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Andhra High Court

Rayala M. Bhuvanewari vs Nagaphanender Rayala on 20 December, 2007

Equivalent citations: AIR 2008 AP 98, 2008 (2) ALD 311, 2008 (1) ALT 613

Author: B Nazki

Bench: B Nazki

ORDER

Bilal Nazki, J.

1. After this revision was entertained, this Court, on 20.7.2007, passed an order requesting Shri Vilas Afzalpurkar, Senior Advocate to be Amicus Curiae as an important question of law was involved and this Court would like to keep on record the valuable assistance provided by the learned Senior Counsel while hearing arguments in this case.

2. The petitioner is respondent in I.A.No.66 of 2006 in O.P.No.833 of 2003 pending before the Family Court at Hyderabad. The petitioner therein filed O.P. seeking a decree of divorce against the respondent-wife. During the hearing of the O.P., he moved an application under Section 45 of the Evidence Act. In this application, he submitted that in order to substantiate his case, he should be allowed to produce a hard disc relating to the conversation of his wife, recorded by him in United States of America (USA). He also contended that the respondent had admitted the voice while she was being cross-examined with respect to Ex.P-18, but she had denied some portions of the conversation. He stated that he wishes to send the hard disc to an expert to ascertain whether there was any alteration, insertion or addition. It appears that the recording was already produced in the Court by Ex.P-18 and the respondent was cross-examined. Because of her denial of certain portions, the petitioner wanted it to be sent to an expert. It was contested by the petitioner herein.

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The Family Court directed that admitted voice of the respondent be recorded by an expert on his equipment in the presence of both parties and then the admitted voice of the respondent be compared with the disputed portion of the conversation in Ex.P-18. The wife is aggrieved of this order and, therefore, the revision has been filed.

3. Certain astonishing facts have come to light during the hearing of this revision. One of the facts relate to the purity of the relation between the husband and wife. Without the knowledge of the wife, the husband was recording her conversation on telephone which she was making with her friends and parents in India. If the husband is of such a nature and has no faith in the wife even about her conversations to her parents, then the institution of marriage itself becomes redundant. There should be some trust between husband and wife and in any case, in my view, the right of privacy of the wife is infringed by her husband by recording her conversation on telephone to others and if such a right is violated, which is fundamental, can such husband, who has resorted to illegal means, which are not only unconstitutional, but also immoral, later on, rely on the evidence gathered by him by such means. Clearly, it must not be permitted.

4. The learned Amicus Curiae has also submitted that nobody, whether a member of the family or otherwise, has any authority to tap the telephones of any other person, particularly without his knowledge. He submits that it is not only violative of Article 21 of the Constitution of India, but is also violative of the Telegraph Act. In this connection, he has submitted a judgment of the Supreme Court in [R.M. Malkani v. State of Maharashtra](#) . In para 30, the Court held:

30. ...Article 21 was invoked by submitting that the privacy of the appellant's conversation was invaded. Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Courts will tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods.

This was a case where police made tapping, but still the Supreme Court was of the view that Courts would not tolerate safeguards for the protection of the citizen to be imperilled.

5. In People's Union for [Civil Liberties v. Union of India](#) , the Supreme Court held in unambiguous terms that right to privacy was a part of the right to life and personal liberty enshrined under Article 21 of the Constitution and once a fact is established as a case constituting a right to privacy, Article 21 would be attracted and the said right cannot be curtailed, except according to the procedure established by law. In para 18, it is stated:

18. The right to privacy - by itself - has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or

has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.

6. In para 35, while considering the various enactments including Section 7 of the Telegraphs Act, the Supreme Court gave directions as to in what circumstances and under what conditions a telephone can be tapped. It gave nine directions. It may not be necessary to produce all those nine directions, but it categorically stated that an order of telephone tapping can only be passed by Home Secretary, Government of India or a Home Secretary of the State Government. It stated that in urgent cases, the power may be delegated to the officer of the Home Department not below the rank of Joint Secretary. Therefore, the husband does not derive any power whatsoever to record a telephonic conversation of his wife without her knowledge.

7. [In X v. Hospital](#) , the Supreme Court dealt with the right of privacy and in para 27 it stated:

27. Right of Privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political. As already discussed above, Doctor-patient relationship, though basically commercial, is professionally, a matter of confidence and, therefore, Doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the Right of Privacy which may sometimes lead to the clash of one person's right to be let alone" with another person's right to be informed.

In para 28, it also stated:

28. Disclosure of even true private facts has the tendency to disturb a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the Right of Privacy is an essential component of right to life envisaged by Article 21. The right however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

8. On the other hand, the counsel for the respondent submits that in [Sharda v. Dharmpal](#) , the Supreme Court even directed a party to divorce proceedings to undergo medical examination. This was a case where right of privacy was pleaded in case where the Court had ordered medical

examination by a spouse. It may become necessary in cases of matrimonial disputes where divorce is sought on grounds of impotency, schizophrenia or for some other disease to refer the party to a medical examination and the Supreme Court upheld such powers of the Courts on the ground that such a course would be necessary to be adopted for the purpose of reaching to a correct conclusion. But, at the same time the Supreme Court held that even if such an order was passed against a party, he cannot be forced to undergo the medical examination. The conclusions, which the Supreme Court drew were (1) that a matrimonial court has the power to undergo medical test; (2) passing of such an order by the Court was not a violation of personal liberty under Article 21; (3) the respondent can refuse to submit himself to medical examination and in such a case, the Court will be entitled to draw an adverse inference against him. Therefore, I do not think that this judgment will in any way help the respondent (husband) in the case.

9. Similarly, there is another judgment of a Single Judge of this Court reported in Padala Kaniki Reddy v. Padala Sridevi . It also deals with referring to medical examination of a party in a matrimonial matter on which there is a direct judgment of the Supreme Court which has been quoted hereinabove.

10. There is a judgment of another Single Judge of this Court in B. Vandana Kumari v. P. Praveen Kumar . It also relates to reference to medical experts for establishing the parentage of a child in a matrimonial dispute.

11. There is another judgment to which reference is made by a Single Judge of this Court reported in J. Thirupathaiah v. K. Subba Rao 1983 (1) ALT 438 : AIR 1983 A.P. 197. The High Court in this case did not consider the question in the light of Article 21 of the Constitution of India. The main question before the Court was whether there was a provision in law to admit evidence on tape. Secondly, the Court was concerned with the question that if a person was asked to record his voice, would it amount to testimonial compulsion of the witness in terms of Article 20(3) of the Constitution of India. Therefore, in my view, this judgment is not applicable to the facts of the present case.

12. Some compilation has also been produced before the Court relating to "Covertly Recording Telephone Conversations" compiled by Ralph Thomas. It gives a position that exists in the USA and it appears that there are laws in the USA, which regulate such issues. According to this compilation, the Federal Law makes it unlawful to record telephone conversations except in one party consent cases, which permit one party consent recording by State Law. According to the compilation, what that means is a person can record their own telephone conversations without the knowledge or consent of the other party in those States where one party consent is required. But, we have a case where there is not even consent of one party. The husband was recording the conversation of his wife with third parties. 12 of the States of the USA, according to this compilation, require all party consent and 38 States permit one party consent and the Federal Law requires that in conversations of personal nature, there cannot be any tapping or monitoring. The exception can be business

recordings. There is a note in this compilation, which starts with a question, "can a person record or tape a conversation of his or her spouse?" It also shows that a person who is party to the conversation, when the conversation is between spouses, can tape the conversation. But, a person cannot tape the conversation of a spouse while he or she is talking to other people, and more specifically to a paramour.

13. For all these reasons, I believe that the act of tapping itself by the husband of the conversation of his wife with others was illegal and it infringed the right of privacy of the wife. Therefore, these tapes, even if true, cannot be admissible in evidence. Hence, Ex.P-18 itself is not admissible in evidence and there is no question of forcing the wife to undergo a voice test and then ask the expert to compare the portions denied by her with her admitted voice.

In the result, the revision petition is allowed. No costs.