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

RESERVED ON : 21st MARCH, 2017
DECIDED ON : 26th APRIL, 2017

\+   **CRL.M.C.1030/2016 & CRL.M.A.No.11917/2016**

SAMEER SANDHIR ..... Petitioner
Through : Mr.Siddharth Luthra, Sr.Advocate, with Mr.Ankur Chawla, Ms.Kanika Singh, Ms.Heena Khan, Mr.Akshay Sahni, Mr.Anupam Prasad and Mr.Ali Chaudhary, Advocates.

versus

CENTRAL BUREAU OF INVESTIGATION ..... Respondent
Through : Mr.Narender Mann, SPP with Mr.Manoj Pant, Advocate.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Instant petition under Section 482 Cr.P.C. has been preferred by the petitioner to challenge the legality and correctness of an order dated 06.02.2016 of learned Spl.Judge, CBI whereby application under Section 173(5)(8) Cr.P.C. filed by CBI to place on record CDs (M-137/13 & M-170/13) (hereinafter referred as ‘CDs’) was allowed. Petition is contested by the respondent.

2. I have heard the learned Senior Counsel for the petitioner and learned Special Public Prosecutor for CBI and have examined the file.

3. Admitted position is that the petitioner among others is facing trial in case RC No.217/2013/A0004 registered under various offences under Prevention of Corruption Act. Charge-sheet and supplementary charge-sheet have since been filed before the Trial Court. By an order dated 06.03.2014, charge has been ordered to be framed against the petitioner and others. Certain witnesses have also been examined on behalf of CBI. On 16.09.2014 at the time of examination of PW-3 (Mr.Uday Suryavanshi) objection was raised to the playing of CDs on the ground that these were never relied upon or filed in the Court. CBI sought permission to file an appropriate application. On 17.09.2014, CBI filed an application seeking permission for preparing copies of sealed CDs; it was allowed by an order dated 27.09.2014. The order was challenged in Crl.M.C.No.4739/2014 before this Court. By an order dated 12.05.2015, the petition was allowed setting aside the order dated 27.09.2014 directing the Trial Court to permit CBI to file an appropriate application to bring on record the sealed CDs and after satisfying itself, as to whether those CDs could be brought on record during the recording of evidence and under what provisions of law. It was further directed that the said application be dealt with promptly while considering the admissibility and authenticity of the sealed CDs.

4. CBI filed an application to place on record the CDs which was contested. On 13.10.2015, the Trial Court ordered to play the said CDs in the Court to ascertain their authenticity. The application filed by the petitioner to oppose playing of the CDs was dismissed by an order dated

31.10.2015. One CD was played and heard in the Court. It remained incomplete due to paucity of time.

5. Orders dated 13.10.2015 and 31.10.2015 were challenged in Crl.M.C. 4605/2015. The said petition was allowed setting aside the orders holding that the Trial Court had to first decide CBI's application and to satisfy as to whether CDs in question were to be brought on record and under what provisions of law.

6. Undisputedly, both these CDs were not filed along with charge-sheet / supplementary charge-sheet. CBI did not place reliance on these CDs; copies of the CDs were not made available to the petitioner. When the examination of PW-3 was underway, on 16.09.2014 an attempt was made to bring on record both the CDs which was opposed by the accused persons. By an order dated 27.09.2014 (Annexure 'P/14') application filed by CBI to bring on record these CDs was allowed. Copies of the CDs were ordered to be prepared from CFSL to supply it to the accused persons along with certificate under Section 65B of Indian Evidence Act. This Court in Crl.M.C. 4739/2014, by an order dated 12.05.2015 (Annexure 'P/17') set aside the said order with directions to the Trial Court to permit CBI to file an appropriate application for bringing on record the CDs and after satisfying itself, as to whether the CDs could be brought on record during recording of the evidence and under what provisions of law. The said application was directed to be promptly dealt with while considering the admissibility and authenticity of the two sealed CDs. By an order dated 06.11.2015 in Crl.M.C.No.4605/2015, orders dated 13.10.2015 and 31.10.2015 of learned Special Judge were set aside. Directions were given to the Trial Court to

decide the application moved by CBI expeditiously and to pass a fresh order after considering the submission of both the parties.

7. Learned Senior Counsel for the petitioner urged that both these CDs cannot be brought on record at this stage when statements of many prosecution witnesses have already been recorded. Both these CDs were not relied on by CBI at the time of filing charge-sheet / supplementary charge-sheet. There exists no provision in Cr.P.C. to allow the prosecution to place on record documents which did not form part of the charge-sheet / supplementary charge-sheet. The documents cannot be brought on record under Sections 173(2) and 173(5) Cr.P.C. as these were already in CBI's possession prior to filing of the charge-sheet. Section 173(5) Cr.P.C. is independent of Sections 173(2) and 173(8) of Cr.P.C. and cannot be used to file documents which were not part of the investigation. The impugned order is contrary to the spirit of order dated 12.05.2015 in Crl.M.C.No.4739/2014. The genuineness and authenticity of the CDs is suspect. Reliance has been placed on '*Central Bureau of Investigation vs. R.S.Pai & Anr.*', 2002 (5) SCC 82; '*Sanjay Singh Ramrao Chavan vs. Dattatray Gulabrao Phalke & Ors.*', 2015 (3) SCC 123, '*Amrutbhai Shambhubhai Patel vs. Sumanbhai Kantibhai Patel & Ors.*', 2017 (2) SCALE and '*Vinay Tiagi vs. Irshad Ali*', 2013 (5) SCC 762.

8. Learned counsel for CBI urged that under Section 173(5) Cr.P.C., CBI is within its right to place on record the documents which were not part of charge-sheet / supplementary charge-sheet. No prejudice would be caused to the petitioner if both the CDs are brought on record as these were seized vide seizure memo dated 04.05.2013 and 10.05.2013 prior to the filing of the charge-sheet. Due to inadvertence / omission, these CDs could

not be brought on record at the time of filing of the charge-sheet or supplementary charge-sheet.

9. Claim of CBI is that CDs bearing No. D-3 and D-4 were seized vide seizure memos dated 04.05.2013 and 10.05.2013 respectively. Vide seizure memo dated 04.05.2013 (D-3), one sealed packet containing Recorded Calls information Report along with one Compact Data Disc make Sony CD-R containing 189 calls in 189 files and two system files were seized from Mr.M.C. Kashyap, Deputy S.P, CBI. Description of the document given was mark M-137/13. One unsealed Recorded Calls information Report along with one Compact Disc containing the same content was also seized given mark M-138/13. Certificate under Section 65 B of the Indian Evidence Act was also seized. Vide seizure memo dated 10.05.2013 (D-4), one sealed packet containing Recorded Calls information Report along with one Compact Data Disc make Sony CD-R containing 101 calls in 100 voice files and 1 text file and two system files was seized from Mr.M.C. Kashyap, Deputy S.P, CBI. Description of the document given was mark M-170/13. One unsealed Recorded Calls information Report along with one Compact Disc containing the above content was also seized given mark M-171/13 along with certificate under Section 65B of the Indian Evidence Act. The impugned order has reproduction of the contents of both the seizure memos. Apparently, both these CDs were collected during investigation prior to filing of the charge-sheet on 02.07.2013. These CDs were sent to CFSL for examination on 27.05.2013. CFSL report dated 25.10.2013 (D-1) was filed along with supplementary charge-sheet on 30.10.2013. It is not in dispute that copies of the seizure memos dated 04.05.2013 and 10.05.2013 filed along with charge-sheet were supplied to

the petitioner and others. They were also supplied copies of the unsealed CDs containing the material as contained in the sealed CDs.

10. Needless to say, the petitioner and others were aware of the existence and contents of the CDs; they were not taken by surprise. Supplementary charge-sheet was filed along with CFSL report on 30.10.2013; copy of CFSL report having reference of both the CDs as Q1 and Q2 was made available to the petitioner. CBI's only fault is that both the CDs were not filed at the time of filing charge-sheet / supplementary charge-sheet in the Court. It is not a case of 'further investigation' as urged by learned Senior Counsel for the petitioner. As observed above, these CDs were in existence prior to the filing of the charge-sheet and were seized vide seizure memos dated 04.05.2013 and 10.05.2013. For omission / mistake / inadvertence / negligence for not placing on record the CDs at the relevant time, in my considered view, CBI cannot be prevented to seek permission of the Court to file these CDs on record subsequent to the filing of the charge-sheet / supplementary charge-sheet during trial. In the instant case, the trial is at its initial stage and only a few witnesses have so far been examined. CBI at the time of examination of PW-3 on 16.09.2014 produced the CDs. On petitioner's raising objections to the playing of the CDs in the Court without having the same brought on record, applications were filed promptly to place on record these CDs. Order dated 09.09.2014 (Annexure 'P/11') reflects that trial was to start from 15.09.2014. There was, thus, no inordinate delay to bring on record the CDs allegedly containing vital conversations to have an impact on the trial.

11. The impugned comprehensive order based upon fair reasoning warrants no intervention. The investigating agency must be given fair

opportunity to prove its case on merits and on technicalities, the crucial piece of evidence cannot be prevented to be brought on record. Though, it is incumbent on the prosecution to produce all the relevant documents with the charge-sheet; but if any document was left out due to any reason, Section 173 Cr.P.C. no where prohibits its filing at a later stage in appropriate cases.

12. Law is well settled. In '*Central Bureau of Investigation vs. R.S.Pai & Anr.*', 2002 (5) SCC 82 reiterated in a recent case of '*Narender Kumar Amin vs. CBI*', 2015 (3) SCC 417, Hon'ble Supreme Court was categorical to hold that word 'shall' used in Section 173(5) Cr.P.C. was not mandatory but directory. The prosecution is not precluded from filing the document during inquiry or trial. The relevant portion is as under :

> *"From the aforesaid sub-sections, it is apparent that normally, the Investigating Officer is required to produce all the relevant documents at the time of submitting the charge-sheet. <u>At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or charge-sheet, it is always open to the Investigating Officer to produce the same with the permission of the Court.</u> In our view, considering the preliminary stage of prosecution and the context in which Police Officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which prosecution proposes to rely, the word 'shall' used in sub-section (5) cannot be interpreted as mandatory, but as directory. <u>Normally, the documents gathered during the investigation upon which the</u>*

prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under Section 173(4) of the Code of Criminal Procedure, 1898 was considered by this Court in Narayan Rao vs. The State of Andhra Pradesh [(1958) SCR 283 at 293] and it was held that the word 'shall' occurring in sub-section 4 of Section 173 and sub-section 3 of Section 207A is not mandatory but only directory. Further, the scheme of sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to investigation. In such cases, there cannot be any prejudice to the accused. Hence, the impugned order passed by the Special Court cannot be sustained."

(Emphasis given)

13. Similar view has been taken in '*Narender Kumar Amin vs. CBI*' (supra).

14. This Court in '*Dr.Sudhir Kumar Seth vs. State of Delhi & Ors.*', 151 (2008) DLT 199, placing reliance on *R.S.Pai's* case (supra) permitted the complainant therein under Section 91 Cr.P.C. to place on record CD recording conversation even after the filing of the charge-sheet and examination of certain witnesses. The Court observed that it could not be said that 'substantial' evidence had been recorded in the case.

15. In '*Dinesh Dalmia vs. CBI*', MANU/SC/7924/2007; AIR 2008 SC 78, the Supreme Court observed :

> *"18. It is true that ordinarily all documents accompany the charge sheet. But, in this case, some documents could not be filed which were not in the possession of the CBI and the same were with the GEQD. As indicated hereinbefore, the said documents are said to have been filed on 20.01.2006 whereas the appellant was arrested on 12.02.2006. Appellant does not contend that he has been prejudiced by not filing of such documents with the charge sheet. No such plea in fact had been taken. Even if all the documents had not been filed, by reason thereof submission of charge sheet itself does not become vitiated in law. The charge sheet has been acted upon as an order of cognizance had been passed on the basis thereof. Appellant has not questioned the said order taking cognizance of the offence. Validity of the said charge sheet is also not in question."*

16. In '*Prithvi Singh Yadav & Ors. vs. State of Madhya Pradesh & Ors.*', 1996 (O) MPLJ 172 decided on 18.09.1995, it was held :

> *"8. The document cannot be refused to be taken on record as additional evidence merely for the reason that it was not seized during investigation by the Investigating Officer. The defence has admitted to have earlier received the copy of the document. As such, there has also been no prejudice to the accused / petitioners from the passing of the impugned order. <u>Section 173 of Criminal Procedure Code does not preclude the filing of a document at a later stage after the</u>*

> *<u>challan was filed.</u> During the course of the trial if the prosecution thinks it necessary to file <u>additional documents or the statements of the witnesses, which may be material and, therefore, seek to rely, the sub-section (8) of this section does not prevent the prosecution from filing such documents,</u> but it certainly casts an obligation on it, that when such documents are sought to be filed, the copies thereof must be supplied to the accused in advance so that the defence may not be taken by surprise and may be prepared to contradict or to make use of the same. <u>An omission to file documents with the charge-sheet is a mere irregularity curable under Section 465, Criminal Procedure Code.</u>"*
>
> *(Emphasis given)*

17. Similarly, in '*Prakash Chand Baid vs. State of Rajasthan & Ors.*', MANU/RH/0894/2015; 2016 (1) RLW689 (Raj.), discussing Sections 91 Cr.P.C., 173(8) Cr.P.C., 231 Cr.P.C. and 311 Cr.P.C., the High Court of Rajasthan (Jaipur Bench) came to the conclusion that the goal of the criminal trial is to discover the truth and to achieve that goal the best possible evidence is to be brought on record. It held :

> *"13. In view of the aforesaid legal position, it is clear that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case. In the present case, it cannot be disputed that the documents in question are relevant and necessary for the proper disposal of the case and, therefore, <u>even if they were not filed alongwith the charge-sheet and were filed by the complainant or his counsel without permission of the trial Court even</u>*

then it cannot be said that illegality or perversity has been committed by the trial Court by dismissing the application filed by the petitioner more particularly in view of the fact that objection was raised on his behalf neither at the time when these documents were filed nor when they were exhibited during the course of examination-in-chief of the respondent-complainant and even soon thereafter………"

(Emphasis given)

18. Thus, there is no express provision debarring evidence to be produced at a certain stage. In Section 173 Cr.P.C. nor in any other provision of the Code of Criminal Procedure, there is any such disabling provision that prevents the prosecution from filing additional documents which could not be filed along with the charge-sheet.

19. In the present case, no prejudice would be caused to the petitioner if the CDs are permitted to be brought on record as these were in existence prior to the filing of the charge-sheet and he was well aware of it. There was mention of seizure of these CDs in the seizure memos dated 04.05.2013 and 10.05.2013. In the charge-sheet also, the Investigating Agency had sought permission to place on record additional list of witnesses / documents (if any) to be filed in future.

20. Since, these documents are supported by required certificates under Section 65B of Indian Evidence Act, their authenticity cannot be suspected at this stage. The Trial Court after hearing the contents of the CDs played in the Court was, prima facie, of the view that the contents of these CDs were in consonance with the transcript on record. As per

prosecution, contents of both the CDs were found identical and there was no question of variance in their contents.

21. After the filing of the charge-sheet by the prosecution, the Trial Court forms its opinion to take cognizance without ascertaining the authenticity, genuineness and veracity of the documents filed along with it; it is to be done during trial. In the instant case, merely because the CDs were filed at somewhat belated stage after the filing of the charge-sheet / supplementary charge-sheet, the prosecution is not expected to prove their authenticity and genuineness beyond reasonable doubt at this stage. The petitioner and other accused persons will be at liberty to challenge the admissibility / authenticity of CDs during trial.

22. Prima facie, there is sufficient material on record to infer that both these CDs are relevant and can be produced as evidence during trial as per law.

23. I find no illegality or material irregularity in the impugned order. The petition lacks in merits and is dismissed. Pending application also stands disposed of.

24. Observations in the order shall have no impact on the merits of the case.

(S.P.GARG)
JUDGE

APRIL 26, 2017 / *tr*