IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR ON THE 17th OF MARCH, 2023

MISC. PETITION No. 6023 of 2022

BETWEEN:-

- 1. DR. SMT. SUCHITRA KHANDELWAL W/O DR. RATAN KHANDELWAL, AGED ABOUT 62 YEARS, OCCUPATION: DOCTOR 14-B SUDAMA NAGAR, DISTRICT INDORE (MADHYA PRADESH)
- 2. DR. RATAN KHANDELWAL S/O SHRI CHIRONJILALJI KHANDELWAL, AGED ABOUT 68 YEARS, OCCUPATION: RETIRED 14-B SUDAMA NAGAR, DISTRICT INDORE (MADHYA PRADESH)

....PETITIONER

(BY SHRI VINAY SARAF, SENIOR ADVOCATE WITH SHRI NILESH AGARAWAL, ADVOCATE)

AND

- 1. FIROZALI S/O BARKAT ALI BOHRA, AGED ABOUT 60 YEARS, OCCUPATION: BUSINESS SAIFEE MOHALLAH, DISTRICT RATLAM (MADHYA PRADESH)
- 2. SHAILENDRA S/O SHARAD MEHTA, AGED ABOUT 48 YEARS, OCCUPATION: BUSINESS DALU MODI BAZAR RATLAM (MADHYA PRADESH)

RESPONDENTS

(BY SHRI V.K. JAIN, SENIOR ADVOCATE WITH SHRI VAIBHAV JAIN, ADVOCATE)

This application coming on for orders this day, the court passed the following:

ORDER

- This petition has been filed under Article 227 of the Constitution of India against the order dated 25.11.2022 (Annexure P/1), passed by the Principal District Judge, Ratlam in RCSA No. 09-A/2025, whereby the application filed by petitioner /defendant under Sections 45 and 73 of the Indian Evidence Act, 1872 (hereinafter referred as 'the Act') for sampling of the voice of plaintiff and to get it examined with the call recordings available on record has been rejected.
- 2] In brief, the facts of the case are that the plaintiff has filed a civil suit for specific performance of contract in which, the plaintiff's evidence has already been closed, and in the aforesaid proceedings, an application was filed on 25.11.2022, by the defendant during the course of the evidence under Sections 45 & 73 of the Act on the ground that after the suit was filed, there was some telephonic conversation between the plaintiff and the father of the plaintiff with the defendant, in which, it can be culled out that the plaintiff has admitted that he was not willing to perform his part of the contract and, therefore, the issue of boundary wall was raised. The aforesaid application has been rejected by the learned Judge of the trial court vide order dated 25.11.2022 holding that the conversation between the

parties in the aforesaid cassettes /CDR are not relevant.

- 3] Shri Vinay Saraf, learned senior counsel for petitioner has submitted the aforesaid finding recorded by the learned Judge of the trial court runs contrary to the earlier order passed by the trial court itself on 5.8.2019, wherein, the application filed by the defendant to bring the aforesaid telephonic conversation etc. on record has been allowed by holding that the said documents are relevant. Thus, it is submitted that it was not open to the learned Judge of the trial court to take a different stand then the one which was already taken back by his predecessor on 5.8.2019.
- 4] Learned senior counsel has also submitted that the telephonic conversation and samplings are necessary for the proper defense of the defendant. Thus, the same ought to have been allowed by the learned Judge of the trial court.
- 5] Shri V.K.Jain,learned senior counsel for the respondent has vehemently opposed the prayer and it is submitted that no case for interference is made out for the reason that the aforesaid conversation had admittedly taken place between the parties subsequent to filing of the suit and thus, the same is not at all relevant as the requirement of the law is that the willingness and readiness of the plaintiff is required to be seen prior to filing of the suit.
- 6] Shri Jain has further submitted that the civil suit was filed in the year 2005, the written statement was filed in the year 2005 itself, and

the transcript and the telephonic conversation were filed before the trial court in the year 2017, and it was allowed in the year 2019, and the present application has been filed only on 25.11.2022, i.e., after completion of the plaintiff's evidence which has been rightly rejected by the trial court. Such procedure cannot be allowed to further protect the petitioner.

- In rebuttal, learned counsel for the petitioner has submitted that in the aforesaid conversation, the willingness and readiness of the plaintiff can be verified which referred to prior to filing of the suit. Counsel for the petitioner has also submitted that earlier there was no occasion for the defendants to file the aforesaid application, as there was no denial and it is only after the plaintiff's witnesses have denied in their cross examination about the factum of such conversation, that immediately the said application has been filed.
- 8] Heard the counsel for the parties and also perused the record.
- 9] On perusal of the record, it is found that the telephonic conversation between the parties and the proof of the same was already taken on record by the trial court vide order dated 5.8.2019, the relevant paras of the same read as under:-

" प्रतिवादीगणों के आवेदन पत्र अंतगर्त आदेश 8 नियम 1 सहपठित घारा 151 सी.पी.सी. आई.ए.नं 3 प्रस्तुति दिनांक 13.11.17 एवं आवेदन पत्र अंतर्गत आदेश 8 नियम 1 सी.पी.सी प्रस्तुति दिनांक 11.12.17 का निराकरण — प्रतिवादीगणों के प्रथम उक्त आवेदन पत्र का सार है कि उनकी एवं घ ानश्याम शर्मा की बातचीत दोनों वादीगण वादी क. 2 के पिता शरद मेहता दलाल अजय कलेरा, ठेकेदार गोपाल सिंह, फेंसिंगकर्ता विष्णुराम पाटीदार से फोन पर विवादित संपत्तियों के संबंध में चर्चा हुई, जिसकी उन्होंने कॉल रिकॉर्डिंग तीन ऑडियो केसेट में की जिसका उल्लेख जवाब दावे के विशेष आपत्ति चरण 1 में किया गया है। प्रतिवादीगण उक्त आडियो केसेट को कहीं रखकर भूल गये जिससे पूर्व में पेश नहीं कर सके। दीवाली पर सफाई करने पर यह तीनों केसेट मिले हैं, जिनकी सी.डी. बनाकर और उनका ट्रांसिकृष्शन बनाकर प्रस्तुत किया है, जिससे उन्हें अभिलेख पर लिया जावे।

आवेदन के समर्थन में डॉ. रतन खण्डेलवाल ने अपना शपथ पत्र , प्रमाण पत्र एवं सूची अनुसार दस्तावेज पेश किया हैं।

उत्तरावेदन पत्र में वादीगणों ने अभिलिखित किया है कि प्रतिवादीगणों ने प्रतिबद्ध पत्र में कोई प्लीडिंग इस संबंध में नहीं की है कि टेलीफोन पर की गई रिकॉर्डिंग साक्ष्य में ग्राह्य नहीं है। बल्कि वह विधि विपरीत होकर आपराधिक कृत्य है, जिससे प्रतिवादीगणों के विरुद्ध घारा 340 दं.प्र.सं. के अधीन प्रकरण पंजीबद्ध किया जाये। प्रतिवादीगणों ने मनमाने दस्तावेज बनाये हैं। वर्ष 2005 की टेलीफोन चर्चा को इतने विलंब से प्रस्तुत किया जा रहा है, जिससे आवेदन पत्र न्यायदृष्टांत तुकाराम वि. मानिकराव ए.आई.आर. 2010 एस.सी. 965 के आलोक में निरस्त किया जावे।

-आवेदन पत्र उभयपक्ष के तर्क सुने गये। प्रकरण देखा गया।

प्रकरण के अनुशीलन से प्रतिवादीगणों ने प्रतिवाद पत्र में उक्त टेप का उल्लेख किया है। प्रतिवादीगणों ने टेप विलंब से प्रस्तुत करने का कारण उसका त्रुटिवश कहीं रखा जाना बताया है, जो उचित पाया जाता है। प्रतिवादीगणों ने उक्त टेप और उनकी सी.डी. तथा ट्रांसकिष्शन प्रस्तुत की है, जो प्रकरण के निराकरण में प्रतिवादीगणों द्वारा प्रस्तुत किये गये उक्त दस्तावेज प्रथम दृष्टतया सहायक प्रतीत होते हैं। वादीगणों द्वारा जो न्यायदृष्टांत प्रस्तुत किया गया है, उसकी परिस्थितियां इस प्रकरण से भिन्न होने से उससे वादीगणों को कोई बल इस प्रकरण में नहीं मिलता हैं। अतः उक्त कारणों को देखते हुए प्रतिवादीगणों का आवेदन पत्र उनकी ओर से प्रस्तुत न्यायदृष्टांत विक्रम सिंह उर्फ विक्की वालिया एवं अन्य वि. स्टेट ऑफ पंजाब एवं अन्य ए.आई.आर. 2017 एस.सी. 3227 के आलोक में स्वीकार कर प्रतिवादीगणों द्वारा प्रस्तुत किया गये सूची अनुसार दस्तावेज अभिलेख पर लिये जाते हैं।

<u>प्रतिवादीगणों के आवेदन पत्र आदेश 8 नियम 1 सी पी.सी. प्रस्तुति दिनांक</u> 11.12.17 का निराकरण —

प्रतिवादीगणों के उक्त आवेदन पत्र का सार है कि उनके द्वारा दिनांक 13. 11.17 को एक आवेदन पत्र आदेश 8 नियम 1 सी.पी.सी. का सूची अनुसार दस्तावेज सहित प्रस्तुत किया था, लेकिन तीन सी.डी. और सी.डी. बनाने वाले का बिल त्रुटिवश प्रस्तुत करना रह गया था, जिसे सूची अनुसार प्रस्तुत किया जा रहा है, जिन्हें अभिलेख पर लिया जावें। उत्तरावेदन पत्र पेश नहीं। आवेदन पत्र पर उभयपक्ष के तर्क सुने गये। प्रकरण देखा गया। प्रकरण के निराकरण में उक्त दस्तावेज प्रथम दृष्टतया सहायक प्रतीत होने से आवेदन पत्र स्वीकार कर उन्हें अभिलेख पर लिया जाता है। प्रकरण वास्ते वादी एवं उसके साक्षियों पर प्रतिपरीक्षण हेतु नियत किया जाता है। प्रकरण लगभग 14 वर्ष पुराना होकर मा. उच्च न्यायालय एवं सर्वोच्च न्यायालय के निर्देशानुसार प्रकरण का शीघ्रातिशीघ्र निराकरण होना है। अतः वादी एवं उसके साक्षी अग्रिम तिथि पर आवश्यक रूप से उपस्थित रहेंगे तथा प्रतिवादीगण वादी और उसके साक्षियों पर प्रतिपरीक्षण आवश्यक रूप से करेंगे। दोनों पक्षों को कोई समय नहीं दिया जाएगा। प्रकरण वास्ते वादी एवं उसके साक्षियों पर प्रतिपरीक्षण हेतु दिनांक 24.08. 2019 को पेश हो।"

(emphasis supplied)

10] On perusal of the aforesaid order, it clearly reveals that on the said date when the applications of the defendants were allowed, learned Judge of the trial court was of the opinion that the documents are relevant. Whereas in the impugned order dated 25.11.2022, the following findings have been recorded by the learned Judge of the trial court:-

"प्रकरण के अवलोकन से यह प्रकट होता है कि वादीगण द्धारा यह वाद लगभग 18 वर्ष पूर्व विक्रय अनुबंध की विशिष्ट पूर्ति एवं कब्जे हेतु पेश किया गया था। वादीगण द्वारा पेश किया गया यह वाद पूर्णतः प्रकरण में पेश अनुबंध पत्र प्रपी—70 पर आधारित है। 18 वर्ष की लम्बी अविध में प्रतिवादीगण द्वारा वॉयस सेम्पल लेकर उसकी जांच विशेषज्ञ से करवाये जाने का कोई निवेदन नहीं किया गया है। जिस बातचीत के बारे में कैसेट बताई जा रही है, वह अनुबंध प्रपी—70 के संबंध में न होकर वादग्रस्त सम्पत्ति पर बनी हुई अधूरी बाउंड्रीवाल के संबंध में है। ऐसी परिस्थिति में वादी फिरोज की आवाज का वॉयस सैम्पल लेकर उसकी जांच विशेषज्ञ से कराये जाने का कोई औचित्य प्रतीत नहीं होता है। अतः प्रतिवादीगण की ओर से पेश आवेदन अंतर्गत धारा 45 एवं 73 साक्ष्य विधान प्रकरण में केवल विलम्ब करने के आशय से पेश किया गया प्रतीत होने के कारण निरस्त किया जाता है।"

(emphasis supplied)

11] The petitioners have also placed on record the transcript of the telephonic conversation between the parties running into around 100

pages whereas, the learned Judge of the trial court has given the finding regarding the said conversation being irrelevant simply observing that it is not in respect of land in dispute in the suit, the specific performance of which is being sought by the plaintiff, and in fact it refers to the boundary wall constructed on the disputed property, which has nothing to do with the dispute between the parties.

- On close scrutiny of the documents filed on record, in the considered opinion of this Court, the aforesaid finding recorded by the learned Judge of the trial court is palpably wrong, for the reasons that evidentiary value of the aforesaid conversation took place between the parties cannot be weighed in at this stage of recording of the evidence. This Court finds force in the submissions advanced by Shri Vinay Saraf, learned senior counsel for the petitioners that earlier there was no occasion for the defendant to call for such voice samples for the reason that until now the existence of this conversation was never denied by the plaintiffs and thus, there was no occasion for the defendants to apply for taking voice samples of the plaintiffs to substantiate the telephonic conversation as aforesaid.
- So far as the objection raised by the counsel for the respondent that the conversation which took place subsequent to the filing of the suit is not relevant, is concerned, this Court is also of the considered opinion that this objection can also be decided by the learned Judge of

the trial court while appreciating the evidence in the final judgement.

- 14] In view of the same, the impugned order cannot be sustained in the eyes of law and is liable to be said aside.
- Resultantly, the impugned order dated 25.11.2022 is hereby set aside, and the petition stands allowed. Consequently, the application filed by the petitioners under Sections 45 and 73 of the Evidence Act is also allowed and the learned Judge of the trial Court is requested to proceed further in accordance with law to record such evidence.
- Needless to say that, this Court has not reflected upon the merits of the case and the learned Judge of the trial court shall be only guided by the evidence adduced by the parties on record. Considering the fact that the matter is pending since 2005, the learned Judge of the trial court is requested to expedite the matter.
- 17] Miscellaneous Petition stands allowed.

Certified copy as per rules.

(SUBHODH ABHYANKAR) JUDGE

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