

Before Ramendra Jain, J.

DR. TRIPAT DEEP SINGH—*Petitioner*

versus

DR. (SMT) PAVITER KAUR—*Respondents*

CR. No. 650 of 2017

April 04, 2018

***Code of Civil Procedure, 1908—S.151—O.18 RL.17—
Recalling witness for cross examination—Maintainability of
application under inherent power—Inherent power to be invoked
only where there is no specific provision in procedure to meet
situation—Specific remedy available under Order 18, Rule 17 to
recall witness—Petitioner instead of availing available remedy filed
application under section 151 CPC for further cross examination of
respondent which cannot be resorted to.***

Held, that the first and fore-most question that arises for consideration before this court is as to whether the learned trial court was competent to recall RW-1 Dr. Paviter Kaur by invoking the inherent powers contained in Section 151 CPC, especially when there is a specific remedy available in the statute. In the considered opinion of this court, the answer of this question is in the negative. It is no doubt true that there are inherent powers conferred upon the court under section 151, CPC, but at the same time, the court has to determine this aspect as to whether the jurisdiction vested with the court under section 151, CPC can be exercised to nullify the provisions of the Code of Civil Procedure, especially when a specific remedy to recall a witness is available under Order 18 rule 17, CPC. The purpose of the provision is very limited. Discretion of the court has to be exercised judiciously and not arbitrarily. Inherent power under section 151 CPC can be invoked only where there is no specific provision in the procedure to meet the situation. The petitioner instead of availing that remedy, has filed the instant application under section 151, CPC., which cannot be resorted to. The power under section 151, CPC shall have to be used with circumspection and care only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

(Para 12)

Suhail Sehgal, Advocate, with Rakesh Kumar, Advocate *for the petitioner.*

S.C.Chhabra, Advocate, for the respondent.

RAMENDRA JAIN, J.

(1) By this common judgment, both the above noted Civil Revision bearing Nos. 650 and 658 of 2017 are being decided together as the controversy involved therein are identical in nature. However, for the sake of convenience, facts are being taken from Civil Revision No.650 of 2017.

(2) Through this petition, the petitioner has challenged order dated 11.11.2016 (Annexure P-1), whereby the application under section 151 PC filed by him for recalling RW-1 Dr. Paviter Kaur for further cross- examination, allowing him to place on record a true and correct replica of CD at Ex.P-1/12, which was not found in playable condition on account of some scratches developed therein and to check other CDs, Exhibits P-1/8, P-1/10 and Ex.PA placed on the record of the court, so as to enable him to produce correct copies of the original CDS, was dismissed by Additional District Judge, Patiala.

(3) A cursory glance of averments in the application dated 01.03.2016 filed by the petitioner under Section 151, CPC shows that the petitioner tendered his evidence in the trial court on 30.9.2011 by way of affidavit dated 13.04.2011. A copy of complete evidence containing 109 pages and three CDs were handed over to the respondent in the court, the same day. On 11.9.2015 when cross-examination of respondent Dr.Paviter Kaur was in progress, she deposed in her testimony that she had heard voices contained in the copies of CDs provided to her by the petitioner in the court on 30.9.2011. She has also read the written version of the CDs provided to her. She further deposed in her testimony that written versions contained in Exhibits P-1/9, P-1/11 and P-1/13 was in accordance with the CDs. However, during her cross-examination, the respondent intentionally denied that the CDs provided to her on 30.9.2011 contained her voice showing her conversation with the petitioner. She also denied that the third CD provided to her on 30.9.2011 contained the voice of her father and her mother, which necessitated the petitioner to move application on 5.11.2015 for comparison of voice of respondent Dr. Paviter Kaur, her father Shri Mehar Singh and her mother Smt. Ranjit Kaur with the voice contained in Exhibits P-1/8, P-1/10 and P-1/12. The respondent-wife filed her reply to the abovesaid

application on 20.11.2015. In para 3 of the reply, the respondent, on merit, pleaded that CDs at Exhibits P-1/8, P-1/10 and P-1/12 were never played in the court. During cross-examination of RW-2 Mehar Singh on 05.11.2015, the CD at Exhibit P-1/12 available in the court file was played in the court, but it did not open on account of development of some scratches thereon. An exact copy of the CD at Exhibit P-1/12 is available with the petitioner on another CD and as such, he may be allowed to place on the record a true copy of the CD at Exhibit P-1/12. A set of the copy of CD was also also supplied to the respondent in the court on 30.9.2011, when the petitioner tendered his evidence by way of affidavit dated 13.4.2011. Therefore, the respondent may be directed to produce in the court the same copy of the CD at Exhibit P-1/12. Some other CDs, Exhibits P-1/8, P-1/10 and PA are also available on the record of the case. The petitioner prays that their status are also required to be checked so that it could be transpired that they are in playable condition. In case, any of the CDs is not in working condition, then he may be allowed to submit a true copy of the same to the court, so that further proceedings may not be effected.

(4) The respondent filed a reply to the application dated 19.1.2016 denying all averments in the application filed by the petitioner averring that there can be no true copy of the CD Ex.P1/12, inasmuch as original copy thereof should have been produced in the court. CD itself is a secondary evidence and the copy thereof cannot be taken on the record. She vehemently denied that the copy of the alleged CD supplied to her is the correct copy of the CD exhibited at Ex. P1/12. The petitioner has not stated even a single word as to how did he prepare the copy of Ex.P1/12, especially when the same is lying on the record of the case and is not in playable condition. She admitted that though a copy of CD was provided to her in the court, but the same has been misplaced. Since the petitioner has already left the country, therefore, he is delaying the proceedings deliberately.

(5) The petitioner has also filed rejoinder to the reply of the application dated 19.1.2016 refuting all the pleas taken up by the respondent in her reply submitted to the court. He reiterated that it is not the case of secondary evidence of the secondary evidence, inasmuch as he has to submit a true copy of the document which he has in his possession.

(6) In reply to the application dated 1.3.2016, the respondent specifically pleaded that the evidence of the petitioner was already

recorded, but it is incorrect that she was handed over with the copy of 109 pages and three CDs. The CDs, which were allegedly, tendered in evidence without playing, were wrongly got exhibited by the petitioner, therefore, the respondent prayed that the CDs are required to be played in the court. It is only thereafter that the petitioner moved an application under section 151 CPC on 19.1.2016, wherein he made a prayer before the court to allow him to place on record another set of CDs of copies of the already exhibited CDs. The alleged CDs provided to her did not contain her voice and thus, she denied that the alleged copies of the CDs provided to her contained her voice. The alleged written versions of the alleged CDs have been manipulated by the petitioner with the sole motive to make it suitable as per his case. The alleged copies of the CDs again provided to the court are not admissible in evidence as these are doctored ones. Even the alleged CDs did not contain the voice of her father or mother. On 11.9.2015 her statement was concluded and thereafter, the case is being adjourned for recording the cross-examination of her father Shri Mehar Singh. The application dated 31.10.2015 which might have been filed by the petitioner on 5.11.2015 has already been replied and disposed of by the trial court vide order dated 11.2.2016, wherein prayer for recalling her or taking her voice sample was not acceded to and as such, the said order has attained its finality. That apart, secondary evidence of secondary evidence is not permissible. The CDs can be created at any time. No CD can be allowed to be produced on the record, keeping in view the detailed cross-examination of the respondent and her father. The petitioner has not stated even a single word as to why the alleged CDs were not put to respondent when she has clearly stated that she had heard the CDs, but the same did not contain her voice.

(7) Learned counsel for the petitioner has vehemently contended that the learned trial court has committed a grave error in not allowing him to produce another set of CDs of the exhibited CDs on the record of the case, especially when the CDs Exhibits P-1/8, P-1/10 and P-1/12 available on the record of the case got damaged on account of scratches thereon, thereby finding it difficult to make it in playing condition. The learned trial court has also not taken into consideration that the respondent should have been directed to produce on record the same copy of the CD at Exhibit P-1/12, which was, admittedly, provided to her in the court. The learned trial court has also erred in not accepting the prayer of the petitioner for taking voice sample of the respondent, her father and her mother with a view to compare their voice with the original voice to be taken in the court by

sending the same to the FSL and to get the statement of the expert recorded as a witness in rebuttal.

(8) On the other hand, learned counsel for the respondent denied all assertions made by the petitioner. He has vehemently contended that CDs are not admissible in evidence as the petitioner failed to comply with the mandatory provision of filing an affidavit at the time of tendering his evidence in support thereof as enshrined in section 65-B of the Act. The learned trial court has not committed any error in passing the impugned orders, dismissing the applications filed by the petitioner.

(9) Having given thoughtful consideration to the submissions made by learned counsel for the parties, both the revisions, being without any merit, deserve to be dismissed for the reasons to follow:-

(10) There is no denying the fact that the petitioner, while tendering his affidavit in his examination-in-chief, also supplied the CDs and copy of the affidavit containing 109 pages to the respondent, but during her cross-examination recorded on 26.8.2015, she deposed that she had not listened the CDs, exhibited on record. Subsequently, she was again cross-examined on 11.9.2015, wherein she testified that she had heard the copies of CDs provided to her in the court and also gone through copies of the written version provided to her in the court. The written versions in Ex.P-1/9, Ex.P- 1/11 and Ex.P-1/13 are in accordance with the CDs, but she denied her voice as also the alleged conversation with her husband contained therein. She also denied the voice of her father and mother allegedly contained in the third CD.

(11) On a perusal of the cross-examination of the respondent, it transpires that a specific suggestion was put to her that she had intentionally denied her voice as well as the voice of her father, her mother and the petitioner, allegedly, recorded in the CDs., but strangely enough, learned counsel for the petitioner could not be able to make any prayer before the trial court to allow him to play the CD's or put the same to RW-1 Dr. Paviter Kaur for the purpose of further cross-examination as also for allowing the petitioner to submit a true copy of CDs on record. Now the petitioner through the instant application intends to seek the relief of recalling of RW-1 Dr. Paviter Kaur for recording her further cross-examination and for allowing him to place on record the correct copy of the CDs, on the record of the case.

(12) The first and fore-most question that arises for

consideration before this court is as to whether the learned trial court was competent to recall RW-1 Dr. Paviter Kaur by invoking the inherent powers contained in Section 151 CPC, especially when there is a specific remedy available in the statute. In the considered opinion of this court, the answer of this question is in the negative. It is no doubt true that there are inherent powers conferred upon the court under section 151, CPC, but at the same time, the court has to determine this aspect as to whether the jurisdiction vested with the court under section 151, CPC can be exercised to nullify the provisions of the Code of Civil Procedure, especially when a specific remedy to recall a witness is available under Order 18 rule 17, CPC. The purpose of the provision is very limited. Discretion of the court has to be exercised judiciously and not arbitrarily. Inherent power under section 151 CPC can be invoked only where there is no specific provision in the procedure to meet the situation. The petitioner instead of availing that remedy, has filed the instant application under section 151, CPC., which cannot be resorted to. The power under section 151, CPC shall have to be used with circumspection and care only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

(13) Taking the recourse of the provisions of Order 18 Rule 17 read with Section 151, CPC, the learned trial court, in the considered opinion of this court, has rightly denied to recall RW1 Dr. Paviter Kaur for the purpose of recording further cross-examination. That apart, it is settled proposition of law that the provisions of the Civil Procedure Code are not applicable in those proceedings where the Family Courts deal with a dispute relating to marriage and family affairs and for matters connected therewith between husband and wife in view of the reasons that the Family Courts have to adopt their own procedure for imparting justice.

(14) The marriage between the petitioner and the respondent took place on 30.3.2007. On 14.2.2008, the respondent gave birth to a baby boy at Civil Hospital, Bhatinda. The son is residing with the respondent. The petitioner filed a petition under section 13(1)(1a) of the Hindu Marriage Act, 1955 for grant of a decree of divorce on the ground of cruelty on 30.4.2010. He has raised various grounds in his petition to show the cruel conduct of the respondent wife, her father and her mother towards him, which need not be referred to herein, in

detail, since this court is dealing with the application under Section 151 CPC for sending Exhibits P-1/8, P- 1/9, P-1/10, P-1/11, P-1/12 and P-1/13 to the concerned CFSL with voice sample of the respondent, her father RW2 Mehar Singh and her mother Smt. Ranjit Kaur for voice comparison, expert opinion and evidence in rebuttal.

(15) A perusal of averments in the application shows that CDs produced on the record by the petitioner ultimately got damaged on account of development of scratches therein, wherein telephonic conversions between him and the respondent-wife, her father and her mother were recorded by the petitioner, by virtue of which the petitioner-husband wanted to prove the act of insufferable cruelty, frequent quarreling etc. on her and her family part, towards him and his family members from time to time.

(16) The conversation between husband and wife in daily routine, in the considered opinion of this court, cannot be made basis or can be considered for deciding the petition under section 13 of the Hindu Marriage Act, inasmuch as quarrel on trivial matters between them in our Society is a routine matter. More so, recording of conversation between the husband and wife and production of a CD thereof, would not be sufficient to ascertain as to under what circumstances, the conversation was recorded, what was the atmosphere and circumstances prevailing in the family at that moment, would be relevant to take into consideration the conversations recorded in the CD to extract the truth. The petitioner filed two revision petitions. After dismissal of the first petition for recalling of the respondent and also for putting the CD during cross-examination before the trial Judge, the petitioner cleverly moved another application, so as to leave no stone unturned and to get success by all means, though having no relevance.

(17) Earlier also, the application for amendment of the petition was dismissed by the trial court. He challenged the order before this court and thereafter in the Apex Court, which shows the conduct of the petitioner that in any circumstance, he does not accept any verdict or any order of the court against him. That apart, recording of conversation of the respondent, her father and her mother by the petitioner, also shows his temperament and tolerance power that he is not ready to listen anything against him. Further, he dragged the respondent for deposition in the witness box for four times.

(18) The respondent filed reply to the said application refuting all allegations levelled against her, contending that the present case is

pending since 29.4.2010. The petitioner had taken more than four and half years to lead his evidence and he has already produced evidence in affirmative. Even she has also closed her evidence. The alleged CDs were never played nor put to her or her father in cross-examination. The only question put to her was, as to whether she heard the copies of the CD's provided to her, which she affirmed, but denied to recognise the voices as these were not of the persons put to her. The petitioner did not make any such prayer at the time of conducting her cross-examination and her father Shri Mehar Singh. Her mother Ranjit Kaur was not examined as a witness and as such, there is no ground made out to compare their voice with the alleged CDs. She prayed for dismissal of the application.

(19) The learned trial court, vide order dated 11.2.2016 issued a specific direction to the petitioner that in cross-examination, any voice can be put to the witness, even if it was not produced on the file. The order dated 11.2.2016 passed by the trial court reads as follows:-

“Rejoinder filed by the petitioner. The application has been filed by the petitioner for allowing the petitioner to submit true and correct copy of CD which was earlier submitted on this file, but now due to some scratches, the same could not be played. The application has been opposed by the respondent. The learned counsel for the petitioner requested that she wants to put voice of RWs to them which was recorded in the CD. So, she may be allowed to place on file the copy of said CD original of which was produced on the file. I find that in cross-examination, any voice can be put to the witness even if it was not produced on the file. So, RW2 Mehar Singh be produced for the purpose of further cross-examination on 1.3.2016. However, if any objection shall be raised by the learned counsel for the respondent, then it shall be heard and decided at that time.”

(20) A perusal of order dated 11.2.2016 clearly spells out that the petitioner can put any voice to the witness even if it was not produced on the file. This liberty was given to the petitioner only for conducting further cross-examination of RW2 Mehar Singh. Therefore, the contention of the learned counsel for the petitioner that he may be allowed to produce a set of copies of the CDs on the record of the case for the reason that CDs on the record got damaged,

inasmuch as some scratches developed thereon and were not in playable condition. Despite this, the petitioner did not put the voice, allegedly, to be contained in the above said CDs, Ex.P-8 to Ex.P-13 to the respondent and her father in their cross-examination for the reasons best known to him and, therefore, he has now got no right to file the instant application for comparison of voices by producing expert in rebuttal. The contention of the learned counsel for the petitioner that the respondent was supplied with the copy of the original CD in the court, which she agreed, but stated in her reply to the application that it got misplaced, cannot at all be accepted, inasmuch as, the learned trial court passed a specific direction granting liberty to either of the parties to put any voice to the witness, even if it was not produced on the file.

(21) So far as the contention raised by learned counsel for the respondent that the alleged CDs are not admissible in evidence as the certificate required under Section 65-B of the Evidence Act, 1872 was not produced by the petitioner at the time of tendering the said CDs along with his affidavit in his examination in chief and now, at a later stage, he has no right to produce the certificate as envisaged under section 65-B of Act, is concerned, in the considered opinion of this court, an electronic record by way of secondary evidence shall not be admitted in evidence unless 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 documents, without which, the secondary evidence pertaining to that electronic record is inadmissible.

(22) Admittedly, the certificate, as required under section 65-B of the Indian Evidence Act 1872 was not placed on the record of the case at the time, when petitioner tendered CDs before the trial court. The plea of the petitioner that the certificate under Section 65-B of the Indian Evidence Act can be produced at a later stage has been dealt with by the learned trial court in detail giving sound reasoning therein. The findings recorded by the trial court in para 7 of its judgment reads as follows:-

“The applicant/petitioner has filed the present application for permission to send the exhibit P-1/8, P-1/9, P-1/10, P-1/11, P- 1/12 and P-1/13 to concerned CFSL with voice sample of the respondent, her father RW2 Mehar Singh and her mother Smt. Ranjit Kaur for voice comparison and to obtain expert opinion evidence in rebuttal. The said CD's were marked as

exhibit subject to certain objection when the petitioner/applicant tendered the same in evidence. Admittedly, the certification as provided under section 65-B of the Indian Evidence Act, 1872 has not been produced at the time of tendering the said CD's, though the learned counsel for the applicant/petitioner has made a faint attempt to argue that certificate under section 65-B of the Evidence can be produced at a later stage by relying upon the case law mentioned above, but the said rulings are not applicable to the facts of the present case, as in the said rulings, it is held that the court while exercising its discretionary powers under section 311 of the Code of Criminal procedure can permit the party to produce the certificate later on, but the case in hand pertains to Hindu Marriage Act and as per Section 21 of the Act, provisions of Code of Civil Procedure are applicable to the proceedings under the Act. Though under the Code of Civil Procedure, the court can also exercise inherent powers but, inherent powers under section 151 CPC can be exercised only when no other remedy is available according to existing provisions of law. In exercising of inherent powers court cannot override general principles of law. It can only be for securing the ends of justice or preventive abuses of the process of the court. By way of filing of present application, the petitioner/applicant sought to lead positive evidence in rebuttal which is not permissible under the Code of Civil procedure especially when a party has not led positive evidence in affirmative. In this regard reliance is placed on the authority of our own Hon'ble High Court in case *Manjit Kaur versus Surjit Singh, 2016(2) RCR (Civil), 686 (P&H)* wherein, it is held as under:

“Civil Procedure Code, 1908, Order 18 Rule 3- Additional Evidence- Permission for examination of expert in rebuttal evidence-Applicant did not examine any expert during his affirmative evidence for comparing signatures of testator on the will-There was no such rebuttal issue- Trial Court wrongly granted such permission-such a procedure is not only unknown to law but also against the mandate of Order 18, Rule 13-order of trial court held not sustainable and set aside”

(23) Now dealing with the admissibility of documentary

evidence by way of electronic record under the Indian Evidence Act, 1908, this court is of the considered view that it can only be proved only in accordance with the procedure prescribed under section 65-B of the Act. This point has been dealt with by the learned trial court in comprehensive manner and giving reasoning therein. For facility of reference, para 8 of the judgment of the trial court is relevant, which reads as under:-

“Apart from that it is also a settled law that any documentary evidence by way of electronic record under the Evidence Act can be proved only in accordance with the procedure prescribed under section 65-B of the Act which deals with admissibility of the electronic record. It is well established that question of resort to Section 45-A of Evidence Act (which provides for the opinion of examiner of electronic evidence) can be made only if, the electronic evidence is duly produced in terms of section 65-B of the Evidence Act at the time of tendering such electronic documents in evidence. In this regard, reliance is placed on judgment of our own Hon'ble High Court in case *Rakesh Jain vs. State of Haryana 2016 (2) RCR (Crl.), 870 (P&H)*, wherein, it is held as under:

“Evidence Act, 1872 Sections 65 B and 45-A Electronic Evidence- Proof of-only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A (opinion of examiner of electronic evidence).

1. 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.
2. In the instant case petitioner failed to produce the certificate along with the CD, audio recording in terms of Section 65-B of the Evidence Act Therefore, the question of resort to Section 45-A is irrelevant.
3. Oral admission as to the contents of electronic record are not relevant unless the genuineness of the electronic record is proved.”

(24) Keeping in view the findings recorded by the learned trial court with respect to admissibility of electronic record by way of

documentary evidence under section 65-B of the Indian Evidence Act, this court finds support from para 9 of the judgment of the Hon'ble Supreme court in *Shafhi Mohammad versus The State of Himachal Pradesh*, Special Leave Petition (Crl.) No.2302 of 2017 SLP(Crl.)No.9431/2011 and SLP (Crl.) Nos.9631-9634/2012, which reads as under:-

“9. We may, however, also refer to judgment of this court in *Anvar P.V. v. P.K. Basheer and Ors.* Manu/SC /0834/2014 : (2014) 10 SCC 473, delivered by a Three Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of section 65 B of the Evidence Act was required to be followed and a contrary view taken in *Navjot Singh* (supra) that secondary evidence of electronic record could be covered under sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per section 65B of the Evidence Act.”

(25) Since Section 65-B of the Evidence Act deals with the secondary evidence which is required to be followed, learned counsel for the petitioner has not been able to prove on the record that the certificate as required under section 65-B of the Indian Evidence Act, 1872 along with the affidavit in his examination in chief was produced at the time of tendering of CDs on the record of the case, therefore, the alleged CDs are not admissible in evidence. Hence, the petitioner cannot be allowed to re- open the same matter again under the garb of the present applications. The plea of the learned counsel for the petitioner that the certificate can be produced at a later stage, in the considered opinion of this court, cannot be held to be tenable, keeping in view the fact that the same was required to be placed at the time of tendering the electronic documents in evidence. The finding recorded by the learned trial court can not at all be said to be perverse or erroneous that may warrant interference by this court.

(26) In view of the foregoing reasons, both the Civil Revision bearing nos.650 and 658 of 2017 filed by the petitioner, being without any merit, fail and are dismissed.

Atul Bhatia