Bombay High Court
Avadut Waman Kushe vs The State Of Maharashtra on 3 March, 2016
Bench: R.P. Sondurbaldota

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 54 OF 2016

Avadut Waman Kushe

Age : 47, Indian Inhabitant
Residing at Police Adhikari
Quarters, Shirala, Taluka-Shirala
Dist.Sangli and permanently
residing at Vishwakarma Apartment,

405 A, Nikam Park,
Devakar Panand, Kolhapur ig .....Petitioner

V/s.

State of Maharashtra
At the instance of Inspector
of Police, Anti Corruption
Bureau, Sangli ......Respondent

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Mr. M.K. Kocharekar i/by. Mr. Sandip Laxman Babar, Advocate for the petitioner.

Mr. Deepak Thakare, APP for the State.

CORAM :- SMT. R.P. SONDURBALDOTA, J.

3RD MARCH, 2016.

JUDGMENT :-

1). The single question raised by the petitioner in this petition is, whether the certificate under Section 65-B(4) of the Indian Evidence Rane * 2/8 * WP-54-2016 3.3.2016 Act required to be filed for admission in evidence of the electronic record must necessarily be filed simultaneous with the electronic record or whether it can be filed at any subsequent stage of the proceedings.

2). The petitioner is being tried for the offences punishable under Sections 7, 9, 12, 13(1)(d) a/w. 13(2) of the Prevention of Corruption Act and Section 201 Indian Penal Code. His pre-trap and trap conversation with the complainant was recorded on a digital recorder. The compact discs (C.D.) of the conversation recorded were produced alongwith the chargesheet. However, at that time the certificate required under Section 65-B(4) of the Indian Evidence Act did not accompany the C.D. Later, when the evidence of the complainant was being recorded, the prosecution desired to run the C.D. for identifying her voice and the voice of the accused. The petitioner, however, raised an objection by filing the application at Exhibit-'20' that in the absence of the requisite certificate, the C.D.

was secondary evidence and hence not admissible in evidence. The prosecution filed its reply at Exhibit-'23' along with the requisite certificate (Exhibit-'24'). The Sessions Court, by the order dated 31 st December, 2015 rejected the application at Exhibit-'20' as devoid of merits and permitted production of the certificate. This order is Rane * 3/8 * WP-54-2016 3.3.2016 presently under challenge.

3). Mr. Kocharekar, the learned Advocate appearing for the petitioner submits that, the prosecution ought to have submitted the certificate while producing the CD on record. It is his argument that, considering the provision of Section 65B of the Evidence Act and the purpose of the certificate, it was necessary for the prosecution to submit the same along with the C.D. and subsequent filing of the certificate cannot be treated as compliance with the mandatory provision. To support his submission, Mr. Kocharekar seeks to rely upon the decision of the Apex Court in the case of Anvar P.V.

Versus. P.K. Basheer and Others reported in (2014) 10 SCC page 473 and an unreported decision of Division Bench of this Court in Faim @ Lala Ibrahim Khan Versus. The State of Maharashtra passed in Criminal Appeal No. 1009 of 2012 on 20th November, 2015.

4). Since the question to be considered relates to interpretation of Section 65-B(4) of the Evidence Act, it would be convenient to reproduce the provision here before referring to the decisions relied upon by Mr. Kocharekar.

"65B. Admissibility of electronic records.-

(1)..........

(2)..........

(3)...........

(4)In any proceedings where it isdesired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say.-

(a)identifying the electronic record containing the statement and describing the manner in which it was produced;

(b)giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c)dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub- section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

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5).    Coming to the decision of the Apex Court, in the decision cited,
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> it was considering as a principal issue in the appeal before it, the question of what is the nature and manner of admission of electronic record. The background facts in which the question arose were that, in an election petition, evidence of the electronic record had been produced along with the oral and documentary evidence. The electronic record consisted of the C.D's used for objectionable songs or announcements made or speeches given. The appellant before the Apex Court had not produced any certificate in terms of Section 65-B without which the electronic record was held inadmissible in evidence. In that background, the Apex Court considered the nature and manner of admission of electronic records. Paras-16 and 22 of the decision, have been specifically relied upon by Mr. Kocharekar.
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> He submits that the special procedure for evidence relating to electronic record is prescribed under Section 65-B of the Evidence Act. In the decision cited, the Apex Court has held that, this provision is a complete code in itself. Therefore, the same has to be strictly construed and followed while producing electronic record. According to him, on correct reading of the provision, it becomes clear that, the certificate must accompany the electronic record at the time of it's Rane * 6/8 * WP-54-2016 3.3.2016 filing itself.

6). Para-16 of the decision, that has been heavily relied upon by Mr. Kocharekar, reads as under :-

> "16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial is based on proof of electronic records can lead to travesty of justice."

Mr. Kocharekar lays emphasis upon the words "certificate must accompany the electronic record" to submit that the certificate ought to have accompanied the C.D's filed along with the chargesheet. He submits that, the certificate being a safeguard against tampering, alteration, transposition, excision of the record, it was imperative that the certificate was filed at the time of filing of the chargesheet.

7). The second decision cited is, on the criminal appeal preferred against conviction for the offence punishable under Section 302 Indian Penal Code. The prosecution had produced "Call Detail Record" in respect of the mobile phones discovered during Rane * 7/8 * WP-54-2016 3.3.2016 investigation. The prosecution had failed to file the certificate in terms of Section 65-B of the Evidence Act. Therefore, that evidence was held to be inadmissible.

8). In both the decisions cited by Mr. Kocharekar, the only aspect considered was the mandatory requirement of filing of the certificate in terms of Section 65-B of the Evidence Act, for the electronic record to be admissible in evidence, about which there can be no dispute.

Since the facts of the decisions cited, involved non-production of the requisite certificate, obviously the discussion of law contained therein, is on the requirement of production of the certificate and not on the stage at which the same must be produced. Therefore, the two decisions cited are of no assistance in deciding the question herein.

9). Perusal of the provision of Section 65-B(4) shows that, there is nothing in the provision that specifies the stage of production of the certificate. If at all anything, the indication therein is in fact otherwise. Firstly, the provision of Section 65-B is about admissibility of electronic record and not production of it. Next the opening words of Section 65-B(4) are "In any proceedings where it is desired to give statement in evidence". This can only be the stage at which the record is tendered in evidence for being considered it's admissibility.

This definitely cannot be the stage of filing of the chargesheet which is Rane * 8/8 * WP-54-2016 3.3.2016 absolutely the preliminary stage of the proceedings. Therefore, I find no substance in the submissions advanced on behalf of the petitioner.

The certificate need not be filed at the time of production of the electronic record. It can be filed at the time, the record is tendered in evidence. The subsequent filing of the certificate cannot reduce it's effectiveness as a safeguard against tampering etc. Hence, the writ petition is dismissed.

ig (SMT. R.P. SONDURBALDOTA, J)