it is already before it and the Court finds that it is necessary for the proper disposal of the case irrespective of the fact that it was not filed along with the charge-sheet. I am of the further view that it is the duty of the Court to take all steps necessary for the production of such a document before it.

20. As per Sec. 311 *Cr.P.C.*, any Court may, at any stage of any trial under *the Code*, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall or re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. Under this provision also wide discretion has been conferred upon the Court to exercise its power and paramount consideration is just decision of the case. In my opinion under this provision it is permissible for the Court even to order production of a document before it if it is essential for the just decision of the case.

21. As per *Section 173(8) Cr.P.C.* carrying out a further investigation and collection of additional evidence even after filing of charge-sheet is a statutory right of the police and for that prior permission of the Magistrate is not required. If during the course of such further investigation additional evidence, either oral or documentary, is collected by the Police, the same can be produced before the Court in the form of



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supplementary charge-sheet. The prime consideration for further investigation and collection of additional evidence is to arrive at the truth and to do real and substantial justice. The material collected during further investigation cannot be rejected only because it has been filed at the stage of the trial.

22. As per [Section 231](#) Cr.P.C., the prosecution is entitled to produce any person as a witness even though such person is not named in the charge-sheet.

23. When legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under [Section 65-B](#) of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured alongwith the electronic record and not produced in the Court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable. It is also pertinent to note that certificate was produced alongwith the charge-sheet but it was not in a proper form but during the course of hearing of these petitioners, it has been produced on the prescribed form.”

58. In *Kundan Singh* (supra), a Division Bench of the Delhi High Court held:(SCC OnLine Del para 50)

“50. *Anwar P.V.* (supra) partly overruled the earlier decision of the Supreme Court on the procedure to prove electronic record(s) in *Navjot Sandhu* (supra), holding that [Section 65B](#) is a specific provision relating to the admissibility of electronic record(s) and, therefore, production of a certificate under [Section 65B\(4\)](#) is mandatory. *Anwar P.V.* (supra) does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under [Section 311](#) Cr.P.C or, at the appellate stage under [Section 391](#) Cr.P.C. Evidence Act is a procedural law and in view of the pronouncement in *Anwar P.V.* (supra) partly overruling *Navjot Sandhu* (supra), the prosecution may be entitled to invoke the aforementioned provisions, when justified and required. Of course, it is open to the court/presiding officer at that time to ascertain and verify whether the responsible officer could issue the said certificate and meet the requirements of [Section 65B](#).”

59. Subject to the caveat laid down in paragraphs 50 and 54 above, the law laid down by these two High Courts has our



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concurrency. So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence.

60. It may also be seen that the person who gives this certificate can be anyone out of several persons who occupy a 'responsible official position' in relation to the operation of the relevant device, as also the person who may otherwise be in the 'management of relevant activities' spoken of in Sub-section (4) of [Section 65B](#). Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, [Section 65B\(4\)](#) makes it clear that it is sufficient that such person gives the requisite certificate to the "best of his knowledge and belief" (Obviously, the word "and" between knowledge and belief in [Section 65B\(4\)](#) must be read as "or", as a person cannot testify to the best of his knowledge and belief at the same time).

61. We may reiterate, therefore, that the certificate required under [Section 65B\(4\)](#) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in *Anvar P.V.* (supra), and incorrectly "clarified" in *Shafhi Mohammed* (supra). Oral evidence in the place of such certificate cannot possibly suffice as [Section 65B\(4\)](#) is a mandatory requirement of the law. Indeed, the hallowed principle in *Taylor v. Taylor* (1876) 1 Ch.D 426, which has been followed in a number of the judgments of this Court, can also be applied. [Section 65B\(4\)](#) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render [Section 65B\(4\)](#) otiose.

8. Therefore, it is clear that the non-production of certificate under Section 65-B of the Evidence Act is a curable defect. It can be produced by the party even subsequent to production of electronic record before the Court. But, it shall be produced before marking of said electronic record.

9. The learned counsel for the respondent mainly objected the petition



that the electronic record namely, the pen drive relied on by the revision petitioner was not at all produced before the Court either at the time of filing the pleadings or at the time of trial. Therefore, the document which is not available in the case record cannot be sought to be compared with the admitted samples. There is a considerable force in the argument of the learned counsel for the respondent that the pen drive which is sought to be compared by the petitioner is not a part of the case record and hence it is not open to the petitioner to file an application to compare the voice record of the pen drive with the admitted voice. On that ground, the order passed by the Court below dismissing the application is liable to be sustained. However the reasoning given by the Court below that the non-production of certificate under Section 65-B of the Evidence Act, at the time of filing this petition is fatal to the prayer of the revision petitioner is not acceptable to this Court in the light of Apex Court decision cited supra. I am inclined to confirm the order passed by the Court below on the ground that the Electronic record which is sought to be compared by the petitioner is not a part of the case records. Therefore, the petitioner is not entitled to maintain this petition itself and I do not find any infirmity or illegality in the order passed by the Court below.



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10. Accordingly, the Civil Revision Petition is dismissed and the fair and decreetal order dated 14.09.2022 passed in I.A.No.03 of 2022 in O.S.No.2267 of 2020 by the learned XVII Additional Judge, City Civil Court, Chennai, is hereby confirmed. No Costs. Consequently, connected Miscellaneous Petition is closed.

20.10.2022

Index : Yes/No
Speaking Order : Yes / No
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To

- 1.The XVII Additional Judge,
City Civil Court,
Chennai.
- 2.The Section Officer,
VR Section, Madras High Court,
Chennai.

S.SOUNTHAR, J.,



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