

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

% *Reserved on : 28.10.2014*
Pronounced on : 05.11.2014

+ W.P.(CRL) 1355/2014

ADVOCATE MANISH KUMAR KHANNA Petitioner
Through : Petitioner in person.

versus

STATE Respondent
Through: Mr. Sanjay Lao, A.S.C. for the State.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. The Petitioner Shri Manish Kumar Khanna, Advocate has filed this Writ Petition in his individual capacity impugning the two different orders passed in two different cases i.e. order dated 14th February, 2014 passed in Sessions Case No. 11/2013 tiled as State Vs. Gupreet Singh & Anr. in FIR No. 23/2012 PS Special Cell and order dated 10th May, 2014 passed in Sessions Case No. 10/2013 titled as State Vs. Arun Kumar & Ors. in FIR No. 28/2012 PS Special Cell whereby his prayer to impose cost on the Prosecution, was declined.

2. In brief the case of the Petitioner is that he has been practising on criminal side since the year 1998 and has been working to provide speedy justice to ordinary litigants and for that purpose has also been using the provisions of RTI Act to obtain necessary information in this regard. The Petitioner is a small time Advocate who is able to charge a very limited fee

and his practice is limited to commercial quantity drug cases along with some murder and rape cases where the possibility of bail is not there. The Petitioner has seen that certain counsel having multiple cases do not appear in time in a particular matter and the result is that either the matters are delayed due to defence delays or even worse the counsel may not be present during the chief examination and is unable to comprehend the finer nuances of the chief examination and makes certain self goals during the cross examination. This causes serious prejudices to the ordinary litigants. Most of the time the adjournment is given for two to three months but if defence counsel is not available the attitude of the Court is harsh. Thus, only a defence counsel who appears on each and every date gets the right to raise the issue of adjournments so that he is not held responsible for the delay. Even the casual leave is not available to the defence counsel. The worst loss is not in term of money but loss of attention to the case and the counsel who has worked till mid-night on the case, lose interest if there is an adjournment and the problem is compounded when the litigant is not in a position to pay for the adjourned dates.

3. The grievance of the Petitioner in these two cases is that in both the matters neither the accused nor the defence counsel was responsible for the adjournments given by the learned Special Judge. Rather prosecution was to be blamed for adjournment as learned Special P.P. was not present resulting in adjournment of the case. In the circumstances his application praying for heavy costs to be imposed on prosecution for failure to examine the witnesses, should have been allowed by the Court but the applications have been dismissed. Since it was the duty of the prosecutor to ensure presence of witnesses and their examination, on his failure to do so the Court should

have imposed heavy costs. The prayer made in the writ petition are as under:-

- “1. Direct the Hon'ble Court to call for suitable number of witnesses on each date.*
- 2. Direct the Hon'ble Court to impose costs more appropriately in the future for non-appearance of the witnesses and the prosecutor.*
- 3. Direct the investigating agency to personally assure that the witnesses called do appear in the Hon'ble Court, and if they cannot appear then to arrange for the presence of an alternative witnesses with prior information to the defence counsels.*
- 4. Direct the prosecution department to insure the presence of the prosecutors in the Hon'ble Court.*
- 5. Impose a cost of rupees one lakh on the State for the above two matters to be paid to the Petitioner.”*

4. Notice of the writ petition was given to the State and counter affidavit has been filed.

5. Both the parties have also filed their written submissions.

6. Both the parties submit that apart from the averments made in the writ petition, counter affidavit and the written submissions, they do not have to add anything.

7. Since the grievance of the Petitioner which has compelled him to file this writ petition arises out of the order dated 14th February, 2014 passed in Sessions Case No. 11/2013 tiled as State Vs. Gupreet Singh & Anr. in FIR No. 23/2012 PS Special Cell and order dated 10th May, 2014 passed in Sessions Case No. 10/2013 titled as State Vs. Arun Kumar & Ors. in FIR No. 28/2012 PS Special Cell, it is necessary to first peruse these orders to find out if any interference is warranted by this Court in exercise of the writ

jurisdiction.

8. Order dated 14th February, 2014 shows that on that date of hearing State was not represented till 11.30 a.m., however, Dr. Adesh Kumar, SSO from FSL, Rohini, who was present since 10.00 a.m., got his statement recorded as PW-3 and was also tendered for cross-examination.

9. Since on that date it was the last opportunity for the prosecution to conclude the evidence but 7 witnesses were yet to be examined, the Petitioner Manish Kumar Khanna, Advocate representing the Accused prayed for imposing of heavy costs on the prosecution for not being able to complete its evidence. He also filed an application praying therein that heavy costs be imposed upon the prosecution for failing to examine the witnesses. The request of the learned defence counsel was declined by observing as under:-

A perusal of record shows that it is only one date i.e. on 5.2.2014 that though the witness summoned by the prosecution was present, he had to be discharged un-examined due to the absence of Ld. APP. On the remaining dates, either the witnesses summoned by the prosecution had not appeared due to some exigency or if they had appeared they had given their deposition on their own without the assistance of Ld. APP.

In view thereof, at this stage this Court is not inclined to impose any costs upon the prosecution. However, it is made clear that the prosecution is now granted dates w.e.f. 16.07.2014 to 31.07.2014 to conclude its evidence and in case they fail to do so during the said period, they shall then be liable for imposition of costs.

10. Another grievance of the Petitioner pertains to the order dated 10th May, 2014 passed in Sessions Case No. 10/2013 titled as State Vs. Arun Kumar & Ors. in respect of FIR No. 28/2012 PS Special Cell whereby the

Special Judge had disposed of the application under Section 309 Cr.P.C. filed by the learned defence counsel Sh. Manish Kumar Khanna, Advocate praying for costs on the ground that despite the order dated 10th October, 2013 by the learned Special Judge for day to day trial as per Section 309 Cr.P.C., prosecution was directed to lead evidence from 7th April, 2014 to 30th April, 2014 but during the above period the prosecution could not examine sufficient number of witnesses.

11. While disposing of the application under Section 309 Cr.P.C., learned Special Judge had observed that though many grounds were raised in the application but Sh. Manish Kumar Khanna, Advocate pressed only two prayers:-

- (i) Heavy costs on the prosecution for not being able to examine sufficient number of witnesses;
- (ii) Specific direction to the prosecution to ensure presence of witnesses as well as prosecutor on future dates to be fixed for PE.

12. Reply to the application was filed by the State explaining the reasons for not being able to examine sufficient witnesses during the period 07.04.2014 to 30.04.2014 as noted in para no. 2 of the order dated 10th May, 2014.

13. After considering the reply filed by the prosecution, the application of the Petitioner was disposed of with following observations :-

“3. In view of the detailed reply filed by Ld. APP Sh. Rajiv Mohan, this Court is of the considered opinion that the Ld. APP cannot be held to be at fault for his absence before this Court on the aforementioned dates in the present case. However, it also cannot be lost sight of that the accused persons cannot be made to suffer a protracted trial due to the inadequacy of the State in appointing sufficient number of prosecutors. As such

though presently no costs are being imposed upon the State for not effectively utilizing the dates fixed by this Court earlier, it is now made clear that in future on the dates fixed by this Court for leading of PE it will be the duty of the prosecution to ensure both the presence of a witness and of the Prosecutor and that in case it fails to do so, heavy costs will be imposed upon it.

*4. Further taking into consideration the directions passed by the Hon'ble Supreme Court in case titled as **Thana Singh Vs. Central Bureau of Narcotics in Criminal Appeal No. 1640 of 2010** namely that in NDPS cases where the number of witnesses is huge and their deposition is also lengthy, a sessions Court should fix block dates for recording evidence, on joint request of all the Ld. Counsels present, presently the following block dates are being given to the prosecution to lead its evidence-25th August to 29th August, from 22nd September to 30th September, from 27th October to 3rd November and from 24th November to 5th December, 2014 (the prosecution evidence will be conducted on all the above mentioned dates excluding Saturdays and holidays).*

5. A copy of this order be also sent to the Ld. Director, Prosecution as a reminder to an earlier request made by this Court to him to appoint a Public Prosecutor who will be exclusively prosecuting the cases filed by the Special Cell under the NDPS Act before this Court."

14. So far as the problem being faced by the Courts due to non-availability of the prosecutor is concerned, this issue has already been addressed by State and needful done, which is clear from the following documents annexed to the counter affidavit :-

- (i) Notification dated 18/9/14 for promotion of 31 Assistant Public Prosecutors to the posts of Addl. P.P.s (Annexure A)
- (ii) Order dated 20.9.14 regarding transfer/posting of Addl. P.Ps. (Annexure B)
- (iii) Order dated 25.9.14 that concerned Addl. P.Ps posted in the

respective courts will conduct trial of cases specifically assigned to Sh. Rajiv Mohan (now retired since 01.10.14). (Annexure C)

(iv) Order dated 01.10.14 that all the Addl. P.Ps and APPs posted in respective courts will conduct the trial of the cases which were assigned to Sh. Rajiv Mohan (retired since 01.10.14) (Annexure D)

(v) **Letter dated 25.9.14 to inform Standing Counsel (Criminal) that Sh. A.K. Mishra has been posted in the Hon'ble Court of Ms. Anu Grover Baliga, Ld. ASJ, NDPS Act. (Annexure E)**

15. In the written submissions filed by the Petitioner, he has raised issue like bail applications of ordinary litigant many time does not get the same adjournment as that of high profile litigant in this Court as well before the trial Court. He has quoted certain high profile cases in the written statements as well inference of money and power as mentioned in the decision of this Court in Crl. Appeal No. 93/2004. Thereafter the Petitioner has referred to the decisions of this Court in *Raj Deo Sharma Vs. State of Bihar, 1998 (7) SCC 507* case repeated in the case of Akil relevant portion of which has been extracted in the petition as well as the Annexure E, the circular in this regard issued by this Court directing the trial Court Judges to comply the decisions of Raj Deo's case (supra) failing which administrative action could be taken against the delinquent judicial officer.

16. The Petitioner has contended that system has become like an onion where different layers and different parts have been made as a complete. Each part like the prosecutor, the witnesses, the computer and the printer, etc. causing small harm to the litigants. The litigant is stripped of his complete flesh as if by piranhas but each individual part refusing to accept any responsibility or accountability on the ground that individually they

have only done a small harm, ignoring the sum total of their collective harm. Anybody who raises this issue is met with loaded meaningless dribble laced with rhetorical snappy comeback phrases.

17. The Petitioner further submitted that it is not a PIL as compensation is being demanded, in the individual matters; although the issue in the larger perspective, as mentioned in the writ, shall be raised as a PIL in future. In the written submissions he had mentioned that he left the case of Arun Kumar (FIR No. 28/2012) as he found it to be intolerable and too expensive in the way the matter is going on and the matter of Gurpreet Singh (FIR No. 23/2012) is still at the stage of defence witnesses but the prayer are relevant as under Article 227 of the Constitution of India this Court must take suo motu cognizance and the compensation remains the issue as the Petitioner has suffered for which the question is does the facts of this case harm the Petitioner in pocket and mind.

18. In the written submissions filed by the State, it is submitted that petition filed by the Petitioner looks like a PIL. The direction given by this Court in the W.P. (Crl.) 1549/2009 have already been complied with by the State by filing up the vacancies of the APP. Since the trial Court has already taken up the matter on day to day basis, it is for the trial Court to see as to how many witnesses could be examined in a day and the petition deserves to be dismissed.

19. I have considered the rival contentions and carefully gone through the record.

20. The legal position is well settled that unless there is any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Articles 226 and 227 of the Constitution to

interfere and if there is evidence on record on which a finding can be arrived at and if the Court has not misdirected itself either on law or on fact, then in exercise of the power under Article 226 and Article 227 of the Constitution, the High Court should refrain from interfering with such findings made by the appropriate authorities.

21. So far as prayer no. 1, 3 and 4 are concerned, learned Special Judge has taken necessary steps in this regard and regular Additional P.P has already been posted in the Court of learned Special Judge where the two cases in respect of FIR Nos. 23/2012 and 28/2012 PS Special Cell are pending.

22. The impugned orders reflect that learned Special Judge has already taken steps to ensure speedy trial by giving necessary directions to the prosecution. Thus, no further direction by this Court in this regard is necessary.

23. The next issue that arises for consideration is in respect of the prayer nos. 2 and 5 in this writ petition. The grievance of the Petitioner is that learned Special Judge failed to impose cost on the prosecution for its inability to produce witnesses on the dates given despite the fact that neither the Accused nor the Petitioner, who is defence counsel in the above noted cases, were blamed for such adjournments.

24. There are three questions that need consideration by this Court :

Q.1. Whether the order dated 14th February, 2014 passed in Sessions Case No. 11/2013 tiled as State Vs. Gupreet Singh & Anr. in FIR No. 23/2012 PS Special Cell and order dated 10th May, 2014 passed in Sessions Case No. 10/2013 titled as State Vs. Arun Kumar & Ors. in FIR No. 28/2012 PS Special Cell rejecting the prayer of the Petitioner

to impose cost on the Prosecution can be termed as causing miscarriage of justice or infragant violation of law so as to infringe his right to have speedy trial thereby calling upon interference by this Court.

Q.2. Whether the discretion exercised by learned Special Judge in both the matters by not imposing cost on the prosecution, can be termed as arbitrary, in contravention of the provisions of Code of Criminal Procedure.

Q.3. Who is entitled to cost, if any, imposed on the Prosecution and can the Petitioner as defence counsel be held entitled to receive the cost.

25. So far as question No.1 is concerned, it may be noted at the outset that the Accused is not the Petitioner before this Court and he had not made any grievance before this Court that he has been denied the right to have speedy trial. Even from the record, it is not established that there is an inordinate delay in completing the trial. In the case of ***Abdul Rehman Antulay etc. Vs. R.S.Nayak and Anr. AIR 1992 SC 1707***, the Supreme Court has considered the right of an Accused to have speedy trial and the factors that require consideration to determine whether there was a delay and the factors responsible for such delay, if any. The guidelines have been laid in para 54 of the Report which are as under :-

54. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are :

1. Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried

speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the societal interest also, does not make it any-the-less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

2. Right to Speedy Trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. That is how, this Court has understood this right and there is no reason to take a restricted view.

3. The concerns underlying the Right to speedy trial from the point of view of the accused are :

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

4. At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the Right to speedy trial is alleged to have been infringed, the first question to be put and answered is-who is responsible for the delay? Proceedings taken by either party in

good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not a frivolous. Very often these stays obtained on ex-parte representation.

5. While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the work-load of the court concerned, prevailing local conditions and so on-what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

6. Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in Barker "it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate". The same ideal has been stated by White, J. in U.S. v. Ewell, 15 Law Edn. 2nd 627, in the following words :

the sixth amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than more speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the

prosecution become prosecution, again depends upon the facts of a given case.

7. We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non- asking for a speedy trial cannot be put against the accused. Even in U.S.A., the relevance of demand rule has been substantially watered down in Barker and other succeeding cases.

8. Ultimately, the court has to balance and weigh the several relevant factors-'balancing test' or 'balancing process'-and determine in each case whether the right to speedy trial has been denied in a given case.

9. Ordinarily speaking, where the court comes to the conclusion that Right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order-including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded-as may be deemed just and equitable in the circumstances of the case.

10. It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of Right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the

complaint. The Supreme Court of U.S.A. too as repeatedly refused to fix any such outer time limit inspite of the Sixth Amendment. Nor do we think that not fixing any such outer limit in effectuates the guarantee of Right to speedy trial.

11. An objection based on denial of Right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis.

26. Reverting to the grievance of the Petitioner before this Court, though the Prosecution failed to conclude its evidence in both the cases during the period when the two cases were listed before learned Special Judge but the circumstances in which the needful could not be done have been incorporated in the impugned orders. Both the FIRs pertained to the year 2012 and in the petition itself, it is mentioned that at the time of filing of the petition, the matter of Gurpreet Singh (FIR No. 23/2012) was at the stage of defence evidence and the matter of Arun Kumar (FIR No. 28/2012) has been left by the present Petitioner Mr. Manish Khanna, Advocate. From the record, it is difficult to arrive at the conclusion that the delay in the matter was such as to infringe the right of the Petitioner to have speedy trial.

27. So far as question No.2 is concerned, the learned Special Judge has given reasons for not imposing cost on the Prosecution and has also issued necessary directions to the prosecution to ensure speedy trial. Imposition of cost in a matter was a subject matter of discretion of learned Trial Court and I find that such discretion has been exercised judicially after taking into consideration all the attendant circumstances including the reasons in which

learned Prosecutor could not attend the case on the date fixed before learned Trial Court.

28. So far as question No.3 is concerned, the Petitioner is claiming cost in his individual capacity as a defence counsel. The question, as to who should receive the cost imposed on the Prosecution, has been considered by this Court in CrI.M.C. No.1792/2010 decided on 24.05.2010 and in W.P.(CrI.) No.1146/2010 decided on 07.02.2011 and followed in the case of ***Directorate of Revenue Intelligence vs. Narendra Sogani & Ors. 2012 (2) JCC 1305.***

29. In the case of ***Directorate of Revenue Intelligence vs. Narendra Sogani & Ors.*** (Supra), the petition was filed by DRI being aggrieved by the orders dated 13.07.2010 and 28.01.2011 whereby the learned ACMM had imposed a cost of Rs.2000/- on the Petitioner on the ground of adjournment which was granted for production of Prosecution evidence and for closing the Petitioner's evidence respectively. The cost was ordered to be paid to the accused persons. The contentions of the Petitioner DRI was that there is no provision in the Code of Criminal Procedure under which cost imposed by the Court can be given to the accused persons. After considering the contentions raised at bar, it was observed as under :-

'5. I have carefully considered the submissions made by the learned counsel and have also considered the two orders bearing Nos. CrI.M.C. 1792/2010 dated 25.5.2010 and W.P.(CrI.) 1146/2010 dated 7.2.2011, which have been referred to by the learned counsel for the petitioner passed by this Court where the cost, which had been imposed by the learned ACMM, had been set aside and not given to the accused persons.

6. I fully agree with the submissions of Mr.Satish Aggarwala that in the Cr.P.C., there is no specific provision under which the cost, which has been imposed on the Prosecuting Agency, can be given to the

accused persons. Even otherwise also, it is normally not done in a criminal case where the cost is imposed on the Prosecution, the same be given to the accused persons, more so, where there is an allegation that the accused themselves have been responsible for the delay. In the instant case, the learned counsel for the petitioner has stated that he has no objection to the deposit of cost with the Delhi High Court Legal Services Committee and a statement has been made by the learned counsel for the accused persons also that he has no objection in case the cost is permitted to be deposited with the Delhi High Court Legal Services Committee. Therefore, this need not be gone into further. A consent order is passed, setting aside this portion of the order of the learned ACMM, directing the payment of cost to the accused persons. Let the cost be deposited with the Delhi High Court Legal Services Committee by the petitioner. To this extent, the order of the learned ACMM dated 30.07.2010 is set aside.'

30. Explanation (2) to Section 309 Cr.P.C. being relevant for the purpose of disposal of this writ petition needs to be quoted and reads as under :-

'Section 309 Cr.P.C. – Power to postpone or adjourn proceedings –
xxx xxx xxx
Explanation 2. – The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.'

Thus as per Explanation (2) to Section 309 Cr.P.C., even if the cost is imposed by the Court, the same cannot be awarded to the Accused or his counsel.

31. In view of above discussion, the writ petition deserves dismissal and the same is hereby dismissed.

PRATIBHA RANI, J

NOVEMBER 05, 2014

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