

(2017) 02 MP CK 0154
MADHYA PRADESH HIGH COURT
Case No: 24 of 2014

Sohail Khan s/o Iqbal Ahmed

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: Feb. 7, 2017**Acts Referred:**

- Code of Civil Procedure, 1908, Section 151, Order 7 Rule 14(3) - Saving of Inherent powers of Court
- Evidence Act, 1872, Section 65-B

Hon'ble Judges: Atul Sreedharan**Bench:** Single Bench**Advocate:** Sanjay Agrawal, Imtiyaz Hussain, Nirmala Nayak, Sushma

Judgement

1. I.A.No.12772/2016, has been filed by the petitioner under Order 7 Rule 14(3) read with section 151 CPC. By the said application, the election petitioner seeks to place on record digital evidence relating to inflammatory speeches, allegedly made by the respondent Ram Kishore Dogne and also video recording of flax banners which allegedly disseminates false information relating to the petitioner, with the intent of tarnishing his image in the eyes of the prospective voter. The application includes as enclosures, three CDs which are marked as document no.9 at page 15 and 2 CDs as document no.13 at page 49. In the said application, the order dated 4.1.2016 passed by this Court while deciding I.A.No.14040/2015 has been adverted to by which the same piece of evidence on CDs were earlier refused to be taken on record by this Court by an extremely elaborate order as the same were non-compliant with section 65-B of the Indian Evidence Act. The petitioner has justified moving this application to take the same piece of evidence on record on the ground that this time round, the said CDs are supported by certification under section 65-B of the Indian Evidence Act and therefore, the same are compliant of the Evidence Act.

2. The said application has vehemently been opposed to by the learned counsel for the respondent on the ground, that the petitioner cannot at this late and subsequent stage be permitted to produce another DVD/CD by supporting it with a certification under section 65-B of the Indian Evidence Act. It is also argued on behalf of the respondent that the name of the person who videographed the flax banner has also not been given in the application.

3. To appreciate the controversy better, this Court is made to understand that there were video recordings of the speeches of the respondent made by the Election Commissioner and also video of the flax banner, which was supplied to the Election Commissioner and that the present CD are copies of the original which have been supported by certification under section 65-B of the Indian Evidence Act.

4. It has been argued at great length by the learned counsel for the petitioner and several judgments have been placed before this Court relating to the ambit and scope of powers of this Court under Order 7 Rule 14 subrule (3) CPC and that where the Court is of the opinion that a particular piece of evidence, which was not in possession of a party earlier, could be filed at a subsequent stage when the same became available, and the Court may allow taking on record such evidence and consider the same. It has also been argued that the Courts must construe the law liberally, once it arrives at the conclusion that the said piece of evidence is relevant and that the same was not available at an earlier point of time.

5. Before examining the relevance or rather, before assessing whether the provisions of Order 7 Rule 14 (3) CPC are relevant at all for consideration, this Court feels bound to examine if the certifications which are given in support of the CDs are by themselves in consonance with the strict requirements of section 65-B of the Indian Evidence Act. The requirement of section 65-B has already been dealt with elaborately by the order passed by Hon"ble Mr. Justice C.V.Sirpurkar in his order dated 4.1.2016, in which this Court has referred to the provisions of section 65-B of the Indian Evidence Act and also examined in great detail the law laid down by the Supreme Court in the case of Anvar P.V. Vs. P.K. Basheer reported in (2014) 10 SCC 473.

6. In page 6 of the order dated 4.1.2016, this Court has reproduced paragraph 15 from Anwar P.V.'s judgment in which the Supreme Court has laid down the pre-requisite conditions to be satisfied where a statement in any proceeding is sought to be given pertaining to an electronic record. Paragraph 15 of the said order is reproduced hereinbelow and the same reads thus:

15. Under section 65-B (4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65-B (2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

7. Condition -(b) mandates that the certificate must describe the manner in which the electronic record was produced and (c)- provides that the certificate must furnish the particulars of the device involved in the production of that record and (e)- the certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device. In the instant case, it is undisputed that the original recording of the public addresses was done by way of a video camera which data was then transferred into a computer. The certification relating to the CD containing the said speeches states in paragraph 1 that the video recording of the general public meetings of the candidates was kept safe in a computer and that the said computers were not tampered with. The said certificate is deficient in material particulars and they are -.

a) It does not disclose whether the original video recording was done by a digital video recorder or by analog video recorder;

b) Whether the video was originally stored on a video tape and thereafter, whether the same was transferred to a computer, and what was the process used to transfer the data from the video camera to the computer, the identity of a computer into

which the data was transferred and its configuration, or

(c) If the original recording was in the digital format, in what device was the video data originally stored in the camera (as in a digital video tape/magnetic hard drive/memory stick/SD Card etc.) as that would be the primary document of electronic evidence and once transferred into a computer, every copy which is generated from the data stored in the computer would be secondary evidence which would require it to be accompanied by a certificate under Section 65-B of the Evidence Act. The said certificate does not disclose even the name, model, or the type (digital or analogue) of the video recorder and neither does it give any details of the storage of the original data, as to whether it was on magnetic tape or a hard drive embedded inside the video camera or on an S.D.Card.

8. Without such details the authenticity and sanctity of the data which is sought to be produced and accepted as secondary evidence will not be in compliance of the strict provisions of section 65-B of the Indian Evidence Act. The certification at page 16 of the application is by the Deputy Election Officer and it does not even state as to who was involved in the transfer of the data from the video recorder to the computer or even the process used for transferring the said data to the computer. Under the circumstances, the said certification is perfunctory and does not comply with the provisions of section 65-B of the Indian Evidence Act.

9. Likewise, the certification for the second CD on page 17. As regards the certification given for the video recording of the flax alleged to be giving incorrect/defamatory information relating to the petitioner, the certificate says that the video recording of the said flax was done using a camera in a mobile phone by the BJP candidate???'s election agent Surendra Jain who thereafter made a CD of the said recording and delivered the same to the office of the Election Commission along with the complaint. From the certification, itself it is evident that what was given to the Election Commission by Surendra Jain itself was secondary evidence as the primary evidence would have been stored in either the internal memory of the mobile phone used by Mr. Surendra Jain or in the SD card inserted into the said mobile. Thus, the primary evidence would be the data which is stored in the memory of mobile phone or the SD Card and the copy made from the data in the mobile phone and transferred to the CD by Surendra Jain was the secondary evidence which was given to the Election Commission. That secondary evidence which was given by Surendra Jain to the Election Commission was never supported by the certification under section 65-B of the Indian Evidence Act. Under the circumstances, the data that was transferred from the CD into the computer of the election commission was itself a copy of a copy and the CD burnt and given to the petitioner herein accompanied by the certificate at page 51 was not even the

secondary evidence but was a copy of a copy of a copy. Under the circumstances the certification relating to the CD having the data of the flax recording is also non-compliant with the provisions of section 65-B of the Evidence Act. Under the circumstances, the said electronic evidence cannot be taken on record.

10. Another aspect in this case is that the petitioner has in fact attempted to review the order dated 4.1.2016 by trying to seek the same relief which was declined earlier albeit filling up the lacuna which was present in the earlier application, by giving the certification under section 65-B of the Indian Evidence Act which was not present earlier. The provisions of Order 7 Rule 14(3) CPC do not go to assist the petitioner as this is not a case where evidence which was not available earlier has now become available to the petitioner. As nothing prevented the petitioner in securing the certifications under section 65-B at the time of filing the election petition itself. It is not the case of the petitioner that he had earlier asked for a certification under section 65-B of the Evidence Act and that the same was declined by the Election Commission. It prima facie appears that the omission was on account of ignorance of the existing the law on the part of the petitioner. The rule of law which is enshrined in the maxim *ignorantia juris neminem excusat* or ignorance of the law excuses no one, would be squarely applicable in this case.

11. It was open to the petitioner to file the certification along with the CDs at the time of filing the election petition itself, which having not been done so, and which being a requirement of the law, the same cannot be filled up subsequently. On the basis of the aforesaid, this Court does not deem it necessary to enter into a discussion on the applicability of Order 7 Rule 14(3) CPC, and the application is dismissed.

12. I.A. No.12770/2016 is dismissed as the same prayer/relief was already agitated before this Court in I.A.No.14040/2015 which was rejected by this Court vide paragraph 18 of the order dated 4.1.2016. Under the circumstances, this application is also dismissed as not maintainable.