

CRR 2042 of 2019

**Central Bureau of Investigation
Vs.
Kunal Mukherjee & Ors.**

Mr. Anirban Mitra

...for the petitioner/CBI

Affidavit of service filed by the petitioner is taken on record.

Opposite parties are not represented.

Challenging the order dated 11th December, 2018 passed by the learned Special Judge, CBI court no. 2, Alipore in Special case no. 3 of 2015, the present application has been preferred. By the impugned order, learned court below came to a finding that the voice sample of the accused persons recorded during investigation without taking leave of the court is not admissible as evidence as it hits by Article 20(3) of the Constitution of India and also because said voice samples were recorded at the office of CBI instead of recording the same before a Magistrate and thereby barred by Section 24 to 26 of the Indian Evidence Act. In this context, court below relied upon the case of **Selvi & others Vs. State of Karnataka** and **Ritesh Sinha Vs. State of U.P. & others.**

The brief background of the present case as stated in the FIR that one Kunal Mukherjee was posted and functioning as Sr. Divisional Electrical Engineer (TRD), Eastern Railway, Sealdah Division during the period from May 2014 to August 2014. Being a public servant, he demanded and accepted illegal gratification

from different persons and agencies for showing them favour in the matter of forwarding bills and others.

In pursuant to the said complaint, one case was registered against said Kunal Mukherjee and others under Section 7,12, Section 13(2) read with Section 13(1) (d) of Prevention of Corruption Act, 1988 and Section 120B of the IPC and on completion of investigation charge-sheet has also been filed against accused persons.

Being aggrieved by the said order, Mr. Mitra, learned counsel for the petitioner submits that court below has erred in arriving at a decision of rejecting admissibility of voice sample of the opposite party during investigation, on incorrect application of law laid down in the cases of Ritesh Sinha (supra) & Selvi & Others (supra). Court below ignored the fact that the accused gave their voice sample voluntarily. The impugned order is also otherwise bad in law and is liable to be set aside.

In the case of **Ritesh Sinha Vs. State of Uttar Pradesh & Anr. (2019) 8 SCC 1**, it was held by the Apex court as follows:

“26. Would a judicial order compelling a person to give a sample of his voice violate the fundamental right to privacy under Article 20(3) of the Constitution, is the next question. The issue is interesting and debatable but not having been argued before us it will suffice to note that in view of the opinion rendered by this Court in Modern Dental College & Research Centre v. State of M.P. [Modern Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353 : 7 SCEC 1] , Gobind v. State of M.P. [Gobind v. State of M.P., (1975) 2 SCC 148 : 1975 SCC (Cri) 468] and the nine-Judge Bench of this Court in K.S. Puttaswamy (Privacy-9J.) v. Union of India [K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1] the fundamental right to privacy cannot be construed as absolute but must bow down to compelling public interest. We refrain from any further discussion and consider it appropriate not to record any further observation on an issue not specifically raised before us”

“27. 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.”

Thereafter in the case of **Pravinsinh Nrupatsinh Chauhan Vs. State of Gujarat reported in 2023 Livelaw (SC) 463**, Supreme court held that Magistrate has the power to order the collection of a voice sample for the purpose of investigation. The Court did not find any infirmity with the impugned judgment of the High Court as well as the special court ordering the accused to give his voice sample to facilitate the investigation of the crime.

Therefore, CBI ought to have made a prayer before the court below and for taking voice sample, they ought to have taken leave from the court below in this respect to facilitate investigation of the crime. Since admittedly no such leave was taken for recording voice sample before the court, I find that the order impugned passed by the trial court and his finding to that extent does not suffer from impropriety or perversity and therefore does not call for interference by this court.

I am informed that the case is pending for hearing of the discharge petition.

In such view of the matter, CRR 2042 of 2019 stands disposed of giving liberty to the petitioner to make prayer before the court below seeking further investigation of the matter and in the event of making such prayer by the petitioner, the court below will dispose of such application in accordance with law without being influenced by any observations made herein.

Urgent Photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Dr. Ajoy Kumar Mukherjee, J.)