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

% *Decided on : 11th September, 2014*

+ W.P.(CRL) 1547/2013

SANJAY SHARMA Petitioner

Through: Mr.Tarun Sharma, Advocate.

versus

STATE Respondent

Through: Mr.Saleem Ahmed, Standing Counsel
(Crl.) for State with SI Pramod
Kumar, P.S. Subhash Place, Delhi.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J. (ORAL)

1. The writ Petitioner before this Court is an Inspector in Delhi Police, who is posted as SHO, Police Station Civil Lines.
2. While posted at P.S. Saraswati Vihar, he investigated case FIR No.36/2008, P.S. Saraswati Vihar titled State vs. Pawan @ Mama. The trial in the above-noted case was pending before the learned Addl. Sessions Judge and was listed for prosecution evidence on 20.05.2013. On that day due to official exigencies, the writ Petitioner in his capacity as Investigating Officer was unable to appear before the learned Addl. Sessions Judge. The reason for non-appearance is stated to be not personal, but due to anticipated protest by Tibettans at Majnu Ka Tila during the visit of H.E., the Chinese Premier to Delhi from 19.05.2013 to 21.05.2013, which required heavy law and order arrangement within the jurisdiction of Police Station Civil Lines.

3. It is also mentioned in the writ petition that when the request of the writ Petitioner to his senior officer to permit him to appear before the learned Addl. Sessions Judge, was not acceded to and he was asked to seek exemption in the case, request to this effect was sent to the learned ASJ through Ct. Deepak. However, due to non-appearance of the writ Petitioner before the learned ASJ on the said date, the learned ASJ imposed a cost of Rs.2,000/- on the prosecution, further directing that the same be recovered from the salary of the Investigating Officer SI Sanjay Sharma. The conduct of the I.O. Sanjay Sharma, i.e. his non-appearance in the case till 1:45 p.m., was also adversely commented upon in the proceedings of that day and copy of the order was ordered to be sent to the Commissioner of Police for appropriate action and compliance under intimation to the learned Trial Court.

4. Feeling aggrieved by the above order, the writ Petitioner has invoked the jurisdiction of this Court under Article 226 of Constitution of India read with Section 482 Cr.P.C. praying for quashing of the impugned order to the extent it imposed adjournment cost on the prosecution to be recovered from the salary of the Petitioner and also to expunge the adverse remarks recorded about his conduct in the order which have been made without any justification and without giving him an opportunity of being heard.

5. I have heard learned counsel for the Petitioner and learned Standing Counsel for the State. The proceedings dated 20.05.2013 recorded by the learned ASJ, are as under:-

“20.5.2013

Present: Ld. Addl. PP for the State.

Accused in JC with Ms.Anu Narula, Advocate.

*Only two witnesses namely Anis Kapoor and Rajesh Goyal are present. Witness Kiran Kapoor is not present. The Investigating Officer SI Sanjay Sharma is also not present nor there is any written request or information from the IO nor there is any competent officer/parokar on his behalf to follow up the case. Senior Officer of the district be informed about the non-appearance of the IO.
Be awaited.*

*Sd/-
ASJ/NW-II, Rohini/20.5.2013*

1:45 PM

Present: Ld. Addl. PP for the State.

Accused in JC with Ms. Anu Narula, Advocate.

PW31 Anis Kapoor and PW 34 Rajesh Goyal are present, examined and discharged.

Despite having kept the file pending the Investigating Officer SI Sanjay Sharma has not appeared. The ACP concerned was also informed about the non-appearance of the IO is also not present. Time is now 1:45 PM. I may specifically observe that the presence of the Investigating Officer is obligatory during the conduct of trial of the case particularly during the examination of the witnesses (Ref.: Zahira Sheikh Vs. State of Gujarat CrI.Appeal No.446-449 of 2004 decided on 12.4.2014). An adjournment has been compelled upon the Court only on account of the lapse committed by the IO who has not only failed to secure the presence of the witness Kiran Kapoor but has also himself absented and failed to appear before the Court. In view of the above I am now compelled to adjourn the case for remaining PE on 23.9.2013 which is subject to a cost of Rs.2,000/- imposed upon the prosecution under Section 309 Cr.P.C. to be deducted from the salary of Investigating Officer SI Sanjay Sharma. The conduct of the IO is also taken on record. Copy of this order be placed before the Commissioner of Police for appropriate action and compliance under intimation to this Court.

*sd/-
ASJ/NW-II, Rohini/20.5.2013”*

6. Learned counsel for the Petitioner has drawn attention of this Court to the steps taken by the Investigating Officer (Petitioner herein) to seek permission to attend the Court of learned ASJ on 20.05.2013 and the

directions of the superior officers to seek exemption from the Court so as to ensure law and order arrangement near Majnu Ka Tila in view of anticipated protest by Tibettans against the visit of Chinese Premier. Request was despatched through Ct. Deepak, who left for the Rohini Court No.409 vide DD No.28B dated 20.05.2013 P.S. Civil Lines at 9:35 a.m and returned at 1:05 p.m vide DD No.54B.

7. The grievances of the writ Petitioner are many fold:-

(i) He being SHO of P.S Civil Lines, was responsible for maintaining law and order situation in the area. On the date when the cost was imposed on the prosecution, he was directed by the senior officers to ensure law and order in the area of P.S. Civil Lines in view of the prevailing situation in the area.

(ii) Being IO of the case, he had ensured production of prosecution witnesses before the learned Trial Court and even on 20.05.2013, two witnesses, namely PW-31 Anis Kapoor and PW-34 Rajesh Goyal were present. The third witness Kiran Kapoor was not present and sent request for exemption through an Advocate. Statement of Investigating Officer was not to be recorded on 20.05.2013.

(iii) Out of the list of 39 witnesses, 34witnesses had been examined by that date. Some other witnesses were required to be examined by the Court. His statement as Investigating Officer of the case was to be recorded at the end.

8. Although, the writ Petitioner has placed all the documents to bring on record that vide his application dated 19.05.2013, he requested ACP/Civil Lines to permit him to attend the Court on 20.05.2013, where State Case titled as State vs. Pawan @ Mama was pending in Court of learned ASJ,

Room No.409, Rohini Courts. However, his request was not allowed by the DCP concerned observing as under:-

“Since there is a sensitive arrangement in Majnu Ka Tila in view of the anticipated protest by Tibetans during the visit of H.E. the Chinese Premier to Delhi from 19th to 21st May, 2013, exemption to be sought for from the Hon’ble Court for non-appearance”.

9. The learned Addl. Sessions Judge, in the proceedings dated 20.05.2013, has observed that the adjournment has been compelled upon the Court only on account of the lapse committed by the IO who has not only failed to secure the presence of witness Kiran Kapoor but also himself absented and failed to appear before the Court and imposed a cost of Rs.2000/- on the prosecution to be recovered from the salary of the Investigating Officer.

10. First of all from the proceedings dated 20.5.2013 it is clear that two public witnesses Anis Kapoor and Rajesh Goyal were present on that day and have been examined. There is no request by learned Addl. PP to defer the examination of those two public witnesses on the ground that Investigating officer was not present to render necessary assistance to him. The mere fact that two public witnesses have been examined without any difficulty being expressed by learned Addl. PP for the State, makes it clear that adjournment, if any, was not because of non-appearance of the Investigating Officer on that day. So far as witness Kiran Kapoor is concerned, learned Addl. Sessions Judge has observed that Investigating Officer has failed to produce her. Witnesses are to be summoned and examined by the Court. There is no mention by the learned Trial Court as to whether witness Kiran Kapoor was served/unseen/untraceable. Although learned counsel for the Petitioner has submitted that PW Kiran Kapoor sent

request for her exemption for personal appearance on that day, however, reason for absence of PW Kiran Kapoor and action taken for the non-appearance do not find mention in the proceedings. Mere mention in the proceedings that Investigating Officer has failed to procure presence of witness Kiran Kapoor is not enough as at the most the Investigating Officer could have been directed to effect service of the summons on the public witnesses if there was any difficulty in locating them by process serving agency, which does not appear to be the case here. Further, learned Addl. Sessions Judge could have proceeded against the witness under Section 350 CrPC, if she failed to appear without any sufficient cause.

11. Certified copy of the proceedings dated 20.05.2013 at the first call record that the Investigating Officer failed to send any request or competent officer/Parokar on his behalf to follow up the case. It may be noted here that learned Addl. Sessions Judge has recorded the presence of learned Addl. PP for the State in the proceedings who has to conduct the trial on behalf of the State. It is also ample clear from the proceedings that apart from Investigating Officer, other witnesses were yet to be examined. Thus, it cannot be said that absence of Investigating Officer compelled the learned Trial Court to adjourn the case. Rather reason for the absence of public witness Kiran Kapoor on that day should have been taken note of by learned Addl. Sessions Judge and necessary action, if required, against her for non-appearance on that day. The proceedings of that day do not reveal whether any dasti summons of Kiran Kapoor were given to the Investigating Officer, whether the summons sent to her were received back served or unserved and if served, who received it and if unserved, what was the reason behind that.

12. The Investigating Officer has placed on record the copy of his

application moved before the superior officers to seek permission to attend the Court case on 20.05.2013 which was not granted in view of the anticipated protest by Tibettans during the visit of H.E., the Chinese Premier to Delhi from 19.05.2013 to 21.05.2013. Being SHO, PS Civil Lines, it was the duty of the Petitioner to ensure law and order situation in the area especially when the case was not listed before learned Addl. Sessions Judge for recording statement of Investigating Officer. Even if, it was listed for examination of Investigating Officer, in that circumstance also, to discharge his primary duty to maintain law and order in the area, the Investigating Officer could have sent his request to the concerned Court to seek exemption on that day and matter should have been listed for some other day for his examination.

13. Although learned Trial Court has recorded in the proceedings that that **senior officer of the District be informed about the non-appearance of the Investigating Officer keeping the case as 'Be awaited', in the proceedings recorded at 1.45 pm, there is no mention as to who was directed to inform which senior officer and what was the report submitted by that official to the Court in this regard. The subsequent proceedings recorded at 1.45 pm only record that ACP concerned was also informed about the non-appearance of the Investigating Officer and despite that he (ACP) is not present, was not a sufficient reason to burden the State with cost especially when the top priority of the Petitioner as SHO, Civil Lines and the senior officers was to maintain law and order in the area in view of the anticipated protest by Tibettans during the visit of H.E., the Chinese Premier to Delhi during that period.**

14. Without going into the controversy as to what happened to the request sent by the writ Petitioner to the learned Trial Court through Constable Deepak vide DD No.28-B who returned to the Police Station and made arrival entry vide DD No.54-B, the writ petition can be disposed of in view of the facts that have emerged on the record and the legal position on the issue.

15. It may be noted here that SI Sanjay Sharma, the Investigating Officer was a witness in the case and received summons in that capacity. At the most, the learned Addl. Session Judge could have served him with show cause notice as required under Section 350 Cr.P.C. and then to pass appropriate order in the matter. It is difficult for any Investigating Officer to ignore his primary duty i.e. maintain law and order that too when there is a serious threat to the law and order situation in the area just to be present in the Court to be of some assistance to learned Addl. PP, if required. Since the witnesses present in the Court on that day were duly examined by the learned Addl. PP and statement of remaining prosecution witnesses other than the Investigating Officer, was yet to be recorded, there was hardly any occasion for the Court to observe that the Court was compelled to adjourn the matter because the Investigating Officer has failed to secure the presence of witness Kiran Kapoor and had absented himself.

16. Before arriving at the conclusion that State/absence of Investigating Officer was responsible for adjournment in the matter on that date, it would have been appropriate had the learned Addl. Sessions Judge also recorded as to the number of witnesses summoned for that date of hearing, how many of them were served and present and the reasons for absence of remaining witnesses and request, if any received on behalf of the witnesses who were

absent despite service. It can be gathered from the record that the case was not listed for recording the statement of Investigating Officer on that date. The main reason given in the proceedings dated 20.05.2013 for imposing cost is the observation of Hon'ble Supreme Court made in ***Zahira Habibullah Sheikh & Anr. vs. State of Gujarat, Crl.Appeal No.446-449 of 2004 decided on 12.4.2014*** that the presence of the Investigating Officer is obligatory during the conduct of trial of the case particularly during the examination of the witnesses.

17. Here it is necessary to mention that the Apex Court in the case of ***Zahira Habibullah Sheikh & Anr. vs. State of Gujarat & Ors.*** 2004 CriLJ 2050 has observed as under :-

*‘..... Another aspect which has been lightly brushed aside by the High Court is that one person who was to be examined on a particular date was examined earlier than the date fixed. This unusual conduct by the prosecutor should have been seriously taken note of by the Trial Court and also by the High Court. It is to be noted that the High Court has found fault with DCP Shri Piyush Patel and has gone to the extent of saying that he has miserably failed to discharge his duties; while finding at the same time that police inspector Baria had acted fairly. The criticism according to us is uncalled for. Role of Public Prosecutor was also not in lien with what is expected of him. Though a Public Prosecutor is not supposed to be a persecutor, yet the minimum that was required to be done to fairly present the case of the prosecution was not done. **Time and again, this Court stressed upon the need of the investigating officer being present during trial unless compelling reasons exist for a department.** In the instant case, this does not appear to have been done, and there is no explanation whatsoever why it was not done. Even Public Prosecutor does not appear to have taken note of this desirability.....’*

18. The reasons before the Investigating Officer for not being able to attend the Court do fall in the category of compelling reasons existing in the police department throughout the day despite serious law and order problem apprehended in the area under his jurisdiction that too in the light of visit of foreign dignitary

19. In the instant case, on the date of hearing 20.05.2013 the writ Petitioner has taken all the steps within his power to discharge his official duties not only as the Investigating Officer but also as SHO, PS Civil Lines. By no stretch of imagination, he could have been held responsible for adjournment of the case on that date. The conduct of the writ Petitioner right from the beginning was first to seek permission of the department to attend the Court and thereafter to send his handwritten request to the concerned Court through Constable Deepak whose departure and arrival entries for Court No.409, Rohini courts have been placed on record, did not warrant any adverse comments.

20. In the circumstances, I find it to be a fit case where to secure the ends of justice, the inherent powers need to be exercised by this Court by quashing the order dated 20.05.2013 passed by learned Addl. Sessions Judge to the extent of adverse comments made against the present Petitioner and cost of adjournment imposed on the prosecution to be recovered from the salary of the Petitioner.

21. Accordingly, the writ petition is allowed and the adverse remarks made by learned Addl. Sessions Judge in the order dated 20.05.2013 about the conduct of the Petitioner i.e. Inspector Sanjay Sharma, referred to above in para no.5 are hereby expunged and order regarding imposition of cost of Rs.2000/- on the prosecution, which was ordered to be recovered from the salary of Petitioner is hereby quashed.

22. The writ petition stands allowed in above terms
Order dasti.

SEPTEMBER 11, 2014/ 'dc/st'

PRATIBHA RANI, J