

EP-24-2014

(KAMAL PATEL Vs RAM KISHORE DOGNE)

HIGH COURT OF MADHYA PRADESH : AT JABALPUR

Election Petition No.24/2014

Kamal Patel

vs.
Shri Ram Kishore Dogne

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Present:- Hon'ble Shri Justice C.V. Sirpurkar

Shri R.P. Agrawal, Senior Advocate with Shri Anuj Agrawal,
Advocate for the petitioner.
Shri Intiaz Hussain, Advocate for respondent No.1.
Sushri Sushma Pandey, Advocate for Respondent No.11.

ORDER
(04-01-2016)

This order shall govern the disposal of I.A. No. 14040/2015 filed on behalf of election petitioner under Order 16 Rule 1 of the Code of Civil Procedure and I.A. No. 14043/2015 also filed on behalf of the election petitioner under Order 7 Rule 14 (3) of the Code of Civil Procedure.

I.A.No.14040/2015

2. This application under Order 16 Rule 1 of the Code of Civil Procedure, has been filed on behalf of election petitioner Kamal Patel on 26-10-2015 for summoning the record from the office of Returning Officer of 135, Harda assembly constituency.

3. It has been submitted hereby that in paragraph no.16 of the election petition, the petitioner had pleaded that the Election Commission of India had video-graphed the public meetings of all candidates of major political parties, including the public meetings held by respondent No.1 Ram Kishore Dogne. The petitioner had obtained copies of such video-recordings in the form of Compact Discs. The petitioner filed an application before the District Election Officer on 25-12-2013 (copy of the application, Document No. 1 annexed to I.A. No. 14040/2015). Pursuant to aforesaid application, the Returning Officer instructed the petitioner to deposit requisite amount vide his letter dated 26-12-2013 (document no. 2). Accordingly, the petitioner deposited the

requisite amount on 31-12-2013 vide document no. 3. Thereafter, the Compact Discs were duly supplied to him which were filed along with election petition as annexure numbers from P/19 to P/25. The original Compact Discs officially prepared by the Election Commission are in the possession of the Returning Officer. Therefore, it has been prayed that the Returning Officer of 135, Harda Assembly Constituency be summoned with originals Compact Discs in the Court.

4. It has further been submitted that it has been pleaded in paragraph no.16 (iii) of the petition that Shri Surendra Jain, who was Election Agent of the petitioner, lodged a complaint (Annexure-P/14) with the Returning Officer on 19-11-2013 to the effect that the respondent installed a large hoarding at State Bank Chowk, Harda, making false allegations about the petitioner so as to prejudice his electoral prospects. Annexure-P/14 was accompanied by the image of the flex hoarding in a Compact Disc, as also the judgment and order of concerned criminal Court, discharging the petitioner in the criminal case. Though, the Election Agent of the petitioner, Surendra Jain, retained copy of the complaint (Annexure-P/14), he did not retain the copy of the Compact Disc. Therefore, it has further been prayed that the Returning Officer of aforesaid Constituency be summoned with original complaint along with enclosed Compact Disc.

5. I.A.No.14040/2015 has been vehemently opposed by learned counsel for the respondent Ram Kishore Dogne by filing a written reply. It has been submitted in the reply that for just decision of I.A.No.14040/2015, it is imperative to keep in mind the pleadings of the petitioner. It has been pleaded in the election petition that the petitioner has obtained copies of the video-recordings which

are in the form of Compact Discs; however, the source from which the so called Compact Discs were obtained by him, has not been disclosed. It has not been pleaded that the petitioner applied to the Election Commission or any of its authorities to obtain certified copies of such Compact Discs. The date of application has also not been pleaded. No pleading with regard to deposit of any amount with the Election Commission for obtaining certified copy of the Compact Discs is to be found in the petition. Likewise, there is no mention in the petition of the date on which such copies were furnished to him. The Compact Discs (from Annexures P/19 to P/25) annexed to the election petition do not bear any certification on their body. Even the name, address and signatures of the person preparing such Compact Discs and the manner in which they were prepared, has not been mentioned in any of the aforesaid annexures. No certification as per requirement of section 65-B of the Evidence Act, accompanies the Compact Discs. There is no mention of the original source of the contents of CDs either. In the election petition, the petitioner has not mentioned that the Compact Discs which are in his possession, are in fact certified copies of the originals, duly obtained from the Election Commission.

6. With regard to compact disc accompanying the complaint made by Surendra Jain dated 19-11-2013 (Annexure-P/14), it has been submitted on behalf of respondent No.1 that the pleadings do not disclose the name of the person who video-graphed the said flex hoarding on his mobile, the mobile number of such person, the person who is said to have transferred video from mobile phone to computer and then from computer to the Compact Disc. Thus, summoning of the Compact Disc from the Returning Officer

would serve no legal purpose. On the basis of aforesaid arguments, it has been prayed that I.A.No.14040/2015 be dismissed.

7. On perusal of the averments made in I.A.No.14040/2015 in the backdrop of pleadings of the petitioner and due consideration of the rival contentions in this regard, this Court is of the view that I.A.No.14040/2015 must be dismissed for the reasons hereinafter stated:

8. I.A.No.14040/2015 essentially contains two distinct prayers.

(i) Summoning of Returning Officer of concerned Assembly Constituency along with original Compact Discs containing video recordings of the electoral meetings convened by all candidates, including those convened by respondent Ram Kishore Dogne.

(ii) Summoning the Returning Officer along with Compact Disc that accompanied the complaint made by Surendra Jain, Election Agent of the petitioner, to the Returning Officer containing imaginary of the flex hoarding, which allegedly contained material, defamatory to the petitioner.

9. Thus, there is no doubt that the petitioner is seeking production of electronic documents which are in possession of the Returning Officer. It appears from the averments made by the petitioner in election petition and I.A.No.14040/2015 that annexures from P/19 to P/25 appended to the election petition, are in fact certified copies of the CDs prepared by the Election Commission; however, the averments made in paragraph 11 by the petitioner in I.A.No.14043/2015 reveals that the copies of CDs supplied to the petitioner by the Returning Officer have in fact been misplaced and cannot be traced inspite of best efforts and annexures P/19 to P/25 are in fact the copies made from CDs supplied by the office of the District Election Officer.

10. Section 65-A of the Evidence Act provides that the contents of electronic record may be proved in accordance with the provisions of section 65-B. In the case of Anwar P.V. vs. P.K. Basheer, 2014 (10) SCC 473, interpreting section 65-B of the Evidence Act, a three judge Bench of the Supreme Court has held as follows:

14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B(2). Following are the specified conditions under Section 65-B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly

fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

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.

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to

be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A's opinion of Examiner of Electronic Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.

19. It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility.

20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on

evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

21. In State (NCT of Delhi) v. Navjot Sandhu² a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerised records of the calls pertaining to the cellphones, it was held at para 150 as follows: (SCC p. 714)

â□□150. According to Section 63, â□□secondary evidenceâ□□ means and includes, among other things, â□□copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copiesâ□□. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed^{â□□*} at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section

(4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.ââ

It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65-B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65-B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record.

22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case², does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate

in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23. The appellant admittedly has not produced any certificate in terms of Section 65-B in respect of the CDs, Exts. P-4, P-8, P-9, P-10, P-12, P-13, P-15, P-20 and P-22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65-B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act. (Emphasis Supplied)

11. In the case of Anwar P.V.(supra), compact discs were used for

announcing objectionable matter, songs etc.; however, CDs from which the objectionable matter was played, had not been got duly seized by the petitioner through police or Election Commission. In these circumstances, the Supreme Court observed that had the CDs from which the objectionable matter was played, been got seized through police or Election Commission, they would have constituted primary evidence and could have been produced by the petitioner without the certificate as envisaged under section 65-B (4) of the Evidence Act. In the case of Anwar P.V. (supra) objectionable speeches, songs and announcement were recorded using other instruments and by feeding them into a computer, CDs were made therefrom, which were produced in the Court, without due certification. Therefore, Supreme Court held that such CDs could not be admitted in evidence because mandatory requirements of section 65-B, were not satisfied.

12. In the case at hand, the objectionable matter formed part of the speeches made in the public meetings convened by the respondent. Those speeches were recorded video-graphed by the Election Commission, presumably by using video cameras. Thereafter, the contents of the memory card of the video cameras must have been transferred to a computer and the CDs forming record of the Election Commission must have been prepared. Thus, even the so called original CDs in the record of the Election Commission, would not constitute primary electronic evidence of the speeches. Moreover, in the case at hand, the CDs supplied to the petitioner were copies of the record maintained in the Election Commission and annexures P/19 to P/25 are in fact the copies prepared from the copies supplied to the petitioner by the Election Commission. Thus, in order to ensure the source and authenticity

of the electronic record, a contemporaneous certificate issued at the time of each transfer in terms of section 65-B (4) of the Evidence Act, would be required because the Supreme Court has specifically held that in the case of CD, VCD, chip etc, the same shall be accompanied by the certificate in terms of section 65-B obtained at the time of taking the documents, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

13. In aforesaid view of the matter, no useful purpose would be served by indulging in the exercise of summoning the Returning Officer along with CDs/DVDs of annexures-P/19 to P/25 maintained by the Election Commission because even those CDs/DVDs would be inadmissible.

14. Coming to the second prayer regarding the Compact Discs sent to the Returning Officer along with complaint dated 19-11-2013, it may be noted that there is no pleading in the election petition as to who prepared the video recording of the flex hoarding displayed near State Bank of India and in what manner, using which instrument. However, by means of I.A.No.14043/2015, which would be considered in latter part of this order, the certificate on affidavit issued by one Santosh S/o Ram Narayan Agrawal is sought to be filed, stating that he had video-graphed the flex hoarding using his mobile phone. He transferred the video into his computer and prepared the Compact Disc furnished to the Returning Officer along with the complaint. However, it may be noted that aforesaid certificate is dated 21-10-2015; whereas the CD was prepared before 19-11-2013. Thus, the certificate now sought to be filed was not obtained at the time of taking the electronic document and is valueless for purpose of ensuring

the source and authenticity of the contents of the Compact Disc.
Thus, the second part of prayer can also not be allowed.

15. Consequently, I.A.No.14040/2015 is dismissed.

I.A.No.14043/2015

16. This interlocutory application has been filed on behalf of the petitioner under Order 7 Rule 14 (3) of the Code of Civil Procedure. By means of this application, the petitioner proposes to file following four documents:

(i) True copy of the application dated 25-12-2013 submitted by the petitioner to the Returning Officer for CDs of all functions organized by the candidates in the year 2013.

(ii) Original letter dated 26-12-2013 received from the office of Returning Officer informing the petitioner that there are in all fourteen DVDs of the functions organized by all candidates and he is required to deposit a challan at the rate of Rs.300/- per DVD, as per rules.

(iii) Certified copy of the letter dated 13-12-2013 written by the petitioner to the Deputy District Returning Officer informing that he is depositing a sum of Rs.13,800/- by way of challan along with certified copy of challan; and

(iv) Certificate issued by Deputy District Returning Officer certifying that Shri Surendra Jain was appointed as Election Agent of the petitioner together with photocopy of Form No.8.

17. At the outset, learned counsel for the respondent submitted that he does not object to the filing of the certificate dated 05-10-2015 issued by Deputy Returning Officer, District Harda, certifying that during the Assembly Elections in the year 2013, Shri Surendra Jain was appointed as election agent of the

candidate of Bhartiya Janata Party, Shri Kamal Patel. As such, certificate dated 05-10-2015 being relevant, is permitted to be taken on record.

18. So far as remaining three documents are concerned, they relate to the Compact Discs (Annexures-P/19 to P/25). Since in foregoing paragraphs of this order, the Court has refused to summon the Returning Officer along with CDs/DVDs maintained by the Election Commission for the purpose of proving the CDs (Annexures- P/19 to P/25), filing and proving of document nos. 1, 2 & 3 above, is redundant.

19. Therefore, I.A.No.14043/2015 is partly allowed. The certificate dated 05-10-2015 prepared by Deputy Returning Officer District Harda is permitted to be taken on record. Rest of the documents shall not be taken on record.

20. It is clarified that the certificate dated 05-10-2015 shall be admitted in evidence only after it is proved in accordance with the provisions of the Evidence Act.

(C V SIRPURKAR)
JUDGE