

A.F.R.**Reserved on 08.05.2023.****Delivered on 25.07.2023.****Court No. - 65****Case :-** APPLICATION U/S 482 No. - 14477 of 2023**Applicant :-** Mohd. Azam Khan**Opposite Party :-** State of U.P. and Another**Counsel for Applicant :-** Syed Imran Ibrahim**Counsel for Opposite Party :-** G.A.**Hon'ble Rajeev Misra,J.**

1. This application under Section 482 Cr.P.C. has been filed by accused-applicant Mohd. Azam Khan challenging the order dated 29.10.2022, passed by Additional Sessions Judge/Special Judge (M.P./MLA), Court No.4, Rampur in Special Sessions Trial No.37 of 2018 (State Vs. Mohd. Azam Khan), under Sections 504 and 171(G) IPC, Section 125 Representation of Peoples Act, 1951 and Section 3(1)(X) SC/ST Act, police station Tanda, district Rampur, whereby a direction has been issued to the accused-applicant to give his voice sample so that the Director F.S.L., Moradabad could examine the voice of the audio cassette to ascertain as to whether the inflammatory/derogatory speech recorded in the audio cassette is that of the accused-applicant and the order dated 22.11.2022, whereby the application (paper no.43 kha) filed by the accused-applicant for recall of order dated 29.10.2022 has been rejected.

2. Heard Mr. Syed Imran Ibrahim, the learned counsel for applicant, Mr. Mahesh Chandra Chaturvedi, the learned Additional Advocate General assisted by Mr. Manu Raj Singh,

the learned A.G.A.-I and Mr. Prashant Kumar, the learned A.G.A. for State.

3. Record shows that in respect of an incident, which is alleged to have occurred on 07.08.2007, a delayed F.I.R. dated 08.08.2007 was lodged by first informant-opposite party-2, namely, Dheeraj Kumar Sheel and was registered as Case Crime No.959 of 2007, under Sections 504 and 171(G) IPC, Section 125 Representation of Peoples Act, 1951 and Section 3(1)(X) SC/ST Act, police station Tanda, district Rampur. In the aforesaid F.I.R., applicant has been nominated as solitary named accused.

4. The gravamen of the allegations made in the F.I.R. is to the effect that on 07.08.2007, accused-applicant, who was member of Legislative Assembly and a leader of Samajwadi Party, made a speech, which was derogatory, inasmuch as, the words used were offensive in nature as they caused hurt to the sentiments of a particular community and further the said act of the accused-applicant violated the model code of conduct, issued by the Election Commission.

5. After aforementioned F.I.R. was lodged, Investigating Officer proceeded with statutory investigation of concerned Case Crime number in terms of Chapter XII Cr.P.C. He examined the first informant and other witnesses by recording their statements under Section 161 Cr.P.C.. During course of investigation, statement of Gulab Rai-Naib Tehsildar was also recorded by the Investigating Officer on 21.07.2007. This witness in his statement before the Investigating Officer has stated that the entire event which occurred on 07.08.2007 including the inflammatory/derogatory speech of the accused was recorded and the CD cassette of the same was handed

over to the Station Officer of the concerned police station, namely, M.P. Singh.

6. Record further shows that second statement of aforesaid witness, namely, Gulab Rai was recorded on 11.01.2008, in which he has stated that the services of one Sanjay, who runs a studio by the name of Pooja Cassette Centre, were taken to record the entire event. This witness further stated that the entire event was video-graphed by the proprietor of aforementioned firm, namely, Sanjay and the video cassette of the same was submitted by him on 09.08.2007 to the police officials.

7. Subsequently, the statement of Sanjay, proprietor of Pooja Cassette Centre, was recorded. This witness in his statement has categorically stated that the event which occurred on 07.08.2007 was recorded by him on the instructions of Gulab Rai, Naib Tehsildar. After recording was completed, the video cassette was handed over by him to Gulab Rai, Naib Tehsildar.

8. After the aforesaid video cassette was received by the Investigating Officer, it appears that an application was filed before court below seeking permission of the court to have voice sample of the accused-applicant so that the veracity of the recovered cassette as to whether the voice recorded therein is that of accused or not could be examined by the Forensic Science Laboratory (here-in-after shall be referred as 'F.S.L.'). It appears that no orders were passed on this application. The said fact derives its sustenance from the recital contained at page 107 of the paper book. Record further shows that the recovered cassette was sent to F.S.L., Lucknow but was returned with the observation that same be sent to

F.S.L., Chandigarh. It is apposite to mention here that thereafter the same was sent to F.S.L., Chandigarh for examination but the same was again returned with an objection that it would not be possible to examine the veracity of the cassette without proper documentation/form.

9. From the above conspectus, it is thus clear that during the course of investigation, no forensic report was submitted with regard to the disputed cassette.

10. Ultimately, the Investigating Officer submitted charge-sheet dated 02.03.2009. However, the disputed cassette was not made part of the charge-sheet but remained part of the case-diary, as the recovery memo of the same had been duly prepared. Resultantly, the disputed cassette was deposited in the Malkhana of the concerned police station.

11. After aforementioned charge-sheet dated 02.03.2009 was submitted, the court concerned took cognizance upon same and simultaneously summoned the applicant. Resultantly, Special Sessions Trial no.37 of 2018 came to be registered in the court of Additional Sessions Judge/Special Judge (M.P./M.L.A), Court No.4, Rampur. The concerned Sessions Judge framed charges against the accused-applicant.

12. The accused-applicant denied the charges so framed and pleaded innocence. Consequently, the trial procedure commenced.

13. The prosecution in discharge of its burden to bring home the charges so framed against the accused-applicant, adduced the following witnesses.

PW-1- Subhash Chandra is an independent witness, but he did not support the prosecution story and was, therefore, declared hostile.

PW-2- Sudesh is also an independent witness, but he also did not support the prosecution story and was, therefore, declared hostile.

PW-3- Banti is an independent witness, but he has not supported the prosecution story and was, therefore, declared hostile.

PW-4- Naresh is an independent witness, but he did not support the prosecution story and was, therefore, declared hostile.

PW-5- Sanjay, who is the owner of firm, namely, Pooja Cassette Centre was thereafter examined. This witness in his deposition categorically stated that on the direction of Mr. Gulab Rai, the Naib-Tehsildar, he recorded the entire event which took place on 07.08.2007 and thereafter handed over the video cassette to Mr. Gulab Rai, Naib Tehsildar.

PW-7- Mahendra Pal Singh was posted as Station House Officer of Tanda police station, district Rampur at the relevant point of time. This witness in his deposition has clearly stated that a public meeting was organized by the Samajwadi Party on 07.08.2007, in which accused-applicant Mohd. Azam Khan made a speech. This witness further stated that in the said meeting an inflammatory/derogatory speech was made by accused-applicant which caused hurt to the sentiments of Balmiki community. However, no immediate action was taken against the applicant in order to prevent public peace and tranquillity. Subsequently, one Dheeraj Kumar Sheel submitted

a written report dated 08.08.2007 on the basis of which Case Crime No.959 of 2007, under Sections 504 and 171(G) IPC, Section 125 Representation of Peoples Act, 1951 and Section 3(1)(X) SC/ST Act, police station Tanda, district Rampur came to be registered. According to this witness, on 09.08.2007, Gulab Rai-Naib Tehsildar handed over the CD and cassette to him which was handed over to the Head Muharir, namely, Viresh and an entry with regard to the same was also made at serial number 42 of the General Diary of police station concerned. During the course of deposition of this witness, the audio/video cassette handed over by Gulab Rai-Naib Tehsildar was produced before the Court in a sealed cover.

PW-8- Om Prakash was posted as Circle Officer, Swar, district Rampur at the relevant point of time. He had investigated the concerned Case Crime number. This witness proved the map prepared by him and accordingly the same was marked as Ext-Ka-3. This witness in his deposition has stated that thereafter he recorded the statement of various witnesses including that of Gulab Rai-Naib Tehsildar. He has supported the recovery memo of the Cassette handed over by Gulab Rai-Naib Tehsildar. Thereafter, this witness recorded the statement of Sanjay, proprietor of Pooja Cassette Centre. He further stated that thereafter an application was made before court below to grant permission for sending the Cassette to F.S.L., Agra. Subsequently, the same was sent to F.S.L., Lucknow but was returned with the observation that the same be sent to F.S.L., Chandigarh. Subsequent to above, the Cassette was sent to F.S.L., Chandigarh but was returned with certain objections. Thereafter, an application was moved before the court concerned to direct the accused-applicant Mohd.

Azam Khan to give his voice sample so that the veracity of the voice recorded in the cassette could be ascertained i.e. the same is of accused-applicant or not. At this stage, this witness was transferred.

PW-9- Gulab Rai was working as Naib Tehsildar, Tanda, district Rampur at the relevant point of time. This witness deposed before the court concerned that he had hired the services of a private person to record the entire incident/event which was to be held on 07.08.2007 (public meeting of Samajwadi Party). The person who had conducted recording of the entire event has subsequently handed over the video cassette to him, which was deposited by this witness at the concerned police station. Proceedings with regard to acceptance of the same at the concerned police station were done in front of this witness and in proof thereof signatures of this witness were obtained.

14. After having gone through paper no.6-A with regard to the recovery memo of the CD and Cassette, this witness proved the same. He further deposed that it contains his signatures also. Accordingly, the recovery memo stood proved and was marked as Ext.Ka-4. After looking at the cassette, this witness deposed that it is the same cassette which was given by him. Accordingly, the cassette was marked as Material Ext.Ka-1, the plastic bag was marked as Material Ext.Ka-2 and the white cloth was marked as Material Ext.Ka-3. Thereafter, this witness has proved the fact that information with regard to the speech made in public meeting held on 07.08.2007 was given to the District Magistrate, Rampur. He has further deposed that Dheeraj Kumar Sheel, who belongs to scheduled caste community, was present at the time of occurrence and

was sitting in a corner. This witness was also examined by the court. As certain questions were put to this witness under Section 165 of Indian Evidence Act, therefore, the provisions of Section 165 of the Evidence Act which have a material bearing on the controversy in hand as well as the questions put to the accused by the court need to be noted. Accordingly, the same are reproduced herein-under :-

“165. Judge’s power to put questions or order production.—The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the Judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.”

“Question asked by court to P.W-9 Gulab Rai U/s 165 Evidence Act.

Question-01- The audio cassette placed by prosecution as Exhibit-1 is played in open court in

presence of counsel for both sides and PW-9 Gulab Rai has been asked if he identifies the voice ? The recorded statement was made by whom & when ?

Ans- Yes, it is the speech of accused Azam Khan. He had delivered it in Tanda in year 2007.

Question-02- Do you know difference between audio & video recording ?

Ans- I do not know difference between audio & video recording.

Question-03- At the spot, audio recording was done or video recording ?

Ans- At the spot, only voice was recorded.

Opportunity given to accused for cross-examination."

15. **PW-10-** Gyananjay Singh who was working as Circle Officer, Swar, district Rampur at the relevant point of time was also examined. Various questions were put to this witness by the Court under Section 165 Indian Evidence Act. Accordingly, the same are extracted herein-under :-

"U/s 165 Evidence Act - के तहत कोर्ट द्वारा पूछे गये प्रश्न-

प्रश्न – क्या कैसेट वस्तु प्रदर्श-1 आपने आरोप पत्र के साथ न्यायालय में दाखिल किया था?

Ans- जी नहीं।

प्रश्न- आप इस के I.O. थे आपने प्रश्नगत कैसेट आरोप पत्र के साथ क्यों नहीं दाखिल की?

Ans- प्रश्नगत कैसेट का परीक्षण पूर्ण नहीं हो पाया था जिसके लिए माननीय न्यायालय से पूर्व विवेचक द्वारा दिनांक 24.01.2008 को अनुमति प्राप्त कर के दिनांक- 15.02.2008, को एफ०एस०एल० लखनऊ भेजवाया गया था। लखनऊ में परीक्षण न होने कारण वहां से चण्डीगढ़ भेजा गया था। वहां से कतिपय विन्दुओं पर आपत्ति के साथ वापस भेज दी गयी।

प्रश्न- आरोप पत्र दाखिल करते समय वक्त क्या आपके द्वारा बतौर I.O. सप्लीमेंटरी इन्वेस्टीगेशन की सूचना न्यायालय को दी गयी या सप्लीमेंटरी इन्वेस्टीगेशन की अनुमति मांगी गयी?

Ans - सूचना नहीं दी गयी।

प्रश्न- आरोप पत्र दाखिल करते समय प्रश्नगत कैसेट कहा पर थी ?

उत्तर – प्रश्नगत कैसेट थाने के माल खाने में दाखिल थी।

प्रश्न- प्रश्नगत कैसेट एक डॉक्यूमेंट्री इविडेन्स थी, आरोप पत्र के साथ दाखिल न कर के मालखाने में किसके आदेश से और क्यों दाखिल की गयी थी?

उत्तर- क्योंकि, कैसेट की जांच पूर्ण नहीं हो सकी थी जांच के लिए माननीय न्यायालय के समक्ष श्री आजम खां के आवाज का नमूना लिया जाना था। जो पूर्ण नहीं हो पाया था। बाद परीक्षण माननीय न्यायालय में दाखिल किया जाता, विवेचना में विलम्ब हो रहा था पर्याप्त साक्ष्य पाते हुए विवेचना में आरोप पत्र प्रेषित की गयी थी।

प्रश्न – एफ०एस०एल० को जब कैसेट भेजा गया था, Voice सैंपल के साथ भेजा गया था कि, बिना Voice सैंपल के भेजा गया था?

उत्तर- बिना Voice सैंपल के भेजा गया था।

प्रश्न - बतौर I.O. क्या आपने कथित कैसेट को यह जानने के लिए कि, आरोपित अपराध गठित होता है और आरोप पत्र में लगी धाराएं आकृष्ट होती हैं, कभी सुना ? या कभी सुनने की कोशिश की ?

उत्तर – कथित कैसेट पूर्व विवेचक द्वारा माननीय न्यायालय के समक्ष वास्ते परीक्षण शील बन्द किया गया था इसलिए मेरे द्वारा कथित कैसेट को नहीं खोला गया।

Cross by defence counsel (Advo. Nasir Sultan) on same day

यह कहना सही है कि, मैं ऑडियो कैसेट व वीडियो कैसेट का अन्तर जानता हूँ। दौरान विवेचना मुझे जानकारी हुई कि, इस मामले से सम्बन्धित वीडियो कैसेट बनाई गयी थी। मेरे संज्ञान में नहीं है कि, केवल आडियो कैसेट बनाई गयी कि नहीं। यह बात सही है कि, केस डायरी में केवल वीडियो कैसेट की बात का उल्लेख है। केस डायरी के पर्चा नं०-9 में सी डी (काम्पैक्ट डिस्क) का उल्लेख है। कैसेट अलग चीज होती है। और काम्पैक्ट डिस्क अलग चीज होती है।

प्रश्न – क्या संजय के द्वारा वीडियो ग्राफी की गयी?

उत्तर – जी हाँ।

वीडियो ग्राफी दिनांक 7.08.2007 को की गयी। जो कैसेट 07.08.2007 को तैयार की गयी उसे मयसील मोहर दिनांक

9.08.2007 को सायं 17.10 पर पहली बार माल खाने में दाखिल की गयी जो कि, नायब तहसीलदार द्वारा थाने पर दाखिल की गयी।

प्रश्न – 7.08.2007, 08.08.2007 तथा 9.08.2007 तक वीडियो ग्राफी की कैसेट किसके पास रही?

उत्तर – वह केवल कैसेट थी इसे पूर्व विवेचक ही स्पष्ट कर सकते हैं।

प्रश्न – केस डायरी में क्या इस बात का उल्लेख है कि, उक्त कैसेट 3 दिन यानि (7.08.2007, 08.08.2007 तथा 9.08.2007 के 17.10) तक किस के पास रही?

उत्तर – कैसेट 09.08.2007 को थाने पर दाखिल किया गया। केस डायरी में इसका हवाला नहीं इस अवधि में किसके पास रही।

यह बात सही है कि, वीडियो ग्राफर संजय फर्द प्रदर्श क-04 का न तो गवाह है न उसके हस्ता० है। यह बात सही है प्रदर्श क-04 में संजय की मौजूदगी का कोई उल्लेख नहीं है।

सील करते समय नमूना मोहर बनाया गया था नमूना मोहर पत्रावली पर उपलब्ध नहीं है। बाद में कहा कि, माल खाने में माल के साथ होगा।

सी०डी० कैसेट का उल्लेख है काम्पैक्ट डिस्क का उल्लेख नहीं है।

प्रश्न – पूर्व विवेचक द्वारा दौरान विवेचना आवाज का नमूना लेने हेतु न्यायालय में प्रार्थना पत्र प्रेषित करना बताया है उस प्रार्थना पत्र का आपको ज्ञान है अगर है तो उस पत्र का हस्त क्या हुआ और कब उसका निस्तारण हुआ?

उत्तर – इन सब बातों का कोई उल्लेख केस डायरी में नहीं है केवल प्रार्थना पत्र देने का उल्लेख है।

प्रश्न – आपके कथनानुसार सेम्पल लेने का प्रार्थना पत्र न्यायालय में प्रस्तुत करने का उल्लेख है। विवेचक होने के नाते आपने उस प्रार्थना पत्र की कोई जानकारी प्राप्त की ? और कोई उसकी पैरवी की ?

उत्तर – इस सम्बंध में मौखिक रूप से थानाध्यक्ष को निर्देश दिया गया था। किन्तु इस सम्बंध में कोई प्रगति नहीं हुई।

प्रश्न – क्या आपने संजय का नायब तहसीलदार गुलाब राय तथा थानाध्यक्ष का 161 Cr.P.C. का बयान अंकित किया।

उत्तर – मेरे द्वारा नहीं किया गया था पूर्व विवेचक द्वारा लिया गया था।

यह कहना गलत है कि, मुझे बहुजन समाज पार्टी की सरकार की प्रभाव में पूर्व ग्रसत होकर आरोप पत्र प्रस्तुत किया हो।

यह कहना भी गलत है कि, नियमानुसार विवेचना न की गयी हो।”

16. After the statement-in-chief/examination-in-chief of aforementioned witnesses were recorded, the court concerned

i.e. Additional Sessions Judge/Special Judge (M.P./MLA), Court No.4, Rampur passed an order dated 29.10.2022 observing therein that since there is no F.S.L. report to prove, that the voice recorded in the audio cassette is that of the accused, therefore, he directed that for just and fair adjudication of the case, the accused shall give his voice sample and the same be sent along with the audio cassette to F.S.L., Moradabad to give its report regarding the same i.e. whether the voice recorded in the disputed cassette is that of accused or not. This order is on record at page 111 of the paper book as Annexure-14.

17. Feeling aggrieved by the said order dated 29.10.2022 referred to above, the accused-applicant filed an application dated 31.10.2022 (Paper No.-43 kha) before court below praying therein that the order dated 29.10.2022 referred to above be recalled. The court below by means of order dated 22.11.2022 rejected the above-mentioned application (paper no.43 kha).

18. Thus, feeling aggrieved by the above orders dated 29.10.2022 and 22.11.2022 passed by court below, accused-applicant has approached this Court by means of present application under Section 482 Cr.P.C..

19. Mr. Syed Imran Ibrahim, the learned counsel for applicant contends that the orders impugned in present application are not only illegal but without jurisdiction. Consequently, the same are liable to be quashed by this Court.

20. According to the learned counsel for applicant, PW-7 Mahendra Pal Singh, PW-8 Om Prakash, PW-9 Gulab Rai, PW-10 Gyananjay Singh in their depositions before the court below have neither been categorical nor consistent with regard to the nature of the disputed cassette, as to whether the same is an

audio cassette or a video cassette. The court below without deciding the issue as to what is the nature of the disputed cassette has proceeded to pass the impugned order dated 29.10.2022 directing the applicant to give his voice sample. He, therefore, submits that court below has not exercised its jurisdiction diligently but in a casual and cavalier fashion. As such, the order dated 29.10.2022 is manifestly illegal, as the same is not the outcome of diligent exercise of jurisdiction by court below.

21. It is next contended by the learned counsel for applicant that from the evidence that has emerged on the record of above mentioned Sessions Trial, it is apparent that recording of the event, which occurred on 07.08.2007, was done/ videographed by one Sanjay, owner of Pooja Cassette Centre, Rampur. The said recording was done by the proprietor of aforesaid firm on the request of Gulab Rai-Naib Tehsildar in his private capacity. There is nothing on record to show that directions were issued to aforesaid Naib Tehsildar by any senior Administrative/Police Officer to get the event recorded which was to take place on 07.08.2007. He, therefore, submits that the disputed cassette is the outcome of an extra judicial act performed by the Naib Tehsildar, namely, Gulab Rai and therefore, the same is neither credible nor worthy of reliance. It is thus urged that the disputed cassette, therefore, cannot be taken into consideration by court below for deciding the guilt of the accuse-applicant.

22. Disputing the impugned order dated 29.10.2022, the learned counsel for applicant contends that the disputed cassette was handed over initially by Sanjay, the owner of Pooja Cassette Centre to Gulab Rai. However, at the time of

handing over of the disputed cassette, the requisite certificate was not given, which is mandatorily required to be submitted in terms of Section 65-B of the Indian Evidence Act. In the absence of the requisite certificate, the disputed cassette could not have been accepted by the police on the record of the concerned case crime number. However, in ignorance of above, the same was accepted and made part of the case-diary, inasmuch as, the recovery memo of the same was prepared, which is duly exhibited from the case-diary. Since the disputed cassette was accepted without the requisite certificate, the same is not worthy of consideration and therefore wholly irrelevant for deciding the guilt of the accused-applicant, if any, on the basis of same.

23. With reference to the material on record, the learned counsel for applicant further submits that even when the disputed cassette was placed before the court below along with the recovery memo of the same, the court below without ascertaining the fact as to whether there is a requisite certificate regarding the same in terms of Section 65-B of the Indian Evidence Act or not on the record proceeded to admit the same in evidence and, accordingly, the recovery memo, disputed cassette, plastic bag and white cloth were admitted in evidence and marked as Material exhibits ka-1, ka-2, ka-3, and ka-4. He further submits that even if the disputed cassette has been admitted in evidence as material exhibit, yet the same cannot be relied upon by the court below against the applicant in the absence of requisite certificate required to be submitted along with an electronic piece of evidence in terms of Section 65-B of the Indian Evidence Act.

24. To buttress his submissions, the learned counsel for applicant has relied upon the three Judges Bench judgement of Apex Court in **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others (2020) 7 SCC 1**. Reference has been made to paragraphs 52 to 59 of the said report. For ready reference the same are extracted herein-under :-

"52. We may hasten to add that Section 65-B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the Cr.P.C..

53. In a recent judgment, a Division Bench of this Court in State of Karnataka v. M.R. Hiremath [State of Karnataka v. M.R. Hiremath, (2019) 7 SCC 515 :

(2019) 3 SCC (Cri) 109 : (2019) 2 SCC (L&S) 380] , after referring to Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] held : (M.R. Hiremath case [State of Karnataka v. M.R. Hiremath, (2019) 7 SCC 515 : (2019) 3 SCC (Cri) 109 : (2019) 2 SCC (L&S) 380] , SCC p. 523, paras 16-17)

"16. The same view has been reiterated by a two-Judge Bench of this Court in Union of India v. Ravindra V. Desai [Union of India v. Ravindra V. Desai, (2018) 16 SCC 273 : (2020) 1 SCC (Cri) 669 : (2019) 1 SCC (L&S) 225] . The Court emphasised that non-production of a certificate under Section 65-B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in Sonu v. State of Haryana [Sonu v. State of Haryana, (2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663] , in which it was held : (Sonu case [Sonu v. State of Haryana, (2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663] , SCC p. 584, para 32)

'32. ... The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the court could have given the prosecution an opportunity to rectify the deficiency.'

17. Having regard to the above principle of law, the High Court [M.R. Hiremath v. State, 2017 SCC OnLine Kar 4970] erred in coming to the conclusion that the failure to produce a certificate under Section 65-B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise."

(emphasis in original)

54. It is pertinent to recollect that the stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet. When a criminal court summons the accused to stand trial, copies of all documents which are entered in the charge-sheet/final report have to be given to the accused. Section 207 Cr.P.C., which reads ["207. Supply to the accused of copy of police report and other documents.—In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of costs, a copy of each of the following—(i) the police report;(ii) the first information report recorded under Section 154;(iii) the statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of Section 173;(iv) the confessions and statements, if any, recorded under Section 164;(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173:Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in court."] as follows, is mandatory. Therefore, the electronic evidence i.e. the computer output, has to be furnished at the latest before the trial begins. The reason is not far to seek; this gives the accused a fair chance to prepare and defend the charges levelled against him during the trial. The general principle in criminal proceedings therefore, is to supply to the accused all documents that the prosecution seeks to rely upon before the commencement of the trial. The requirement of such full disclosure is an extremely

valuable right and an essential feature of the right to a fair trial as it enables the accused to prepare for the trial before its commencement.

55. In a criminal trial, it is assumed that the investigation is completed and the prosecution has, as such, concretised its case against an accused before commencement of the trial. It is further settled law that the prosecution ought not to be allowed to fill up any lacunae during a trial. As recognised by this Court in CBI v. R.S. Pai [CBI v. R.S. Pai, (2002) 5 SCC 82 : 2002 SCC (Cri) 950] , the only exception to this general rule is if the prosecution had "mistakenly" not filed a document, the said document can be allowed to be placed on record. The Court held as follows : (SCC p. 85, para 7)

"7. From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court."

This extract is taken from Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1 : (2020) 4 SCC (Civ) 1 : (2020) 3 SCC (Cri) 1 : (2020) 2 SCC (L&S) 587 : 2020 SCC OnLine SC 571 at page 52

56. Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the

court, in examining any application by the prosecution under Sections 91 or 311 Cr.P.C. or Section 165 of the Evidence Act. Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law.

57. The High Court of Rajasthan in *Paras Jain v. State of Rajasthan* [*Paras Jain v. State of Rajasthan*, 2015 SCC OnLine Raj 8331] , decided a preliminary objection that was raised on the applicability of Section 65-B to the facts of the case.

57.1. The preliminary objection raised was framed as follows : (SCC OnLine Raj para 3)

"3. (i) Whether transcriptions of conversations and for that matter CDs of the same filed along with the charge-sheet are not admissible in evidence even at this stage of the proceedings as certificate as required under Section 65-B of the Evidence Act was not obtained at the time of procurement of said CDs from the service provider concerned and it was not produced along with charge-sheet in the prescribed form and such certificate cannot be filed subsequently."

57.2. After referring to *Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , the High Court held : (*Paras Jain case* [*Paras Jain v. State of Rajasthan*, 2015 SCC OnLine Raj 8331] , SCC OnLine Raj paras 15-23)

"15. Although, it has been observed by the Hon'ble Supreme Court that the requisite certificate must accompany the electronic record pertaining to which a statement is sought to be given in evidence when the same

is produced in evidence, but in my view it does not mean that it must be produced along with the charge-sheet and if it is not produced along with the charge-sheet, doors of the court are completely shut and it can not be produced subsequently in any circumstance. Section 65-B of the Evidence Act deals with admissibility of secondary evidence in the form of electronic record and the procedure to be followed and the requirements be fulfilled before such an evidence can be held to be admissible in evidence and not with the stage at which such a certificate is to be produced before the court. One of the principal issues arising for consideration in the above case before the Hon'ble Court was the nature and manner of admission of electronic records.

16. From the facts of the above case, it is revealed that the election of the respondent to the Legislative Assembly of the State of Kerala was challenged by the appellant Shri Anwar P.V. by way of an election petition before the High Court of Kerala and it was dismissed vide order dated 16-11-2011 by the High Court and that order was challenged by the appellant before the Hon'ble Supreme Court. It appears that the election was challenged on the ground of corrupt practices committed by the respondent and in support thereof some CDs were produced along with the election petition, but even during the course of trial certificate as required under Section 65-B of the Evidence Act was not produced and the question of admissibility of the CDs as secondary evidence in the form of electronic record in absence of requisite certificate was considered and it was held that such electronic record is not admissible in evidence in absence of the certificate. It is clear from the facts of the case that the question of stage at which such electronic record is to be produced was not before the Hon'ble Court.

17. It is to be noted that it has been clarified by the Hon'ble Court that observations made by it are in respect of secondary evidence of

electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act and 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.

18. To consider the issue raised on behalf of the petitioners in a proper manner, I pose a question to me whether an evidence and more particularly evidence in the form of a document not produced along with the charge-sheet cannot be produced subsequently in any circumstances. My answer to the question is in negative and in my opinion such evidence can be produced subsequently also as it is well-settled legal position that the goal of a criminal trial is to discover the truth and to achieve that goal, the best possible evidence is to be brought on record.

19. Relevant portion of sub-section (1) of Section 91 Cr.P.C. provides that whenever any court considers that the production of any document is necessary or desirable for the purposes of any trial under the Code by or before such court, such court may issue a summons to the person in whose possession or power such document is believed to be, requiring him to attend and produce it or to produce it, at the time and place stated in the summons. Thus, a wide discretion has been conferred on the court enabling it during the course of trial to issue summons to a person in whose possession or power a document is believed to be requiring him to produce before it, if the court considers that the production of such document is necessary or desirable for the purposes of such trial. Such power can be exercised by the court at any stage of the proceedings before judgment is delivered and the court must exercise the power if the production of such document is necessary or desirable for the proper decision in the case. It cannot be disputed that such summons can also be issued to the

complainant/informer/victim of the case on whose instance the FIR was registered. In my considered view, when under this provision court has been empowered to issue summons for the production of document, there can be no bar for the court to permit a document to be taken on record if it is already before it and the court finds that it is necessary for the proper disposal of the case irrespective of the fact that it was not filed along with the charge-sheet. I am of the further view that it is the duty of the court to take all steps necessary for the production of such a document before it.

20. As per Section 311 Cr.P.C., any court may, at any stage of any trial under the Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall or re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. Under this provision also wide discretion has been conferred upon the court to exercise its power and paramount consideration is just decision of the case. In my opinion, under this provision it is permissible for the court even to order production of a document before it if it is essential for the just decision of the case.

21. As per Section 173(8) Cr.P.C. carrying out a further investigation and collection of additional evidence even after filing of charge-sheet is a statutory right of the police and for that prior permission of the Magistrate is not required. If during the course of such further investigation additional evidence, either oral or documentary, is collected by the police, the same can be produced before the court in the form of supplementary charge-sheet. The prime consideration for further investigation and collection of additional evidence is to arrive at the truth and to do real and substantial justice. The material collected

during further investigation cannot be rejected only because it has been filed at the stage of the trial.

22. As per Section 231 Cr.P.C., the prosecution is entitled to produce any person as a witness even though such person is not named in the charge-sheet.

23. When legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured along with the electronic record and not produced in the court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable. It is also pertinent to note that certificate was produced along with the charge-sheet but it was not in a proper form but during the course of hearing of these petitioners, it has been produced on the prescribed form."

58. In Kundan Singh [Kundan Singh v. State, 2015 SCC OnLine Del 13647 : (2016) 1 DLT (Cri) 144] , a Division Bench of the Delhi High Court held : (SCC OnLine Del para 50)

"50. Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] partly overruled the earlier decision of the Supreme Court on the procedure to prove electronic record(s) in Navjot Sandhu [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , holding that Section 65-B is a specific provision relating to the admissibility of electronic record(s) and, therefore, production of a certificate under Section 65-B(4) is mandatory. Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri)

24 : (2015) 1 SCC (L&S) 108] does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under Section 311 Cr.P.C. or, at the appellate stage under Section 391 Cr.P.C.. Evidence Act is a procedural law and in view of the pronouncement in Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] partly overruling Navjot Sandhu [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , the prosecution may be entitled to invoke the aforementioned provisions, when justified and required. Of course, it is open to the court/presiding officer at that time to ascertain and verify whether the responsible officer could issue the said certificate and meet the requirements of Section 65-B."

59. Subject to the caveat laid down in paras 52 and 56 above, the law laid down by these two High Courts has our concurrence. So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence."

25. In the light of above-noted observations made by the Apex Court, the learned counsel for applicant contends that it is now well settled that an electronic piece of evidence cannot be relied upon in the absence of the certificate which is mandatorily required under Section 65-B of the Evidence Act. As the disputed cassette is not accompanied by the requisite certificate therefore the same cannot be relied upon in evidence. Consequently, no directions could have been issued by court below to the applicant to give his voice sample for securing the F.S.L. report regarding the said cassette.

26. It is lastly contended by the learned counsel for applicant that the issue as to at what stage the police can ask or obtain

the voice sample of an accused is no longer res-integra and is now set at rest. In this regard, reference is made to the judgement of Apex Court in **Ritesh Sinha Vs. State of U.P. and another (2019) 8 SCC 1.**

27. Learned counsel for applicant has referred to paragraph 27 of the aforesaid report which reads as under :-

“In the light of the above discussions, we unhesitatingly take the view that until explicit provisions are engrafted in the Code of Criminal Procedure by Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime. Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in this Court under Article 142 of the Constitution of India. We order accordingly and consequently dispose of the appeals in terms of the above”

28. With reference to above (i.e. paragraph 27 of the said judgement), the learned counsel for applicant contends that the Apex Court has declared in unequivocal terms that the voice sample of an accused can be obtained by the Investigating Officer only during the course of investigation and not subsequently. Since in the present case, the police report in terms of Section 173(2) Cr.P.C. i.e. charge-sheet has already been submitted against the applicant therefore, the order impugned dated 29.10.2022 passed by the court below being in clear violation of above judgement of the Apex Court is, therefore, un-sustainable and thus liable to be quashed by this Court.

29. The court below has committed a grave error in rejecting the application filed by the accused-applicant for recall of the order dated 29.10.2022, vide order dated 22.11.2022. He then

concluded by submitting that the orders impugned in the present application are thus liable to be quashed by this Court and the application be allowed.

30. Per contra, Mr. Mahesh Chandra Chaturvedi, the learned Additional Advocate General has opposed the present application. He submits that the order impugned dated 29.10.2022 is perfectly just and legal. The court below has not committed any illegality in passing the order dated 29.10.2022 or in rejecting the recall application filed by the applicant seeking recall of the order dated 29.10.2022, vide order dated 22.11.2022. He further submits that procedure is an aid to justice and therefore the rigours of procedure cannot be construed in such a manner so as to prevent the court from discovering the truth. When the order impugned is examined in the light of above, it cannot be said that any prejudice has been caused to the applicant on account of the impugned order, inasmuch as nothing has been decided against applicant, but only a direction has been issued to applicant to give his voice sample.

31. According to the learned Additional Advocate General, so far as challenge to the order dated 22.11.2022 passed by court below, whereby the recall application filed by accused-applicant seeking recall of the order dated 29.10.2022 is concerned, no illegality has been committed by the court below in rejecting the recall application. Attention of the Court was invited to the provisions contained in Section 362 Cr.P.C. and on basis thereof he contends that since there is a specific bar under the Code i.e. Criminal Procedure Code restraining the criminal court from reviewing or recalling an order passed by them, thus a court of criminal jurisdiction has no jurisdiction to recall an order. In

view of above, the recall application filed by accused-applicant seeking recall of order dated 29.10.2022 was itself misconceived and, therefore, the court below has not committed any illegality in rejecting the said application.

32. With regard to the merits of the order dated 29.10.2022 passed by the court below, learned Additional Advocate General contends that it is explicit from record that an application for obtaining the voice sample of accused-applicant was filed by the Investigating Officer before court below at the first opportunity i.e. during the pendency of investigation. However, the said application remained pending as the court concerned did not pass any order on the same i.e. either allowing it or rejecting it. As such, it cannot be said that there was any lackadaisical approach on the part of the Investigating Officer in seeking the order of the court to direct the accused to give his voice sample. It is well settled that an act of court prejudices none. He thus contends that if the application filed by the prosecution seeking a direction from court to direct the accused to give his voice sample was not decided by the court below during the pendency of investigation then merely on the basis of the observations of the Supreme Court as noted above it cannot be contended that court below has no jurisdiction to grant such permission at subsequent stage. Aforesaid circumstance as has emerged in this case has not been dealt with by the court in its judgement referred to above. There is no such injunction issued by the Supreme Court that even if the application was filed at the investigation stage but if it was not allowed before the submission of the police report, the court cannot allow the same subsequently. Apart from above, it is explicit from the record that the disputed cassette was sent

to the F.S.L. Agra and F.S.L. Chandigarh during the pendency of investigation but the same was not examined for one reason or the other. He, therefore, submits that in view of above, it cannot be said that the Investigating Officer was not diligent about the sensitivity of the matter and that appropriate steps were not undertaken by him at the appropriate time to ascertain the guilt of the accused-applicant in the crime in question, on the basis of the disputed cassette.

33. In the submission of the learned Additional Advocate General when the order impugned is examined in the light of above, it is apparent that court below in an honest and pragmatic manner, has directed that voice sample of accused-applicant be obtained to ascertain the guilt of the accused-applicant (regarding the inflammatory/derogatory speech) in the crime in question. Moreover, the order impugned does not by itself convict the accused-applicant but the consequences of the same shall be an aid to decide the guilt of the accused-applicant in the crime in question, if any.

34. The learned Additional Advocate General further contends that there is no time limit for obtaining the requisite certificate in respect of an electronic evidence submitted before the court concerned and relied upon by either of the parties. In this regard, he has referred to the judgement of the Apex Court in **Arjun Panditrao Khotkar** (supra) relied upon by the learned counsel for applicant and has referred to paragraph 59 of the report to buttress his submission. For ready reference, the same is again reproduced herein-under :-

"59. Subject to the caveat laid down in paras 52 and 56 above, the law laid down by these two High Courts has our concurrence. So long as the hearing in a trial is not yet over, the requisite certificate can

be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence.”

35. On the above premise, he submits that non submission of requisite certificate by the person from whose custody the electronic evidence has come before the court will only be an irregularity and not an illegality and, therefore, capable of being rectified. The requisite certificate can be submitted before court concerned any time but before the delivery of judgement.

36. With reference to the observations made by the Apex Court in paragraph 27 of the judgement in **Ritesh Sinha (supra)**, the learned Additional Advocate General has placed before court the said judgement in extenso. He has invited the attention of the Court to the questions, which fell for consideration before the Court. For ready reference, both the questions which fell for consideration before the Court, are being reproduced herein-below :-

“5. Two principal questions arose for determination of the appeal which have been set out in the order of Ranjana Prakash Desai, J. dated 7-12-2012 in the following terms :(Ritesh Sinha case2, SCC p.364, para 3)

3.1. Whether Article 20(3) of the Constitution of India, which protects a person accused of an offence from being compelled to be a witness against himself, extends to protecting such an accused from being compelled to give his voice sample during the course of investigation into an offence ?

3.2. Assuming that there is no violation of Article 20(3) of the Constitution of India, whether in the absence of any provision in the Code, can a Magistrate authorise the investigating agency to record the voice sample of the person accused of an offence ?”

37. With reference to question no.2 which emerged for adjudication before the Bench, learned Additional Advocate General contends that in the present case the court itself has directed the accused to give his voice sample. The matter is not under investigation, inasmuch as, the police report in terms of Section 173 (2) Cr.P.C. has already been submitted. However, in the present case, the ratio laid down by the Apex Court as noted above shall not be an embargo on the power of the court to direct the accused to give his voice sample as the application regarding same was already filed by the Investigating Officer during the course of investigation but the said application remained pending. This fact is clearly discernable from the recital contained at page 107 of the paper book. Therefore, the order impugned cannot be dislodged on that ground. There is no fault on the part of prosecution. Moreover, an act of court prejudices none.

38. At this juncture, the learned Additional Advocate General has again reiterated his earlier submissions (which have been noted in the preceding paragraphs of this judgement from where the submissions of the learned Additional Advocate General have been taken note of). He, therefore, contends that since the order passed by the court is with reference to Section 165 of Indian Evidence Act and there being no fetters on the power of the court to obtain such material which shall be helpful in discovering the truth, the order impugned cannot be

said to be illegal or the outcome of casual exercise of jurisdiction in terms of Section 165 Indian Evidence Act.

39. Attention of the Court was then invited by the learned Additional Advocate General to the provisions contained in Section 293 Cr.P.C. and on basis thereof he contends that since F.S.L. report is exempted from any proof in evidence, therefore, the present application has been engineered only to defeat the cause of justice and hence the same is liable to be rejected.

40. The learned A.G.A. has then submitted that the direction issued by the court is for the benefit of the accused himself. Taking a hypothetical view that in case the applicant does not give his voice sample and therefore no F.S.L. report can be obtained to ascertain that the voice recorded in the cassette is that of accused, then an adverse inference can be drawn against applicant. In this regard, he has referred to the judgement of the Supreme Court in **Sharda Vs. Dharmpal (2003) 4 SCC 493.**

41. The learned Additional Advocate General has also referred to Section 54-A Cr.P.C. which has been introduced in the year 2005. Expanding the scope of the term "Identification" occurring in this Section, he submits that the same can also be construed to mean identification of the voice of accused also. When the order impugned is examined in the light of above, no irregularity can be attached to the same.

42. On the above conspectus, the learned Additional Advocate General submits that present application is liable to be dismissed.

43. It is lastly urged by the learned A.G.A. that the accused-applicant himself has agreed to give his voice sample. In this regard, reference is made to paragraphs 28 and 41 of the affidavit filed in support of the present application. For ready reference, the same are reproduced herein-under :-

"28. That it is submitted that the applicant is not shying away from giving his voice sample, however, he only insists that the proper procedure of the same be followed.

41. That in the light of the facts and circumstances mentioned herein above, it is once again submitted here that the applicant is ready to give his voice sample; however his only request is that the authenticity of the CD be first looked into, and then once the F.S.L. submits a report in that regard, he may be asked to give his voice sample."

44. Having heard the learned counsel for applicant, the learned Additional Advocate General assisted by the learned A.G.A. for State, and upon perusal of record, this Court finds that the issue as to what is the nature of the disputed cassette is a question of fact and will not have material bearing on the merits of the order impugned dated 29.10.2022. Once the original cassette was itself placed before the court and has been admitted into evidence as Material exhibit Ka-1, therefore, the correct description of the same can be taken note of by the court in its judgement. Merely on the ground that court below without deciding the nature of the disputed cassette i.e. whether it is an audio cassette or a video cassette had directed the accused-applicant to give his voice sample, the order impugned dated 29.10.2022 cannot be said to be illegal causing prejudice to the applicant and therefore liable to be set aside. This Court, therefore, finds that the aforesaid

submission raised by the learned counsel for applicant has been made only to be rejected. Accordingly, the court declines to delve into the said submission.

45. With regard to the power of the court to direct an accused to give his voice sample with reference to the judgement of the Apex Court in the case of **Ritesh Sinha (supra)**, this Court finds that the controversy involved in aforesaid case before the Apex Court was in respect of a matter which was at the stage of investigation as is exhibited from question no.2 reproduced herein-above. It is an un-disputed fact that in the present case, a police report in terms of Section 173 (2) Cr.P.C. i.e charge-sheet has already been submitted. Thereafter, charges were framed against accused-applicant. Resultantly the trial has commenced.

46. However, the judgement of the Supreme Court in the case of **Ritesh Sinha (supra)** relied upon by the learned counsel for applicant is not attracted in the present case. As per the said judgement, a Magistrate has been conferred with the jurisdiction to direct an accused to give his voice sample for the purpose of investigation. However, the Court finds that in the present case, an application was duly filed by the prosecution before court below during the course of investigation to direct the accused to give his voice sample. However, the said application remained pending as no order was passed thereon. The judgement relied upon by the learned counsel for applicant does not deal with such an eventuality. No fault can be attributed to the prosecution either, nor the prosecution can be made to suffer on that account. Even otherwise, it is well settled that an act of court prejudices none. Simply because no order was passed by court concerned

on the application filed by the prosecution during the course of investigation cannot be construed to mean that the court has no jurisdiction to direct the accused-applicant to give his voice sample subsequently. In view of above, the impugned order dated 29.10.2022 is thus not liable to be interfered with.

47. Having dealt with the submissions urged by the learned counsel for applicant and the objection raised by the learned A.G.A. and the material on record, this court does not find any good ground to set aside the orders impugned.

48. However, the Court finds that the only objection raised by the applicant which is tenable in law is that only when there is a requisite certificate of the competent person only then the disputed cassette is worthy of consideration and can be relied upon. Since the objection raised by the applicant relates to a procedural irregularity coupled with the fact that the judgement of the Apex Court in **Arjun Panditrao Khotkar (supra)** does not prohibit from obtaining the requisite certificate i.e. the one required in terms of Section 65-B of the Evidence Act at the subsequent stage of trial but before the delivery of judgement, the objection raised by the learned counsel for applicant is liable to be sustained.

49. Considering the above this application is disposed of finally with a direction that court below shall obtain a certificate from Sanjay (proprietor of Pooja Cassette Centre) who had recorded the entire event which occurred on 07.08.2007 and thereafter handed over the cassette to Mr. Gulab Rai-Naib Tehsildar in terms of Section 65-B of the Indian Evidence Act. After such certificate has been submitted before court by Sanjay, the applicant shall give his voice sample as already directed vide order dated 29.10.2022.

48. With the aforesaid direction, this application is finally **disposed of.**

Order Date :- 25.07.2023
Rks.