BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 25.10.2024

Pronounced on : 30.10.2024

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

CRP(MD)No.2362 of 2024
and
CMP(MD)No.13409 of 2024

R..... ... Petitioner/Petitioner/Respondent

vs.

1.B..... ...Respondent/Respondent/Petitioner

2.The Secretary to Government,
Ministry of Electronics and
Information Technology
(MEITY), Government of India,
New Delhi. ... 2nd respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order dated 14.03.2024 made in I.A No.1 of 2023 in HMOP No.61 of 2019 on the file of the Subordinate Court, Paramakudi.

For Petitioner : Mr.D.Senthil

For Respondents : Mr.J.Senthil Kumaraiah for R1

Mr.K.Govindarajan,
Deputy Solicitor General of India for R2

Mr.Srinath Sridevan, Senior Counsel
Amicus Curiae

ORDER

"B"'s marriage with "R' was solemnized on 07.02.2003. Two girl children were born through the wedlock. Alleging cruelty, adultery and desertion on the part of "R" (wife), "B" filed HMOP No.61 of 2019 on the file of Sub-Court, Paramakudi for dissolution of the marriage. The husband examined himself as PW.1 and marked Ex.P4 Call Data Record of the wife. Seeking rejection of the said document, the wife filed I.A No.1 of 2023. It was dismissed as premature by the court below vide order dated 14.03.2024. Challenging the same, this civil revision petition has been filed.

2.The learned counsel appearing for the petitioner reiterated all the contentions set out in the memorandum of grounds of civil revision petition and called upon this Court to set aside the impugned order and grant relief as prayed for.

3.The learned counsel appearing for the respondent/husband submitted that the impugned order is well reasoned and that it does not warrant interference.

4.I carefully considered the rival contentions and went through the materials on record. This case raises several issues of fundamental importance. I, therefore, requested Shri Srinath Sridevan, Senior Advocate, to

assist the court as amicus curiae. The learned amicus discharged his role admirably and I place on record my appreciation for his assistance.

5.The matrimonial petition was filed in 2019 itself. Therefore, the Indian Evidence Act, 1872 would apply and not the Bharatiya Sakshaya Adhiniyam, 2023 which came into force on 01.07.2024. However, the learned amicus requested the court to look at the issue from the perspective of the new Act also and issue certain directions. There is a compelling reason as to why such a request was made. Section 63 of BSA, 2023 deals with the admissibility of electronic records. Sub-section (4) of the said provision is as follows :

> "(4)In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things shall be submitted along with the electronic record at each instance where it is being submitted for admission, namely:—
>
> (a) .....
>
> (b) ...
>
> (c)....
>
> and purporting to be signed by a person in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate) **and an expert 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 in the certificate specified in the Schedule."

The effect of the above provision is that filing of the certificate is mandatory along with the electronic record. The certificate is to be signed by the person in charge of the computer system and an expert. The sub-section itself refers to a schedule annexed to the Act which is in two parts, Part A and Part B. Part A is to be filled by the party and Part B is to be filled by the expert. Section 39 of the BSA, 2023 deals with opinions of experts. Section 39(2) deals with experts in relation to electronic evidence. Section 39(2) is as follows :

> "(2) When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000, is a relevant fact.
>
> Explanation.—For the purposes of this sub-section, an Examiner of Electronic Evidence shall be an expert ."

The above provision takes us to Section 79A of the Information Technology Act, 2000. It reads as follows :

> "79A.Central Government to notify Examiner of Electronic Evidence.–The Central Government may, for the purposes of providing expert opinion on electronic form evidence before any court or other authority specify, by notification in the Official Gazette, any Department, body or agency of the Central Government or a State Government as an Examiner of Electronic Evidence.
>
> Explanation.–For the purposes of this section, -electronic form evidence? means any information of probative value that is either stored or transmitted in electronic form and includes computer

evidence, digital audio, digital video, cell phones, digital fax machines."

In the light of the above three provisions, namely, Section 63 and Section 39 of BSA, 2023 and Section 79A of the Information Technology Act, 2000, one can conclude that a person desirous of relying on any electronic record as a document in evidence must submit a certificate at the time of filing the electronic record. The certificate must be in two parts, Part A and Part B. Part B must be filled up by the expert notified under Section 79A of the Information Technology Act, 2000.

6.It is admitted by the Central Government that only a handful of entities have been notified till date as experts under Section 79A of the Act. It is surprising to note that no expert has been notified in the State of Tamil Nadu. It is beyond dispute that Tamil Nadu has good I.T infrastructure and skilled manpower. Since BSA has already come into force, very soon there will be need for certificates under Section 63(4) of BSA for securing admission of electronic records. If experts are not available in Tamil Nadu, that would result in denial of the right of access to justice which is a fundamental right. I, therefore, direct the second respondent to expeditiously notify sufficient number of persons/bodies/entities as experts in the State of Tamil Nadu. The number to be so notified will have be commensurate with the possible demand. It would be advisable to have such experts in each district in Tamil

Nadu. This exercise of assessment and notification shall be carried out within a period of three months from the date of receipt of copy of this order. Since the position as on date is that meeting the statutory requirement is not possible of compliance, the learned amicus wanted me to read down the Section so that any person who is specially skilled in computer science can be recognised as an expert for the purpose of filling up Part B of the certificate. I do not want to travel that far as that would amount to re-writing Section 79A of the I.T Act. But such an occasion may arise if the notification directed to be issued under Section 79A of the I.T Act, 2000 is not issued by the Central Government.

7.In the case on hand, the applicable provision is Section 65B(4) of the Indian Evidence Act, 1872. It reads as follows :

> "(4) In any proceedings where it is desired 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 subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

The above provision was considered in ***Anvar P.V vs. P.K.Basheer (2014) 10 SCC 473***. It was held therein as follows :

"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."

The husband (respondent herein) produced the call history as Ex.P4. The marking was done subject to objection. In ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and ors (2020) 7 SCC 1***, while holding that furnishing of certificate under Section 65B(4) was mandatory, the Hon'ble

Supreme Court clarified that Section 65B does not speak of the stage at which such certificate must be furnished to the Court. In ***Anvar P.V***, it was observed that such certificate must accompany the electronic record when the same is produced in evidence. The Hon'ble Supreme Court in ***Arjun Panditrao Khotkar*** clarified that this would be so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. In cases where a defective certificate is given, or, in cases where such certificate has been demanded and is not given by the person concerned, the judge conducting the trial must summon the person/persons referred to in Section 65B(4) of the Evidence Act and require that such certificate be given by such person/persons. The trial judge ought to do so when the electronic record is produced in evidence before him without the requisite certificate. The Hon'ble Supreme Court made a distinction between the procedure to be followed in civil cases and criminal cases. It was further held that so long as the hearing in trial is not yet over, the requisite certificate can be directed to be produced at any stage so that information contained in electronic record form can be admitted and relied upon in evidence. It was authoritatively laid down that certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record.

8.Coming to the case on hand, the certificate enclosed by the husband reads that the electronic statement was taken from Jio official

website and that the website is in order without any malfunction. One can take judicial notice of the fact that call history can be obtained by reaching out to the website of the concerned telecom service provider from the mobile phone. The user of the device would get OTP. After authentication, the information sought for will be provided which can be downloaded. A cursory perusal of Ex.P4 would show that the mobile phone belonged to the wife and the husband had access to the same. When the mobile phone with the sim card was in the custody of the husband, he had reached out to the telecom service provider (Jio) and obtained the call data. The certificate filed by the husband is no certificate at all. It is not a defective certificate. It is not the case of the husband that he wrote to the service provider and there was no response. The call history was downloaded from Jio website. Therefore, only a person occupying a responsible official position in Jio could have issued the certificate. The husband/respondent herein could not have issued a self serving certificate. Therefore, the case on hand will fall outside the caveat laid down in ***Arjun Panditrao Khotkar*** by the Hon'ble Supreme Court. Ex.P4 ought to have been accompanied by a certificate as contemplated in Section 65B(4) of the Indian Evidence Act, 1872. The court below could not have deferred taking a decision in the matter.

9.This is primarily because there has been a clear invasion of the privacy right of the wife. It is obvious that the husband had stealthily obtained

the information pertaining to the call history of his wife. He was not the owner of the mobile device or the registered user of the sim card. He had clandestine custody of the same for probably a brief while. There has been a clear breach of the privacy of the wife. In ***Justice K.Puttaswamy (Retd) v. UOI (AIR 2017 SC 4161)***, it was held that privacy is a fundamental right. Can evidence procured in violation of this right be admissible in evidence?. This question does not admit of an easy answer. The learned amicus has tabulated the dichotomy of judicial opinion :

Admissible	Inadmissible
Kethana Lokes v. Rahul Bettakotte 2024 Karnataka HC 21752	Asha Latha v. Durgesh 2023 SCC OnLine Chh 3959
Deepti Kapur v. Kunal Julka AIR 2020 Del 156	Rayala Bhuvanewari v. Naggaphanender AIR 2008 AP 98
Preeti v. Kunal AIR 2016 Raj 153	Neha v. Vibhor Garg (2021) (Punjab & Haryana HC)
Sachin Arora v. Manju 2023 DHC 3197	Sankarram v. Kalaiselvi CMSA(MD)No.54 of 2021 (Madurai Bench of the Madras High Court).

Neha v. Vibhor Garg has been challenged before the Hon'ble Supreme Court in SLP (C) No.21195 of 2021. Vide order dated 28.04.2022, the proceedings before the Family Court have been stayed. The order of the High Court had not been stayed.

10.The following observations and ratio laid down by the Court of Appeal in ***Imerman v. Technquiz (2010 EWCA Civ 908)*** are relevant :

> "it was a breach of confidence for a person intentionally to obtain another person's information secretly and without authorisation, knowing that he reasonably expected it to be private, and, without that other persons authority, ... that the husband had an expectation of privacy at common law and in accordance with article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the majority of documents stored on the server which had been accessed without his authority at a stage in the divorce proceedings ....
>
> Why should one spouse have no right of confidentiality enforceable against the other in relation to their separate lives and personalities?...
>
> Each spouse is entitled to a separate life, distinct from the shared matrimonial life.
>
> Legal protection applies to protect the confidence itself, not merely to prevent the dissemination of information. It does not need to be shown that the information will be misused; merely that it has been obtained in breach of confidence would be sufficient."

In ***Katz v. United States (389 U.S 347 (1967),*** Justice Harlan propounded the reasonable expectation of privacy test to determine whether an action by the government has violated an individual's reasonable expectation of privacy. It was a two part test ; the individual has exhibited an actual (subjective) expectation of privacy and the expectation is one that society is prepared to recognise as reasonable. If both requirements are met and the government has taken an action which violates this 'expectation', then the government's

action has violated the individual's right. In a research paper titled "***My Diary is Your Diary : The Right to Privacy in a Marriage"*** by Turkish author Dr.Nadire Ozdemir, it was recommended that the Harlan test laid down in the context of state surveillance should be extended to matrimonial relationships also and that the spouses should be entitled to claim right of privacy against each other.

11.Some of the courts which leaned in favour of admissibility of evidence obtained in breach of privacy relied on Section 14 of the Family Courts Act, 1984. The said provision is as follows :

> "**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)."

I am however not able to agree with such an approach. Though privacy like any other fundamental right is not absolute, it was held in ***Justice K.Puttaswamy*** case by Justice D.Y.Chandrachud for himself and three other Hon'ble Judges that any curtailment or deprivation of the privacy right would have to take place under a regime of law and that the procedure must be fair, just and reasonable and subject to constitutional safeguards. The expression ***"regime of law"*** requires some elaboration. Taking inspiration from the title of

the book ***"Legislating Privacy" by Priscilla M Regan***, I hold that "***regime of law***" envisages a special and comprehensive legislation dealing with the subject of privacy. Such a parliamentary legislation would also deal with the question relating to admissibility of evidence procured in breach of one's privacy. Exceptions may be created. National security and supreme public interest could be overriding considerations. In the absence of such a comprehensive legislation, one has to conclude that there is no "regime of law" dealing with the subject of privacy as of now. The Family Courts Act, 1984 was enacted more than three decades prior to Justice Puttaswamy judgment. The discretionary power conferred on the Family Court under Section 14 of the Family Courts Act cannot be said to fall within the meaning of the aforesaid expression "regime of law". There is no legislative validation of evidence obtained by violating the fundamental right to privacy. In this background, it would not be proper for the courts to carve out exceptions on their own.

12.The observations made by the High Court of Harare, Zimbabwe in ***CRB 57 of 2016 (S. v Nsoro)*** dated 25.02.2016 are apposite though rendered in a criminal case. The deceased husband refused to let the accused wife read a text message which the husband had received on his phone. Out of anger over the deceased's refusal to divulge the message, the wife had stabbed the husband causing his death. Justice Chitapi has the following take on the right to privacy between spouses :

"...Section 57 (d) of the Constitution provides that every person has the right to privacy of their communications. There is no law which provides that a husband or wife has a right to infringe on the privacy of the other's communications. The accused's insistence that the deceased should divulge a communication made to him on his phone was in itself an infringement upon the right of the deceased to privacy of communication. The deceased was lawfully entitled to refuse to divulge the message he had received on his phone to the accused albeit the accused being his wife....

It is the court's view that society should learn to respect privacy of communications. Many a time, the cellphone has been cause of 'matrimonial quarrels and domestic disputes because couples do not respect each others' right to communications made or received. A cellphone is materially a gadget which is intended to ease communications between persons. A lot of cases come before the courts in which a spouse will have invaded the private communications of another by going through messages and other communications on the other spouse's phone. This practice should be deprecated. It amounts to investigating or eavesdropping on one another. Usually, spouses who do this will be aiming to find evidence of wrongful conduct by the other. Eavesdropping on another's cellphone is evidence of lack of trust in that other person. Courts are flooded

with cases where couples or spouses seek to prove wrongful conduct by the other using evidence in the form of messages retrieved from another spouse's phone. **Such evidence unless obtained with the consent of the owner of the phone would have been illegally obtained in contravention of the rights of every person to the privacy of communication** as guaranteed by Section 57 of the constitution and evidential rules relating to admissibility of illegally obtained evidence should be applied...."

13.I came across an interesting article titled "**Rethinking the 'Fruits of the poisonous tree' doctrine: Should the 'ends' justify the 'means**'?" (***2020 SCC OnLine Blog OpEd 76***). The authors Bharat Chugh & Taahaa Khan lament the consequentialist approach that 'the tree may be poisonous but the fruit is fine'. To them, the concept of ends justifying the means is deeply troubling and calls for judicial intervention. They also invoke the "Unfair Operation Principle" applied by the UK Courts. This principle prohibits admission of evidence if in the given case, its reception runs contrary to the principles of basic fairness. The principle gives courts the discretion to decide, on a case to case basis, as to what would operate fairly or unfairly against the accused, and in appropriate cases, exclude such evidence. The authors refer to 94th Report of the Law Commission of India which suggests exclusion of evidence unlawfully obtained in criminal cases.

14.Trust forms the bedrock of matrimonial relationships. The spouses must have implicit and total faith and confidence in each other. Snooping on the other destroys the fabric of marital life. One cannot pry on the other. Coming specifically to the position of women, it is beyond dispute that they have their own autonomy. They are entitled to expect that their private space is not invaded. The wife may maintain a diary. She may jot down her thoughts and intimate feelings. She has every right to expect that her husband will not read its contents except with her consent. What applies to diary will apply to her mobile phone also. The Hon'ble Supreme Court is now considering the question whether forcible sexual intercourse by the husband against the wife's will would constitute marital rape. Obtaining of information pertaining to the privacy of the wife without her knowledge and consent cannot be viewed benignly. Only if it is authoritatively laid down that evidence procured in breach of the privacy rights is not admissible, spouses will not resort to surveillance of the other. One may wonder if marital misconduct which has to be made out for obtaining relief may become impossible of proving. It is not so. It can very well be established and proved by appropriate means. Interrogatories can be served. Adverse inference can be drawn. The charged spouse can be called upon to file affidavit with the express warning that falsity will lead to prosecution for perjury. In exceptional cases, the court can even take it upon itself to unearth the truth. Law cannot proceed on the premise that marital misconduct is the norm. It cannot permit

or encourage snooping by one spouse on the other. ***Privacy as a fundamental right includes spousal privacy also and evidence obtained by invading this right is inadmissible.***

15.The impugned order is set aside. This civil revision petition is allowed. No costs. Connected miscellaneous petition is closed.

30.10.2024

Index : Yes / No
Internet : Yes/ No
skm

To:

1.The Subordinate Judge, Paramakudi.

2.The Secretary to Government,
Ministry of Electronics and
Information Technology
(MEITY),
Government of India,
New Delhi.

G.R.SWAMINATHAN, J.

skm

CRP(MD)No.2362 of 2024
and
CMP(MD)No.13409 of 2024

30.10.2024