

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED : 20/11/2007

CORAM :

THE HONOURABLE MR. JUSTICE A. KULASEKARAN C.R.P. (PD) No. 2657 of 2007

and

M.P. No.1 of 2007

G. Shyamala Ranjini .. Petitioner

Versus

M.S. Tamizhnathan .. Respondent

Revision under Article 227 of the Constitution of India against the fair and decreetal Order dated 21.07.2007 and made in I.A. No. 70 of 2007 in HMOP No. 96 of 2004 on the file of Sub Court, Mettur.

For Petitioner : Mr. S.V. Jayaraman, Sr. Counsel for Mr. N.A. Nissar Ahamed

For Respondent : Mrs. Hema Sampath, Sr. Counsel for M/s. V.N.S. Law Firms

ORDER

The respondent in HMOP No. 96 of 2004 on the file of Sub Court, Mettur, is the revision petitioner herein. The said HMOP was filed for dissolution of marriage by the respondent herein. In the said HMOP, I.A. No. 70 of 2007 was filed by the respondent herein to receive the audio CD, which was allowed by order dated 21.07.2007, which is questioned in this revision petition.

2. Mr. S.V. Jayaraman, learned senior counsel appearing for the counsel for the revision petitioner submitted that the respondent's case is that the petitioner abused in filthy language and threatened the respondent in his cell phone which was recorded in it and re-recorded in audio CD, if so, the cell phone of the respondent could be marked, but the same is not done and produced only the audio

CD, which is not a primary evidence; that the audio CD is fabricated one and inadmissible, which was ordered to be taken into evidence by the trial court, hence, the same is liable to be set aside. In support of his contention, the learned senior counsel relied on the decision (J. Yashoda vs. K. Shobha Rani) 2007 (4) TNLJ 228 (Civil) wherein the Honourable Supreme Court held thus:-

"8. The rule which is the most

universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstance mentioned. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the content of a document cannot be admitted without non- production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section. In Ashok Dulichand v. Madhavlal Dube and Another (1975 (4) SCC 664), it was inter alia held as follows:-

"After hearing the learned counsel

for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of Section 65 of Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any person or of reach of, or not subject to, the process of the Court of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it. Clause (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before respondent NO.1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case respondent no.1 denies that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his application. It was however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of respondent No.1. There was also no other material on the record to indicate the original document was in the possession of respondent No.1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No.1 in his affidavit denied being in possession appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the Photostat copy. We find no infirmity in the above order of the High Court as might justify interference of this Court."

3. Mrs. Hema Sampath, learned senior counsel

appearing for the counsel for the respondent submitted that the conversation of the revision petitioner have been recorded by the respondent in audio CD, hence, it is incorrect to say that it was recorded originally in cell phone and re-recorded in audio CD; that the Court below ordered to receive the said audio CD, while doing so, it found that the audio CD alone would not prove the case of the respondent; that when the CD is played, the conversation found recorded is concerned, opportunity will be granted to the petitioner herein for cross-examination and Section 65-B of the Indian Evidence Act contemplates that any information contained in electronic record, which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer, shall be deemed to be also a document and in the interest of justice, it warranted to receive the said audio CD. The learned senior counsel relying on the decision reported in (Bipin Shantilal Panchal vs. State of Gujarat and another) (2001) 3 scc 1 submitted that archaic practice is that admissibility of document or other item of evidence as and when objections thereto were raised and then detailed orders were passed either by upholding or overruling the said objections and after passing the orders, the trial court waited for days and weeks for the parties consent to go before higher courts for the purpose of challenging the said interlocutory orders can

be avoided and whenever an objection is raised during the evidence collecting stage, regarding admissibility of any material in evidence or other items of evidence, the trial court can make note of such objection and mark the objected document tentatively as an exhibit in the case subject to such objections to be decided at the last stage in the final judgment, hence, this Court may dismiss this revision petition and leave the matter to be decided by the trial court. The relevant portion of the judgment in para -14 of

(Bipin Shantilal Panchal vs. State of Gujarat and another)

(2001) 3 scc 1 is as follows:

"14. When so recast, the practice

which can be a better substitute is this. Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable, the Judge or Magistrate can keep such evidence excluded from consideration. In our view, there is no illegality in adopting such a course. However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.

The learned senior counsel for the respondent also

relied on the decision reported in (Munusamy Kounder vs.

Balu) 2002-3-Law Weekly 250 wherein a learned single Judge

of this Court following the decision of the Honourable

Supreme Court in Bipin Shantilal Panchal's case, held in

Para No.13 thus:

"13. Accordingly, when the

petitioner in CRP No. 1643 of 2001 as well as the respondent in CRP No. 2808 of 2001 come with an explanation that the petitioner in CRP No. 2808 of 2001 (respondent in CRP 1643 of 2001) is in possession of the original agreement dated 25.08.1986, the mere non- production of the original document by itself cannot be a valid reason to refuse to permit the petitioner in CRP No. 1643 of 2001 as well as the respondent in CRP

No. 2808 of 2001 to mark a photocopy of the agreement dated 25.08.1986, as the petitioner in CRP No. 2808 of 2001 (respondent in CRP No. 1643 of 2001) is in no way prejudiced by permitting the petitioner to mark the document, as his right to object as to the admissibility of the said document is always protected under law. Moreover, while permitting the petitioner in CRP No. 1643 of 2001 as well as the respondent in CRP No. 2808 of 2001 to mark the photocopy of the agreement dated 25.08.1986, under Order 13 Rule 2 of the Civil Procedure Code, it is not permissible for the Court to go into the admissibility or otherwise of the document in question, as held in Mohammed Ali S. vs. Basheer Ahamed case, referred supra."

The trial court relied on the decision reported in N.

Srirama Reddy and others vs. V. Giri) AIR 1971 SC 1162

wherein in Para No.22, it was held by the Honourable

Supreme Court thus:

"22.Having due regard to the

decisions referred to above, it is clear that a previous statement, made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court, as well as to test the veracity of the witness and also to impeach its impartiality. Apart from being used for corroboration, the evidence is admissible in respect of the other three last mentioned matters, under Section 146 (1), Exceptions 2 to Section 153 and Section 155 (3) of the Evidence Act."

4. This Court carefully considered the argument of the counsel for both sides and perused the records placed for consideration. Even before deciding the admissibility of the audio CD in dispute, it is necessary to read para-3 of the affidavit filed by the respondent herein in support of I.A. No. 70 of 2007 before the court below, which was also relied on by the learned counsel for both sides, which runs as follows:

"3. The above case is posted for

enquiry today. The respondent giving lot of pin pricks to me and calling over cell phone and using ugly and filthy language and she is threatening me and she will finish me through coolies. The above things were recorded by me in audio C.D. The above audio C.D. is produced herewith to prove my case. Hence, this petition."

5. The learned senior counsel for the petitioner pointing out the said paragraph submitted that it appears from the said contents the conversation was recorded in

cell phone, later re-recorded in a audio CD for which the learned senior counsel for the respondent submitted that it is incorrect to say that it was recorded in cell phone and re-recorded in audio CD, indeed, the same was recorded straightaway in audio CD.

6. The object of the pleadings (which includes affidavit) is to ascertain the real dispute between the parties to narrow the area of conflict and to see where two sides differ. Until the construction is understood or ascertained the meaning of the averments, it is difficult to arrive at a conclusion as to whether the document in dispute is a primary evidence or secondary evidence at this stage. The trial court allowed I.A. No. 70 of 2007 thereby tentatively permitted the respondent to mark the audio CD reserving the right of the petitioner to cross-examine the respondent in respect of its contents. Applying the ratio laid down by the Honourable Supreme Court in (Bipin Shantilal Panchal vs. State of Gujarat and another) (2001) 3 scc 1 in the case on hand, it is suffice to direct the trial court, while taking evidence, to consider the objections raised by the petitioner regarding the admissibility of the audio CD and decide the same at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable, the trial court can keep such evidence excluded from consideration, otherwise consider it.

7. With the above direction, the Civil Revision

Petition is dismissed. No costs.

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To

The Subordinate Judge

Sub Court

Mettur.