

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

+ **W.P.(CRL.) 225/2012**

Date of Decision: 11.04.2012

R K CHANDOLIA

..... Petitioner

Through: Mr.Vijay Aggarwal with Mr.
Karan, Mr.Gurpreet Singh,
Advocates.

Versus

CBI & ORS

..... Respondents

Through: Ms.Sonia Mathur, Advocate &
Mr.Sushil Dubey, Advocate with
IO Dy.S.P. Rajesh Chahal.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

1. The present petition challenges the order of the Ld. Special Judge dated 12.01.2012, disallowing certain questions to be put to the prosecution witness PW 12 , during cross-examination.

2. The facts necessitating the disposal of the present petition are that, the charge sheet was filed against petitioner on 02.04.2011. Thereafter the Ld. Special Judge was pleased to frame charges against the petitioner vide order dated 22.10.2011 under Section 13(2) r/w Section 13(1)(d) PC Act r/w Section 120-B IPC, Section 120-B r/w 409/420/468/471 IPC, Section 7 or Section 11 r/w Section 12 PC Act. Thereafter, the prosecution witnesses were summoned for examination. During the cross-examination of PW 12 Tarun Das, certain questions asked by the

petitioner's counsel were disallowed on the premise of these being "irrelevant". The two questions which were disallowed by the Special Judge were, "*Do you have a mobile phone*" and "*Do you pay service tax on the phone bill of your mobile phone*". The petitioner has preferred the present petition, challenging the order of the Ld. Special Judge dated 12.01.2012 disallowing these questions.

3. The learned counsel for the petitioner submitted that the purpose of asking those questions were, to prove that the Government was earning revenue on mobile telephony through Service Tax during the tenure of co-accused A. Raja as Telecom Minister. Further it was also his intention to show that the said prosecution witness was not aware that "Service Tax" was levied on mobile telephony. It is further submitted that the Ld. Special Judge cannot deprive the defense counsel of his right of cross-examination in view of sections 146, 148 and 151 of the Evidence Act, and cannot over-rule questions put up by the defense counsel as "irrelevant" without passing a speaking order in that regard.

4. The learned counsel for the petitioner drew my attention to provisions of sections 146, 148 and 151 of the Evidence Act and contended that he also has a right to put such questions to the prosecution witness which have bearing on his veracity and may shake his credit worthiness. It is submitted that the Ld. Special Judge has disallowed the questions on the premise of these being "irrelevant" and not "scandalous" and the "irrelevance" is not a ground to disallow the question in view of section 151 Evidence Act. It was further submitted that a question considered "irrelevant" falls in the category of Section 148 or Section

149 and cannot be forbidden outrightly, but an option has to be provided to the witness by the Judge to answer the question or not.

5. The learned counsel for the respondent CBI challenged the maintainability of the present writ petition. It was contended that the correctness of the order of the Ld. Special Judge cannot be examined by this Court under its writ jurisdiction. Relying upon ***Chandravarkar Sita Ratna Roa v. Ashlata S. Guram AIR 1987 SC 117***, and ***Indian Renewable Energy Development Agency Ltd v. Debts Recovery Appellate Tribunal & Ors 127 (2006) DLT 158***, she contended that the order of the Ld. Special Judge being an interlocutory order is not amenable to writ jurisdiction of this Court under Article 226 of the Constitution.

6. The learned counsel for the respondent CBI submitted that, section 152 of the Evidence Act empowers the Judge to forbid any question in cross-examination, which in his view, is intended to annoy the witness. Also the words used in section 152 of the Evidence Act are, “*the Court shall forbid*” which makes it the duty of the Judge to forbid such questions. It is further submitted that, in view of the background of the testimony of this witness already recorded, it can be construed that the disallowed questions hold no relevancy or significance to the subject matter and cannot be understood to have any bearing on the veracity of the witness. Drawing my attention to Section 138 of the Evidence Act, it is further submitted that the right to cross-examination of the defense counsel is restricted to the “relevant facts” of the case. It is submitted that Section 148 Evidence Act does not use the term “must”, instead uses the

term “may” in relation to warning the witness before answering an irrelevant question, hence, the discretion to allow or disallow an “irrelevant” question to be answered by the witness is with the judge.

7. After hearing counsel for both the parties, the learned counsel for the petitioner submitted that he does not wish to re-examine the said witness, however he seeks clarity on his right to cross-examination of the witnesses.

8. I have heard the learner counsel for the petitioner, the respondent CBI and perused the case laws cited by the parties. I have also perused the examination of PW12.

9. In Indian Renewable Energy Development Agency Ltd (supra), the Division Bench of our High Court held thus:

“An order allowing or rejecting an application for cross examination is only an interlocutory order. In the present case by the interlocutory order the application for cross examination has been partly allowed. In our opinion, this does not give rise to any cause of action. It is only when the final order is passed by the DRT disposing the proceedings before it finally that a cause of action will arise. In any event, writ jurisdiction is discretionary jurisdiction and a writ petition is not ordinarily entertained against an interlocutory order”.

10. The maintainability of the present petition may be seen in the light of the law laid down by the Hon'ble Supreme Court. In the case of ***Chandravarkar Sita Ratna Roa (Supra)***, the Hon'ble Supreme Court observed that,

“21. It is true that in exercise of jurisdiction under Article 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any mis-direction in law or a view of fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its jurisdiction under Articles 226 and 227 of the Constitution to look into the fact in the absence of clear cut down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a finding within the jurisdiction of the inferior tribunal except where the findings were perverse and not based on any material evidence or it resulted in manifest of injustice (See Trimbak Gangadhar Telang and Another (supra)). Except to the limited extent indicated above, the High Court has no jurisdiction.”

11. Also in the case of ***Pepsi Foods Ltd & Anr v. Special Judicial Magistrate & Ors 1998 SCC (Cri) 1400*** relying upon catena of judgments the Hon'ble Supreme Court held that,

“25. Nomenclature under which petition is filed is not quite relevant and that does not debar the Court from exercising its jurisdiction which otherwise it possesses unless there is special procedure prescribed which procedure is mandatory. If in a case like the present one the Court finds that the appellants could not invoke its jurisdiction under Article 226, the Court can certainly treat the petition one under Article 227 or Section 482 of the Code. It may not however, be lost sight of that provisions exist in the Code of revision and appeal but sometime for immediate relief Section 482 of the Code or Article 227 may have to be resorted to for correcting some grave errors that might be committed by the subordinate Courts. The present petition though filed in the High Court as one under Articles 226 and 227 could well be treated under Article 227 of the Constitution.”

12. In the case of **State, through Special Cell, New Delhi Vs. Nayjot Sandhu @ Afshan Guru & Ors.**, 2003 (6) SCC 641, the Hon'ble Supreme Court expressly recognized the powers of the High Court to interfere even with an interlocutory order in exercise of jurisdiction under Article 227 of the Constitution though it cautioned that such powers should be exercised sparingly and only with a view to keep subordinate Courts within the limits of their authority and only in very exceptional circumstances, warranting interference in exercise of these extraordinary powers. Therefore, the judgment of the Hon'ble Supreme Court in the case of *Nayjot Sandhu* (supra) does not rule out

invoking and exercise of constitutional powers of this Court in appropriate cases.

13. The main grievance of the counsel for the petitioner is that unless the questions put to the witness are forbidden under Section 151 or 152 of the Indian Evidence Act, the court cannot disallow the questions put to the witness in his cross-examination. It was also his submission that if the questions put to a witness were not to be allowed, the right course for the Trial Judge under Section 148 was to decide if the witness was to be compelled to answer the same or not and if he thinks fit, he may warn the witness that he was not obliged to answer.

14. Under the scheme of Evidence Act, Chapter X deals with the examination of the witnesses. Different kinds of responsibility are cast on the judge in different provisions of this Chapter while recording evidence. Then the Courts also have extensive powers for protecting the witnesses from the questions not lawful in cross examination as set out in Sections 146 to 153, Evidence Act. Under Section 136, the Judge has not only to satisfy that the evidence that was to be led was relevant but, in what manner if proved, would be relevant. It was only if he was satisfied that the evidence, if proved, would be relevant, that he could admit the same. If it is his duty to admit all the relevant evidence, it is no less his duty to exclude all irrelevant evidence. Section 5 of the Act also declares that “evidence may be given in any suit or proceedings of the existence or non-existence of every facts in issue and of such other facts as hereinafter will be declared to be

relevant, and of no others. From this, it comes out to be that the Judge is empowered to allow only such evidence to be given as is, in his opinion, relevant and admissible and in order to ascertain the relevancy of the evidence which a party proposes to give, he may ask the party, in what manner, if evidence proved, would be relevant and, he may then decide as to its admissibility. In fact, the question of relevancy is of great nicety and sometimes, great difficulty is felt by the Trial Judge in deciding question of relevancy. Therefore, it is desired that in doubtful cases, he should admit rather than excluding the evidence.

15. Section 137 gives a statutory right to the adverse party to cross-examine a witness. Section 138 only lays down the three processes of examination to which a witness may be subjected. It does not deal with the admissibility of the evidence. It also provides that the examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief. Under this Section, the cross-examination can go beyond the facts narrated in examination-in-chief, but all such questions must relate to relevant facts. It is not that under the right of cross examination, the party will have the right to ask reckless, irrelevant, random and fishing questions to oppress the witness. The “relevant facts” in cross examination of course have a wider meaning than the term when applied to examination-in-chief. For instance, facts though otherwise irrelevant may involve questions affecting the credit of a witness, and such questions are permissible in the cross examination as per Section 146 and 153 but, questions manifestly irrelevant or not intended to contradict or qualify the

statements in examination-in-chief, or, which do not impeach the credit of a witness, cannot be allowed in cross examination. It is well-established rule of evidence that a party should put to each of a witness so much of a case as concerns that particular witness.

16. It is experienced that sometimes, cross examination goes rambling way and assumes unnecessary length and is directed to harass, humiliate or oppress the witnesses. It is also experienced that the Courts often either due to timidity or the desire not to become unpopular or at times, not knowing its responsibilities and powers, allow the reckless, scandalous and irrelevant cross examinations of witnesses. In fact, in such situations, the court has the power to control the cross examination. The court has a duty to ensure that the cross examination is not made a means of harassment or causing humiliation to the witness. While allowing latitude in the cross examination, court has to see that the questions are directed towards the facts which are deposed in chief, the credibility of the witness, and the facts to which the witness was not to depose, but, to which the cross examiner thinks, is able to depose. It is also well-established that a witness cannot be contradicted on matters not relevant to the issue. He cannot be interrogated in the irrelevant matters merely for the purpose of contradicting him by other evidence. If it appears to the Judge that the question is vexatious and not relevant to any matter, he must disallow such a question. Even for the purpose of impeaching his credit by contradicting him, the witness cannot be put to an irrelevant question in the cross examination. However, if the question is relevant to the issue, the witness is bound to answer the same and cannot take an

excuse of such a question to be criminating. That being so, it can be said that a witness is always not compellable to answer all the questions in cross examination. The court has ample power to disallow such questions, which are not relevant to the issue or the witness had no opportunity to know and on which, he is not competent to speak. This is in consonance with the well-established norm that a witness must be put that much of a case as concerns that particular witness.

17. A protracted and irrelevant cross examination not only adds to the litigation, but wastes public time and creates disrespect of public in the system. The court is not to act a silent spectator when evidence is being recorded. Rather, it has the full power to prevent continuing irrelevancies and repetitions in cross examination and to prevent any abuse of the right of cross examination in any manner, appropriate to the circumstances of the case. The court could have such a power to control the cross examination apart from the Evidence Act as also the Code of Criminal Procedure. Section 146 though relaxes the ambit of cross examination and permits the putting of questions relating to the trustworthiness of the witness, but such questions also must be relevant for the purpose of impeaching the credit, though not to the issue. Under the garb of shaking credit, irrelevant or vexatious questions cannot be allowed, if they do not really impeach the credit of witness or do not challenge the evidence given in examination-in-chief relating the matter under enquiry. It is established proposition of law that if the question is directly relevant i.e. if it relates to the matters, which are points in issue, the witness is not protected to answer even it amounts

to criminating him but, if it is relevant only tending to impeach the witness's credit, the discretion lies with the Judge to decide whether witness shall be compelled to answer it or not. Generally, he will not be allowed to be contradicted except in the cases under Section 153. In fact, Section 132, 146, 147 and 148 embrace whole range of questions, which can properly be addressed to witness and these should be read together.

18. Thus, it can be said that the relevancy of evidence is of a two-fold character; it may be directly relevant in the bearing on, elucidating, or disproving, the very merits of the points in issue. Secondly, it can be relevant in so far as it affects the credit of a witness. As regard the relevancy relating to a credit of a witness, the court has to decide the same under Section 148 whether the witness is to be compelled to answer or not or to be warned that he is not obliged to answer. The Judge has the option in such a case either to compel or excuse. The provisions of Section 148-153 are restricted to questions relating to facts which are relevant only in so far as they affect the credit of the witness by injuring his character; whereas some of the additional questions enumerated in Section 146 do not necessarily suggest any imputation on the witness's character. When we talk of the relevancy of the questions relating to character, unnecessarily provocative or merely harassing questions will not be entertained in this class of questions.

19. As per Section 151 and 152, the questions which are apparently indecent or scandalous or which appear to be intended to insult or

annoy or are offensive in form, are forbidden. Such questions may be put either to shake the credit of witness or as relating to the facts in issue. If they are put merely to shake the credit of the witness, the court has complete dominion over them and to forbid them even though they may have some bearing on the questions before the court. But, if they relate to the facts in issue or are necessary to determine the facts in issue existed, the court has no jurisdiction to forbid them. The court cannot forbid indecent or scandalous questions, if they relate to the facts in issue. It is because what is relevant cannot be scandalous.

20. Having seen that though the ambit of cross examination of a witness goes beyond his examination-in-chief, but there has to be relevancy of the questions as regard to the facts or to the creditworthiness of a witness. The counsels must exercise their right of cross examination in a reasonable manner. They have their obligations no less than their privileges. They have no right of unlimited arguments or examination of witnesses, but only so much as would be relevant and reasonably necessary in the particular matter. When a Judge exercises his discretion and disallows a question being irrelevant on any count, the cross examiner should accept the court's rulings without any demur or display of temper. The court is entitled to expect such like acceptance of a ruling on the part of the counsel.

21. A perusal of the recorded cross-examination of PW 12 dated 12.01.2012, evidences that the defense counsel had already asked the witness questions relating to "Service Tax" which the Ld. Special Judge had not objected to. However, the question being, "*Do you have*

a mobile phone” and “Do you pay service tax on the phone bill of your phone” do not have any relevance to the subject matter or the creditworthiness of the witness. Hence, in view of the statement already recorded, the stretching on the subject of “Service tax” in a context alien to the subject matter of the case and having no relevance whatsoever to the subject matter, is a cause of concern for the Court and it shall be the duty of the Court to forbid such questions.

22. On the touchstone of Chapter X of the Evidence Act, it is his duty to monitor the cross-examination of the witness. The Hon’ble Supreme Court in the case of **Makhan Lal Bangal Vs. Manas Bhunia & Ors., 2001 AIR (SC) 490** held thus:

“An election petition is not a dispute between the petitioner and respondent merely; the fate of the constituency is on trial. A Judge presiding over the trial of an election petition, and any trial for the matter of that, needs to effectively control examination, cross-examination and re-examination of the witnesses so as to exclude such questions being put to the witnesses as the law does not permit and to relieve the witnesses from the need of answering such questions which they are not bound to answer. Power to disallow questions should be effectively exercised by reference to Sections 146 148 150 151 and 152 of the Evidence Act by excluding improper and impermissible questions. The examination of the witnesses should not be

protracted and the witness should not feel harassed. The cross-examiner must not be allowed to bully or take unfair advantage of the witness. Though the trials in India are adversarial, the power vesting in the court to ask any question to a witness at any time in the interest of justice gives the trial a little touch of its being inquisitorial. Witnesses attend the court to discharge the sacred duty of rendering aid to justice. They are entitled to be treated with respect and it is the judge who has to see that they feel confident in the court. In Ram Chander Vs State of Haryana, this Court observed,

".... to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest....".

An alert judge actively participating in court proceedings with a firm grip on oars enables the trial smoothly negotiating on shorter routes avoiding prolixity and expeditiously attaining the destination of just decision. The interest of the counsel for the parties in conducting the trial in such a way as to gain success for their respective clients is understandable but the obligation of the

presiding judge to hold the proceedings so as to achieve the dual objective - search for truth and delivering justice expeditiously - cannot be subdued. Howsoever sensitive the subject matter of trial may be; the court room is no place of play for passions, emotions and surcharged enthusiasm”.

23. Therefore, the Ld. Special Judge was well within his power and authority to disallow a baseless question which, in view of the Court, was thrown at the witness with an intention to suppress, harass or annoy the witness. Therefore, the purpose of the question, as stated by the petitioner's counsel is illusory and does not appeal to reason. Further, the contention of the learned counsel for the petitioner that even if the questions were “irrelevant”, these could not be discarded outrightly without giving the witness an option to answer the same, is for the reasons given hereinbefore, misplaced and mistaken.

24. The Trial Judge is the best Judge to decide the relevancy of the questions put up by the defense counsel during cross-examination of a witness and this Court cannot in its extraordinary powers under Article 226 or Article 227 of the Constitution or inherent powers under Section 482 Cr.P.C. interfere in exercise of such discretion by the Trial Judge unless the same was manifestly illegal or perverse or has resulted in miscarriage of justice.

25. In view of the above observations, I am satisfied that the order of the learned Special Judge does not suffer from any illegality or

infirmity and I find no infirmity in the order of the Ld. Special Judge in disallowing certain questions put up by the petitioner's counsel during cross-examination of PW12.

26. Petition stands dismissed. A copy of this order, preferably soft copy, be circulated amongst all the Judges of subordinate judiciary.

M.L. MEHTA, J.

APRIL 11, 2012/akb