

**(244) IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRR-1601-2021 (O&M)
Date of Decision:18.04.2022

Sunil

... Petitioner

Versus

State of Haryana

...Respondents

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. Saurabh Dalal, Advocate
for the petitioner.

Mr. Parveen Kumar Aggarwal, DAG, Haryana.

JASJIT SINGH BEDI, J.

CRM-6149-2022

This is an application filed under Section 482 Cr.P.C. for preponing the date of hearing in the case i.e. fixed for 30.05.2022.

Notice in the application.

Mr. Vikrant Pamboo, DAG, Haryana accepts notice on behalf of the respondent-State.

For the aforementioned reason, the same is allowed and the date of hearing advanced from 30.05.2022 to that of today and the matter is taken up on board today itself.

CRR-1601-2021

The present revision petition has been filed against the judgment of the learned Additional District and Sessions Judge, Rewari dated

15.11.2021, whereby the appeal of the petitioner against the judgment of the learned Judicial Magistrate, 1st Class, Rewari dated 14/15.01.2019 (P-2) convicting him under Section 420 IPC and sentencing him to one year rigorous imprisonment and to pay fine of Rs.1000/-, has been dismissed.

2. The brief facts giving rise to the present petition are that complainant-Subedar Sadhu Ram Yadav PW-3 moved an online complaint before the Police as well as before SBI General Manager to the effect that he was serving in the Army. On 28.01.2016 at about 18.00 hrs while he was in journey to rejoin his unit he went to the SBI ATM Counter, Railway Station, Rewari for withdrawing a sum of Rs.3000/-. When he entered the ATM Pin, the ATM machine did not respond. He tried thrice but no response was received. Thereafter, some other persons had also tried to make a withdrawal but the machine did not accept his pin also. Thereafter, he went to another ATM counter (i.e. SBI, Main Branch, Rewari-2) but there also he could not withdraw any amount. However, he meanwhile received a message thereafter regarding the withdrawal of Rs.40,000/- on his registered mobile No.8884296341. The complainant subsequently took a mini statement which also showed an ATM withdrawal of Rs.40,000/-. Thereafter, he lodged an FIR on the SBI toll free number and registered a complaint. The complainant thus, requested for the registration of a zero FIR and a request was also made by him to the Bank authorities for providing video footage of the transaction of withdrawal.

3. On the basis of above complaint, the investigation was started and the CCTV footage of the time of the incident was taken. Thereafter, on 21.04.2016, the petitioner who was arrested in case bearing FIR No.16/16

under Section 420 IPC suffered a disclosure statement that on 28.01.2016 also he had withdrawn Rs.40,000/- from ATM Railway Station, Rewari. Thereafter, in pursuance of his disclosure statement he had got recovered Rs.40,000/-. Though in his disclosure statement, the petitioner/convict had also stated that he along with his accomplice Sandeep had committed the present offence but during investigation, it was found that alleged accomplice Sandeep was lodged in District Jail, Jhajjar from 31.01.2016 to 10.02.2016. Thereafter, challan was presented against the appellant in FIR No.29 dated 12.03.2016 at Police Station GRPF, Rewari.

4. Pursuant thereto, charges were framed under Section 420 IPC against the petitioner/convict, to which he pleaded not guilty.

5. The prosecution to prove its case examined a total 07 witnesses. The details of the examined witnesses are as under:-

“To support its case, the prosecution examined 7 witnesses.

PW1 ASI Ashok Kumar proved recovery memo Ex.PW1/A and demarcation memo Ex.PW1/B.

PW2 Ashok Kumar, Clerk SBI proved CD Ex.PW2/A, statements of account Ex.P1 and Ex.P2, ATM transaction Ex.P3, Letter Ex.P4, Complaint details and statement Ex.P5 to Ex.P10, statements of account Ex.P11 to Ex.P15.

PW3 Sudhu Ram proved complaint Ex.PW3/A.

PW4 SI Narender Singh proved memo Ex.PW2/A, search memo Ex.PW4/A, disclosure Ex.PW4/B, demarcation Ex.PW1/B, site plan of recovery Ex.PW4/C, recovery memo Ex.PW1/A and after completion of the report under section 173 Cr.P.C. was tendered by Inspector/SHO

Kamaljeet whose signature he identified, FIR Ex.PW4/D and endorsement Ex,PW4/E.

PW5 HC Balwant Singh proved disclosure statement Ex.PW5/B, demarcation memo Ex.PW1/B, recovery memo Ex.PW1/A and search memo Ex.PW4/A.

PW6 ASI Rajpal proved site plan Ex.PW6/A.

PW7 HC Surrender proved search and arrest memo Ex.PW4/A and disclosure statement of accused Sunil Ex.PW4/B.”

6. Thereafter, the statement of the accused/convict was recorded under Section 313 Cr.P.C., wherein all the incriminating evidence was put to him to which, he pleaded innocence and false implication. However, no defence evidence was led by him.

7. Based on the material on record and the evidence lead, the Court of learned Judicial Magistrate, 1st Class, Rewari vide judgment dated 14/15.01.2019 convicted and sentenced, the petitioner/convict to rigorous imprisonment for one year and to pay fine of Rs.1000/- in default of which he was to undergo simple imprisonment for three months. The primary argument of the accused-petitioner which was not accepted by the Court was that in the absence of a certificate under Section 65B(4) of the Indian Evidence Act, the CCTV footage could not be admissible in evidence in light of the judgment in **‘Shafhi Mohd. Vs. State of Himachal Pradesh, (2018) 2 SCC, 801’**.

8. The revision-petitioner thereafter filed an appeal before the Court learned Additional District and Sessions Judge, Rewari and the same came to be dismissed vide order and judgment dated 15.11.2021.

9. The learned counsel for the petitioner has firstly argued that there has been a substantial delay between the occurrence and the FIR. He

has argued that the test identification parade of the petitioner/convict was not held and therefore, his identity had not been established. He also made a legal submission that in the absence of a certificate issued under Section 65B(4) of the Indian Evidence Act, the contents of the CCTV footage of the ATM concerned could not have been read in evidence. He thus, argues that there is no legally admissible evidence against the petitioner/convict so as to convict him for the offence in question.

10. I have heard the arguments of the learned counsel for the parties.

11. The first submission of the petitioner/convict is that there has been a considerable delay in the registration of the FIR. It may be pointed out here that undoubtedly, the complaint Ex.PW3/A was dated 23.02.2016 but a perusal of the complaint would show that the complainant had lodged a complaint with the Customer Care No.AT-42922266176 dated 28.01.2016, which had also been sent online to his home branch on 29.01.2016, which have been subsequently forwarded to the SBI Banking Authority. From the documents on record, it is clearly established that immediately after the occurrence the complainant-PW3 had approached the competent authority and furnished information about the wrongful withdrawal of Rs.40,000/- from his account through the ATM. Therefore, there has been absolutely no delay in getting the FIR registered.

12. The second submission of the petitioner/convict is that the test identification parade was not held and this was fatal to the case of the prosecution. Undoubtedly, a test identification parade was not held but the Courts below have held that it was not required as the CCTV footage was enough to prove the identity of the petitioner.

This leads us to the issue of the admissibility in evidence or the lack thereof, of the CCTV footage of the ATM without the requisite certificate under Section 65B(4) of the Indian Evidence Act.

The learned trial Court and the Lower Appellate Court relied upon the judgment in *Shafhi Mohd's* case (supra) to contend that the requirement of a certificate was purely procedural and could be relaxed by the Court in the interest of justice. However, what was not considered by the Courts below was para 14 of the judgment, as per which, it has been stated that the requirement to furnish the certificate would apply only to a person, who is in a position to produce such certificate being in control of the device. Para 14 of the *Shafi Mohd's* case (supra) is reproduced herein below:-

“14.The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Section 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory.”

{Emphasis supplied}

In the present case, PW2-Ashok Kumar, Clerk SBI, Rewari or another officer could have easily provided the certificate in question as they were the custodians of the CCTV footage and the consequent CD Ex.PW2/2 prepared from the said footage.

Be that as it may, the aforementioned judgment has been specifically overruled by a Larger Bench of the Apex Court in **“Arjun Panditrao Khotkar Versus Kailash Kushanrao Gorantyal & others, 2020(3) R.C.R. (Civil) 256 .** Paras 43, 44, 58, 59 and 72A reads as under:-

“43. Thus, it is clear that the major premise of Shafhi Mohammad (supra) that such certificate cannot be secured by persons who are not in possession of an electronic device is wholly incorrect. An application can always be made to a Judge for production of such a certificate from the requisite person under Section 65B(4) in cases in which such person refuses to give it.

44.Resultantly, the judgment dated 03.04.2018 of a Division Bench of this Court reported as (2018) 5 SCC 311, in following the law incorrectly laid down in Shafhi Mohammed (supra), must also be, and is hereby, overruled.

58. 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).

59. 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.

72. The reference is thus answered by stating that:

(a) Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported as (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.

13. A perusal of the aforementioned judgment as also para 14 of *Shafhi Mohd's* case (supra) would clearly establish that the evidence of the CCTV footage, which has been converted to a CD Ex.PW2/2 could not be read in evidence in the absence of the certificate under Section 65B(4) of the Evidence Act, which could easily have been furnished by a responsible

officer of the SBI, Rewari, who was the custodian of the CCTV camera in the ATM room. Thus, the CCTV footage is inadmissible in evidence and cannot be used in the identification of the petitioner.

14. The finding of the Courts that the petitioner could not prove that he was elsewhere thereby inculcating him is also contrary to the settled position of law. The prosecution is to stand on its own legs and cannot take advantage of the purported weakness of the defence.

15. Therefore, in the absence of the proper identification of the petitioner, there is no evidence to connect the petitioner with the commission of the offence of which he is charged.

16. In view of the above, the present revision petition is allowed. The judgment of the learned Additional District and Sessions Judge, Rewari dated 15.11.2021 and judgment of conviction and order of sentence dated 14/15.01.2019 (P-2) passed by the learned Judicial Magistrate, 1st Class, Rewari are hereby set aside and he is acquitted of the charges passed against him.

(JASJIT SINGH BEDI)
JUDGE

18.04.2022
JITESH

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No