

Petitioner Vs. Respondent

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Court : Chennai

Decided On : Mar-10-2016

Judge : M. Venugopal

Appeal No. : O.A. No. 120 of 2016 in E.L.P. No. 1 of 2011

Appellant : Petitioner

Respondent : Respondent

Judgement :

1. The Petitioner has filed this instant Original Application before this Court praying for passing of an order by this Court to issue subpoena to the then Assistant Returning Officer, Kolathur Assembly Constituency, now working as Assistant Commissioner V, Office of the Commissioner of Land Administration, Ezhilagam, Chepauk, Chennai 600 005 viz., Mr.Boovaraghavan, to come and give evidence for the purpose of proving the 15 CDs marked as Ex.C-8 to Ex.C-15, by C.W.2 on 28.08.2015 under Section 65-B of the Indian Evidence Act.

2. According to the Petitioner, C.W.2 (Mohanachandran), the present Returning Officer for Kolathur Constituency, in his evidence, had deposed that the documents in Serial Nos.1 to 8 in O.A.No.695 of 2015 are presently available in his office and he had brought the said documents with him now but he was not in possession of the certificates authenticating the same and further he had stated that the CDs (15 Nos.) were maintained by the earlier Returning Officer in his

office and that he was not in a position to certify the CDs as he is holding the present post only since 01.03.2014 and he was not aware of the content of the CDs, as to how they were produced, how they were stored or how they were reproduced. Also, he stated, in his evidence, that the earlier Returning Officer of Kolathur Constituency during Assembly Elections 2011 would be in a position to certify the aforesaid CDs.

3. It is the stand of the Petitioner that he took steps to issue subpoena to the then Returning Officer viz., Mr.M.Rajarathinam to tender evidence as well as to furnish certificates under Section 65-B of the Indian Evidence Act, 1872 authenticating the CDs marked by C.W.2 on 28.08.2015. As a matter of fact, the subpoena sent to the two addresses of the then Returning Officer viz., M.Rajarathinam were returned, he was not residing thereto. As such, the Petitioner desires to examine one Mr.Boovaraghavan, who worked as Assistant Returning Officer of Kolathur Constituency during Assembly Elections 2011 (now working as Assistant Commissioner V, Office of the Commissioner of Land Administration, Ezhilagam, Chepauk, Chennai 600 005) because of the reason that he worked along with the then Returning Officer (Mr.M.Rajarathinam) of Kolathur Constituency during Assembly Elections 2011 to tender evidence and to furnish certificate/certificates in regard to the CDs taken by the Election Commission at the time of Election. Moreover, the said Boovaraghavan (then Assistant Returning Officer) would be in a position to speak about the CDs viz., Ex.C-8 to Ex.C15, which were produced before this Court from the records of the Returning Officer kept in the regular course of business. Hence, the Petitioner prays for issuance of subpoena to the said person.

4. In response, the Learned Counsel for the 1st Respondent submits that the present O.A.No.120 of 2016 in E.L.P.No.1 of 2011 praying for passing of an order by this Court to issue subpoena to the then Assistant Returning Officer viz., Boovaraghavan to prove the 15 CDs marked as Ex.C-8 to Ex.C.15 is an abuse of process of Law.

5. Further, it is represented on behalf of the 1st Respondent that C.W.2 cannot tender any evidence concerning Ex.C-8 to Ex.C-15 and that he has merely

tendered the CDs into Court without knowing whether they are genuine or not and therefore, he could not furnish any certificate complying with the statutory requirement, as envisaged in Section 65-B of the Indian Evidence Act.

6. The Learned Counsel for the 1st Respondent proceeds to take a plea that the Petitioner seeks to go on a roving enquiry since he seeks to summon another Officer viz., Mr.Boovaraghavan, who was not identified by C.W.2 as a person competent to issue certificate and speak about the CDs. That apart, the said Boovaraghavan (then Assistant Returning Officer of Kolathur Constituency during Assembly Elections 2011), now sought to be summoned, is evidently not competent to speak about the CDs, tendered into Court by C.W.2.

7. It is also contended on behalf of the 1st Respondent that the issuance of subpoena to the then Assistant Returning Officer viz., Mr.Boovaraghavan is only a time delay tactics and in any event, the same is illegal from the perspective of Section 65-B of the Indian Evidence Act, 1872.

8. At this stage, this Court very pertinently points out that the object of examination of a witness is to elicit from him all material facts within his personal knowledge to prove that party's case. These may be either 'Facts in Issue' or 'Relevant to the Issue' (provided they are not excluded by public policy or privilege).

9. It is to be noted that a case can be decided and Judgment being pronounced after the parties were provided with an opportunity to lead appropriate evidence and address arguments. Of course, a Court of Law ought not to shut and close the evidence of parties unless the conduct of the parties is contumacious, grossly negligent and there are serious inactions or laches on their part. As a matter of fact, the trial Court should only adopt the course of closure of the evidence of a party only if it finds that the defaulting party is intending to stultify the process of the Court and not permitting it to proceed in the matter as per decision in State of Maharashtra V. Maimuna Begam reported in AIR 1994 Bombay 353 (DB).

10. Furthermore, a Court cannot say before hand that all evidence yet to be taken is going to be irrelevant. Also that, in the decision Yellappa Kammar V. Fakira Variyappa Barki, reported in AIR 1933 Bombay 303, it is observed that 'it is the

duty of the counsel to see that he calls sufficient evidence and Judges ought not to stop the parties from calling such evidence as they think proper unless the evidence is manifestly unnecessary.'

11. Moreover, in the decision *Yerabalu Chennabasappa V. Official Receiver*, reported in AIR (30) 1943 Madras 266, it is held as follows:

In deciding a case on the merits the Court is bound to hear all the evidence that a party chooses to adduce and cannot decide the matter on the evidence of some of the witnesses selected by it on the ground that as any other witnesses examined would have said the same thing there was no object in examining them.

12. Dealing with the aspect of ingredients of Section 65-B of the Indian Evidence Act, 1872 under the caption 'Admissibility of Electronic Record', this Court significantly points out that Section 65-B of the Act is a new provision which prescribes the mode for proof of contents of electronic records and the primary purpose is to sanctify proof by secondary evidence. Indeed, this facility of proof by secondary evidence would apply to any computer output, such output being deemed as a document. In this connection, it is not out of place for this Court to relevantly point out that a computer output is a deemed document for the purposes of proof. In reality, Section 65-B(1) of the Indian Evidence Act enjoins that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer and to be referred to as computer output, shall also be deemed to be a document. If the conditions specified under Section 65-B of the Act are satisfied, the electronic record shall become admissible in any proceedings without further proof or production of the original as evidence of any contents of the original or of any fact stated in it.

13. It cannot be gainsaid that the electronic records are admissible when it is certified that the contents of a computer print out are generated by a computer fulfilling the conditions of Sub-section (2) of Section 65-B of the Indian Evidence Act, 1872, the certificate being signed by a person occupying a responsible official position in relation to the operation or management of the relevant activities, as per decision *State V. Mohd. Afazal*, reported in (2003) 107 DLT 385 (Delhi). Also

that, it should be sufficient for this purpose that the statement is made to the best of knowledge and belief of the person making it [vide Section 65-B(4) of the Act].

14. It cannot be forgotten that when a statement has to be produced in evidence in terms of Section 65-B of the Indian Evidence Act, it should be accompanied by a certificate which should identify the electronic record containing the statement and describe the manner in which it was produced; furnish the particulars of the device involved in the production of the electronic record showing that the same was produced by a computer and showing compliance with the conditions of Sub-section (2) of the Section 65-B of the Act.

15. In this connection, this Court worth points out the Landmark decision of United States District Court for Maryland in Lorraine V. Markel American Insurance Company in 2007, wherein it is held that 'when electronically stored information is offered as evidence, the following to be ascertained: (a) Is the information is relevant; (b) Is it authentic; (c) Is it Hearsay; (d) Is it original or if it is a duplicate, is there admissible secondary evidence to support it; and (e) Does its probative value survive the test of unfair prejudice'.

16. That apart, an Electronic Evidence without a certificate under Section 65-B of the Indian Evidence Act, 1872 cannot be proved by means of an oral evidence and also the opinion of an Expert under Section 45-A of the Indian Evidence Act cannot be resorted, to make such electronic evidence admissible. Further, once the electronic evidence is properly adduced along with the certificate of Sub-section (4) of Section 65-B of the Act, the other party may challenge the genuineness and if original electronic record is challenged, although Section 22-A of the Indian Evidence Act disqualifies oral evidence as to the contents of the 'Electronic Records', an oral evidence as to the genuineness of record certainly can be offered, as opined by this Court.

17. It is to be noted that Section 79 of the Indian Evidence Act speaks of 'Presumption as to genuineness of certified copies'. As a matter of fact, Section 79 of the Indian Evidence Act applies to certificates, certified copies or other documents certified by proper officers or by officers duly authorised. Also, the genuineness of certificate of certified copy can be presumed by a Court of Law.

18. It is to be remembered that Section 45-A of the Indian Evidence Act, 1872 which provides for the Opinion of Examiner of Electronic Evidence (who is appointed under Section 79-A of the Information Technology Act, 2000) can only be availed once the provisions of Section 65-B of the Indian Evidence Act are very much fulfilled. As such, the compliance of ingredients of Section 65-B of the Indian Evidence Act are now mandatory for persons who intend to rely upon emails, websites or any electronic record in a civil case or criminal case to which the provisions of the Indian Evidence Act are squarely applicable.

19. It may not be out of place for this Court to make a pertinent mention that Section 65-B of the Indian Evidence Act has been inserted by means of an amendment by the Information Technology Act, 2000. No wonder, it is a special provision which governs the digital evidence and overrides the general provisions as regards the tendering of a secondary evidence under the Indian Evidence Act, 1872.

20. A cursory perusal of Section 2(t) of Information Technology Act, 2000 defines 'Electronic Record' as under:

(t) electronic record means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

Also, Section 4 of the Act speaks of 'Legal recognition of electronic records'.

21. Further, there is no two opinion of a fact that an objection as to the mode of proof ought to be taken before the document is admitted and marked as exhibit. However, when a document is accepted before a Court of Law/trial Court, the party against whom it is being brought on record is entitled to question it on the ground of its inadmissibility. If after the admission of a particular document it is later on found to be an irrelevant or inadmissible one, in the eye of Law, it may be rejected at any stage of the suit as per Order 13 Rule 3 of C.P.C.

22. At this juncture, this Court worth recalls and recollects the decision in Bipin Shantilal Panchal V. State of Gujarat and another, (2001) Supreme Court Cases 1

at special page 2, whereby and whereunder, it is observed and held as follows:

It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or re-moulded to give way for better substitutes which would help acceleration of trial proceedings. (Para 13)

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, 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. (Para 14)

The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is re-canvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding that objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses. (Para 15)

Therefore, the above is made as a procedure to be followed by the trial courts whenever an objection is raised regarding the admissibility of any material or any

item of oral evidence. (Para 16)

23. This Court aptly points out the decision in *K.Anjaneya Setty V. H.Rangiah Setty*, AIR 2002 Karnataka 387 at special page 388, wherein it is held as follows:

Though it is settled practice that when any objection is raised regarding marking of a document it has to be heard and decided at that stage itself, a time has come to recast or remould the procedure. When an objection is raised for marking of a document, the Court should record the objections and thereafter permit the document to be marked subject to objections. Thereafter, the parties may be allowed to cross-examine the witnesses on the basis of the said document. At the end of the trial while hearing the arguments on the main, arguments regarding admissibility of the document also be heard. If the Court upholds the objections it could exclude the said document and the oral evidence led in respect of the said document from consideration. If the said objection is overruled then the Court would decide the case on merits by taking note of the said document and the oral evidence in respect of the said document on record. In appeal the Appellate Court would again go into the aforesaid questions and pronounce its judgment on merits. If ultimately the document is held to be inadmissible and the oral evidence recorded in respect of the said document has to be excluded, it could be said so much time of the Court in recording the evidence was wasted. When compared to the time taken to hear the arguments regarding objection and the orders passed thereon and in case the matter is taken up in revision the time spent therein, in appeal if that objection is taken and if that objection is overruled and the matter has to be remanded, the time so spent in recording evidence would be negligible and such a procedure could advance the cause of justice.

24. Also, this Court significantly points out the decision in *State of Gujarat V. Shailendra Kamalkishor Pande and others*, 2008 CRI. L.J. 953 at special page 958 to 960, wherein it is observed as follows:

7.2 CD itself is primary and direct evidence admissible as to what has been said and picked-up by the recorder. A previous statement made by a witness and recorded on tape, can be used not only to corroborate the evidence given by the witness in the 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 his impartiality. Thus, apart from being used for corroboration, the evidence is admissible in respect to other three matters i.e. under Section 146(1) of the Evidence Act which provides questions lawful in cross-examination. The said section provides that when a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend to test his veracity. Section 153 provides exclusion of evidence to contradict answers to questions testing veracity. In that behalf Section 153 is relevant and Exception 2 of said section is also relevant which provides that if a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted. For ready purpose, Section 153 and Exception 2 of Section 153 which reads as under: Section 153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1 - If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2 - If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.

7.3 Section 155 of the Evidence Act provides impeaching credit of witness. Section 155 provides that the credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him, particularly Sub-clause 3 which provides that proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

7.4 The weight to be given to such evidence is however distinct and separate from the question of its admissibility. Assuming for the moment that the trial Court admits some evidence contrary to the rules of evidence or the provisions of the Evidence Act by merely exhibiting the same or by merely admitting the same no

final conclusion is drawn or decision is taken on such evidence. The defence is ultimately obliged to establish by cogent evidence as regards the genuineness of the CD, as to how the CD was prepared, by examining the person who prepared the CD and who authenticates the same as regards the true nature of the same. It is only after the defence discharges this obligation that the trial Court would be in a position to consider it as a piece of evidence. Therefore, at this stage when the question is as regards to admissibility of a document in the form of a CD by the defence, there should not be any serious objection because the trial Court will consider the relevancy of the same and the authenticity of the same at the final stage while appreciating the entire evidence on record.

7.5 In this behalf I also refer to the provisions of Section 136 of the Evidence Act which provides Judge to decide as to admissibility of evidence which reads as under:

Section 136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and no otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and, the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

7.6 Section 136 of the Evidence Act is very clear. Of course, the trial Court has not considered this provision and this is the provision which the trial Court should have considered and after considering the same should have allowed the application Exh. 292. One another important aspect which needs to be noted is that if the victim himself after watching the CD admits having answered the questions put to

him by a local TV channel then under such circumstances the entire controversy comes to an end. It is not the case that the production of the CD per se is inadmissible in evidence. But the issue is with regard to the genuineness of the same which can be established by the defence by giving a proper undertaking to the trial Court as per Section 136 of the Evidence Act. The judgment of the Hon'ble Supreme Court in the case of State of Bihar v. Sri Radha Krishna Singh relevant para 40 on page 695 is the answer to the said question which reads as under:

"...We may not be understood, while holding that Ex. J., is admissible, to mean that all its recitals are correct or that it has very great probative value merely because it happens to be an ancient document. Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil.

7.7 The Hon'ble Supreme Court in the aforesaid judgment has explained that admissibility of a document is one thing and its probative value quite another. These two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil. While holding that this order relates only to the admissibility in evidence of the CD in question and has not dealt with the weight to be attached to that evidence which is left to the trial Court to decide the same in accordance with law. The order can be modified to the extent that before permitting the CD to be produced and played, before the Court, the Court may insist that the entire dialogue i.e. questions and answers be reduced in writing in the form of a transcript authenticated by a responsible person who had recorded the entire conversation and after seeking necessary undertaking in this regard from the defence the trial Court may proceed further with the examination of Ashutosh. I rely upon the judgment of Calcutta High Court in the case of Rakhaldas Pramanick v. Sm. Shantilata Ghose , delivered by Justice P. B. Mukharji (as he was then) and in para 4 the learned Judge has observed like this:

Now documentary exhibits on the original side appear on the record in the following manner. When a party proves a document through a witness, he tenders

that document after such proof and then the Court marks it as exhibit. Ex hypothesi, exhibit means a document exhibited for the purpose of being taken into consideration in deciding some question or other in respect of the proceeding in which it is filed.

7.8 After relying upon the aforesaid judgment, our High Court in the matter of State of Gujarat v. Gaurang Muthurbhai Leuva reported in 1999 (2) GLH 564 while explaining the meaning of the word "exhibit" and the effect of exhibiting a particular document as held in para 5 as under which has a lot of bearing so far as the present case is concerned.

Let me therefore make it clear that the document when it is exhibited the Court while exhibiting the same does not finally decide the rights of the parties, or form any opinion, or express any opinion on the document or on the point that arises for consideration. In short, no legal complexion is given to the issues that arise for consideration. After the hearing is over, while finally adjudicating, the Court is free to discard a particular document holding that it was not duly proved or holding that the document was partly proved namely, execution along thereof was proved, but as the contents thereof were not proved, the same cannot be taken into account. If either of the parties later on files during the course of the hearing an application to expunge the document admitted in record, the Court may hearing the parties expunge the same if it finds that the document is not legally and correctly proved and exhibited. In short, by exhibiting the document merits or demerits thereof are not dissected, and the rights and obligations of the parties are not finally decided, or legal complexion is not given to the issue that arises for consideration as giving exhibit to the document is the procedural aspect of the matter and it merely shows that document is formally proved. The rights and obligations of the parties are to be decided while finally appreciating the evidence for the purpose of pronouncing final verdict."

25. As far as the present case is concerned, the stand of the Petitioner is that when Mr.Boovaraghavan served as the then Assistant Returning Officer of Kolathur Constituency during Assembly Elections 2011 (now working as Assistant Commissioner V, Office of the Commissioner of Land Administration, Ezhilagam,

Chepauk, Chennai), at that time Mr.M.Rajarathinam served as Returning Officer of Kolathur Constituency during Assembly Elections 2011, who could not be served in the addresses furnished.

26. In view of the fact that Mr.Boovaraghavan, the then Assistant Returning Officer of Kolathur Constituency during Assembly Elections 2011, had worked along with the then Returning Officer Mr.M.Rajarathinam and according to the Petitioner, the said Boovaraghavan, (then Assistant Returning Officer of Kolathur Constituency now working as Assistant Commissioner - V, Office of the Commissioner of Land Administration, Ezhilagam, Chepauk, Chennai) can also tender evidence and furnish certificates in regard to the CDs taken by the Election Commission at the time of Election, because of the reason that he was also one of the Assistant Returning Officers. Moreover, it is represented on behalf of the Petitioner that the said Boovaraghavan, the then Assistant Returning Officer, will be in a position to speak about the CDs marked as Ex.C-8 to Ex.C-15 and these records are the records of the Returning Officer kept in the regular course of business. Added further, the said then Assistant Returning Officer viz., Mr.Boovaraghavan would be in a position to assist the Court for the purpose of establishing the CDs, which were marked as Ex.C-8 to Ex.C-15 by C.W.2.

27. Although an objection is put forward on the side of the 1st Respondent that Mr.Boovaraghavan (who worked as the then Assistant Returning Officer of Kolathur Constituency during Assembly Elections 2011), now sought to be summoned on behalf of the Petitioner, is not competent to speak about the CDs tendered into Court by C.W.2 (through whom CDs viz., Ex.C-8 to Ex.C-15 were marked), at this stage, this Court, simpliciter, is of the considered view that objection as to the admissibility, mode of proof and its relevancy and the item of oral evidence, in the considered opinion of this Court, can be decided during the last stage of the final Judgment [of course the Court can take note of such objection and mark the objected documents tentatively as Exhibits, which does not dispense with proof]. Viewed in that perspective, this Court permits the Petitioner to take out subpoena to Mr.Boovaraghavan, the then Assistant Returning Officer of Kolathur Constituency during Assembly Elections 2011, as prayed for in the application.

28. In fine, the Original Application is allowed. No costs. Registry is directed to issue subpoena to Mr.Boovaraghavan, the then Assistant Returning Officer of Kolathur Constituency during Assembly Elections 2011 (now working as Assistant Commissioner - V, Office of the Commissioner of Land Administration, Ezhilagam, Chepauk, Chennai) to appear before this Court on 18.03.2016 at 2.15 p.m. and to tender evidence for the purpose of proving the CDs. viz., Ex.C-8 to Ex.C-15 (marked through C.W.2) under Section 65-B of the Indian Evidence Act. In this regard, the Petitioner is directed to pay emergent batta. Private Notice is also permitted.

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