R/SPECIAL CRIMINAL APPLICATION NO. 686 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE ILESH J. VORA SD/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**NO**

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PURNESH ISHVARBHAI MODI
Versus
STATE OF GUJARAT

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Appearance:
Appearance:

FOR THE PETITIONER

MR HARSHIT S TOLIA WITH MR PARTH S TOLIA, ADVOCATES

FOR THE STATE GOVERNMENT (RESPONDENT NO.1)
MRS KRINA CALLA, APP

FOR THE ACCUSED – (RESPONDENT NO.2)
MR PS CHAMPANERI, ADVOCATE

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CORAM:**HONOURABLE MR. JUSTICE ILESH J. VORA**

Date : 17/08/2021
CAV JUDGMENT

1. The present petition is directed under Article 226 of the Constitution of India and Section 482 of the Code of Criminal Procedure against the order dated 05.01.2021 passed by learned Chief Judicial Magistrate, Surat, below Exh:59 in Criminal Case No.18712/2019, whereby, the application filed under Section 311 of the Code has been rejected.

2. The facts and circumstances giving rise to this application are as under:-

(i) A defamation case under Sections 499 & 500 of the Indian Penal Code ('IPC' for short) filed by the applicant Purnesh Modi, who is an elected member of legislative assembly from the constituency of Surat City – 167 (west) against the respondent No.2, sitting Member of Parliament, Vynand Constituency and at the relevant time, he was President of Indian National Congress, *inter alia*, alleging that, during last general election held in 2019, the respondent No.2 was addressing an election rally in Kollar of Karnataka State and had allegedly made defamatory remarks with respect to Modi surname and community at large.

(ii) In the aforesaid background, the applicant filed a private complaint being Criminal Case No.18772/2019 before the Court of learned Chief Judicial Magistrate, Surat, against the alleged defamatory remarks made by the respondent No.2 and the Court after examining the complainant under Section 200 of the Code, issued summon against the respondent No.2 under Section 204 of the Code and thereafter, plea was recorded under Section 251 of the Code and the matter was fixed for evidence of the complainant. The testimony of the applicant complainant recorded vide Exh:18, wherein, in

support of his oral evidence so far defamatory remark is concerned, has produced the electronic records in form of Pen-drive and three CDs containing the alleged defamatory remarks. During the course of evidence of the complainant, the other side objected the contents of the electronic record and after recording the objections, the trial Court has tentatively given Exhs:21 & 26 to Pen-drive and three CDs subject to prove the contents of the electronic data according to the Indian Evidence Act. In order to prove the contents of the alleged speech/remarks contained in the Exhs:21 and 26, the trial Court has issued summons to the witnesses as per the application Exh:32 submitted by the applicant. The testimony of the witnesses D. Shambhubhai Bhatt, Joint Chief Electoral Officer Bangalore and P.M Raghunath were recorded at Exhs:52 and 56. Based on the evidence of two witnesses, the complainant could not prove the authenticity and source of the electronic record and accordingly, the application under Section 311 vide at Exh:59 moved before the trial Court *inter alia* stating that the witnesses already examined are unable to throw light on the issue of source and authenticity of the electronic record and it is on record that, the video recording of the speech being made by Video Surveillance Team at Kollar, Electoral Office and therefore, four witnesses cited in the application are essential to be examined, to prove the contents of the electronic record as per the Evidence Act.

3. The Trial Court has rejected the application at Exh:59 observing that, the complainant has examined adequate number of witnesses to prove his case and the present application for examination of witnesses is not necessary for just decision of the case since other witnesses as per the

application at Exh:32 for proving the electronic record have already been examined and accordingly, the application has been rejected.

4. Being aggrieved by the impugned order, the applicant has come up before this Court by filing the present petition.

5. Heard Mr. Harshit S. Tolia, learned counsel appearing for the Petitioner, Mrs. Krina Calla, learned APP for Respondent No.1 - State and Mr. P.S.Champaneri, learned counsel for respondent No.2.

6. Mr. Harshit Tolia, learned counsel for the applicant would submit that, the order of the trial Court do not exhibit judicial application of mind while rejecting the application as relevant and necessary aspects of the matter have not been taken into account; in this context, it is his submission that, the whole case hinges on the alleged defamatory remarks contained in the three CDs at Exh:26 for which the trial court has given tentative exhibit, subject to prove its contents according to the procedure laid down in the Evidence Act. Under the circumstances, it is incumbent on the part of the complainant to prove the contents of the electronic record at Exh:26 as secondary evidence as provided under Section 65B of the Evidence Act. Learned counsel Mr. Harshit Tolia drew the attention of the Court to the statutory provision of the Evidence Act i.e. Section 65A & 65B to submit that, any documentary evidence by way of an electronic record can be proved only in accordance with the procedure prescribed

under Section 65B of the Act, which deals with the admissibility of the electronic record. It is his further submission that, the applicant admittedly has not produced any certificate in terms of Section 65B in respect of CDs and Pen-drive at Exhs:21 and 26 respectively. Therefore, the same cannot be admitted in evidence. Thus, unless and until, the certificate in terms of Section 65 B of the Act, is not produced before the trial Court, the whole case regarding defamatory remarks would fall on this ground. The Trial Court ought to have considered this aspect while rejecting the application and ought to have held that, the witnesses cited in the application at Exh:52 are essential for the just decision of the case.

7. Learned counsel in order to substantiate his submissions, relied upon the cases of **Mohanlal Shamji Soni Vs. Union of India [AIR 1991 SC 1346] and Natasha Singh Vs. CBI [(2013) 4 SCC 741]**, to submit that, it is a cardinal rule of law of evidence that, the best available evidence must be brought before the Court to prove a fact or a point on issue, for which the court is under obligation to discharge its statutory function to ensure that justice is done.

8. Placing reliance on the case of **Arjun Pandit Rao Khotkar Vs. Kailash Kushan Rao Gorantyal [2020 (7) SCC 1],** to submit that, non production of certificate in terms of Section 65B (4) of the Evidence Act, at the time of filing the complaint or not asking the certificate at the relevant point of time, would not fatal to the case of the complainant, as it is a curable defect and trial Court while exercising the power permitting the applicant to examine the witnesses to produce the certificate do not result in serious or irreversible prejudice

to the accused and while examining any application by the prosecution under Section 91 or 311 of the Code or Section 165 of the Evidence Act, the Court has to strike balance between the rights of the parties and after exercising discretion, if the Court is satisfied that, accused is not prejudiced, Court may in appropriate case allow the prosecution to such certificate at later point in time for fair trial.

9. On the other hand, learned counsel Mr. P.S.Champaneri, for the respondent No.2, reiterating the facts as mentioned in the Affidavit -in-Reply would submit that, the present petition under Article 226 of the Constitution of India is not maintainable as the subject matter of the petition is against the interlocutory order. He would further submit that, the extraordinary jurisdiction under Article 226 of the Constitution of India and /or inherent powers under Section 482 of the Code may not be exercised in the peculiar facts and circumstances of the case, more particularly, when the applicant-complainant has been indolent and having regards to the facts there is no jurisdictional illegality or impropriety in the impugned order. The applicant failed to make out any case for exercise of powers under Section 482 of the Code to secure the ends of justice and therefore, the petition deserves to be dismissed. He would further submits that, the writ applicant had dropped one of the witness, who had videographed the alleged defamatory remarks vide Exh:32 and this aspect having been considered by the trial Court while rejecting the application. Thus, the application at Exh:59 filed under Section 311 of the code is nothing, but an afterthought and an abuse of process and the case does not fall any of the criteria for exercising power under

Section 482 of the Code.

10. Mr. P.S.Champaneri further submits that, the application at Exh:59, filed under Section 311 of the Code, is an abuse of process of law and Court to fill up the lacuna remained in the case at belated stage. It is his submission that, Exh:26 i.e. 3 CDs are inadmissible in evidence. The applicant or any person on his behalf had never applied before the concerned authority to get the certificate in terms of section 65B (4) of the Evidence Act, so as to prove the contents of the documents. Thus, relying on the case of **Anvar P.V Vs. P.K.Basheer [2014 (10) SCC 473]**, approved by the Hon'ble Apex Court in the case of **Arjun Pandit (supra)**, to submit that, the secondary evidence in form of electronic record has to be produced with the accompanying requisite certificate under Section 65B(4) and not otherwise, and if the same is produced, without the certificate, is inadmissible in evidence. Thus, the application at Exh:59 is in teeth of the proposition of law propounded by the Apex Court in the case of Anvar P.V. (supra), which is apparently being filed to fill up the lacuna in the case, which is nothing but an abuse of process of law. In this aspect, he would further submit that, after rejection of the application at Exh:59, the trial court has further proceeded and evidence is concluded and statement of the respondent No.2 under Section 313 of the Code has also been recorded and additional statement under Section 313 of the Code is also being submitted by the respondent No.2 and therefore, cause is not survived to pass any order under Section 311 of the Code. Mr. Champaneri would further submit that, reasonable opportunities have been provided to the complainant to adduce necessary evidence and any relief now being sought

by means of the present petitioner is likely to prejudice the right of the respondent No.2 and destroy the defence.

11. Mr. Champaneri would submit that, in the present case, the complaint is filed under Sections 499 and 500 of IPC in the court of learned Chief Judicial Magistrate, Surat, who, by an order dated 02.05.2019 had issued process and ordered to issue summons to the respondent No.2. In this context, referring to the provisions contained in sub-section (2) of Section 204 of the Code, it is his submission that, the complainant failed to submit list of witnesses before issuance of summons and had not discharged his obligation of submitting the list of witnesses. Under the circumstances, the application Exh:59 for examining further witnesses is not a bonafide application, but having been filed with a view to washout the cross examination of earlier witnesses which cause serious prejudice to the rights of the respondent No.2 and therefore, the trial Court has rightly recorded that, the witnesses cited in the Exh:59 are not essential to be examined for just decision of the case since other witnesses have already been examined and therefore, the impugned order does not warrant any interference by this Court.

12. Relying on the cases of **Mohan Ramjibhai Soni Vs. Union of India [1991 Suppl. Vol-I. SCC 271] & Swapna Kumar Chatterji Vs. CBI [2019 14 SCC 328]**, it has been submitted by Mr. Champaneri that, while exercising powers under Section 311 of the Code, due care should be taken by the court and it should not be used for filling up the lacuna left by the prosecution or the defence or to the disadvantage of the accused or to cause serious prejudice to the defence or to

give an unfair advantage to the rival side and powers conferred under Section 311 should be exercised only for strong and valid reasons and shall not exercise if the court is of view that, application has been filed as an abuse of process of law.

13. In view of the aforesaid contentions raised by learned advocate Mr. Champaneri and in support of the proposition of law as referred to above, it is his submission that, the case of Arjun Pandit (supra) would not applicable to the facts of the present case as the facts situation is not *pari materia* or similar to the facts of Arjun Pandit (supra). In the present case, the applicant or anybody on his behalf did not apply to get requisite certificate to prove the admissibility of the electronic record and till date, they have not applied to get the same. Thus, the case of Arjun Pandit (supra) would not rescue to the case of the complainant.

14. Thus, it has been submitted by Mr. Champaneri that, the applicant failed to make out a case for exercise of extraordinary power under Section 482 of the Code and that the doctrine of just decision incorporated for exercise of wide power is not warranted as has been recorded by the trial Court while rejecting the application Exh:59 and therefore, there is no any error apparent while rejecting the application at Exh:59 and hence, present application may not be entertained by the Court and the same deserves to be dismissed.

15. I have considered the rival submissions made by the respective parties and perused the material placed on record.

16. Section 311 of the Code reads as under:-

> "**Section 311** - *Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and 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*."

17. It is settled by the catena of decisions of the Apex court that, in order to enable the court to find out the truth and render a just decision, the salutatory provision of Section 311 is enacted where under any court by exercising its discretionary power at any stage of enquiry, trial or other proceedings can summon any person as a witness or recall or reexamine him already examined.

18. In the case of **Raja Ram Prasad Yadav Vs. State of Bihar [(2013) 14 SCC 461]**, the Hon'ble Apex Court held that the court should bear in mind that no party in a trial can be foreclosed from correcting error and that if proper evidence was not adduced or a relevant material was not brought on record due to inadvertence, the court should be magnanimous in permitting such mistake to be rectified.

19. In **Mohan Shamjibhai Soni (supra)**, the Apex Court while examining the scope of Section 311 of the Code held that, it is cardial rule of law of evidence that the best available evidence must be brought before the Court to prove a fact or a point an issue and the court has a duty to determine a truth and render a decision and same is also object of Section 311, wherein, the Court may exercise its discretionary authority at any stage to summon witness, who is expected to be able to throw light upon the matter and dispute, because if the

judgment happened to be rendered on an inchoate, inconclusive and speculative, presentation of facts, the ends of justice would be defeated.

20. In the facts of the present case, the applicant is the complainant of a private case filed under Sections 499 and 500 of the IPC against the respondent No.2 for his alleged defamatory remarks uttered by him while addressing public gathering at Kollar, State Karnataka and the same has been videographed by the video surveillance team and video viewing team duly notified by the office of Deputy Commissioner and District Election Officer, Kollar District. The alleged speech being recorded on 3 CDs by Kollar District Election Office and have been sent to Chief Electoral Office at Bangalore and handed over to one Mr. Ganesh Yaji and in turn, he had handed over the same to one Mr. Raghunath, who had dispatched it to the complainant through courier. In order to prove the alleged defamatory remarks, the evidence of complainant has been recorded at Exh:18, wherein, he has submitted to the Court documents in form of Pen-drive and 3 CDs at Exh:21 and 26 respectively. The trial Court after considering the objections raised by the respondent No.2, gave tentative exhibit to the Pen-drive and 3 CDs as Exhs:21 and 26 respectively subject to prove its contents, authenticity and source according to the principles of Evidence Act. The complainant has tendered application at Exh:32 and cited witnesses to be examined the authenticity and source of 3 CDs and accordingly, he has examined Mr. D. Shambhu Bhatt at Exh:52 and Mr. Raghunath at Exh:56. However, the witnesses could not throw light upon the matter in dispute as 3 CDs have

been prepared by the District Election Office, Kollar. In this background, the complainant i.e. applicant herein moved an application at Exh:59, under Section 311 of the Code to summon the persons of the office of Election Office at Kollar, who have prepared the CDs from the original data of videography.

21. The trial Court has rejected the application observing that, the complainant has examined witnesses to prove electronic record namely witness Mr. D. Sbhaubhai Bhatt at Exh:52, Chief Electoral officer and Mr. Raghunath at Exh:56 and therefore, on the same ground, the application at Exh:59 has been filed to summon the witnesses for which the complainant has already examined the witnesses. The trial Court further observed that, the complainant has examined adequate number of witnesses to prove his case and again for the same facts, Exh:59 being given and therefore, the witnesses cited in Exh:59 are not essential for the just decision of the case.

Admissibility of Electronic Evidence

22. Before the trial Court, issue was raised pertaining to admissibility of the electronic evidence and how and under what manner it can be proved. Admittedly, it is settled principles of law that, if electronic record is filed in its original form to make it admissible before court, no certificate in terms of Section 65B of the Evidence Act is required. If it is on a paper, stored, recorded or copied on optical or magnetic media produced by a computer, it is termed as “Document” and certificate under Section 65B (4) is needed to make it admissible. If we look at the definition of evidence, it includes

all documents (electronic records) produced for inspection of the court and such documents are called documentary evidence. The Indian Evidence Act regulates the procedure for taking of evidence before a court of law. The law of evidence requires that, best evidence must be given in proof of the facts or relevant facts and primary evidence is considered to be the best evidence since it is the best available corroboration of existence of a fact. Section 64 of the Evidence Act provides that the documents must be proved by primary evidence, whereas, Section 65 provides under what circumstances, the secondary evidence is admissible. Sections 65A and 65B were introduced in the chapter relating to documentary evidence. Section 65A states that the contents of electronic record may be proved in accordance with the provisions of Section 65B of the Act, which provides that any information contained in the electronic record 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, whereas, Section 65B (4) provides that, in any proceedings where it is desire to give statement in evidence, a certificate as prescribed being required to be issued and signed by a person occupying the responsible official position in relation to operation of relevant device or the management of the relevant activity shall be evidence in any matter as indicated in the certificate.

23. In view of the aforesaid legal provisions, it makes clear that any documentary evidence by way of electronic record under the Evidence Act, can be proved only in accordance with the procedure prescribed under Section 65B of the Evidence Act and the certificate under Section 65B(4) is a condition precedent to the admissibility of such evidence by way of

electronic record.

24. In case of **Anvar P.V Vs. P.K.Basheer [2014 (10) SCC 473],** a three Judge-Bench of the Apex Court settled the issues which had arisen because of the conflicting judgment as well as the practices being followed in the trial Courts as to the admissibility of electronic evidence. It is necessary to refer the observations made in paras 22 and 24, which reads as under:-

> *"22. 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 Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."*
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> *24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence*

on electronic record with reference to Section 59,65A and 65B of the Evidence Act, 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 of the conditions in Section 65B of the Evidence Act."

Requirement for Acceptance of Electronic Evidence

25. Recently, in the case of **Arjun Pandit Khotkar Vs. Kailash Khushan Rao Gorantyal [2020 (7) SCC 1],** the Apex Court in a reference dealing with the interpretation of Section 65B of the Evidence Act, has held that, the certificate required under Section 65B (4) of the Act is a condition precedent to the admissibility of evidence by way of electronic record and after referring the case of Anvar P.V. (supra), settled the law, which reads as under:-

i. The requisite certificate in terms of Section 65B (4) is unnecessary if the original document itself is produced. This can be done by the owner of the laptop computer, computer tablet, or even a mobile phone by stepping into the witness box and proving that the devise concerned, on which the original information firs stored, is owned and/or operated by him.

ii. When it becomes impossible to physically bring such device to the Court or system to the court, then the only means providing information contained in such electronic record can be in accordance with Section 65B(1) together with the requisite certificate under Section 65B (4).

iii. The judgment in **Shafhi Mahammad Vs. State of H.P [(2018) 2 SCC 801]**, states the law incorrectly and is in the

teeth of the judgment in Anvar P.V following the judgment in Tomasho Bruno, which has been held in *per incuriam* hereinabove – the underlying reasoning of the difficulty of producing a certificate by a party who is not in possession of an electronic devise is also wholly incorrect.

iv. In a fact circumstance where the requisite certificate has been applied for from the person or the authority concerned and the person or authority either refuses to give certificate or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions of the Evidence Act, CPC or Cr.P.C. Once such application is made to the court and the court then orders or directs that requisite certificate be produced by a person to whom its send a summons to produce such certificate, the party asking for certificate has done all that he can possibly do to obtain the requisite certificate.

v. Section 65B does not speak of the stage at which such certificate must be furnished to the court. In Anvar P.V. (supra), the Apex Court did not observe that such certificate must accompany the electronic record when the same is produced in evidence. In cases where either a defective certificate is given or in cases where such certificate has been demanded and is not given by the concerned person, the judge conducting the trial must summon the person/persons referred to in section 65B(4) of the evidence Act and require that such certificate be given by the 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, subject to discretion being

exercised in civil cases in accordance with law and in accordance with the requirement of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principles 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.

vi. When the criminal courts summon the accused to stand trial, copies of all documents which are entered in the chargesheet/final report have to be given to the accused. Section 207 of Cr.P.C. which reads as follows is mandatory. Therefore, the electronic evidence i.e computer output has to be furnished at the latest before the trial begins. Prosecution is obligated to supply all documents upon which the reliance may be placed to an accused before commencement of the trial. Thus, the exercise of powers by the court 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 right of the parties has to be carried out by the court in examining any application by the prosecution under Section 91 or 311 of the Code or Section 165 of the Evidence Act. Depending on the facts of each case and the court exercising discretion after saying that the accused is not prejudiced by want of fair trial, court may in appropriate cases allow the prosecution to produce such certificate at a later point of 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.

vii. Subject to the caveat laid down in para 52 and 56 of the judgment, the law laid down by two High Courts i.e**. Paras Jain Vs. State of Rajasthan [(2015) SCC Online (Raj) 8331]** and **Kundan Singh Vs. State (2015 SCC Online Delhi 13647]**, have our concurrence. So long as the hearing of the trial is not yet over, the requisite certificate can be directed to be procured by the learned Judge at any stage so that information contained in electronic record form then can be admitted and relied upon in evidence.

viii. The judgment in Tomasho Bruno [(2015) 7 SCC 178], being *per incuriam* does not lay down the law correctly, also the judgment in Safhi Mohammad [(2018) 5 SCC 311], do not lay down the law correctly and are therefore, overruled.

ix. The general directions issued in para 64 of the judgment shall hereinafter be followed by courts that deal with electronic evidence to ensure there preservation and production of certificate at all appropriate stage. These directions shall apply in all proceedings till rules and directions under Section 67C of the Information Technology Act and data retention conditions are formulated for compliance by the telecom and internet service provider.

26. The present petition is required to be examined in light of the aforesaid settled legal proposition.

27. In the facts of the present case, the complainant had attempted twice to prove the admissibility of the electronic records at Exh:26 i.e. 3 CDs, wherein, alleged defamatory remarks being videographed by the Kollar District Election Office. The trial Court has rejected the application on the

ground that, sufficient opportunity being given to the applicant to prove the contents of the electronic record and the witnesses cited to be examined in the application at Exh:59 are not essential for just decision of the case. In the case, the complainant has specifically averred in the application at Exh:59 that, witness D. Shabhubhai Bhatt at Exh:52 and Raghunath at Exh:56 failed to throw light upon the issue and therefore, he could not prove the source and authenticity of the electronic record and from the testimony of the witnesses, it reveals that, the source of electronic record is the Kollar District Election Office, for which, has relied on the Resolution dated 16.02.2019, whereby, team was constituted namely Video Surveillance Team and Video Viewing Team, who in turn, entrusted the liability to shoot the video of the election meetings and rally. The applicant has specifically named all the persons who were in-charge of the office of the Deputy Commissioner and District Election Office, Kollar and pleaded that, the persons named in the application are essential to be examined for a just decision of the case. It is pertinent to note that the contents of the electronic record still required to be proved as it is the court, who has directed the complainant to prove the admissibility of electronic record following the mandatory provisions like Section 65B of the Evidence Act.

28. In view of the aforesaid background, this Court finds that for admissibility of the electronic record at Exh:26, which is the basis of the complaint, for which the application under Section 311 of the Code at Exh:59 was filed, so as to enable the applicant to prove the contents of 3 CDs at Exh:26. The trial Court is primarily concerned with the arriving at the truth about the facts and issue. Therefore, the parameters of

exercising powers under Section 311 of the Code are well defined; that it may be exercised in a case where it appears to the Court to be necessary in the interest of justice and this power is bound to be exercised by the Court when the same is necessary for the just decision of the case. In the impugned order, the Trial Court has rejected the application only on a ground that, earlier vide Exh:32, opportunity being given to the complainant to prove the electronic record. It is evident that, the contents of the electronic record still required to be proved by the applicant and during deposition of the witness D. Shabmbhubhai Bhatt at Exh:52, it reveals that Kollar Election Office has prepared 3 CDs from its computer. Under the circumstances, the witness from Kollar Election Office seems to be essential to prove the contents of the electronic record at Exh:26 for which the trial Court has conditionally given exhibit to prove the contents according to the procedure laid down in the Evidence Act. In this context, it will be useful to refer to decision of the Apex Court reported in **2021 (3) SCC 661 [V.N.Patil Vs. K. Niranjan Kumar & Ors.],** wherein in para 14, it has been laid down as under:-

> *"14. The object underlying section 311 Cr P C is that there may not be failure of justice on account of mistake of either party in bring the valuable evidence on record or living ambiguity in the statement of the witnesses examined from either side. The determinative factor is whether it is essential for just decision of the case*.

29. Reverting back to the facts of the present case for fair trial, the information contained in 3 CDs can only be admitted and relied upon in evidence when it has been proved in terms of Section 65B (4) of the Evidence Act. The object of underlying Section 311 of the Code is that, there may not be failure of

justice on account of mistake of either party in bringing the valuable evidence on record. It is true that, there are no hard and fast rules for exercising the discretion under Section 311 of the Code as it depends on the facts of each case, but court has to apply its judicial mind while exercising its discretion keeping in mind the concept of fair trial. It has been held by the Apex Court in catena of decisions that, fair trial is main object of criminal procedure and it is the duty of the Court to ensure that, such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the Society, and, therefore, fair trial includes grant of fair and proper opportunities to the person concerned, and same must be ensure as this is a constitutional , as well as right. Thus, under no circumstances, can a person's right to fair trial be jeopardized. Thus, it is essential that, the rules of procedure that have been designed to ensure justice are scrupulously followed and the Court must be jealous in ensuring that there is no breach of the same. *[vide Talab Haji Hussain Vs. Madhukar Purshottam Mondkar [AIR 1958 SC 376]. Zahira Habibulla Vs. State of Gujarat [AIR 2004 SC 3114]. Zahira Habibulla Shaikh Vs. State of Gujarat [AIR 2006 SC 1367]. Kalyani Bhaskar Vs. M.S.Sampoornam [(2007) 2 SCC 258]. Vijay Kumar Vs. State of U.P. [(2011) 8 SCC 136]. Sudevanand Vs. State [(2012) 3 SCC 387]*.

30. The learned counsel for respondent No.2 Mr. P.S. Champaneri raised the substantial issue with regard to maintainability of present petition invoking extraordinary jurisdiction under Article 226 of the Constitution of India and Section 482 of the Code. It is settled law that the remedy under Article 226 is discretionary remedy for doing complete

justice and correcting injustice. So far Section 482 of the Code is concerned, if the high court finds necessary for securing the ends of justice, the section empowers the High Court to exercise its inherent powers and in that case, there can be no limitation in exercise of its power. Thus, noticing the facts of the present case and the way in which the impugned order is passed by the trial Court, this Court is of considered view that, the dismissal of the application at Exh:59 by the Court below is not in consonance with the object and scope, as prescribed under Section 311 of the Cr.P.C and dictum of law settled by the Apex Court. As a result, this Court finds that case is made warranting interference in the impugned Order. Hence, the impugned order dated 05.01.2021 passed by learned Chief Judicial Magistrate, Surat, below Exh:59 in Criminal Case No.18712/2019 is hereby quashed. The matter is remitted back to the trial Court for fresh decision on the application at Exh:59 filed under Section 311 of the Code. The trial Court shall decide the same in accordance with law following the principles of admissibility of electronic record as propounded by the Apex Court in the case of Arjun Pandit (supra). It is made clear that, this Court has not considered the contentions raised by the respective parties on merits. Parties are at liberty to raise all the contentions raised hereinabove before the trial Court at appropriate stage. The observations made hereinabove only with a view to decide the issue involved in the matter. Trial court shall decide the matter on its own merits.

31. In view of the aforesaid terms, present petition stands disposed of. Direct Service is permitted.

SD/-
(ILESH J. VORA,J)

SUCHIT