

19.02.2024
Court No. 19

C.O. No. 2197 of 2023

Rajib Ganguly
Vs.
Anupam Banerjee & Ors.

Mr. Ankit Agarwala
Ms. Alotriya Mukherjee
....for the petitioner.

Mr. Firdous Samim
Ms. Gopa Biswas
Ms. Payal Shome
Ms. Sampriiti Saha
Ms. Purba Mukherjee
Ms. Mohona Das

....for the opposite party no.1.

1. The revisional application arises out of two orders dated March 31, 2023, and May 19, 2023, passed by the learned Civil Judge, Senior Division, 7th Court at Alipore in Money Suit No.153 of 2022.
2. The petitioner is the defendant no.1 in the suit. The opposite party/plaintiff filed an application under Order 26 Rule 10 A of the Code of Civil Procedure before the learned Court praying for an investigation commission, by appointing a scientific expert/forensic expert. The purpose behind such application was for investigation and comparison of the voice recording of the defendant no.1 pertaining to a previous conversation, upon collecting the voice sample of the said defendant. According to the plaintiff, such scientific investigation was necessary

in order to determine whether the said conversation took place between the defendant no.1 and the plaintiff. The plaintiff's case was that the defendant no.1 had made some admissions over a telephonic conversation (mobile) about the money which the defendant no.1 had taken from the plaintiff and had promised to return the same.

3. The petitioner filed written objection to the application. The learned trial court, by order dated March 31, 2023, allowed the said application upon considering the plaint case. The learned court relied on the provisions of Order 26 Rule 10 A of the Code of Civil Procedure and arrived at the conclusion that, if a scientific investigation was required to be conducted in a suit in order to decide the dispute between the parties and if in the opinion of the court, such investigation could not be done by the court, the court could pass an order for commission by a scientific expert, directing him to address such question and file a report.

4. The court concluded that specific power had been conferred on the court under Order 26 Rule 10 A of the Code of Civil Procedure, to conduct scientific investigation for the purpose of deciding a case. Provisions of Rule 10 of the Order would be applicable in such cases. The word "scientific

investigation” would also include sending the document/sample to a forensic expert in order to find out the truth and to obtain a report from the forensic expert.

5. Therefore, the advocate commissioner, being an officer of the court was directed to keep the custody of the sample and such custody would be deemed to be the custody of the court. In view of such provision of law, orders were passed. The court was of the opinion that the evidence of a forensic expert was necessary for deciding the dispute between the parties to the suit. As science and technology had improved in “leaps and bounds”, it was desirable to have the assistance and aid of an expert in the case. The application was allowed on the aforementioned reasons.

6. The learned court also recorded that the practice of directing a forensic expert to come to court would be impractical and cumbersome. Therefore, the court was of the view that the sample should be sent after its collection, to the expert for investigation and for a report.

7. Accordingly, the learned court appointed an advocate commissioner Mr. Samir Saha, for such exercise. The following directions were passed, which are quoted below:-

“1. He is directed to collect multiple voice samples of both the plaintiff of this suit namely Anupam Banerjee and the defendant no.1 of this suit namely Rajib Ganguly, at length, after serving notice to both the plaintiff and the defendants and after observing all necessary legal formalities required in this behalf.

2. He is directed to take custody of the original voice recording made by the plaintiff and make a copy of the same as well as the voice samples collected by him and submit all the copies in the court.

3. He is directed to properly number the original voice recording made by the plaintiff as well as the voice samples collected by him.

4. He is directed to submit the voice samples of the plaintiff and the defendant no.1 collected by him as well as the voice recording which was recorded by the plaintiff, in original, to the Office of the CFSL, Kolkata situated at DJ-10/1, Action Area 1D, New Town, Kolkata - 160.

5. He is directed to bring back the detailed Official Forensic Report regarding the voice recording from CFSL, Kolkata in original and submit the same in the Court.”

8. The application was disposed of accordingly and the plaintiff was directed to pay provisional cost of Rs.20,000/- as early as possible, for the purpose.

9. Thereafter, the learned Advocate Commissioner filed a modification application, inter alia, stating that it was difficult for the commissioner to obtain the voice sample. Such procedure would have to be performed by a scientific expert from the CFSL Department, under a proper scientific environment.

10. The learned court disposed of the modification application on May 19, 2023, inter alia, directing that for the ease of the work of the learned Advocate

Commissioner, a direction be issued upon the CFSL, Kolkata, to assign a scientific expert to collect the voice sample of both the parties, examine and investigate the same under proper environment, additionally to the directions which were previously given.

11. Mr. Ankit Agarwal, learned Advocate for the petitioner/defendant no.1 had assailed the orders on the following grounds : -

- (a) The transcript of the said document/voice recording of the said conversation had not been handed over to the defendant no.1. The provisions of Order XI of the Code of Civil Procedure had not been complied with.
- (b) The issues had not been framed and the court could not have pre-judged the matter by holding that the report of the scientific expert with regard to the voice sample was in aid of the suit. The suit was based on the allegations that the defendants had defrauded the plaintiff and misappropriated a huge sum of money, which the plaintiff sought to recover by filing the suit.
- (c) Neither the electronic device nor the contents thereof, had been tendered in evidence and unless the plaintiff proved the plaint case by

leading evidence and parties were examined, on such voice recording, the question of sending the voice sample and the recording for a scientific investigation, did not arise.

(d) That the direction was pre-mature and the orders of the learned court below should be set aside on such grounds.

12. Mr. Firdaus Samim, learned advocate for the plaintiff/opposite party submits that the court, at any stage of the suit, could appoint a commissioner for scientific investigation of any document or sample and the commissioner could be directed to send the same to a scientific expert for examination. Under Order 26 Rule 10 A, such commission could be directed.

13. The report of the scientific expert would be necessary in this case, in order to do complete justice. In the facts of this case, scientific investigation involved a comparison of the voice sample of the defendant no.1, with the voice recording of the conversation of the parties, which was preserved in the electronic device (mobile phone).

14. Mr. Samim further submits that a criminal investigation was going on against the defendant at the instance of the plaintiff/opposite party on the issues of cheating, forgery etc. Thus, the contentions

of the plaintiff that such incident had taken place and the defendant no.1 had partially admitted the plaint case, could be proved further, by a scientific investigation, as the truth should come out. The entire endeavour of the court should be to elucidate the truth and for such purpose, if the court deemed fit that a scientific investigation would be necessary, such order would be justified. The court was not in a position to compare the voice samples of the parties with the voices in the preserved recorded conversation in the electronic device. The court could take aid of the provisions of Order 26 Rule 10A and appoint a scientific expert for such purpose and wait for the report.

15. The evidentiary value of such report would be decided at the trial and not at the stage of receiving the voice sample. Thus, the report can be kept in the custody of the court and taken note of at the final hearing of the suit.

16. Having considered the rival contentions of the parties, the issue to be decided in the revisional application is whether the learned court proceeded with material irregularity and erred in law, by passing the orders impugned.

17. The plaintiff filed this suit for recovery of money, valued at Rs.12,96,960/-. The plaint case

was that the plaintiff carried on business of wholesale eggs. The plaintiff had 9/10 share in a three storeyed building named as Madan Mohan Bhaban. The lay-out of the building was such that the plaintiff could not separate his 9/10 share. The building was vacant and dilapidated. One, Mr. Partha Mukherjee and Smt. Rama Mukherjee were joint owners of 1/10 share. Due to internal differences between the plaintiff and the Mukherjees, the building could not be sold. The plaintiff decided to sell his 9/10 share and ascertained the market value to be around Rs.1,20,00,000/-.

18. The plaintiff could not find a purchaser. Thereafter, one Miss Sarbani Ganguly, a junior Advocate practicing at the Alipore Police Court, introduced the plaintiff to the defendant nos.1 and 3. The said defendants introduced themselves as property consultants. The said defendants convinced the plaintiff that they would act as intermediaries (brokers) and ensured that the property would be sold. Commission of 2 % was claimed by them. The defendant nos.1 and 3 introduced the plaintiff to Mr. Tinku Singh of Dhanbad, who expressed the desire to purchase both the plaintiff's share and the share of the Mukherjees.

19. That the defendant nos.1 and 3 intimated the plaintiff that they had fixed a meeting with the Mukherjees and with the intervention of the boys of a local club, who belonged to a particular political party, the Mukherjees' would be persuaded to sell out their own portion. For such purpose, around Rs.15 lakhs would be required to pay off the local boys and others.

20. The plaintiff expressed that he was not in a position to pay Rs.15 lakhs and paid the money in instalments. The plaintiff later realized that the alleged agreement with the Mukherjees and the meetings held were false and fabricated stories. The signatures of the Mukherjees' were forged. The Mukherjees had not been convinced for sale of their portions, but the money was wrongfully taken from the plaintiff under pressure, coercion, by fraud and misrepresentation.

21. That the plaintiff had preserved a recorded conversation, in which the defendant no.1 admitted that he and his associates had fraudulently taken Rs.11,58,000/- from the plaintiff and he wanted to settle the matter. As the defendant nos.1 and 3 refused to repay the amount, the suit for recovery of money was filed.

22. According to the plaintiff, he had preserved the conversation in his mobile phone and he prayed that necessary order be passed for obtaining voice samples of the defendant no.1 and himself, sending the same for scientific investigation/forensic investigation and for a report, in order to establish the fact that the defendant no.1 had admitted the plaint case and had also expressed his willingness to return the money.

23. In the written statement, the defendants had denied all the claims and had stated that only Rs.33000/- was given by the plaintiff to conduct a search in the office of the registry. The said defendants claimed to be developers, who were approached by the plaintiff for development of the property.

24. Having considered the above facts, this court is of the view that at first, issues should have been framed. Whether there was any such conversation between the parties and whether the conversation was an admission of the allegations made in the plaint, were triable issues. There had to also be a discovery and inspection in terms of Order XI of the Code of Civil Procedure.

25. Secondly, the plaintiff has to prove his case, and proceed in terms of Order XVIII of the Code of

Civil Procedure. He has to lead his evidence. The plaintiff has to depose first. The plaintiff has to tender all documents in support of his case. If the plaintiff wants to prove his plaint case through the contents of the electronically preserved document, he has to prove such evidence by complying with the relevant provisions of Indian Evidence Act, 1872.

26. The learned court could not have passed the orders impugned, before all the above steps had been complied with. It was not the appropriate stage. The orders were passed at a premature stage of the suit.

27. The decision in ***Ritesh Sinha vs. State of U.P*** reported in **(2013) 2 SCC 357**, will not be applicable in this case.

28. Two Hon'ble Judges of the Hon'ble Apex Court differed in their opinions. Hon'ble Justice Ranjana P. Desai was of the view that the Magistrate had an ancillary or implied power under Section 53 of the Code to pass an order permitting taking of voice sample to aid an investigation. Disagreeing with such opinion, Hon'ble Justice Aftab Alam, held that voice sample was not included either in the explanation to Section 53 of the Code or in Section 311-A. The matter was referred to a three judges bench.

29. The question has been settled now in the decision reported in ***AIR 2019 SC 3592***. Although,

the magistrate may permit the investigating agency to record voice samples of the accused, the present case is a civil suit for recovery of money. Unless issues are framed and trial commences, the plaintiff proves his plaint case and leads evidence to prove the voice recording in accordance with the Indian Evidence Act and the defendant No.1 is examined on such evidence, the question of forensic investigation by matching the voice sample of the defendant No.1, with the pre-recorded conversation between the parties, would not arise.

30. In a criminal investigation, it is the duty of the investigating agency to collect evidence for the aid of the investigation. Collection of voice sample is a step in furtherance of the investigation. In the civil suit, such is not the proposition of law. The plaintiff has to prove his case first.

31. The orders were passed at a pre-mature stage. The plaintiff was yet to prove the plaint case by leading evidence. The voice recordings had not been tendered. Parties had not been examined in this regard. Once the document/electronically preserved conversation is proved in the evidence, and during the deposition of the defendant no.1, there is a denial of the voice being his, the occasion to pass such orders would not arise. The learned court could not

have decided at the initial stage of the suit that the report would be required for adjudication of the dispute between the parties.

32. Under such circumstances, the orders impugned are set aside.

33. The plaintiff reserves the right to follow the procedure as per law and make such prayer at the appropriate stage, if such occasion arises.

34. If any voice sample has been taken, the same shall not be acted upon and no report shall be filed on the basis thereof.

35. Accordingly, CO 2197 of 2023 is hereby allowed.

36. There shall be no order as to costs.

37. All parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)