

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

+ **Crl. Rev.P. 266/2011 & Crl.M.A. Nos. 6768/2011 & 6770/2011**

% Reserved on: 8th August , 2011

Decided on: 14th September, 2011

MANISH KUMAR AGARWAL

..... Petitioner

Through: Mr. Amit Kumar, Mr. Ashish Kumar,
Advvs.

versus

CENTRAL BUREAU OF INVESTIGATION

..... Respondent

Through: Mr. P.K. Sharma, Standing Counsel
with Mr. Uday Prakash, Adv.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Not Necessary |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MUKTA GUPTA, J.

Crl.M.A. 6770/2011

Exemption allowed subject to just exception.

Crl. Rev.P. 266/2011 & Crl.M.A. 6768/2011 (stay)

1. The instant revision petition is directed against the order dated 24th May, 2011 passed by the Learned ACMM rejecting the Petitioner's

application for grant of permanent exemption and allowing the application of CBI for separation of trial and recording of evidence in the absence of the co-accused Daminder Singh Batra under Section 299 Cr.P.C.

2. Briefly the case of the prosecution is that the Petitioner is a qualified Chartered Accountant and was working with Rajinder Steels Ltd. While working as such on 8th August, 1995 he requested for disbursement of Rs. 10 crores furnishing along therewith Auditor's certificate for advance to the suppliers, proforma invoice of M/S. Technomac Engineers Pvt. Ltd. and the Industrial Enterprises (Regd.), performance guarantee of M/S. R.M. Machine, The Industrial Enterprises and insurance of the equipment. The Petitioner further represented that the equipments to be acquired under ECS were ready for delivery from its supplier and would be received on or before 31st August, 1995. As per the allegations M/S. R.M. Machine Pvt. Ltd. a group company of the co-accused D.S. Batra was shown as one of the suppliers of M/S. Rajinder Steels Ltd. The equipments mentioned in the proforma invoice were not supplied and on the strength of forged invoices loan of Rs. 15 crores was got approved and misappropriated. In Company Petition No. 44/1998 the Hon'ble High Court of Judicature at Allahabad vide its order dated 18th September, 2006 directed CBI to register and investigate the charges of fraudulent diversion of bank's funds. On this FIR No. RC.BD1/2007/E/0003

under Section 120-B read with Section 420/468/471 IPC was registered. The CBI filed charge-sheet against Daminder Singh Batra and the Petitioner for the above-mentioned offences. The Petitioner filed an application under Section 205 read with Section 317 (1) Cr.P.C. for grant of permanent exemption from appearance on 21st December, 2009. The grounds urged in the application inter-alia were that the Petitioner was working as Vice-President of ABG Shipyard Ltd. based at Mumbai, his only son was suffering from autism and requires regular care, he was attending hearings regularly since 19th January, 2008, and has incurred huge expenditure on it; the co-accused is absconding, and he would be represented by the Advocate and would not seek any adjournment on the ground of absence of the Petitioner. On 20th October, 2010 an application was filed by the CBI under Section 299 Cr.P.C. for separation of trial and recording of evidence in absence of co-accused Daminder Singh Batra, as extradition request qua him had been sent to the concerned authority for sending it further to the Government of USA.

3. Learned counsel for the Petitioner contends that Section 223 Cr.P.C. ordains conducting of a trial of two accused in conspiracy together and merely because the other accused is not available at the moment, the trials of the two conspirators cannot be separated. It is contended that for separation of trial under Section 299 Cr.P.C. a prima facie finding has to be returned that the co-

accused was absconding which is missing in the impugned order. Further in a case where extradition proceedings are going on and the whereabouts of the accused are known, it cannot be said that he is “absconding”. Reliance is placed on *Jayendra Vishnu Thakur Vs. State of Maharashtra and Anr. (2009) 7 SCC 104* to contend that the trial cannot be split under Section 299 Cr.P.C. Reliance is also placed on *Nirmal Singh Vs. State of Haryana (2000) 4 SCC 41*; *Kadiri Kunhahammad Vs. State of Madras AIR 1960 SC 661*; *State of Karnataka Vs. Narsa Reddy (1987) 4 SCC 170*; *Jitendra Narottam Das Mehrotra & Ors. Vs. State and Ors. 2004 (1) Crimes 108*; *A.E. Pinto & Ors. Vs. C.B.I. 2002 (63) DRJ 697*. It is contended that the Learned ACMM separated the trial contrary to the law laid down by the Hon’ble Supreme Court, this Court and the statutory provisions contained under Section 299 and 223 of Cr.P.C. The separation of trial would cause prejudice to the case of the Petitioner as he has been alleged to be a conspirator and the main offence has been committed by accused No.1.

4. Learned counsel for the CBI on the other hand contends that the word “abscondence” as used in Section 299 Cr.P.C. is applicable when the person is not available for trial. Thus even a person who is purposefully avoiding trial would fall within the ambit of “absconsion”. There is no provision in the Cr.P.C. which prohibits the separation of trial. It is the duty of the Court to

try a case expeditiously and take all measures which are required for the expeditious disposal thereof. In case the presence of the co-accused cannot be procured without delay the trial has to be separated under Section 299 Cr.P.C. Though Petitioner has alleged that prejudice would be caused to him, however he has not shown how prejudice would be caused to him. Reliance is also placed on *Jayander Vishnu Thakur* (supra) to show that the meaning of “absconding” also includes intend to avoid legal process or to hide.

5. I have heard learned counsel for the parties. Section 299 Cr.P.C. provides as under:

“299. Record of evidence in absence of accused.

(1) If it is proved that an accused person has absconded and that there is no immediate prospect of arresting him, the court competent to try [or commit for trial] such person for the offence complained of, may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in

evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.”

6. Their Lordship’s in *Jayander Vishnu (supra)* held:

“It is neither in doubt nor in dispute that sub-section (1) of the said provision is in two parts – the first part provides for proof of jurisdictional fact in respect of abscondence of an accused person and the second that there was no immediate prospect of arresting him. In the event, an order under the said provision is passed, deposition of any witness taken in the absence of an accused may be used against him if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without any amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.”

7. Their Lordships while disagreeing with the decisions in *Bhagwati vs. Emperor AIR 1918 Allahabad 60* held that it was not an ipsi-dixit of the Magistrate that would be sufficient for attracting an extraordinary provision and the Magistrate was required to apply his mind to arrive at a definitive finding on the basis of materials on record, in absence whereof his order must be held to be arbitrary and thus without jurisdiction. It was further held that indisputably both the conditions contained in the first part of Section 299 of the Code must be read conjunctively and not disjunctively. Satisfaction of one of the requirements should not be sufficient. It was thus, obligatory on the part of the learned court to arrive at a finding on the basis of the materials

brought on record that the jurisdictional facts existed so as to enable the court concerned to pass an appropriate order on the application filed by the Special Public Prosecutor. In the case before the Hon'ble Supreme Court, their Lordship's observed that the accused therein had been arrested at least in two cases and remanded to police custody which fact was not brought to the notice of the learned Trial Court. Thus, it was held that if these facts were brought to the notice of the Court, he could not have been termed an absconder, which was an essential finding of fact to be arrived at. Thus the decision in *Jayander Vishnu (supra)* has no application to the facts of the present case

8. In *Nirmal Singh (supra)* their Lordships held that Section 299 (1) Cr.P.C. consists of two parts; the first part speaks of the circumstances under which witnesses produced by the prosecution would be examined in the absence of the accused and the second part the circumstances when such deposition can be given in evidence against the accused in any enquiry or trial for the offence for which he is charged. Since Section 299 Cr.P.C. is an exception to the principle embodied in Section 33 of the Evidence Act, all the conditions prescribed must be strictly complied with.

9. In the case at hand it has been proved by the CBI that the co-accused is not available for trial, extradition proceedings qua him are pending. The charge-sheet filed states that co-accused Daminder Singh Batra is absconding.

Further the Petitioner himself has stated in his application under Section 205 read with Section 317(1) Cr.P.C. seeking permanent exemption from personal appearance, that the co-accused has been absconding and has not subjected himself to the jurisdiction of the learned Trial Court. The Court has recorded a finding that since permanent exemption has been sought by accused No.2 that is the Petitioner on the ground that extradition proceedings against the accused No.1 are still pending separation of trial is required to be ordered.

10. The reliance on *Narsa Reddy (supra)* is misconceived and has no application to the facts of the present case. The High Court in the said case had directed splitting of the trial of the accused because of the petition before it. The Hon'ble Supreme Court held that instead of splitting the trial the High Court ought to have been decided the petition under Section 482 Cr.P.C. pending before it. In *A.E. Pinto(supra)* this Court on the facts of the case held that since the offences committed were in the part of same transaction and same set of witnesses were to be examined and thus a joint case can and should be held. A.E. Pinto in the said case had been extradited later. By the time he was extradited only four out of 150 witnesses had been examined by that time. Thus, the facts in the said case have no application to the present case as it is not known when the co-accused will be extradited and would be available for trial.

11. Section 223 Cr.P.C. is an enabling provision. It permits the trial of two persons involved in a conspiracy to be tried together, however it does not bar the trial of one accused in the absence of other if it is a case of conspiracy. A Division Bench of Madras High Court in *Pandiyan and others v. The Inspector of Police, Sathangadu Police Station, Chengalpattu District, 2005* (1) Crime 268 observed as under:-

“24. It is also made clear that though Section 223 enables that all persons could be tried together for the commission of the offence committed in the course of the same transaction, it is needless to say that it is only an enabling provision so as to prevent multiplicity of proceedings and there is no provision, which prevents the Court from trying the case as against other accused separately if the facts and circumstances of the particular case so warrant.”

12. The word “absconding” is defined as “to hide”, “clandestine manner/intent to avoid legal process, “to depart secretly or suddenly, especially to avoid arrest, prosecution or service of process.” There can be no dispute that the co-accused is absconding as he is avoiding the process. Though the Petitioner in the present petition disputes that the co-accused in the absconding, however this was his principle contention in the application for exemption before the learned Trial Court. Except making a bald assertion that prejudice will be caused, it has not been demonstrated, how prejudice

would be caused on separation of trial. In view of the facts of the case, the order of the learned Trial Court separating the trial of the Petitioner suffers from no illegality.

13. I find no merit in the petition. Petition and applications are accordingly dismissed.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 14, 2011
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