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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 1st September, 2023*

\+ **REVIEW PETITION NO. 230/2023, IA NOS.16702/2023 & 16703/2023**
in
CS (OS) 622/2002

MAJOR GENERAL M.S.AHLUWALIA
...Plaintiff/Respondent No1
Through: Mr. Chetan Anand, Advocate with Mr. Akash Srivastava and Ms. Tejaswini, Advocates.

versus

TEHELKA.COM AND ORS.
... Defendant/Review Petitioner
Through: Mr. Meet Malhotra, Sr. Advocate with Mr. Vivesh B. Saharya and Mr. Akshat Agarwal, Advocates for review petitioner/D-1 to D-4.
Ms. Petal Chandhok, Advocate for D-5 to D-7/Zee Telefilms.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T *(oral)*

1. A Review Application under Section 114 read with Order XLVII Rule 1 and Section 151 Code of Civil Procedure, 1908 (*hereinafter referred to as* “CPC”) has been filed on behalf of the petitioners (defendant Nos 1 & 3 in the Suit who are *hereinafter referred to as* "applicant Nos. 1 & 2" respectively) for review of the Judgement dated 21.03.2023 in aforesaid suit

filed on behalf of respondent No.1 (plaintiff in the Suit) wherein damages in the sum of Rs.2 Crores have been granted on account of defamation.

2. **It is submitted that the present review application** has been filed in the light of the judgment in the case of *Shankar K. Mandal vs. State of Bihar*, (2003) 9 SCC 519 which places credence on the decision of the Hon'ble Supreme Court in the case of *Daman Singh vs. State of Punjab* (1985) 2 SCC 670 (Constitution Bench), wherein it was observed that in case a *party thinks that the happenings in Court have been wrongly recorded in the judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record. That is the only way to have the record corrected*. A reference has also been made to *BCCI vs. Netaji Cricket Club,* AIR 2005 SC 592, wherein the Apex Court had observed that a mistake or error by counsel or the court would be a valid ground for seeking review to correct such error or mistake. The present review application has, therefore, been filed for correction of the error/ mistake which according to the petitioner has occurred in the impugned judgment.

3. The applicants have further submitted that admittedly, the plaintiff did not tender in evidence or place on record the video clip of operation WESTEND as aired on National Television by defendant No.7/ Zee Telefilms. Further, respondent No. 1/ plaintiff did not prove the copies of the transcript of the operation WESTEND on which the Suit was based. Therefore, the Suit in the first instance should have been dismissed for failure to prove or certify the Broadcast and the transcript downloaded from a computer in accordance with Section 65B of the Indian Evidence Act,

1872. For this reference has been made to _State of Haryana vs. Naveen Kumar @ Monu and Anr_, 2018 SCC OnLine P&H 3248 & _Ravinder Singh vs. State of Punjab_, 2022 (7) SCALE 242. In _Ravinder Singh_ (supra), all the earlier judgments pertaining on section 65B Indian Evidence Act, 1872 have been discussed in detail and it has been concluded that oral evidence in place of a Certificate under Section 65B of the Indian Evidence Act would not suffice as the requirements delineated in Section 65B(4) of the said Act are mandatory.

4. Moreover, the applicants had placed strong reliance on _Indian Potash Ltd. vs. Media Contents and Communication Service_ (2019) SCC OnLine Del 11991 which elaborately and extensively dealt with what would amount to civil defamation and what acts and actions would not so amount to defamation; however, no notice of this judgment has been taken by this Court.

5. The applicants have further asserted that the plaintiff had in principle agreed to take the money but did not do so as is apparent from the testimony of Mathew Samuel (defendant No.4 in the Suit) before the Commission of Inquiry. This clearly shows that nothing factually incorrect was stated in the Transcript and that the very same Transcript was the basis of successful prosecution of a number accused by the CBI and also was the basis of Army Court of Inquiry proceedings against the serving Generals of the Indian Army. Further, all the witnesses of respondent No. 1 had asserted that respondent No. 1 was allegedly defamed on account of the Television broadcast and not in light of what was written in the Transcript of the

undercover sting operation. It is therefore, stated that the judgment suffers from an error which needs to be corrected by way of Review.

6. **Learned counsel for respondent No.1** who appeared on advance Notice, seriously refuted the claims of the applicants and asserted that all the aspects which have been agitated by way of Review, in fact question the judgment on merits. The admissibility of the Transcripts in the absence of Certificate under Section 65B of the Indian Evidence Act, 1872 has been specifically dealt with in the judgment. There is no error apparent on the face of record or a mistake which is amenable to correction under Order 47 Rule 1 of CPC. The application is claimed to be without any merit and is liable to be dismissed.

7. **Submissions heard**.

8. The **first aspect** for consideration is whether this Review Application is maintainable on the grounds agitated in the present application. The law relating to the grounds on which a review can be entertained is defined in **Order 47 Rule 1 CPC** which are as under :

> *"**Application for review of judgment** – (1) Any person considering himself aggrieved –*
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> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
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> *(b) by a decree or order from which no appeal is allowed, or*
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> *(c) by a decision on a reference from a Court of Small Causes,*
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> *and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or Order made,*

> *or on account of some mistake or <u>error apparent on the face of the record</u> of for any other sufficient reason, desires to obtain a review of the decree passed or Order made against him, may apply for a review of judgment to the Court which passed the decree or made the Order."*

9. The Hon'ble Supreme Court in the case of <u>*Shankar K. Mandal*</u> (supra) after referring to the observations of Constitution Bench in <u>*Daman Singh*</u> (supra) had observed as under :

> *"If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record. That is the only way to have the record corrected."*

10. It is quite evident that the scope of review is confined to the errors or mistakes which are essentially factual in nature pertaining to what had transpired in the matter before the Court. It neither deals with the observations made in the judgment nor does it provide for the correction in the observations made on the merits of the case. Since the Review in the present case is premised on the admissibility of the Transcripts, an aspect which has already been addressed in the Judgement, the claim of the applicants that the Review has been filed only for correction of facts, is not tenable.

11. Be that as it may, the grounds on which the review has been sought may be considered. It is claimed in the Review Application that the entire case of the respondent No.1 was based on the Transcripts the authenticity of which was never disputed and had been a basis of successful prosecution by the CBI of number of accused and was also a basis of Army proceedings

against the serving Generals. The plaintiff and the witnesses examined by him had claimed that the plaintiff was allegedly defamed on account of Television broadcast and not on the basis of Transcript of undercover Operation. It is asserted that while vide the impugned Judgment the Suit against the Broadcaster had been dismissed, it has been allowed against the producers of Undercover Operation, which is erroneous on the face of record.

12. The perusal of the record shows that the respondent No1/plaintiff had claimed relief against two sets of defendants; one was against the applicants who had conducted the Undercover Operation and the second set was Zee Telefilms and others who had broadcasted the Video Tapes of the sting operation. It is pertinent to note that the authenticity of the sting operation or of the conversations recorded of respondent No. 1, was not ever under challenge. Considering that respondent No.1 failed to produce any evidence of broadcast of CDs or any other evidence against the broadcasters, the suit has been dismissed against them.

13. Further, respondent No.1 had never questioned or denied the interview with Samuel Mathew who was defendant No.4 in the Suit. The claim was that the "Transcripts" which were prepared on the basis of recorded interview in the CDs contained certain "Editorial Remarks" which were patently false and defamatory in nature.

14. In this regard, the first aspect which clearly emerged from the testimony of DW1/applicant No.2 was that the "Editorial Comments" were written by Applicant No.2 as his inference from the conversation of the Respondent No.1 with Mathew Samuel (defendant No.4 in the Suit) and the

same were not a part of the conversation recorded in the CD. These "Editorial Remarks" were not a part of electronic record i.e. the CD in the present case, and therefore, cannot be termed as an "Electronic Record" which is defined under Section 2(1)(t) of the Information Technology Act, 2000 as "*data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche*".

15. It is also pertinent to mention that the entire Transcript along with the Editorial remarks were not electronically generated through any computer software. Rather, they were the Transcripts that were admittedly typed/ prepared by DW1/applicant No.2 which were obtained from the Enquiry Commission where they were submitted, as stated by the respondent No.1. It is necessary to clear the air that Section 65B of the Indian Evidence Act, 1872 only contemplates a printed version or a copy of the electronic record that is stored or recorded in a computer to be a document, which shall also be construed as "Electronic Evidence". The "Editorial Comments" were manually written by applicant No. 2 and is not a software or computer generated document and the mandate under Section 65B does not get attracted in the facts of this case. Section 3 of the Indian Evidence Act, 1872 defines a document as under :

> *"–"**Document**" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter."*

16. In terms of this definition it can be easily held that Editorial Remarks were not based on any computer printout and in fact was a 'document'.

17. The other aspect was the admissibility and proof of this document.

18. In this regard it may be observed that when this document Ex.PW1/A was tendered by the plaintiff/ respondent No. 1 during the evidence, an objection was taken by the applicants on the ground that the said document was not a certified copy of the original Transcript. However, majority of the dialogues from the Transcript and the Editorial Comments had been admitted and reproduced by defendant No.1 to 4, two of whom are the applicants in the present case, in their Written Statement. This admission in pleadings is further corroborated with the admission of DW1/applicant No. 2 in his cross examination.

19. In this context, though the Transcript is a photocopy obtained from the Enquiry Commission, its contents have been admitted under Section 65(b) read with Section 58 of the Indian Evidence Act, 1872 which essentially provide that when there is a admission of the contents of a document in the pleadings, no question of proving the document by primary or secondary evidence arises. In fact, in such cases of admission, there is no requirement on a party relying on a document to even produce it.

20. In the case of *R. VE. Venkatachala Gounder vs Arulmigu Visweswara Swami & VP Temple & Anr*, (2003) 8 SCC 752, the Apex Court had explained how and in what manner the objection has to be taken to the exhibiting of the document. It explained that there may be two situations which may arise while exhibiting a document. The first situation relates to the "*mode of proof*" alleging it to be irregular or insufficient. In such a case where only the manner of proving a document is in question, the same may be over looked or ignored in case the document itself is not disputed. It is only in the second category of cases where the admissibility of the document

itself is in question that there can be no waiver of manner of proving the document. This can be best understood by an example where a Will, even though admitted, cannot be held admissible unless it is proved as provided under law i.e. by examination of at least one attesting witness. However, where a photocopy is sought to be tendered, it relates only to the mode of proof and the same can be waived or not objected to by the other party. In such circumstances where only mode of proof is in question, the Court may look into a document, if no objection has been taken by the party.

21. Considering that the applicants themselves had relied on the "Editorial remarks" in the Transcripts not only in their Written Statement, but had also admitted the same when applicant No. 2 was confronted and cross examined on the "Editorial remarks" in extenso, the requirement of *mode of proof* of the Transcript as described in *R. VE. Venkatachala* (supra) has been done away with. Therefore, though an objection was taken to these Transcripts at the time they were tendered in evidence by the respondent No. 1, the same were disregarded.

22. *Thus,* in the present case, since the "Editorial remarks" as contained in the Transcript were not an electronic record as it did not have its genesis in any electronic or computer device, it will not be an electronic record and thus did not require a Certificate under Section 65(B) of the Indian Evidence Act, which is a mandatory requirement for proving an Electronic Record. As it was only a "document" as defined under the Indian Evidence Act, the minute its authenticity was not questioned or objected to by the applicants, it became admissible and the same could be relied upon by the Court.

23. At this juncture, it is observed that the mention of Ex.PW1/D, which was a Printout obtained from the website of Tehelka, in paragraph 96 of the impugned Judgement may have prompted the present application as the said Exhibit was not accompanied with a Certificate under Section 65B of the Indian Evidence Act, 1872. Albeit there is a reference to Ex.PW1/D, the document that was been the basis of the Judgment was only Mark-A/PW1/A which was subsequently admitted by applicant No.1/ Anirudh Behl (DW1) in his cross-examination and not Ex PW1/D. The entire evidence, therefore, was around a document which was not an electronically generated one. It may also be mentioned here that the admission of DW1/applicant No. 2 that the Transcript containing the “Editorial remarks” was also available on the website of Tehelka establishes the element of publication.

24. The contentions raised by the applicants are therefore, completely without any merit. The judgments referred to by the applicants namely *State of* Haryana (supra) & *Ravinder Singh* (supra), undoubtedly define the law for proving the electronic evidence which is well established, but are essentially not applicable to the “Editorial Remarks” to the Transcript which became the basis of defamation against the respondent No.1/ plaintiff.

25. The applicants have further agitated that the Sting Operation was genuine and these very recordings became a basis of prosecution by CBI against many Officers and action by the Army. Again, this argument does not aid the case of the applicants in so much as there is no denial to the Sting Operation or the conversations that were recorded. They may have resulted in prosecution/ action against many Officers, but the fact remains that in the present case, respondent No. 1/plaintiff was exonerated by the Army Court

of Enquiry and was only awarded with *'Severe displeasure'* on account of his conduct which was found to be unbecoming of an Army Officer and not because of acceptance of any money as was implied in the "Editorial Comments". This aspect also finds mention in the impugned Judgment. As already observed, the entire case of the respondent No.1 did not rest on the authenticity of the sting operation, but only on the "Editorial Comments" inserted by defendant No.3/ applicant No.2 to the Transcript of recording prepared thereafter. There is no error apparent on the face of record nor has the applicants been able to highlight any error or mistake which can be corrected within the ambit of review.

26. The learned Counsel on behalf of the applicants had further agitated that though they had relied upon the judgment of *Indian Potash Ltd.* (supra), the same has not been discussed in the impugned judgment. The Coordinate Bench of this Court in *Indian Potash Ltd.* (supra) had made a reference was made to *Romesh Thappar vs. State of Madras* AIR 1950 SC 124, *Brij Bhushan vs. State of Delhi* AIR 1950 SC 129 and *Sakal Papers (P) Ltd. vs. The Union of India* AIR 1962 SC 305, wherein it was held that "*the conscience of the community and exercises the power to keep alive and vital the higher values and goals towards which our society imperfectly strives*".

27. The Coordinate Bench further observed that defamation law is not to be used to gag, silence, suppress and subjugate press and the media. A reference was also made to the case of *Subramanian Swamy vs. Union of India* (2016) 7 SCC 221, wherein it was observed that "*Right to free speech was held to be not meaning that a citizen can defame others. Protection of reputation was also held to be a human and fundamental right, serving a*

social interest. To constitute the offence of defamation, it was held that there must not only be an imputation but it must have been made with the intention of causing harm or having reason to believe that such imputation will harm the reputation of the person about whom it is made".

28. Though, this judgment itself does not find mention in the impugned Judgment, the principle narrated therein has been discussed and covered in paragraph 114 and 115 of the impugned judgment. It has been observed that the publication would be defamatory if not made in "*good faith for the cause of public good*". It has also been noted that a "fair comment" cannot justify a statement which is untrue. The principles enunciated in *Indian Potash Ltd.* (supra) have been fully examined and answered in the impugned judgment. In fact, the aforesaid judgments as mentioned in *Indian Potash Ltd*. (supra) are in congruity with the observations made in the impugned Judgment as it does not define any proposition of law which is contrary to the observations and conclusions made in the impugned judgment.

29. The review application is without merit and is hereby dismissed.

30. The pending applications also stand dismissed.

NEENA BANSAL KRISHNA, J

SEPTEMBER 1, 2023
Va/Ek