Rajasthan High Court
Preeti Jain vs Kunal Jain &Anr; on 27 May, 2016

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

ORDER

Preeti Jain Vs. Kunal Jain & Another
(S.B. Civil Writ Petition No.224/2016)

Date of Order: May 27, 2016.

PRESENT
HON'BLE MR. JUSTICE ALOK SHARMA

Mr. Peush Nag, for the petitioner.
Mr. Nitin Jain, for respondents.

BY THE COURT:

Challenge has been made to the order dated 18-12-2015 passed by the Family Court Kekri, District Ajmer (hereinafter `the Family Court) dismissing the petitioner-wife-non-applicants (hereinafter `the non applicant) application praying that as the evidence of the respondent-husband-non-applicant (hereinafter `the applicant) placed in the course of a divorce petition, on record of the Family court i.e. one pinhole camera, hard disk memory, 3 CD/ DVDs video recording, mobile messages, CD/ DVD of bio-data photos along with the affidavit in evidence was in the nature of electronic records without requisite certification under under Section 65B read with 122 of the Evidence Act, 1872 (hereinafter the Act of 1872') and in the cross hair of Section 122 thereof, not be taken on record and read in evidence.

The facts relevant are that the applicant husband filed an application for dissolution of the marriage under Section 13 of the Family Court Act, 1984 (hereinafter `the Act of 1984') against the the non applicant wife praying that their marriage solemnized on 10-12-2013 be dissolved on the grounds of cruelty and adultery. It was alleged that the applicant had in his possession a video clipping recorded through a pin hole camera establishing the non applicants extra-martial relationship. The divorce petition was resisted by denial. It was stated that the electronic record referred to as the foundation of the divorce petition was fabricated and the petition was liable to be dismissed.

Pleadings being complete and issues framed, the applicant filed his affidavit in evidence in support of the divorce petition and relied upon the video clippings alleged to be recorded by him establishing the extra marital affair of the respondent wife and certain other electronic record. Following the affidavit in evidence, the non applicant moved an application under Section 65B read with 122 of the Act of 1872 stating that the electronic record placed on record by the applicant with his affidavit in

evidence did not satisfy the preconditions of Section 65B of the Act of 1872 and was therefore inadmissible. Protection of Section 122 of the Act of 1872 was also invoked, stating that the electronic record was inter alia constituted of privileged communication between the husband and the wife, and hence could not be read in evidence without the consent of wife, which was absent. It was submitted that the electronic record to the extent constituted of such communication was also not admissible.

The applicant's response to the non-applicant's case was that the original electronic recordings having been placed on record of the family court, section 65B of the Act of 1872, which relates to secondary evidence of electronic record, did not attract. It was further submitted that Section 122 of the Act of 1872 was also not applicable to the electronic record placed before the family court in support of the divorce petition. Inasmuch as all of it was not a communication between the husband and the wife and even if it were, it was not hit by the plain language of the Section 122 of the Act of 1872 and saved by the exception inbuilt in the aforesaid section. Section 14 of the Family Court Act, 1984 was also invoked as an exception to issues of relevance and admissibility arising under the Evidence Act, 1872. The family court by the impugned order dated 18-12-2015 dismissed the non applicants application. Hence this petition.

Counsel for the non applicant has reagitated the case as set up before the family court. It was submitted that the electronic record placed before the family court did not satisfy the mandate of Section 65B (4) of the Act of 1872, which requires a certificate (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 was appropriate, through which the material was electronically recorded) stating that the contents of the electronic recordings were true to the best of his knowledge and belief. Such a certificate had not been filed, submitted counsel, and consequently the electronic record produced by the applicant along with his affidavit in evidence in support of the divorce petition was not admissible in evidence. It was submitted that yet the non-applicant's substantial case had been casually and without good cause overlooked by the family court. It was further submitted that the electronic record also was, in part, privileged communication between the husband and the wife, which under Section122 of the Act of 1872 was not admissible. Counsel emphatically submitted that unauthorized recordings and communications between the husband and the wife were wholly unconstitutional, violative of the non applicants right to privacy, and therefore, could not be considered in evidence by the family court. It was submitted that the leverage conferred on the Family Court under Section 14 of the Act of 1984 could not be construed to entitle it to admit evidence in the course of adjudication of matrimonial disputes before it, contrary to the mandate of the Act of 1872, particularly Sections 65B and 122 thereof, as in the instant case or for that matter in a manner eclipsing the non-applicant's right to privacy under Article 21 of the Constitution of India. Therefore the impugned order dated 18-12-2015 dismissing the non applicants application objecting the admissibility of the electronic record placed by the applicant with his affidavit in evidence in support of his divorce petition is wholly illegal and liable to be quashed and set aside, submitted Mr. Peush Nag.

Mr. Nitin Jain, counsel for the applicant husband has supported the impugned order dated 18-12-2015 passed by the Family Court.

Heard. Considered.

Section14 of the Family Court Act, 1984 provides that a family court may receive any evidence, report, statement, documents, information or matter which in its opinion will facilitate the effective adjudication of the disputes before it, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872. The aforesaid section therefore makes it pellucid that the issues of relevance and admissibility of evidence which regulate a regular trial do not burden proceedings before the family courts. It is the discretion of the family court to receive or not to receive the evidence, report, statement, documents, informations etc. placed before it on the test whether it does or does not facilitate an effective adjudication of the disputes before it. Aside of the aforesaid, I am of the considered view that Section 65B of the Act of 1872 only deals with the secondary evidence qua electronic records. It does not at all deal with the original electronic records, as in the instant case, where the pinhole camera, with a hard disk memory on which the recording was done has been submitted before the Family Court. The Apex Court in the case of Anvar P.V. Vs. P.K. Basheer [(2014)10 SCC 473] has held that if an electronic record is produced as a primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence without compliance with the conditions of Section 65B of the Act of 1872. That evidence would take the colour of primary evidence, subject no doubt to its credibility based on forensic examination and cross examination. Further, I am of the considered view that the privilege in respect of the husband and the wife's communication under section 122 of the Act of 1872 would also not attract, as Section 14 of the Family Court Act eclipses Section 122 of the Evidence Act in proceedings before the Family Court. Section 14 aforesaid is a special law, so to say, as against the general law, which Section 122 of the Act of 1872 encapsulates vis-a-vis privileged communications between husband and wife.

Consequently, I am of the considered view that the application filed by the non applicant under Section 65B read with Section122 of the Act of 1872 against the admissibility of the electronic record filed by the applicant husband along with the affidavit in evidence in support of the divorce petition was rightly rejected by the family court, inter alia with reference to the Family Court's wide discretion under Section 14 of the Act of 1984. Nothing either for the reason of excess of jurisdiction, nor for reason of perversity or patent illegality vitiates the impugned order dated 18-12-2015 passed by the Family Court.

Consequently the petition is liable to be dismissed. Dismissed.

(Alok Sharma), J.

arn/ All corrections made in the order have been incorporated in the order being emailed.

Arun Kumar Sharma, Private Secretary.