IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

MONDAY ,THE 14TH DAY OF JANUARY 2019 / 24TH POUSHA, 1940

OP (FC).No. 513 of 2018

AGAINST THE ORDER IN I.A.384/2018, I.A.No.491/2018 &
I.a.nO.763/2018 IN OP 609/2017 of FAMILY COURT, THALASSERY

PETITIONER/:

PRAMOD E.K.,
AGED 48 YEARS
S/O SEKHARAN, KUNNUMPURATH HOUSE, MUZHAPPILANGAD P O,
THALASSERY
670662

BY ADVS.
SREEJA SOHAN.K.
REJI R

RESPONDENT/:

LOUNA V.C.,
AGED 41 YEARS
D/O PRABHAKARAN @ BABU, LOUNA LOULY HOUSE, CHALA EAST
P O, -670621.
670621

BY ADV. SRI.M.SASINDRAN

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 14.01.2019,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

'CR'

C.K.ABDUL REHIM
&
T.V.ANILKUMAR, JJ.

O.P.(FC) No.513 of 2018

Dated this the 14th day of January 2019

JUDGMENT

T.V.ANILKUMAR, J.

All the three interim applications filed by the husband in O.P.609/2017 before the Family Court, Thalassery were dismissed on 31.7.2018 by a common order. He challenges the dismissal by invoking the powers of this Court under Article 227 of the Constitution of India.

2. He married the sole respondent in the O.P. on 19.4.1997 and later filed O.P.609/2017 for dissolution of marriage on the ground of cruelty. He had also filed O.P. 371/2013 for permanent custody of the minor children. The respondent/wife also filed O.P.204/2014 and MC 111/2014 claiming maintenance from him.

3. While the respondent, wife was being cross examined in the O.P. No.371/2013, the petitioner/husband confronted her with a

quarrelsome conversation of her recorded by him in his mobile phone. Since the sound track played from the mobile phone in the course of trial did not appear to the witness to be clear, she replied that she was not able to confirm the conversation. This led to the petitioner recording the voice in a CD and producing it in O.P.609/2017. The mobile phone was, however, not produced in any of the proceedings till date and the device seems to be in the custody of the petitioner.

4. The petitioner submitted before the Family Court that CD containing the voice of the respondent is a secondary evidence admissible under Section 65-B (4) of the Indian Evidence Act 1872. He therefore filed I.A.491/2018 for an order admitting the CD in evidence. He also filed I.A.763/2018 invoking Order XXVI Rule 10 A of the CPC for appointment of an Advocate Commissioner for recording the sample voice of the respondent in an electronic device at the digital studio attached to the All India Radio, Kannur and producing the same before the court along with certificate issued by a responsible officer attached to the studio under Section 65-B(4). I.A.384/2018 is the third petition filed by the petitioner for sending the sample voice of the respondent to a scientific expert attached to a Forensic Laboratory for comparison of her voice extracted in the CD.

5. The respondent did not, in her counter statements, oppose

the plea for recording the sample voice or for comparing it with the contents in the CD at the Forensic Laboratory. Nonetheless, the court below dismissed all the three petitions on 31.7.2018 by the impugned order taking a view that even if a scientific result favourable to the petitioner is obtained, it would be of no help to him so long as the CD is not certified under Section 65-B(4) of the Indian Evidence Act and is inadmissible in evidence. Two decisions, ***Perumal Vs. Star Tours and Travels (India) Ltd., (2010) (3) KLT SN.15)*** and ***P.V.Anwar Vs. P.K.Basheer and Others, (AIR 2015 SC 180)*** were relied on in this respect by the court below in passing the impugned order.

6. Heard counsel on either side.

7. Under Section 65-B(4), secondary evidence of an electronic document is not admissible unless it is certified by a responsible person as required by the Section. If objection on the ground of lack of certification is omitted to be taken at the time of tender of the electronic document in evidence, the challenge to admissibility cannot be raised at a later stage of the proceeding since the law deems the objection to be waived. The principle of waiver and consequential estoppal applicable to ordinary documents applies to electronic documents also, as can be discerned from the decision of the

Hon'ble Supreme Court in ***Sonu @ Amer Vs.State of Haryana, [(2017) KHC (6474)].*** The Hon'ble Supreme Court in a recent decision in ***Shafhi Muhammed Vs. State of Himachal Pradesh [(2018) (2) KHC (80)]*** made it clear that the insistence for certification under Section 65-B(4) of the Evidence Act should be confined only to such cases where the person proposing to tender secondary evidence is not in control of the electronic device and consequently not in a position to secure certification. In the case at hand, the petitioner indisputably holds custody of the cell phone alleged to have been used by him for recording the quarrelsome dialogue of the respondent.

8. The core question to be addressed in the present case is whether the CD produced before the Family Court could be admitted in evidence in the absence of certification under Section 65-B(4) of the Indian Evidence Act.

9. The argument of the learned counsel for the petitioner is that the Family Court failed to notice and to give effect to Section 14 of the Family Courts Act (for short 'the Act') which empowers the Family Courts to dispense with the application of the rigid rules of the relevancy and admissibility of evidence incorporated in the Indian Evidence Act 1872 to the proceedings before them and further erred

in refusing to receive the uncertified CD in evidence. The argument, according to us, is legally sound and merits acceptance.

10. Section 14 of the Act reads 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)."*

The words employed in the Section make it abundantly clear that, any matter, information etc., placed before a Family Court may be admitted in evidence uninhibited by the rules of relevancy and admissibility prescribed by the Evidence Act, provided the Family Court is of the opinion that the matter before it is essential for the effective resolution of the dispute in the proceeding. Understood in the light of the object and scheme of the Act, Section 14 of the Act seems to convey the legislative intention that Family Court has absolute freedom to depart from adopting the sophisticated and strict rules of relevancy and admissibility applicable to the regular civil courts in the country. The freedom of partial departure from the Evidence Act helps the Family Courts prevent valuable information and materials necessary for effective adjudication of disputes from

being shut out in the enquiries and trial. In effect, the rules of relevancy and admissibility in the Evidence Act ought to be read subject only to Section 14 of the Act. In the event of any inconsistency emerging between the provisions of these two Acts, Family Courts Act 1984 alone will prevail, thanks to Section 20 of the Act. In the two decisions of the High Court of Kerala, ***Treasa Bency Vs. Preceline George, (2013) (3) KLT 414)*** and ***Pankajakshan Nair Vs. Shylaja, (2017) (1) KLJ 739***), the uniform view taken is to the effect that the technicalities of the Evidence Act should not be imported to the proceeding before the Family Courts in view of the provisions in Section 14 of the Act. We too concur with the view expressed in the said decisions.

11. In view of the overriding effect of the Section 14 of the Act on the rules of admissibility in the Evidence Act, we hold that the CD produced before the Family Court, Thalassery is admissible in evidence, despite the fact that it was not certified as mandated by Section 65-B(4) of the Act. The contention put forth by the learned counsel for the respondent that the non obstante clause in Section 65-B (1) introduced by Act No.21 of 2000 would, however, prevail over Section 14 of the Act rendering production of certificate under Section 65-B(4) of the Evidence Act inevitable, does not merit

acceptance. The words used in Section 65-B(1) sufficiently indicate that the non obstante clause does not extend outside the Evidence Act nor does it curtail the operation of any other law.

12. The Family Courts though not bound by the sophisticated rules of relevancy or admissibility of evidence by virtue of Section 14 of the Act, in our opinion, should not, however be understood to possess unregulated or unbridled power or freedom to receive in evidence indiscriminately all matters that are brought before them. Any undue and excessive liberal interpretation put on Section 14 of the Act may only produce mischievous and disaster result and even do disservice to the system. While interpreting Section 14, only the true legislative object should be given effect to and promoted and any mischief suppressed. The hearsay which is inherently inadmissible cannot be therefore acknowledged as an evidence in any proceeding before a Family Court also.

13. The legal system of our country has always the tradition of observing ordinary principles of proof and natural justice even in situations where authorities of law deciding cases are not bound or governed by the Evidence Act 1872. Section 14 of the Act is only aimed at mitigating the rigour of sophisticated rules of relevancy and admissibility of the Evidence Act, rather than annihilating the very

fundamental rules of proof and natural justice inherent in an ideal legal system. We are therefore, of the view that the Family Courts absolved from the trauma of observing rules of relevancy and admissibility of evidence envisaged by the Evidence Act 1872, are nonetheless bound to adhere to the fundamental rules of evidence based on logic, fairness and expediency and also principles of natural justice.

14. This naturally takes us to an inquisitive question whether the production and admission of the CD in evidence by the mere force of Section 14 of the Evidence Act are proof of the alleged quarrelsome talk of the respondent. Mere admission of a document in evidence, whether it be electronic or otherwise, will not discharge the burden of the party proposing evidence from proving the contents also. What Section 14 of the Act enacts is not any special rule of evidence as certain other special statues do. A document merely marked with or without consent of the opposite party in a proceeding before a Family Court is no proof at all unless the contents thereof are either admitted by the adverse party or proved through the persons who can vouch for the truth of the facts. This is an elementary principle of proof flawing from principles of natural justice, logic fairness and expediency *dehors* the provisions of the Evidence Act. We are of the

opinion that Family Courts cannot take any exception to this binding fundamental rule of evidence and therefore, the CD produced before the Family Court cannot be said to be proved unless the contents are also proved despite its admission in evidence. Section 14 of the Act as evident from the very language of the Section itself only relaxes observance of the rules of relevancy and admissibility of evidence rather than dispensing with the very fundamental principles of evidence and natural justice or proof of contents of a document.

15. The purported voice of respondent extracted in the CD in our opinion has to be proved in the same manner as a tape recorded conversation. The petitioner can succeed in proving the alleged riotous dialogue in the CD only when the identity of the speaker is also proved. Proof of the accuracy of the statement recorded is another essential requirement in the matter of proof of a tape recorded conservation. The court accepting the evidence must rule out that no tampering was made while the statement was recorded. These are only some of the guidelines in the matter of proof of contents of the CD. Elaborate discussion as to how a tape recorded conservation could be proved is decipherable from ***Ram Singh and others V. Col.Ram Singh, (AIR 1986 SC 3), Yusufalli Esmail Nagree (AIR 1968 SC 147)*** and ***Sunil Panchal Vs. State of***

Rajasthan, (MANU/RH/0987/2016). Unless all the essential conditions above are satisfied, contents of the CD produced by the petitioner cannot be said to be proved despite its admission in evidence by the mere force of Section 14 of the Act.

16. In view of the forgoing discussion made, the impugned order of the Family Court dated 31.7.2018 is hereby set aside and consequently, I.As 384, 491 & 763 of 2018 filed by the petitioner are allowed. The court below is directed to proceed to take requisite follow up action.

In the result, the O.P.(FC) is allowed.

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Sd/-

C.K.ABDUL REHIM,
JUDGE

Sd/-
T.V.ANILKUMAR,
JUDGE

al/-

APPENDIX

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	**TRUE COPY OF THE ORDER PASSED BY THE HON'BLE FAMILY COURT ON 31.7.2018**

RESPONDENTS EXHIBITS : NIL

TRUE COPY

P.S TO JUDGE

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