

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

+ CRL.M.C. 671/2016

Date of Decision: July 12th, 2016

MOTILAL VORA

..... Petitioner

Through Mr.R.S.Cheema, Sr. Adv. with
Ms.Tarannum Cheema, Ms.Hiral
Gupta, Mr.Manvendra Singh and
Mr.Harinder Bains, Advs.

versus

SUBRAMANIAN SWAMY & ANR.

..... Respondent

Through Dr.Subramanian Swamy with
Ms.Roxna Swamy, Mr.Ishkaran Singh
Bhandari & Ms.Sonia V. Madan,
Advs.
Mr.Rahul Mehra (Standing counsel)
with Mr.Amit Chadha, APP,
Mr.Amrit Singh, Mr.Shekhar
Budakoti & Mr.Jamal Akhtar, Advs.

WITH

+ CRL.M.C. 672/2016

YOUNG INDIAN

..... Petitioner

Through Ms.Rebecca John, Sr. Adv. with
Ms.Tarannum Cheema, Mr.Harsh
Bora, Ms.Nicy Paulson & Ms.Rudrani
Tyagi, Advs.

versus

SUBRAMANIAN SWAMY & ANR

..... Respondent

Through Dr.Subramanian Swamy with
Ms.Roxna Swamy, Mr.Ishkaran Singh
Bhandari & Ms.Sonia V. Madan,
Advs.

Mr.Rahul Mehra (Standing counsel)
with Mr.Amit Chadha, APP,
Mr.Amrit Singh, Mr.Shekhar
Budakoti & Mr.Jamal Akhtar, Advs.

WITH

+ CRL.M.C. 1317/2016

SAM PITRODA @ SATYANARAYAN GANGARAM PITRODA

..... Petitioner

Through Mr.Kapil Sibal, Sr. Adv. with
Mr.Devadatt Kamat, Mr.Adit Pujari &
Ms.Tarannum Cheema, Advs.

versus

DR.SURAMANIAN SWAMY & ANR

..... Respondent

Through Dr.Subramanian Swamy with
Ms.Roxna Swamy, Mr.Ishkaran Singh
Bhandari & Ms.Sonia V. Madan,
Advs.

Mr. Mr.Amit Chadha, APP.

WITH

+ CRL.M.C. 1319/2016

SUMAN DUBEY

..... Petitioner

Through Ms.Tarannum Cheema & Mr.Shikhar
Sareen, Advs.

versus

DR.SUBRAMANIAN SWAMY & ANR.

..... Respondent

Through Dr.Subramanian Swamy with
Ms.Roxna Swamy, Mr.Ishkaran Singh
Bhandari & Ms.Sonia V. Madan,
Advs.
Mr. Mr.Amit Chadha, APP.

AND

+ CRL.M.C. 1321/2016

OSCAR FERNANDES

..... Petitioner

Through Dr.A.M.Singhvi, Sr. Adv. with
Mr.Amit Bhandari, Ms.Tarannum
Cheema & Mr.Shikhar Sarin, Advs.

versus

SUBRAMANIAN SWAMY & ANR & ANR

..... Respondent

Through Dr.Subramanian Swamy with
Ms.Roxna Swamy, Mr.Ishkaran Singh
Bhandari & Ms.Sonia V. Madan,
Advs.
Mr. Mr.Amit Chadha, APP.

**CORAM:
HON'BLE MR. JUSTICE P.S.TEJI**

P.S.TEJI, J.

1. As both the impugned orders arise out of the same Criminal Complaint bearing C.C. No.09/1/13 titled as “*Subramaniam Swamy v. Sonia Gandhi & others*”, so all these petitions are being taken together for decision.

2. The factual matrix is that a complaint for offences under Sections 403, 406 and 420 IPC read with Section 120B of the IPC was filed against the accused persons, namely, Sonia Gandhi @ Edvige Albina Antonia Maino, Rahul Gandhi, Motilal Vora, Oscar Fernandes, Suman Dubey, Sam Pitroda @ Satyanarayan Gangaram Pitroda and Young Indian (hereinafter accused Motilal Vora, Oscar Fernandes, Suman Dubey, Sam Pitroda @ Satyanarayan Gangaram Pitroda and Young Indian shall be referred to as “*the petitioners*”) by the respondent No.1-Dr.Subramanian Swamy (hereinafter referred to as “*complainant*”). It was alleged in the complaint that the accused persons committed fraud, cheating and other offences against All India Congress Committee (Congress Party) and The Associated Journals Ltd. (AJL), who are the publishers of National Herald newspaper, which was founded under the Chairmanship of Sh.Jawarharlal Nehru. The AJL was closed and printing of newspapers was terminated with unpaid debt of Rs.90 crores. On 23.11.2010, Young Indian Pvt. Ltd. was incorporated with Rs.5 lakh as paid up capital in which Ms.Sonia Gandhi and Sh.Rahul

Gandhi were having 38% shares each. A board resolution of Young Indian Pvt. Ltd. was passed to own the debt of AJL after obtaining interest free loan from the Congress Party. In a board meeting, AJL agreed to transfer its entire share equity to Young Indian Pvt. Ltd. for Rs.50 lakhs. Accused persons were claimed to be the office bearers of the Congress Party. It was further alleged that AJL was having assets worth Rs.2000 crores which became the property of Young Indian Pvt. Ltd. for a mere Rs.50 lakhs and in this way the public money given to the Congress Party which was exempted from Income Tax Act, was used by the accused persons for committing fraud, cheating, misappropriation and criminal breach of trust.

3. The Trial Court summoned the accused persons on 26.06.2014 which was challenged before this Court by way of filing the Crl.M.C. Nos.3332/2014, 3333/2014, 3335/2014, 3336/2014 & 2156/2015 and this Court was pleased to dismiss the same vide order dated 07.12.2015. On the appearance of the accused persons before the Trial Court on 19.12.2015, the process of the trial began. During the pendency of pre-charge evidence, an application under Section 91 of the Cr.P.C. was moved by the complainant which was allowed vide impugned order dated 11.01.2016 by summoning the documents. Similarly, another application under Section 91 of the Cr.P.C. was also moved by the complainant which was allowed vide impugned order dated 11.03.2016 in which the directions were issued to summon the balance sheets of Congress Party and AJL for the year 2010-11.

4. Feeling aggrieved by the impugned order dated 11.01.2016, three petitions bearing Crl.M.C. Nos. 671/2016, 672/2016 and 1317/2016 have been filed by the petitioners, namely, Motilal Vora, Young Indian and Sam Pitroda respectively. Feeling aggrieved by the impugned order dated 11.03.2016, two petitions bearing Crl.M.C. Nos.1319/2016 and 1321/2016 have been filed by the petitioners, namely, Suman Dubey and Oscar Fernandes respectively. Notice of the petitions was issued and the complainant did not prefer to file any reply to the same.

5. Arguments advanced by the learned Senior Counsel for the petitioners and the complainant have been heard at length.

6. Mr.Kapil Sibal, learned Senior Counsel for the petitioner-Sam Pitroda argued that while considering the application under Section 91 Cr.P.C., the Court is required to see the desirability and necessity of the documents to be summoned, but in the present case the Trial Court without ascertaining the necessity of the documents ordered to summon them which is against the settled principles of law. It was further argued that no notice of the application for summoning the documents was given to the petitioner though the petitioner was appearing before the Trial Court. He vehemently argued that the order passed by the Trial Court is without due application of mind and the application has been allowed without giving any notice or opportunity of hearing to the petitioner despite being available in the proceedings. In support of the submissions made, judgments in the cases of *Sethuraman v. Rajamanickam (2009) 5 SCC 153; Alagesan and*

others v. State (2008) Cri.L.J. 3300 (Madras); Pawan Duggal v. State (2001) 59 DRJ 645; Om Parkash Sharma v. CBI (2000) 5 SCC 679; State of Orissa v. Debendra Nath Padi (2005) 1 SCC 568; Ravindra Kuman Chandolia v. CBI 2012 SCC Online Del 1263 and Chandgiram v. State 2012 SCC Online 1740 have been relied upon.

7. Dr.A.M. Singhvi, learned Senior Counsel for the petitioner Oscar Fernandes argued that the order passed by the Court below is violative of natural justice as notice of the application was not given to the petitioner though the petitioner was very much participating in the proceedings and was available for that purpose. Dr. Singhvi adopted the arguments advanced by Mr.Kapil Sibal, learned Senior Counsel for the petitioner Sam Pitroda and further argued that the order passed by the Court below is violative of principle of natural justice as it demands the hearing of the opposite party before issuance of the notice, particularly when the order is a non-speaking order without dealing with necessity or desirability of the documents summoned before passing the order. He further referred to certain documents which have been ordered to be summoned without showing any necessity or desirability. He further demonstrated that even in the application necessity and desirability has not been reflected.

8. Mr.R.S. Cheema, learned Senior Counsel appearing for the petitioner Motilal Vora insisted upon the contention that the complainant had not given any detail or contents of the documents and their necessity and desirability. The complainant has also not

mentioned which of the document are to be proved through which witness and he even did not mention the name of any witness. He further argued that no notice of the application was given to the petitioner and the impugned order was passed without giving an opportunity of hearing to him. In support of these contentions, he relied upon judgments in the case of *Divine Retreat v. State of Kerala & Ors.* (2008) 3 SCC 542; *State of Punjab v. Davinder Pal Singh Bhullar & Ors.* (2011) 14 SCC 770; *Manharibhai Muljibhai Kakadia v. Shaileshbhai Mohanbhai Patel & Ors.* (2012) 10 SCC 517 and *Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors.* (1985) 3 SCC 545. The ratio of these judgments is that a notice needs to be given to a person against whom a proposed action is to be taken and that right of affording opportunity of hearing is a principle of natural justice and it cannot be denied.

9. Mr.Ramesh Gupta, learned Senior Counsel for the petitioner-Suman Dubey also argued that while passing the impugned order, the Court below has not given any notice to the petitioner and thus violated the principle of natural justice. It was further argued that Section 91 of the Cr.P.C. clearly mandates that the necessity and desirability of the documents is to be gone through by the Court while exercising the power under Section 91 Cr.P.C.

10. Ms.Rebecca John, learned Senior Counsel for the petitioner-Young Indian Pvt. Ltd. adopted the arguments advanced by other Senior Advocates for the petitioners and argued that the impugned

order deserves to be set aside and the matter be remanded back to the Trial Court to decide afresh. Similarly, she also referred the judgments in the cases of *State of Bombay v. Janardhan and others AIR 1960 Bom 513* and *Niadar Singh v. Maman & others 2001 (57) DRJ 702*.

11. The complainant appearing in person argued that Section 91 of the Cr.P.C. does not envisage the issuance of notice to the opposite side and the power under Section 91 Cr.P.C. is vested with the Court which the Court can exercise at any time during the pendency of the trial. He further argued that permitting the complainant to summon the documents itself demonstrates the application of mind and implied necessity and desirability of the documents. He further argued that the documents as per the impugned orders have already been summoned and the photocopies thereof have been kept in a sealed cover by the Trial Court. He referred to judgments in the case of *The Assistant Collector of Customs, Bombay and another v. L.R. Melwani and another AIR 1970 SC 962* and *Express Newspapers Pvt. Ltd. and others v. Union of India and others AIR 1986 SC 872*.

12. On hearing the rival contentions of learned Senior Counsel for the petitioners as well as the complainant, the question before this Court to be decided is the scope and applicability of Section 91 of the Cr.P.C. and relative consideration at the time of passing the impugned orders. It is necessary to deal with Section 91 of the Cr.P.C., which reads as under :

“91. Summons to produce document or other thing.

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed-

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891) or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.”

13. The term “*document*” referred in Section 91 of the Cr.P.C. has been taken from Section 3 of the Indian Evidence Act, which reads as under:

“Documents” means any matter expressed of described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

From a reading of Section 91 of the Cr.P.C. and the term “*document*” as per Section 3 of the Indian Evidence Act, it is clear that the document means legally permissible document either in the shape of original document or in the shape of copy duly authenticated. It is apparent that the photocopy cannot be termed as document as neither it is original nor it is authenticated without any person authenticating the same. More the reason that the photocopy cannot take the place of original document for proving any particular fact or circumstance. Thus, the summoning of the documents under Section 91 of the Cr.P.C. is summoning of the original documents, particularly in the present case.

14. The other aspect is the applicability of Section 91 of the Cr.P.C. which could be invoked during the pendency of the investigation, inquiry, trial or any other proceedings under the Code. The present case we are dealing with the trial of the petitioners which is at the stage of pre-charge evidence.

Though, it is mentioned that power under Section 91 of the Cr.P.C. could be invoked at any stage of the investigation, inquiry or trial but it is still to be examined by the Court, the purpose and the object of exercising the power envisaged under Section 91 of the Cr.P.C. There could be various situations. Firstly, the

documents could be summoned at the instance of the prosecution or the complainant to prove its case at the time of examination of the prosecution witnesses and to get it exhibited and proved through the witness who is under the oral examination. Similarly, it could be summoned at the instance of defence to confront the prosecution witnesses during cross-examination and similarly by the defence at the time of leading the defence evidence to put to the defence witnesses for the purpose of exhibition and establishing its plea in the defence.

Apart from the same, the Court on its own can summon the documents to clear any ambiguity or for the purpose of clarification of any disputed fact or discrepancies in the documents so exhibited by the prosecution/complainant or by the defence, in other words for clarification for reaching a just decision.

In the present case, none of the situations discussed above had arisen to summon the documents.

15. Learned Senior Counsel for the petitioners vehemently argued that the orders passed in the present case do not reflect any necessity or desirability. On this point, judgment in the case of ***Ashok Chawla v. Ram Chander Garvan, Inspector CBI MANU/DE/1243/2011*** has been referred in which it was observed that Section 91 Cr.P.C. provides that whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may

issue a summons or such officer a written order, requiring the person in whose possession or power such documents are believed to be to attend and produce the same. On similar point, various other judgments have also been relied upon :

- (i) “The power given under Section 91 of the code is a general and wide power which empowers the court, the production of any document or any other thing at any stage of any investigation, inquiry or other proceedings under the Code of Criminal Procedure. It is no doubt true that the legislature has circumscribed this power to be exercised only where the court considers that the summoning of such document or things was necessary or desirable in its view, then the court could pass an order both in favor of the accused as well as the prosecution. It is no doubt true that such power would not be exercised where the documents or thing may not be found relevant or it may be for the mere purpose of delaying the proceedings or the order is sought with an oblique motive.”
[Neelesh Jain v. State of Rajasthan MANU/RH/0569/2005]

- (ii) “As per Section 91 of the Code of Criminal Procedure, when the Court considers that production of any document is necessary or desirable for the purpose of trial of a criminal case, such Court may issue summons for the production of the document sought for. The Court has to judicially consider whether production of the document is relevant for the purpose of trial. Section 91 of the Code

of Criminal Procedure does not confer an absolute right on the accused to seek for production of any documents. The party who prays for issuance of summons for production of document has to necessarily demonstrate before the Court that production of such document is material for arriving at a just decision in the case. If the petitioners fail to establish that a particular document is necessary and desirable to be summoned, then the Court shall not summon the document.”

[*Alagesan and others v. State* (2008) *Cri.L.J.* 3300 (Madras)]

- (iii) “Section 91 Cr.PC envisages production of any document or other thing which according to the court or police officer in charge of the police station is necessary or desirable for the purpose of any investigation, enquiry or trial or other proceedings under the Code. The width of the powers under this section is unlimited. The only limitations are as regards to the such documents or things to be necessary or desirable for the purposes mentioned therein. Though the case of Debendra Nath Padhi (supra) pertained to the stage of framing of charges and the Apex Court held that at that stage, the case of production of documents was not made out, but the plain and literal reading of provisions of section 91 Cr.PC would reveal that the court was empowered to order for production of document or other thing only when that may be necessary or desirable for the purpose of enquiry, trial or other proceedings. The court has to deal with this issue to satisfy

itself as regard to the necessity or desirability of the documents sought to be produced.”

[Ravindra Kuman Chandolia v. CBI 2012 SCC Online Del 1263]

- (iv) “Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code'. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the section.....

In so far as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were inbuilt inherent limitations as to the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfill the task

or achieve the object. Before the trial court the stage was to find out whether there was sufficient ground for proceeding to the next stage against the accused....”

[*State of Orissa v. Debendra Nath Padi* (2005) 1 SCC 568]

- (v) “Section 91 Cr.P.C. envisages the production of any document or other thing which is required or desirable for the purpose of any investigation, inquiry, trial or other proceedings under the Code, if the Court is satisfied that such documents are essential and required at the relevant stage of proceedings. For allowing the application for production of documents or other things under Section 91 Cr.P.C., the Court has to deal with the issue of their necessity and relevancy and also whether such documents are required at the stage when they are sought to be summoned by the applicant. Summoning of documents cannot be allowed on a mere asking by the applicant or as a matter of routine. Section 294 Cr.P.C. provided for admission/denial of the documents filed in the Court by the prosecution or the accused. It also provided that where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed and that the court may, in its discretion, require such signature to be proved.”

[*Chandgiram v. State* 2012 SCC Online 1740]

16. The facts and circumstances in the present case show that neither any list of witnesses has been furnished with proposed testimony nor any list of documents has been furnished which were to be exhibited through such witnesses to prove the fact and establish the case of the complainant at the pre-charge stage. The applications dated 02.01.2016 and 01.03.2016 have been filed in a casual manner and the orders have been passed in a casual manner without looking into the fact that no list of witnesses was furnished and no summons have been issued for the purpose of summoning the documents for proving a particular fact.

17. The other argument advanced by the learned Senior Counsel for the petitioners is that the impugned orders passed in the present case are violative of the principle of natural justice as the petitioners were neither given any notice nor opportunity of hearing was given to them before passing the impugned orders of summoning the documents. It has been further argued that before passing a judicial order by the Court it is imperative upon the Court passing such order to issue notice to the opposite party or an opportunity of hearing must be given before passing any such order. It is not only a requirement under the principle of natural justice but also non-hearing tantamount to violation of principle of natural justice. On this point, various judgments have been relied upon.

The Hon'ble Apex Court held that:

- (i) “....No doubt every Court has its plenary powers to deliberate upon every issue

agitated before it as well as any other issue arising on the materials placed before it in the manner known to law after giving a prior notice and affording an opportunity of being heard. This power of discharging the statutory functions whether discretionary or obligatory should be in the interest of justice and confined within the legal permissibility. In doing so, the Judge should disengage himself of any irrelevant and extraneous materials which come to his knowledge from any source other than the one presented before him in accordance with law and which are likely to influence his mind on one way or the other....”

[Union of India and another v. W.N. Chadha AIR 1993 SC 1082]

- (ii) “Very strangely, the High Court did not even issue notice to the appellant/complainant, on the spacious ground that the production of the documents, which was sought for by the accused, would cause no prejudice to the appellant/complainant. We fail to understand this logic. After all, if the documents in possession of the appellant/complainant, which were his personal documents, sought for by the accused and the production of which was rejected by the Trial Court, and which were ordered to be produced by the High Court, at least a hearing should have been given to the appellant/complainant. He could have shown, firstly, that no such documents existed or that there was no basis for the production of those documents, particularly, in view of the fact that he was not even cross-examined in respect of those

documents. On this ground, the order of the High Court would have to be set aside.”

[Sethuraman v. Rajamanickam (2009) 5 SCC 153]

- (iii) “The order directing the investigation on the basis of such vague and indefinite allegations undoubtedly is in the teeth of principles of natural justice. It was, however, submitted that accused gets a right of hearing only after submission of the charge-sheet, before a charge is framed or the accused is discharged vide Sections 227 & 228 and 239 and 240 Cr.P.C. The appellant is not an accused and, therefore, it was not entitled for any notice from the High Court before passing of the impugned order. We are concerned with the question as to whether the High Court could have passed a judicial order directing investigation against the appellant and its activities without providing an opportunity of being heard to it. The case on hand is a case where the criminal law is directed to be set in motion on the basis of the allegations made in anonymous petition filed in the High Court. No judicial order can ever be passed by any court without providing a reasonable opportunity of being heard to the person likely to be affected by such order and particularly when such order results in drastic consequences of affecting one's own reputation. In our view, the impugned order of the High Court directing enquiry and investigation into allegations in respect of which not even any complaint/information has been lodged with the police is violative of principles of natural justice.”

[Divine Retreat v. State of Kerala & Ors. (2008) 3 SCC 542]

- (iv) “If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 Cr.P.C. would not operate. In such eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault.”
- [Davinder Pal Singh Bhullar & Ors. (2011) 14 SCC 770]***

- (v) “The proposition that notice need not be given of a proposed action because, there can possibly be no answer to it, is contrary to the well-recognized understanding of the real import of the rule of hearing. That proposition overlooks that justice must not only be done but must manifestly be seen to be done and confuses one for the other. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. Procedural

safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of public authorities. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decision taken by public authorities operate, to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons.”

[*Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors. (1985) 3 SCC 545*]

18. The rival contention by the complainant is that the notice is not mandatory before passing the order under Section 91 of the Cr.P.C. as it is the discretion of the Trial Court whether a particular document should be summoned or not. He has referred to a judgment in the case of *Assistant Collector of Customs, Bombay and another v. L.R. Melwani and another AIR 1970 SC 962* in which it was observed as under :

“That apart we do not think that the High Court was justified in interfering with the discretion of the learned Magistrate Whether a particular document should be summoned or not is essentially in the discretion of the trial court. In the instant case the Special Public Prosecutor had assured the learned trial Magistrate that he would keep in readiness the statements of witnesses recorded by the Customs authorities and

shall make available to the defence Counsel the statement of the concerned witness as and when he is examined. In view of that assurance, the learned Magistrate observed in his order:

"The recording of the prosecution evidence is yet to commence in this case and at present there are no materials before me to decide whether or not the production of any of the statements and documents named by the accused in his application is desirable or necessary for the purpose of the enquiry or trial. As stated at the outset, the learned Special Prosecutor has given an undertaking that he would produce all the relevant statements and documents at the proper time in the course of the hearing of the case. The request made for the issue of the summons under Section 94, Criminal Procedure Code is also omnibus."

The reasons given by the learned Magistrate in support of his order are good reasons. The High Court has not come to the conclusion that the documents in question, if not produced in court are likely to be destroyed or tampered with or the same are not likely to be made available when required. It has proceeded on the erroneous basis that the accused will not have a fair trial unless they are supplied with the copies of those statements even before the enquiry commences. Except for very good reasons, the High Court should not interfere with the discretion conferred on the trial courts in the matter of summoning documents. Such interferences would unnecessarily impede the progress of cases and result in waste of

public money and time as has happened in this case.”

The other judgment relied upon by the complainant is in the case of *Express Newspapers Pvt. Ltd. and others v. Union of India and others AIR 1986 SC 872*. Apparently, this judgment is not having any relevance with Section 91 of the Cr.P.C.

19. The argument advanced by the complainant cannot be taken into consideration in isolation and it needs to be considered with the combined effect of the exercise of the power under Section 91 of the Cr.P.C. The facts narrated on record do not demonstrate the exercise of discretion under Section 91 of the Cr.P.C. in any other circumstance except to facilitate the evidence of the complainant. No question arises to look into the present case of exercising the power under Section 91 of the Cr.P.C. to summon the document except to render assistance and to facilitate the complainant evidence against the petitioners. In such a scenario, the plea of the complainant appreciating the order passed by the Trial Court without giving any notice or opportunity of hearing to the opposite side that too in a criminal case, would tantamount not only to the violation of principle of natural justice but also to the violation of Article 21 of the Constitution of India.

20. Apart from the discussion made above, it is apparent from the arguments advanced that no list of witnesses or list of documents showing its connectivity with the witnesses or to the facts to be established before the Trial Court cannot be treated as proper application for rendering assistance to the Court to facilitate

the evidence by way of seeking documents without demonstrating any necessity or desirability. The applications were moved in a casual manner and the orders passed on the same were also passed in a casual manner without due application of mind. The facts and circumstances mentioned above, non-issuance of notice to the opposite side and impugned orders being non-speaking and without due application of mind as per the law laid down by Hon'ble Apex Court, culminates into the impugned orders as ineffective, redundant and not sustainable in the eye of law and liable to be set aside.

21. In view of the above discussion and the law laid down as referred above, this Court is of the considered opinion that while passing the order under Section 91 Cr.P.C. for summoning the documents, if the other party has already joined the proceedings, it is entitled to be heard. Consequently, the orders dated 11.01.2016 and 11.03.2016 are hereby set aside along with proceedings consequent thereto.

22. Undisputedly, the complainant always has a right to invoke the provision of Section 91 Cr.P.C. and the Court is always empowered to pass an order in the facts the circumstances of the case, keeping in view the necessity and desirability of the document in situations as discussed above and giving due opportunity of hearing to the other party.

23. However, it is made clear that the right of the complainant shall not be curtailed in any circumstance to move the fresh application during the pendency of the proceedings before the

Court below.

24. The petitions and applications, if any, are disposed of accordingly.

(P.S.TEJI)
JUDGE

JULY 12, 2016
dd

