

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

% Order delivered on: 22nd May, 2015

+ **Crl.M.C. No.2143/2015**

SURESH KALMADI Petitioner
Through Mr.Kapil Sibal, Sr. Adv. and Mr.
Sandeep Sethi, Sr. Adv. with Mr.
Siddarth Aggarwal, Ms. Shyel
Trehan Mr. Dhritiman Roy, Advs.

versus

CBI Respondent
Through Ms. Sonia Mathur, Standing
Counsel for CBI with IO Anand
Swarup for CBI

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. In view of the fact that the cross examination of PW-18 in the matter is fixed before the trial court, the matter is being heard at the interim stage itself. The respondent has filed the short written submission.

2. Mr. Suresh Kalmadi, petitioner has filed the present petition under Section 482 of the Code of Criminal Procedure Code, 1973, read with Article 227 of the Constitution of India seeking quashing of order dated 16th May, 2015 passed by the Special Judge (PC ACT) (CBI-01), Patiala House Courts in C.C. No.22 of 2011.

3. The petitioner is facing trial in CC No. 22 of 2011 arising out of FIR RC No. DAI-2010-A-0044 under Sections 120- B read with Sections 420, 467, 468 and 471 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and under Sections 13(2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988.

4. It is the case of the prosecution that the contract for Timing Scoring and Results systems for the Commonwealth Games 2010 ought not to have been awarded to Swiss Timing/Omega, but to a Spanish company by the name of MSL Software.

5. By the impugned order dated 16th May, 2015 the petitioner's application dated 7th April, 2015 under Section 91 of the Code of Criminal Procedure, 1973 seeking production of Call Detail Records for the phone number "9811806773" of Mr. Jyoti Chhabra being a representative of a company by the name of ATOS Origin, was dismissed.

6. The petitioner had prayed in the application for the production of Call Detail Records for the purpose of cross-examining PW-18 Mr. Sujit Panigrahi. In his testimony before the Trial Court on 7th April, 2015, PW-18 Sujit Panigrahi has identified the phone number "9811806773" as belonging to one Mr. Jyoti Chhabra of "ATOS Origin", who was also a potential bidder for the proposed TSR RFP. It is the case of the petitioner that he was also in a commercial relationship with Microsistemas Lagasca S. A. de Madrid (hereinafter referred to as "MSL"), which had in fact bid for the TSR RFP.

7. It is also the case of the Petitioner that PW-18 Mr. Sujit Panigrahi was in regular contact with ATOS Origin and MSL through the said Mr. Jyoti Chhabra during the entire process of procurement of the TSR/OVR System. There it is alleged that the Call Detail Records of Mr. Jyoti Chhabra are therefore relevant to establish that constant communication between PW-18 Sujit Panigrahi and him, and the onward communications between Mr. Jyoti Chhabra and representatives of MSL.

8. The Trial Court has dismissed the application dated 7th April, 2015 on the reason that *"this submission is hardly of any relevance when the mobile call record of PW-18 Sujit Panigrahi is already on record and from that mobile record, it can be easily made out that how many calls PW-18 Sujit Panigrahi made to Sh. Jyoti Chhabra, vice versa how many times Sh. Jyoti Chhabra called PW-18 Sujit Panigrahi."*

9. It is submitted by the petitioner that communications between PW-18 Sujit Panigrahi, Mr. Jyoti Chhabra and representatives of MSL around crucial events in the procurement process i.e. (a) between January-April 2009 (preparation and evaluation of the Expression of Interest (EOI) for Timing, Scoring and Results (TSR)), (b) May-June 2009 (preparation of Scope of Work for TSR), (c) July-September 2009 (preparation of Request for Proposal (RFP) for TSR and change of eligibility criteria of the TSR RFP at different intervals of time), (d) October 2009 (publication of TSR RFP and modifications/clarifications issued to bidders), November-December 2009 (receipt of bids and evaluation) -reveal the efforts made PW-18

Sujit Panigrahi behind the scenes to ensure award of tender for TSR to MSL in the procurement process.

10. It is also the case of the petitioner that a review of the Call Detail Records of PW-18 Sujit Panigrahi reveal the close nexus of phone calls and SMSs shared between Sujit Panigrahi and Jyoti Chhabra of “ATOS Origin”, a potential bidder to the TSR contract for CWG D2010.

11. Mr. Kapil Sibal, learned Senior counsel appearing on behalf of petitioner submitted that the Trial Court did not to appreciate that Call Detail Records of Mr. Sujit Panigrahi can only serve the limited purpose of showing (a) the constant communication between PW-18 Sujit Panigrahi and Mr. Jyoti Chhabra. The Call Detail Records of PW-18 Sujit Panigrahi cannot disclose (b) the onward communications between Mr. Jyoti Chhabra of ATOS Origin and representatives of MSL. Only the Call Detail Records of Mr. Jyoti Chhabra can serve this purpose. The name of Mr. Jyoti Chhabra is not mentioned in the list of witnesses. The petitioner at the initial stage to cross the star witness on this aspect. The suggestion of the respondent to summon Jyoti Chhabra as defence witness has no consequence when the PW-18 the main witness is under cross-examination and at the present stage is the most appropriate to produce the details of mobile call record of Jyoti Chhabra. The other suggestion of the respondent is that the witness be recalled in subsequent stage has no bearing as the petitioner has a right to built up his defence from the day one.

12. It is alleged by Mr. Sibal that these Call Detail Records are crucial for the petitioner to establish his defence and disprove the principal charge of a criminal conspiracy to favour M/s Swiss Timing; and, for the Court to discover the truth about the allegations against the accused and no prejudice would cause if the respondent would produce their documents which are relevant and connected with the present case. Mr. Sandeep Sethi, learned Senior counsel for the petitioner has also referred few decisions in support of petitioner's case.

13. It is also matter of record that the Trial Court allowed similar applications under Section 91 of the Code of Criminal Procedure moved by Accused No. 3 for production of Call Detail Records of PW-18, Mr. Sujit Panigrahi and PW- 29, Mr. Vijay Kumar Gautam, by orders dated 25th April, 2013 and 9th July, 2013 respectively. But Trial Court rejected a similar application-seeking summons for Call Details Records of Mr. Jyoti Chhabra vide impugned order dated 16th May, 2014.

14. Mr. Sethi, the other learned Senior counsel has heavily relied upon the decision of Bombay High Court on similar aspect in the case of **Kamal Ahmed Mohammed Vakil and Ors. vs. State of Maharashtra**, 2013 CrI.L.J. 858 and in paras 33, 37, 51, 54 and 59 wherein, it was held as under :

“33. Section 91 of the Code empowers a Court to issue summons to a person 'to produce before the Court, a document or thing believed to be in possession of such person if the Court considers the production of such documents or other things necessary or desirable for the

purpose of any inquiry, trial or other proceedings under the Code.' The scope of section 91 is very wide and obviously, it cannot be restricted only to the documents on which the prosecution relies, nor to the stage contemplated by Section 233 or 243 of the Code. There may be cases where for an effective cross-examination of a witness, the cross-examiner would require certain documents in his hand. Without the availability of such documents, the rights and obligations of a cross-examiner under Sections 155(3) and 145 of the Evidence Act, cannot be effectively discharged or exercised by him. To overcome such a situation, he can urge the court to supply such documents to him. If they are in the court, copies thereof can be supplied, but if they are not, the court would be expected to use the powers under Section 91 of the Code, whenever it finds it necessary or desirable. To overcome an unfair or unjust result, the court certainly would be entitled to exercise the powers under Section 91 of the Code, which section is widely framed and contains nothing to indicate otherwise. It is not that the documents called for by the accused, must be called by the court, just for asking, but, surely, that the prosecution is not relying on such documents cannot be a consideration that should weigh in deciding such application made by an accused.

37. The decision in Manu Sharma's case (supra) was again considered and referred to by the Supreme Court of India in V.K. Sasikala vs. State MANU/SC/0792/2012 : (2012) 9 SCC 771. After reproducing paragraph nos. 216 to 221 in Manu Sharma's case, it was observed that 'the concept of a free and fair trial, painstakingly built up by the Courts on a purposive interpretation of Article 21 of the Constitution was much larger and was not limited only to the compliance with the provisions of section 207 of the Code.' Their Lordships, inter alia, observed that the individual notion of prejudice, difficulty, or handicap, in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions. Their Lordships further observed :

"It is not for the prosecution or for the court to comprehend the prejudice that is likely to be caused to the accused. The perception of prejudice is for the accused to develop and if the same is founded on a reasonable basis it is the duty of the Court as well as the prosecution to ensure that the accused should not be made to labour under any such perception and the same must be put to rest at the earliest. Such a view, according to us, is an inalienable attribute of the process of a fair trial that Article 21 guarantees to every accused." (Paragraph 20 of reported judgment)

In that case, Their Lordships allowed the appeal directing inspection of unmarked and unexhibited documents to be given to the accused by the Trial Court before the examination of the accused under section 313 of the Code, would be completed.

51. Even the plea 'that let adverse inference be drawn against the prosecution' put forth to suggest that an accused will not be prejudiced by non-production of the relevant evidence, will not necessarily prevent judicial inquiry into the correctness of the claim of non-availability or loss. Such plea is sometimes put forth to prevent a judicial inquiry into the matter, when the prosecution feels that the adverse inference likely to be drawn by the court from the nonproduction of the documents called for by the defence, would not be as adverse as would be likely to be caused to the prosecution, by production of those documents. What is often forgotten in such cases that deliberate suppression or withholding of documents which an accused would want to be produced for his defence, would, in appropriate cases, go beyond the drawing of an adverse inference and may vitiate the trial itself. In the aforesaid case of *Habeeb Mohammed* (supra), Their Lordships clearly held :

“a conviction arrived at without affording opportunity to the defence to lead whatever relevant evidence it wanted to produce cannot be sustained. The only course open to us in this situation is to set aside the conviction”.

54. It must be emphasized that the appellants are facing a serious charge and there is every possibility that they or atleast some of them, would receive a death sentence, on being found guilty. It is, therefore, absolutely essential that they get a full and proper opportunity to defend themselves. When the evidence that is being sought to be given in defence by them, is relevant and admissible, the claim that such material or evidence is not available, cannot be accepted, without scrutiny and without making efforts to secure such evidence, should it be available. This is particularly so, because, the prosecution had been, all along, averse to the idea of permitting such evidence to be given, and had been raising various objections from time to time, to prevent the said evidence from being brought before the Court.

59.Undoubtedly, Principles of Natural Justice are an integral part of a fair trial. Article 21 of the Constitution of India and the Universal Declaration, mentioned above, both guarantee a fair trial to the accused. Even if the Code does not contain any provision for providing "all" the evidence collected by the investigating agency such a provision has to be read into the Code. For principle of natural Justice *audi alteram partem* would have to be read into the Code. It is trite to sate that opportunity of hearing means effective and substantial hearing. Truncated evidence, half hidden evidence given to the accused or placed before the Court, do not amount to effective hearing. Thus, under the principle of *audi alteram partem* the accused would have the right to access the evidence which is in his favour but which the prosecution is unwilling to produce in the Court and whose disclosure does not harm the public interest. In case the

relevant evidence in favour of the accused is not supplied, we would be creating "Kangaroo Courts" and weaving an illusion of justice. Such Courts and such illusions are an anathema to the judicial sense of fair play.....”

15. The case of prosecution is that the record sought by the petitioner cannot be put to the present PW i.e. PW-18 since it neither relates to him nor can he possibly have knowledge about the correctness thereof. It is submitted that petitioner is trying to summon the evidence only in an attempt to make out a new case and collect fresh material during the trial which is against the spirit of Section 91 Cr.P.C. The application filed by the petitioner does not satisfy the tests of relevance and desirability as laid down in Section 91 Cr.P.C. The respondent had collected all the material necessary for prosecution and has placed on record. If there is any material which is required by the petitioner for his defence, he is entitled to summon or produce the same while leading defence evidence. The witness i.e. PW-18 who is presently being cross examined cannot be confronted with the records proposed to be summoned.

16. Ms. Sonia Mathur, learned counsel for CBI has also referred the following decisions in support of her arguments :

- a. **Chandgiram vs. State**, 2012 IV AD (Delhi) 637
- b. **R.C. Chandolia vs. CBI** W.P. (Crl.) 31/2012 (Delhi High Court) date of order 1st March, 2012.
- c. **G.S. Mayawala & Anr. vs. Om Prakash Mittal**, 2007 (4) JCC (NI) 408.

17. In the case of **Chandgiram** (supra), a prayer was made in the application that the malkhana register, the mortuary register, log book of PCR vehicle and call details with Cell ID of various mobile numbers 9811498020, 9810986899, 9899649902, 9953576329, 9871156664 and 9873188306 are also sought to be summoned. In addition to that, the statements given by one of the eye witness to the TV Channel contained in a CD is also sought to be produced by the petitioner for the purpose of cross-examination of prosecution witnesses. The finding of the court was that the documents cannot be allowed on mere asking by applicant or as matter of routine. The documents were required by petitioner for his defence, as stated in application, same could be summoned or produced by him while leading defence evidence. The documents were required for the purpose of defence cannot be summoned under Section 91 Cr.P.C. The application cannot be filed to delay the proceedings of the Act.

In the application it was specifically stated by the petitioner that under Section 91 Cr.P.C. that these documents were required for defence. There were no pleadings, but the request was made during the arguments it was submitted by learned counsel for the petitioner that these documents are required for the purpose of cross examination of prosecution witnesses.

It was held by the court that it was a vague submission which was made. The prosecution witnesses had already been examined and cross examined. Even otherwise it was held that in any case no relevancy of any of those documents and the purpose of putting them in cross examination to any prosecution witness, have been spelt out.

Merely by saying that these documents were required for the purpose of cross examination was not enough.

The situation, however in the present case is entirely different as the application was made during the course of cross-examination of PW-18 when few facts were disclosed and reasons were also spelt out in the application. Therefore, the same referred decision is distinguishable in view of different circumstances in the present case.

18. In the case of ***Ravinder Kumar Chandolia*** (supra) the court after examining the details of documents sought to be produced by the otherside for the purpose of cross-examination of PW-7, in para 14, it was held that it was felt not necessary and relevancy of any record sought to be produced, therefore the trial court order was upheld.

19. In the case of ***G.S. Mayawala & Anr.*** (supra) in para 6 to 9 of the decision are read as under :

“6. According to the petitioner, the main controversy revolves regarding the cash payment of Rs.2 lakhs made by the respondent to the present petitioner. As per case of the respondent in the complaint, he had made cash payment amounting to Rs.2 lakhs to the present petitioner no.1 for petitioner no.2, but no receipt was issued by the petitioner no.2. So, it is for the respondent to prove that he had made this payment of Rs.2 lakhs in cash to the present petitioner.

7. Much reliance has been placed by the petitioner on one diary page filed by the respondent in the trial court. The photocopy of that diary page is at Page No.70. However, this page does not lead us anywhere. Moreover, this document has been filed by the respondent and the respondent has to prove the authenticity of this document and for that purpose

there is no need for production of any other documents prayed by the petitioner.

8. Under Section 91 Cr.P.C., the court can consider production of any document from the person in whose possession or power such documents are believed to be, only, if it is necessary or desirable for the purposes of the trial.

9. Here, in the case in hand, the documents required to be produced from the power and possession of the respondent, are not at all relevant for deciding the controversy between the parties and as such the decision cited by learned counsel for the petitioner is not applicable to the facts of the present case. The present petition, under these circumstances is not maintainable and the same is hereby dismissed.”

The facts and circumstances in this case are distinct with the situation of the present case. Therefore, it does not help the case of the respondent as in the referred case the documents were filed by the respondent thus, it was rightly held that it was the duty of the respondent to prove the authenticity.

20. In the present case, the petitioner is facing trial for an offence which may entail him punishment. He is seeking production of those documents and things which according to prosecution records even appear to be inexistence and which he feels shall help him in defending himself. According to him that these documents are connected with the case in hand. Therefore, it cannot be argued straightway that he is trying for making of any roving or fishing inquiry or is making a request which may be unreasonable. It is settled law that in a criminal trial the prosecution has to be absolutely fair and

impartial. The main purposes of a criminal trial is not to get some one convicted. The object is to discover the truth and punish the accused if found guilty. The documents which he himself cannot procure for the purposes of putting his defence have to be requisitioned by invoking Section 91 Cr.P.C., if the Court is satisfied that those are necessary or desirable for the purpose of trial.

21. The defence has to be built up from day one of the trial. The right to defend, which flows from the fundamental right to “life” and “personal liberty” enshrined in Article 21 of the Constitution of India, is not an illusory right, but a substantive one. The tool given in the hands of the court to discover the truth of the controversy before it. The power under Section 91 Cr.P.C. to discover the truth and to do complete justice to the accused. Naturally, the discretion vested in the Court must be applied judiciously, while keeping in mind the constitutional mandate, and the purpose of Section 91 Cr.P.C. The Court is not expected to reject the application in a mechanical manner and without assigning reasons that these documents are not relevant and required, therefore, the prayer cannot be allowed. There must be finding to the effect that why these are not relevant and required.

22. In the present case, Trial Court has observed that the petitioner does not require the Call Detail Records of Mr. Jyoti Chhabra for the cross examination of PW -18 Sujit Panigrahi on the ground that the records are "hardly of relevance" when the mobile call record of PW-18 is already on record. The Trial Court apparently did not make relevancy of the onward communications of Mr. Jyoti

Chhabra with officers of MSL. Trial Court was of the view that the case of the petitioner was limited to the fact that PW-18 Sujit Panigrahi was in constant communication with Mr. Jyoti Chhabra, though as a matter of fact the application disclosed that the call detail records were required to establish, the onward communications between Mr. Jyoti Chhabra and representatives of MSL".

23. Trial Court did not consider the request of the petitioner that the Call Detail Records of PW -18 Sujit Panigrahi cannot establish the nexus between representatives of MSL, Jyoti Chhabra and PW-18 Sujit Panigrahi. Call Detail Records of PW-18 Sujit Panigrahi only demonstrate communication between PW-18 Sujit Panigrahi and Mr. Jyoti Chhabra which cannot disclose the onward communication between Mr. Jyoti Chhabra and representatives of MSL. The petitioner submitted that the said record is necessary and he may be able to prove that Mr. Jyoti Chhabra acted as a conduit between PW-18 Sujit Panigrahi and MSL Software. The attempt to favour MSL therefore operated in a two step process: first, Mr. Jyoti Chhabra corresponded with PW-18 Sujit Panigrahi at the OC on behalf of MSL and second, he corresponded with officers/ employees of MSL on behalf of PW-18 Sujit Panigrahi.

24. It is submitted by the petitioner that the nexus that the call records will demonstrate strikes at the foundation of the Prosecution's case, and which would show that there was no conspiracy between the petitioner and other accused persons to favour M/s Swiss Timing, and that in fact other officials of the OC, i.e. Prosecution witness PW-18 Sujit Panigrahi attempted to favour MSL as a bidder and these

facts in support of this are evident and demonstrable, but have been deliberately overlooked or concealed by the Prosecution and therefore, the petitioner has a right to an effective opportunity to establish this case with the aid of relevant documents such as the Call Detail Records of Mr. Jyoti Chhabra. At this stage, the Court is not concerned whether the averments made in the application under Section 91 Cr.P.C. may be gospel truth or not. If the documents are necessary in order to decide the real controversy, the same cannot be thrown particularly when the application is filed by the accused.

25. There is some force in the submission of the petitioner for some extent as it also appears from the pleadings that the Trial Court has taken an inconsistent view while passing the Impugned Order. In similar applications under Section 91 Cr.P.C. moved by Accused No. 3 for summoning Call Detail Records of PW-18 Sujit Panigrahi and PW-29 Vijay Kumar Gautam, the Trial Court by orders dated 16th April, 2013 and 9th July, 2013 summoned the records sought. However, the prayer of the petitioner in the application under Section 91 Cr.P.C. was rejected.

26. In view of the aforesaid reasons and without going into any merit of the case and expressing opinion, the impugned order is set aside as the same is not sustainable in law in the facts of the present case. The merit of the said record sought to be produced by the respondent would be considered after the trial as to whether the same would help the case of the petitioner or not.

27. The application filed by the petitioner before the trial court is allowed by quashing the impugned order for summoning the Call

Detail Records for “9811806773” of Mr. Jyoti Chhabra of ATOS Origin. The same be produced accordingly. The trial court is to pass an order for the preservation of Call Detail Records of Mr. Jyoti Chhabra for the year 2009 till the conclusion of the trial.

28. The petition is accordingly disposed of. No costs.

29. Copy of order be given *dasti* to both parties under the signatures of Court Master.

(MANMOHAN SINGH)
JUDGE

MAY 22, 2015