



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 4TH DAY OF APRIL, 2024

BEFORE

THE HON'BLE MR JUSTICE H.P.SANDESH

CRIMINAL REVISION PETITION NO. 470 OF 2024

BETWEEN:

1. SRI G.M. KUMAR
AGED ABOUT 51 YEARS,
S/O GANGADARAPPA
NO.32/1-2
CRESCENT TOWER,
CRESCENT ROAD,
HIGH GROUND,
BENGALURU - 560001.

...PETITIONER

(BY SRI S. BALAKRISHNAN, ADVOCATE)

AND:

1. SRI KISHAN HEGDE
AGED ABOUT 48 YEARS,
S/O K.R.HEGDE,
R/AT FLAT NO.401
ZEN GARDEN, AJJARKADU,
UDUPI - 576 101

...RESPONDENT

THIS CRL.RP IS FILED U/S.397 R/W 401 OF CR.P.C
PRAYING TO SET ASIDE THE ORDER PASSED BY THE
APPELLANT COURT IN CRL.A.NO.58/2023 DATED 12.03.2024
ON THE FILE OF PRL. DISTRICT AND SESSIONS JUDGE AT
UDUPI BY ALLOWING THIS APPEAL.

THIS PETITION, COMING ON FOR ADMISSION THIS DAY,
THE COURT MADE THE FOLLOWING:



**ORDER**

This matter is listed for admission and I have heard the learned counsel for the petitioner.

2. In this revision petition, the petitioner has prayed this Court to set aside the order passed by the First Appellate Court rejecting the application filed under Section 391(2) read with Section 207(V) of Cr.P.C. The prayer made in the said application is with regard to direct the respondent-complainant to produce mobile handset with its SIM card, memory card/ chip through which Ex.P1-CD is allegedly retrieved.

3. It is contended that the alleged defamatory statement was said to be telecasted on 29.03.2017 and 30.03.2017. But, on 30.03.2017 happened to be on Ugadi Festival. The Anchors of the TV channels used to wear traditional or ethnic dresses on the said date. But in the CD produced by the respondent, the Anchor is found wearing a suit and tie. Further, the respondent in the Certificate under Section 65B of the Evidence Act appended to the print out of Ex.P1, contended that the data was stored in his mobile phone having No.9845239894 i.e., Apple-7 model. But the mobile phone is



not produced with its SIM card and memory chip to show that the alleged video clipping was telecasted on 29.03.2017 and 30.03.2017. Further, the respondent in his cross-examination has admitted that the said mobile phone is in the possession of his daughter at present staying in Canada. Hence, there is no difficulty for the respondent to procure the same and produce before the Court. It is further contended that the appeal proceedings being continuation of the Trial Court, the Appellate Court can record additional evidence by calling the parties before the Court, summon additional documents and dispose of the appeal based on the additional evidence. This is also supported by many of the judgments of the Hon'ble' High Court of Karnataka and the Hon'ble Supreme Court of India. Hence, prays to allow the application.

4. This application was resisted by the respondent by filing statement of objections contending that the same is not maintainable either in law or on facts. Only to delay the disposal of the case, this petition is filed without any proper reasons. Admittedly, the defamatory news was telecasted on 29.03.2017 and 30.03.2017. But, the photos produced by the appellants with the petition is of the telecast dated 30.03.2017



only. Moreover, at the initial stage, the appellants have approached the Hon'ble High Court of Karnataka and Hon'ble Supreme Court of India to quash the proceedings against him. After being unsuccessful in his efforts, he had faced the trial. It is also contended that the appellants have not at all raised any such matter or suggestion to that effect in the cross-examination of the respondent before the Trial Court. Now, at this belated stage, the appellants cannot make use of such manipulated photos and seek for leading further evidence by summoning new documents. As such, the petition filed at this stage for adducing further evidence does not survive and sought for rejection of the same.

5. The First Appellate Court also formulated the point whether the respondent needs to be directed to produce his mobile, namely Apple-7 with SIM card No.9845239894 and memory chip at this stage. The First Appellate Court, having perused the records, observed that the respondent had retrieved the data with regard to telecasting of alleged defamatory news item on 29.03.2017 and 30.03.2017 from his mobile. The video clippings in the CD at Ex.P1 discloses that the Anchors were wearing suit and tie i.e., western attire. The



Court also taken note of the grounds which have been urged and formed the opinion that 30.03.2017 happens to be the day of Ugadi Festival. But admittedly, in the petition itself, the appellants had categorically contended that news item was said to be telecasted on 29.03.2017 and 30.03.2017. If the news item was telecasted on 29.03.2017 then telecast on 30.03.2017 was a repeat telecast. Hence, the contention of the appellants that the Anchor would be wearing ethnic dress does not hold any water.

6. The First Appellate Court also made an observation that without laying any foundation, the appellants now cannot file this petition calling for the same and further observed that appellants have not made any efforts to produce the entire news items that were telecasted on 29.03.2017 and 30.03.2017 before the Trial Court during the trial. Further the Court was of the opinion that no doubt, the appellants have categorically contended that they are not the Editors or persons responsible for telecasting of news item in B TV news Channel. But the appellants had not at all contended that they are in no way concerned to TV channel in the cross-examination of P.W.1. Further, the First Appellate Court also, while rejecting



the application was of the opinion that Ex.P1 came to be marked before the Trial Court after it was displayed in the open Court. At that time, no questions were asked regarding the clothes worn by the news Anchors. Even before this Court, with the consent of the appellants and the respondent, the contents of Ex.P1 was viewed in the open Court. Hence, for the reasons discussed, this Court is of the opinion that in the absence of setting up a specific defence before the Trial Court, the appellants now cannot come up with this petition calling for production of documents or mobile phone from the respondent. Moreover, the respondent had produced the video clipping of the alleged telecasted news portion along with Certificate under Section 65B of Indian Evidence Act. When that is so, at this stage, the respondent cannot be directed to produce the mobile phone as sought by the appellants.

7. Learned counsel for the petitioner would vehemently contend that if the mobile Chip/SIM is not produced, there are chances of morphing the same and no opportunity was given to effectively cross-examine the witness. Learned counsel would further submit that an application was filed before the Trial Court to recall the witness under Section



311 of Cr.P.C. and the same was also rejected. Learned counsel also brought to notice of this Court the order sheet of the Trial Court in C.C.No.888/2017. On perusal of the order sheet of the Trial Court, it discloses that a time bound direction was given to the Trial Court to dispose of the case in CrI.P.No.6027/2022 and three months time was granted to dispose of the same and the said order was received by the Trial Court on 30.01.2023. The order sheet also discloses that the complainant was examined on 27.02.2023 immediately after the direction was given by this Court and on 07.03.2023, completed his evidence and produced Certificate under Section 65B of the Evidence Act along with an affidavit to that extent. Further, the learned counsel for the accused sought time on 07.03.2023 and 14 days time was granted to cross-examine the witness even after producing the Certificate under Section 65B of evidence Act and case was adjourned to 21.03.2023 and once again, time was sought and the matter was adjourned to 28.03.2023. On 28.03.2023, the matter was adjourned to 03.04.2023 and 03.04.2023 was declared holiday. On 05.04.2023, accused No.1 was absent and EP was filed, the Trial Court observed that counsel for accused prays to adjourn



the matter till 19.04.2023 due to his busy schedule and having important medical negligence case at Davanagere Court. The learned counsel for the complainant seriously resisted the above submission and contended that the present matter is time bound matter, as such prays to reject the above submission and adjourned the matter for further cross of P.W.1, finally as a last chance to 06.04.2023. Once again on 06.04.2023, the accused Nos.1 to 3 were absent and EP was filed and the same was also rejected and further cross-examination of P.W.1 was taken as Nil.

8. Learned counsel for the appellant would submit that no sufficient opportunity was given. Learned counsel in support of his argument relied upon the judgment of the Apex Court in ***P. GOPALKRISHNAN ALIAS DILEEP VS. STATE OF KERALA AND ANOTHER*** reported in ***(2020) 9 SCC 161*** and brought to notice of this Court Para No.50, wherein an observation is made that the contents of the memory card/pen-drive being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases



involved issues such as of privacy of the complainant/witness or his/her identity, the Court may be justified in providing only inspection thereof to the accused and his/her lawyer or expert for presenting effective defence during the trial. The Court may issue suitable directions to balance the interests of both sides. Learned counsel referring this judgment would vehemently contend that it is necessary to give direction to the respondent to produce mobile handset with its SIM card, memory card/ chip.

9. Having heard the learned counsel for the petitioner and on perusal of the impugned order and also considering the order sheet of the Trial Court, it is very clear that complainant was examined on 07.03.2023 and while further examination, the Certificate under Section 65B of Evidence Act along with affidavit is produced and opportunity is given to cross-examine the witness and even time bound limit of a period of three months 14 days time was given from 07.03.2023 to cross-examine the witness and adjourned the matter to 21.03.2023 from 07.03.2023 and thereafter also, for further cross of P.W.1 at the request of the learned counsel for the accused, again adjourned the matter to 28.03.2023 from 21.03.2023 and once



again on 28.03.2023, when the witness was present, learned counsel for the accused filed memo stating that on the previous hearing one person by name Mahendra was accompanied by his gunman present before the Court during the course of cross-examination of P.W.1. The said Mahendra has caused interference and his act amounts to contempt of Court, as such, prayed to take appropriate action against him as per law. The Trial Court has passed a detailed order with regard to the memo also.

10. Having taken note of the direction, the Trial Court also taken note of the fact that the matter is a time bound matter and directed to proceed with the matter and once again deferred the matter for further cross of P.W.1. Once again, further cross-examination of P.W.1 was deferred to 03.04.2023 and on 03.04.2023, it was declared as a holiday and matter was adjourned to 05.04.2023 and on 05.04.2023, P.W.1 was further cross-examined and once again the counsel sought time till 19.04.2023 on the ground that due to busy schedule and having important medical negligence case at Davanagere Court and the same was a time bound matter, considered his request. As such, requested to reject the above submission. However,



counsel was given adjournment and listed the matter for next date and on the next date also, all the accused were absent and EP was filed and the same was rejected.

11. Having taken note of the proceedings conducted before the Trial Court and also when the witness was cross-examined before the Trial Court on different occasions and when sufficient opportunity was given by the Trial Court, now the appellant cannot contend that no opportunity was given to cross-examine the P.W.1. It is also important to note that when Certificate at Ex.P2 is also produced along with Ex.P1-CD, the same is in compliance with Section 65B(4) of the Indian Evidence Act. No doubt, the counsel relied upon the judgment of the Apex Court in the case of **P. GOPALKRISHNAN ALIAS DILEEP** referred supra, it is very clear with regard to furnishing of card/pen drive i.e., the electronic record must be regarded as a document. The said judgment will not come to the aid of the petitioner considering factual aspects of the case.

12. The First Appellate Court also while passing an order made an observation that with regard to the contention which has been taken in the application, no such question was



put to PW1 during the course of cross-examination and new grounds are urged before the First Appellate Court with regard to production of mobile. The First Appellate Court also taken note that when Ex.P1 was marked before the Trial Court and the same was displayed in the open Court and at that time also no question was asked regarding the clothes worn by the news anchors. These grounds which have been raised in the First Appellate Court for the first time and new defence cannot be set up in appeal. The First Appellate Court made an observation that with the consent of the appellants and respondent, the contents of Ex.P1 was viewed in the open Court and taken note of no such defence was set up before the Trial Court and now, without setting up of such defence before this Court, before this Court, the appellants cannot come up with this petition calling for production of documents or mobile phone from the respondent.

13. It is also important to note that in view of bringing new enactment to the IT Act, 2000, considering the electronic evidence, relevant amendments are also made to the Indian Evidence Act. It is also important to note with regard to electronic evidence is concerned, when issue was raised with



regard to production of Certificate under Section 65B(4), the said issue was dealt in **STATE (NCT OF DELHI) VS. NAVJOT SANDHU reported in (2005) 11 SCC 600** wherein held that a person who is having acquaintance with the material itself is enough to consider the same. But the Apex Court in the judgment in **ANWAR P.V. VS. P.K. BASHEER AND OTHERS** reported in **(2014) 10 SCC 473** held that Certificate under Section 65B(4) is mandatory. Later, in the judgment of **SONU ALIAS AMAR VS. STATE OF HARYANA** reported in **(2017) 8 SCC 570** and **SHAFHI MOHAMMAD VS. STATE OF HIMACHAL PRADESH** reported in **(2018) 2 SCC 801**, the said principle was diluted. Once again, the matter came up before the Apex Court in the case of **ARJUN PANDITHRAO KHOTKAR VS. KAILASH KUSHANRAO GORANTYAL AND OTHERS** reported in **(2020) 7 SCC 1**, when the matter was referred to the larger bench in view of reported judgment of same parties in **(2020) 3 SCC 216**, and the larger bench in the said judgment also reiterated the principles laid down in **ANWAR P.V's** case, wherein it is held that if the prosecution relies upon the secondary evidence before the Court, the Certificate under Section 65B(4) is mandatory. In the case on



hand also it has to be noted that when Ex.P1 was marked before the Trial Court, certificate also produced therein at Ex.P2 under Section 65B(4). Now, cannot contend the same in the appeal raising the new contentions and the said fact has been observed by the First Appellate Court that without raising the said contention cannot raise the same in the appeal without foundation.

14. Even in the recent judgment of the Apex Court in the case of **TAQDIR VS. STATE OF HARYANA** reported in **(2022) 4 SCC 321** with regard to the admissibility and production of certification under Section 65B(4) of the Indian Evidence Act, it is held that when the original hard disk was produced and the same was marked and same was not displayed and only certified material was marked and displayed before the Court and even Apex Court also held that even original is marked and certified copy i.e., secondary evidence also was marked and when the secondary evidence is produced before the Court and the same is not objected and same is played before the Trial Court, now cannot contend that original is not displayed and original has to be required to be played and an opportunity also given to the accused to substantiate



his case. The production of secondary evidence is permitted with the certificate under Section 65B(4) of the Indian Evidence Act.

15. I have already discussed that sufficient opportunity is given to the accused to cross-examine the witness even though time bound of three months direction was given to the Trial Court and for about almost one month time was taken for cross-examination of PW1 and cross examined him, now cannot contend that original has not been produced. When certificate is produced along with Ex.P1-CD and no objection was raised before the Trial Court. Even the First Appellate Court also held that while marking of the said document, objection was not raised and the same cannot be raised at a later stage that too in the appeal. When such being the case, I do not find any error in the findings of both the Courts in considering electronic evidence and the law is settled that the secondary evidence can be relied upon subject to production of certificate under Section 65B(4) of the Indian Evidence Act. In the case on hand, certificate is also produced under Section 65B(4) of the Indian Evidence Act as per Ex.P2 and now cannot contend that the same is marked and no opportunity was given by the Trial



Court. The First Appellate Court also rightly rejected the application filed under Section 391(2) read with Section 207(V) of Cr.P.C., in passing detailed order that no foundation was made raising the said defence before the Trial Court. Hence, I do not find any merit in the revision petition to set aside the order passed by the First Appellate Court and no grounds are made out in this revision petition to exercise the revisional jurisdiction.

16. In view of the discussions made above, I pass the following:

ORDER

The revision petition is dismissed.

The observation made while disposing of this revision petition shall not influence the First Appellate Court while reconsidering the matter on merits.

**Sd/-
JUDGE**

ST,SN
List No.: 1 Sl No.: 60