



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1782 OF 2024

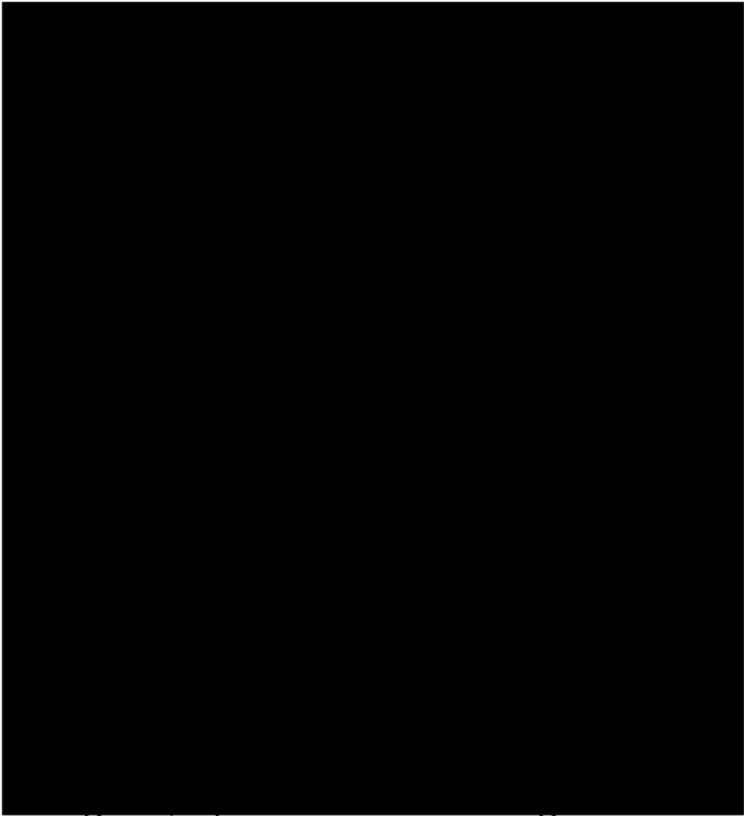
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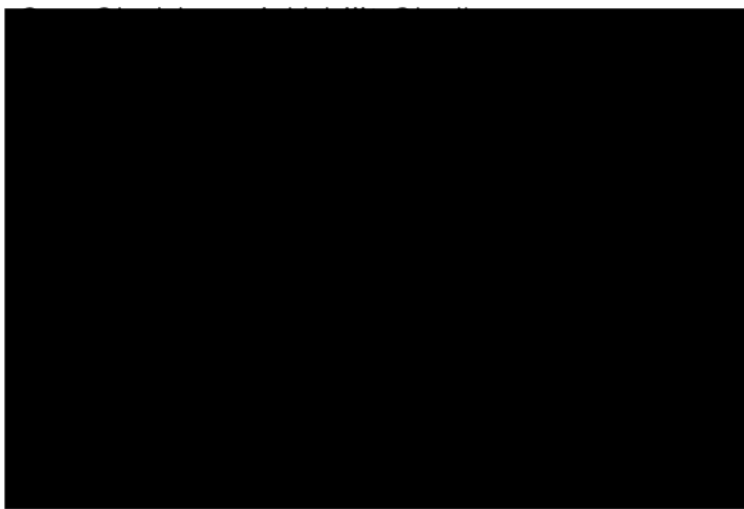


...Petitioners

Versus

1.

2.



...Respondents

Advocate for Petitioners : Mr. Nikhil P.Ghanwat

Advocate for Respondent Nos. 1 and 2 : Mr.Mukul S.Kulkarni

CORAM : SHAILESH P. BRAHME, J.

RESERVED ON : 07th MAY 2025

PRONOUNCED ON : 09th MAY 2025

JUDGMENT :

. Rule. Rule is made returnable forthwith. Heard both sides with their consent finally at the admission stage.

2. Petitioners are challenging order dated 14.02.2024 passed below Exhibit-114 by Judicial Magistrate First Class, Parner in Criminal M.A No. 75 of 2013, refusing to direct the Respondent to give her voice sample for referring it to authorize forensic laboratory for verification/identification of her recorded voice in compact disc and the memory card. The Respondents have instituted proceedings under Sections 12, 18, 19, 20 and 22 of 'The Protection Of Women From Domestic Violence Act, 2005' (in short Act of 2005) against the Petitioners in Criminal M.A No. 75 of 2013 which are at the stage of arguments.

3. The controversy between the parties is over domestic violence. Petitioner No.1 and Respondent No.1 were married on 05.05.2009. Respondent No.2 is the son born out of the said

wedlock. Due to matrimonial disputes, they are residing separately. Both of them are working as teachers. By way of defence petitioners have raised a plea that Respondent No.1 is having extra marital relations with one Mr. Sanjay Dalvi and he claims that the conversation between Respondent No.1 and her paramour has been recorded in cellphone through memory card and being converted into compact disc. The memory card and the compact disc are produced on record and marked as Article 1 and Article 2.

4. A forensic report is secured by the petitioners which is at Exhibit 96. A certificate under Section 65(B) of evidence act was issued on 18.12.2017 which was marked as Exhibit-106. The transcript of the conversation was produced by the petitioners on record which is marked as Exhibit-109. Petitioners examined witness No.3/Mr.Nilesh Ralebhat who issued Exhibit-96.

5. Petitioners submitted application Exhibit-107 for direction to verify the contents of compact disc and the transcript. It was allowed by order dated 07.02.2018. Respondents had challenged that order in Criminal Writ Petition No.354 of 2018 but it was dismissed on 24.06.2019.

6. Petitioners submitted application Exhibit-114 for directing the Respondent No.1 to provide her specimen voice sample for verification and identification to be done by authorized forensic laboratory. The said application was contested by the Respondents. By impugned order it was rejected. Hence, the

parties are before this Court.

7. Learned Counsel Mr. Nikhil Ghanwat appearing for the petitioners submits that during the course of arguments petitioners learnt that Respondent No.1 has denied her voice recorded in the compact disc and that necessitated them to file application Exhibit-114 which should not have been rejected. It is submitted that the Respondent No.1 is bound to provide voice sample and to buttress the submission reliance is placed on the judgment of Gujarat High Court in the matter of **Jil w/o.Priyanka Choksi vs. State of Gujarat & Anr.** reported in 2024 ALL MR(Cri).128, **Ritesh Sinha vs. State of Uttar Pradesh and Anr.** reported in AIR 2019 SC 3592 and **M/s.Janchaitanya Housing Ltd.,Ameerpet vs.M/s.Divya Financiers** reported in AIR 2005 SC 3353. It is vehemently submitted that the provisions of Articles 20 and 21 of the Constitution of India would not be an impediment for compelling a party to give her voice sample in the proceedings of domestic violence. It is further submitted that the proceedings under the domestic violence act are quasi civil in nature and Court has ample power to compel a party to give voice sample. It is contended that compact disc and memory card are proved by Exhibit-96,106 and 109 and the deposition of Mr.Nilesh Ralebhat.

8. *Per contra*, Learned Counsel Mr.Mukul Kulkarni for Respondents would resist the petition on the basis of affidavit-in-reply. It is submitted that the application Exhibit-114 was moved

belatedly. The intention of the petitioners is to protract the proceedings. It is further submitted that the compact disc and memory card have not been proved by following due procedure of law and therefore it would be futile exercise to verify the contents therein. It is further submitted that the primary evidence of the electronic material is not before the Court and there is no need to compel the Respondent No.1 to give her voice sample. It is further submitted that giving no objection for exhibiting transcript at Exhibit-109 would not absolve the petitioners from proving the electronic evidence.

9. Learned Counsel further submits that plea of extra marital relationship was taken by the Petitioners in HMP No. 250/2013 filed by husband for dissolution of marriage and negated by the competent Court. His petition for dissolution of marriage was dismissed by judgment and order dated 01.07.2022. It is submitted that material admission are elucidated from the deposition of Mr.Nilesh Ralebhat. The evidence on record shows that original electronic evidence is not before the Court and the compact disc and memory card are inadmissible.

10. After having heard both sides what needs to be adjudicated in the present matter is as to whether the Respondent No.1 can be compelled to give her voice sample for soliciting report of verification from the forensic laboratory. It is necessary to focus on the relevant fact that petitioners have come up with plea that Respondent No.1 is having extra marital relations. Her conversation

with her paramour has been recorded in a cell-phone. A memory card and compact disc which are marked as Article 1 and 2 are produced alongwith certificate under section 65(B) as Exhibit-106 on record. A transcript of the conversation prepared by the petitioners has been marked as Exhibit-109. It further reveals from record that the transcript has been verified by the officers of the Court to be as per the contents of the compact disc.

11. The proceedings between the parties are quasi-civil and quasi-criminal in nature. Petitioners cannot be termed as accused persons. As per Section 28(2) of domestic violence act, Magistrate has power to follow the procedure for disposal of application under Section 12 of PWDVA Act. There is no provisions to compel the party to the proceedings under domestic violence act to give voice sample. Article 20(2) of the Constitution of India can not be made applicable.

12. Parties adduced oral evidence. Petitioner adduced evidence of witness no.3/Nilesh Ralebhat. His deposition was recorded on two occasions. Both depositions are placed on record. He is digital forensic examiner who issued Digital Forensic Report which is at Exhibit-96. It can be treated to be report of hash value of the compact disc having following remark:

“Given digital evidence is not tampered and clean source file detected with known file format with good health”

13. He has proved the said report. He has given admissions in his

cross-examination. In his further deposition, memory card and compact disc are marked as Articles 1 and 2. His evidence needs to be appreciated at the conclusion of the proceedings alongwith other material. The electronic material pressed into service by the petitioners is supported by deposition of expert referred above. Digital forensic report at Exhibit-96, certificate under section 65(B) of Evidence Act at Exhibit-106 and transcript of the conversation at Exhibit-109. Prima facie material placed on record has probative value subject to further deliberations and consideration at the concluding stages before the trial court. I am therefore not inclined to accept the submissions of advocate Mr.Kulkarni that memory card and compact disc which are marked as Articles 1 and 2 are not admissible in evidence.

14. The probative value of electronic material can be gone into during the course of trial. At this stage, it is inappropriate to discard the material on the ground that original was not placed on record or source and the genuineness of the electronic material is doubtful. This Court can not be oblivious of the fact that transcript at Exhibit-109 runs into 35 pages disclose prolonged conversation on different occasions. Order passed below Exhibit-107 on 07.02.2018 was subjected to the challenge in Criminal Writ Petition No.354 of 2018. No interference was caused in the impugned order. The observations in paragraph no.2 of the order of 24.06.2019 of Learned Single Judge would not be interpreted to be detrimental to the probative value of the electronic record. Those are prima facie observations. The electronic record has to be tested during the

course of conclusion of the trial. I therefore overrule the objections of the respondents that exercise of soliciting voice sample is futile or uncalled for.

15. I have gone through the judgment passed by competent court in H.M.P No.250 of 2013 discarding plea raised by the petitioner regarding extra marital relationship. The electronic record and the oral evidence which is before the trial magistrate was not before the competent court deciding Hindu Marriage Petition. Therefore, findings recorded in paragraph Nos.23 and 24 of the judgment are not binding. The trial magistrate is not precluded from examining the plea of extra marital relationship independently on the basis of the evidence on record.

16. Respondent was cross-examined in the present matter and she has already denied the allegation of extra marital relations. It was possible for the petitioner to file application soliciting voice sample on earlier occasion. However the stage of recording of evidence is not over. Application Exhibit-114 can not be rejected on the ground of delay.

17. Learned counsel Mr.Kulkarni is right in his submission that one of the reasons cited in the application at Exhibit-114 is misconceived when the respondent is denying the plea of extra marital relations as well as recording of her conversation with her paramour. There was no need for her to get her voice sample tested. But solely on that ground application Exhibit-114 can not be rejected. The submission of the respondents that original cell

phone or the computer is not on record hence article 1 and 2 cannot be relied, has not merit. It would be the lookout of the trial court to appreciate probative value.

18. Petitioner has placed reliance on the judgment of **M/s.Janchaitanya Housing Ltd.,Ameerpet** (supra). In that case Supreme Court was dealing with a civil matter and the defendant had solicited direction to send pro-note to the handwriting expert for comparing the signature thereon with the signatures of vakalatnama, written statements and deposition. In those context the observations in paragraph Nos.14 and 15 have been made. Those can not enure to the benefit of the petitioner.

19. Reliance is placed on the judgment the Supreme Court in **Ritesh Sinha vs. State of Uttar Pradesh and Anr.** reported in AIR 2019 SC 3592. That was a case of reference before larger bench. Following questions were referred for the adjudication :

5. Two principal questions arose for determination of the appeal which have been set out in the order of Justice Ranjana Prakash Desai dated 7th December, 2012 in the following terms.

(1) Whether Article 20(3) of the Constitution of India, which protects a person Accused of an offence from being compelled to be a witness against himself, extends to protecting such an Accused from being compelled to give his voice sample during the course of investigation into an offence?

(2) Assuming that there is no violation of Article 20(3) of the Constitution of India, whether in the absence of any provision in the Code, can a Magistrate authorize the investigating agency to record the voice sample of the person Accused of an offence?

20. So far as first question is concerned, it was held that voice sample is not evidence and it is answered in negative. For second question following are observations :

24. Would a judicial order compelling a person to give a sample of his voice violate the fundamental right to privacy Under Article 20(3) of the Constitution, is the next question. The issue is interesting and debatable but not having been argued before us it will suffice to note that in view of the opinion rendered by this Court in *Modern Dental College and Research Centre and Ors. v. State of Madhya Pradesh and Ors.* (2016) 7 SCC 353, *Gobind v. State of Madhya Pradesh and Anr.* (1975) 2 SCC 148 and the Nine Judge's Bench of this Court in *K.S. Puttaswamy and Anr. v. Union of India and Ors.* (2017) 10 SCC 1 the fundamental right to privacy cannot be construed as absolute and but must bow down to compelling public interest. We refrain from any further discussion and consider it appropriate not to record any further observation on an issue not specifically raised before us.

25. In the light of the above discussions, we unhesitatingly take the view that until explicit provisions are engrafted in the Code of Criminal Procedure by Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime. Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in this Court Under Article 142 of the Constitution of India. We order accordingly and consequently dispose the appeals in terms of the above.

21. Reliance of the petitioner on the judgment of Gujarat High Court of Learned Single Judge in the matter of *Jil w/o. Priyanka Choksi* (supra) can not be said to be misplaced. It has a persuasive value because proceedings in that case were also under domestic violence act. The voice sample of members of the family were solicited to be referred for the verification by wife which was

declined by the trial magistrate. Against that appeal was preferred which was also dismissed and thus the matter was before the High Court. It was observed that wife who had approached High Court had identified voice of her husband and other members. A report of hash value, certificate under section 65(B) of Evidence Act and transcript of conversation were on record. Following paragraphs are relevant :

“18. This matter is also required to be appreciated from different angle where the proceedings under the DV Act are between the aggrieved who would be the women which includes the wife and the respondent who would include the husband and the family members. The proceedings are for the protection of the rights of the women who are the victims of violence and which aims at preventing of such occurrence of domestic violence in the society. The learned Magistrates who are dealing with the cases under the DV Act are required to keep in mind the avowed object of the Act. Thus, in view of that object, the Magistrates are given the authority under Section 28(2) to lay down its own procedure for the disposal of the application under Section 12 or sub-section (2) of Section 23. Every proceedings should be so conducted which would be inclusive in nature. The legislature has also intended to assist the Magistrate in discharge of the function of the Act to take the services of the protection officers. It becomes the duty of the protection officers to assist the Magistrate and to make a domestic incident report on receipt of the complaint of domestic violence. The application under Section 12 of the DV Act can be moved by the aggrieved person or the protection officer or any such person on behalf of the aggrieved may present an application to the Magistrate seeking one or more relief under the DV Act. The said provision which gives authority to the concerned to move the Magistrate is to ensure that there is no further perpetration of the domestic violence in the society. When the aid of the protection officer has become mandatory and the proceedings with the service of councilors as well as service provides and with the assistance of welfare expert, the Magistrate is equipped with all the assistance to deal with the proceedings under the DV Act. Section 28(2) of the DV Act gives a wide power to the Magistrate to adopt his own procedure for the disposal of the application under Section 12. The rejection of

the application Exh.46 and Criminal Misc. Application no. 12 of 2016 is not in conformity of the object which is sought to be achieved through provision of the DV Act. The learned Magistrate dealing with the trial under the DV Act has to keep in mind that the domestic violence complaint by the women is in a household where she is surrounded by the family members of the husband. She would not have any friend in the matrimonial family. The law would only be her friend supporting her in the family. Latest development of technology would assist her and help her to bring her case of domestic violence suffered by her in the shared household. Such evidence on record should be accepted by the learned Magistrate without asking for the extraordinary proof of such evidence. In family matters, the Courts have all the authority to take into the trial all the reports, statements, documents, information on matters which would assist the Court in effective decision of the dispute whether such documents are relevant or admissible under the Indian Evidence Act. The analogy can be drawn through the provision of Section 14 Family Courts Act, which read as under:-

"14. Application of Indian Evidence Act, 1872.- A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872)."

19. In the family matters, all such documents would become admissible irrespective that those documents become relevant or not or could not be proved in accordance to the Indian Evidence Act. Here in this case, the petitioner had tried to assist the Court by making a prayer by moving application Exh.46 to get further evidence for the CD which she had produced on record. The report of the FSL authority would have been for the assistance of the Court. The CD itself becomes an admissible evidence in view of the decision in the case of R.M. Malkani (supra) and Ziyauddin Burhannuddin Bukhari (supra), more so being a matrimonial matter, the parties need not prove the documents or the statement or any other report in accordance to the Indian Evidence Act, without even falling for the relevancy or the admissibility of all those documents, which become part of the trial, it gets admitted as evidence. Here in the present case, when the wife has already produced the CD and transcript of

the CD on record, identifying the voice of the husband and other family members, she need not prove more than that on record. However, to assist the Court and to prove the reliability of the CD, she has placed on record the hash value and even the certificate under Section 65B.

. The identification of the voice would not be question, since it is the wife who is identifying the voice of husband and in-laws with whom she had stayed together during the matrimonial life. Though recording would be without the knowledge of husband and family members but the conversation between the persons recorded and placed on record by way of CD is relevant to the matter in issue of domestic violence. The wife by producing the hash value and Section 65B certificate as per the Indian Evidence Act has prima facie proved that there is no erasing or tampering in the recorded conversation. Now the issue which relates is whether the Magistrate has the power to direct the person to give voice samples. It becomes relevant to note that the proceedings before the Judicial Magistrate are under DV Act and the proceedings are dealt with as per the criminal procedure Code. As per the provision of law, the respondent cannot be considered as an 'Accused' till there is breach of protection order. Here the prayer was not for a direction to any police to collect voice sample of any accused, but an order to both the parties, for the giving their voice sample.”

22. In the proceedings under domestic violence act, the parties are not informant and accused in the sense of criminal jurisprudence. They are in domestic relationship. Non applicants would not stand for trial for any offence. Therefore, principles of Article 20(3) of the Constitution of India are not attracted. In the matters of compulsion to offer the voice sample, the Supreme Court **Ritesh Sinha** (supra) is skeptical. It is not laid down that a person can not be compelled to give sample of voice. On the contrary, Magistrate is recorded to be conceded with the power to order a person to give a sample of his voice. Hence, the findings

recorded by the Learned Judge in impugned order are unsustainable.

23. When High Court is considering the matter for direction to a person to give voice sample, it is permissible to have recourse to Section 482 of Cr.P.C.(Section 528 of B.N.S.S). Magistrate in the matters of domestic violence has power to adopt the procedure as per Section 28(2) of the Act. Exercise of such power depends on the facts and circumstances of each case. No straight jacket formulae can be laid down. If there is adequate material on record having potential to prove the relevant facts, a person can be compelled to give voice sample. Such power is conceded with the Magistrate. Due to advent of technology, electronic evidence is being introduced. The electronic evidence is replacing conventional evidence. There is more need to invest such powers to the Magistrate who is a fact finding authority.

24. I find force in the submissions of learned counsel for the petitioners. Respondent is bound to give her voice sample to be referred to the forensic laboratory for verification. Hence, I pass following order :

ORDER

1. Writ Petition is allowed.
2. Impugned order dated 14.02.2024 passed by Learned Judicial Magistrate First Class, Parner is

quashed and set-aside and application Exhibit-114 stands allowed.

3. Respondent shall tender her voice sample within a period of three weeks which shall immediately referred to the forensic laboratory for verification.

4. Petitioner shall bear the expenses of above exercise.

5. Rule is made absolute as above.

[SHAILESH P. BRAHME, J.]