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**(2019) 04 MP CK 0035**

**In the Madhya Pradesh High Court**

**Case No : Criminal Revision No. 1152 Of 2019**

Babu Khan S/O Edoo Khan Banarasi

APPELLANT

Vs

State Of Madhya Pradesh

RESPONDENT

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**Date of Decision : 02-04-2019**

**Acts Referred:**

Code Of Criminal Procedure, 1973 — Section 397, 401  
Indian Penal Code, 1860 — Section 342, 376B  
Evidence Act, 1872 — Section 59, 63, 65A, 65B, 65B(2)

**Citation : (2019) 04 MP CK 0035**

**Hon'ble Judges : S.K. Awasthi, J**

**Bench : Single Bench**

**Advocate : Ashish Gupta, Vikas Yadav**

**Final Decision : Allowed**

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## **Judgement**

1. The petitioner has preferred the present criminal revision under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 against order dated 19.02.2019 passed by Additional Sessions Judge, Khategaon, District Dewas (MP) in Sessions Trial No.69/2017 whereby an application filed by the petitioner seeking direction to the trial Court for conducting forensic examination of Compact Disc (CD) filed by the petitioner in his defence, has been rejected.
2. The petitioner is facing charge of Sections 376-B and 342 of the Indian Penal Code, 1860 before the Additional Sessions Judge, Khategaon, District Dewas (MP).
3. During the trial, the petitioner filed CD containing photographs of the petitioner and the prosecutrix and other material regarding their relationship. The petitioner wish to prove this CD in his defence. Therefore, he moved an application before the trial Court with a request that the said CD be sent to Forensic Science Laboratory for forensic examination so that it may be clarified that no tampering or editing has been done with the CD. However, the said application was rejected by the trial Court vide impugned order dated 19.02.2019, which is

subject matter of challenge before this Court.

4. Learned counsel for the petitioner has submitted that the prosecutrix was having love affair with the petitioner and they talk each other on mobile phone and messages passed through Whatsapp. There are several photographs in which they were together. The petitioner wish to prove this electronic record in his defence; and before doing this, it is required that the said CD should be sent to the FSL for forensic examination, so that it may be verified that no tam-pering or editing has been done in the said electronic record.

5. Learned Public Prosecutor for the respondent / State of Madhya Pradesh has supported the impugned order and prays for rejection of the petition.

6. I have heard the learned counsel for the parties and perused the record.

7. Before advertng to the controversy of the matter, it is required to go through the provision of Section 65-B of the Indian Evidence Act, 1872: -

"65B. Admissibility of electronic records.-

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:-

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for

the purposes of any activities regularly carried on over that period as mentioned in clause

(a) of sub-section (2) was regularly performed by computers, whether-

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,-

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,-

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by

means of any appropriate equipment.

Explanation.-For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

8. From perusal of the aforesaid provision, it is clear that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be also a document and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

9. It is settled law that any electronic evidence by way of electronic record under the Indian Evidence Act, 1872, in view of Sections 59 and 65-A can be proof only in accordance with the procedure prescribed under Section 65-B of the Indian Evidence Act, 1872. Section 65-B deals with the admissibility of the electronic record. The purpose of this provision is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Indian Evidence Act, 1872 any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under Sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B (2). Following are the specified conditions under Section 65-B (2) of the Evidence Act: -

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

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

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

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

10. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read

with Section 65 of the Indian Evidence Act shall yield to the same. Special law will always prevail over the general law. It appears, that the trial Court omitted to take note of Section 59 and 65-A while dealing with the admissibility of electronic record. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

11. However, from the perusal of the impugned order, it does not appear that the petitioner has filed a certificate as per Section 65-B of the Indian Evidence Act, 1872 along with electronic record. If the petitioner files such a certificate, then CD should be sent to the Forensic Science Laboratory to verify the authenticity of the same. Therefore, the present criminal revision deserves to be allowed and the impugned order deserves to be quashed.

12. Accordingly, Criminal Revision No.1152/2019 is allowed and impugned order dated 19.02.2019 passed in Sessions Trial No.69/2017 by the Additional Sessions Judge, Khategaon, District Dewas (MP) is hereby quashed; and it is directed that the same be reconsidered and decided afresh, considering the provisions of Section 65-B of the Indian Evidence Act, 1872, so that the petitioner can produce his document (s) / record in his defence.