

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL WRIT PETITION NO. 121 OF 2016

S. Mahalingam

.....Petitioner

V/s.

State
(C.B.I., E.O.W. Mumbai)

....Respondent

Mr. R. M. Tiwari Advocate for Petitioner.
Ms. Rebecca Gonsalvez for Respondent
Mr. A. R. Patil APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : JULY 27, 2016.

PC :

- 1) Heard.
- 2) Rule. Rule made returnable forthwith with the consent of the parties.
- 3) The Petitioner herein is accused in C.B.I. Special Case No. 60 of 2004.
By this petition, the Petitioner herein questions the correctness, legality and validity of the order dated 23/11/2015 passed by Special Judge C.B.I., thereby allowing the application filed by the prosecution below Exhibit 161, permitting them to lead the secondary evidence.

4) The relevant facts are as follows:

The C.B.I. filed the charge-sheet against the present petitioner and other accused on 31/07/2004. It is specifically stated in the charge-sheet that the loan documents and other relevant documents had been stolen from the office of the C.B.I. That the C.B.I. had filed a separate offence in respect of the theft of the documents which took place on 05/11/2003. The said case was registered as R.C. No. 44-A/2004. It was specifically stated in the charge-sheet that large number of the original documents proposed to be relied upon by the prosecution had been stolen and in all probabilities destroyed by the accused in R.C. No. 44-A-2004. The prosecution had filed the certified true copies of the stolen documents which form a compilation of the charge-sheet.

5) The learned counsel for the Petitioner submits that the said case was registered as Special Case No. 117 of 2004 wherein the accused were tried for offence punishable under sections, 461, 381, 201 r/w 34 of Indian Penal Code and under section 13 (1) (d) (ii) r/w Section 13 (2) of Prevention of Corruption Act, 1988. By Judgment and Order dated 18/02/2010 the accused were acquitted for offence punishable under section 381, 201 r/w 34 of the Indian Penal Code and the original accused no. 2 was convicted for offence punishable under section 461 of the Indian Penal Code. Accused no. 2 was

also convicted for offence punishable under Sections 13 (1) (d) of Prevention of Corruption Act, 1988.

6) In C.B.I. Special Case No. 60 of 2004, prosecution filed an application seeking permission to lead the secondary evidence in respect of the same documents. Accused no. 3 had opposed the said application on the ground that the C.B.I. had filed a separate case for the theft of the said documents and the accused have been acquitted for offence punishable under section 381 of the Indian Penal Code.

7) The learned counsel for the Petitioner, at this stage also submits that since the accused were acquitted of the charges under Section 381 of the Indian Penal Code, it can be inferred that the prosecution has failed to lay the foundation in the present case. According to the learned counsel, the very fact that the documents were lost and destroyed as admitted by the prosecution, no case could be made out against the present petitioner. The learned counsel further submits that the acquittal of the accused in Special Case No. 117 of 2004 would be a relevant factor. The learned counsel for the Petitioner submits that Section 65 (c) of the Indian Evidence Act contemplates as follows:

“65. Cases in which secondary evidence relating to documents may be given – Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-

(a) -----

(b) -----

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;”

and therefore, prosecution cannot take advantage of its own fault as it is a matter of record that the prosecution has been negligent.

8) The learned Special Judge, upon perusal of the Judgment, in Special Case No. 117 of 2004 has rightly held that there is no evidence to show that the documents were stolen by the accused who were being tried in Special Case No. 117 of 2004 but by itself, it cannot be said that the documents were not lost or stolen from the office of the C.B.I. This Court cannot be oblivious of the fact that the prosecution had filed the certified copies of the relevant documents.

9) The learned counsel has submitted that at the stage of 294 of the Code of Criminal Procedure, 1973, the accused has denied the existence of the said documents.

10) It is in these circumstances, that it would be incumbent upon the

prosecution at the stage of recording of evidence to substantiate the existence of the documents or the genuineness of the certified copies of the documents filed along with charge-sheet. At this stage, it cannot be said that the prosecution has no foundation and therefore the learned Sessions Judge has rightly allowed the application. The findings recorded by the Special Judge warrants no interference. The petition, being sans merits, deserves to be dismissed.

11) Writ Petition stands dismissed. Rule is discharged.

12) The learned Special Judge shall not be influenced by the observations made herein above as they are restricted to the present petition.

(SMT. SADHANA S. JADHAV, J.)