

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

% Reserved on: 10th February, 2017
Decided on: 16th February, 2017

+ **CRL.REV.P. 448/2016 & CrI.M.A. 10118/2016 (stay)**

ATUL JAIN

..... Petitioner

Represented by: Mr. Ajit Kumar Sinha, Sr.
Advocate with Mr. Aishwarya
Sinha, Advocate.

versus

CENTRAL BUREAU OF INVESTIGATION

..... Respondent

Represented by: Mr. Nikhil Goel, Spl. PP with
Mr. Ashutosh Ghade, Adv.

+ **CRL.REV.P. 528/2016 & CrI.M.A. 12461/2016 (stay)**

LALIT AGGARWAL

..... Petitioner

Represented by: Mr. Rajesh Kaushik, Advocate.

versus

STATE (CBI)

..... Respondent

Represented by: Mr. Nikhil Goel, Spl. PP with
Mr. Ashutosh Ghade, Advocate.

+ **CRL.REV.P. 539/2016 & CrI.M.A. 12707/2016 (stay)**

SYED SADAKAT

..... Petitioner

Represented by: Mr. S.M. Jamal, Advocate.

versus

CENTRAL BUREAU OF INVESTIGATION

..... Respondent

Represented by: Mr. Nikhil Goel, Spl. PP with
Mr. Ashutosh Ghade, Advocate.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Aggrieved by the order dated 5th May, 2016 passed by the learned Special Judge disposing of an application dated 4th September, 2015 filed by CBI seeking permission to examine some foreign based witnesses through video conferencing, the petitioners prefer the present petitions.
2. In the application the CBI prayed that statements of three witnesses, that is, Ms. JH, her father Mr. RJH and Mr. KJP (names concealed to ensure that the identity of the victims is not revealed) be permitted to be examined through video conferencing. According to the CBI, Ms. JH was one of the two victims, Mr. RJH, her father whereas the third witness Mr. KJP was the husband of the other victim as well as the complainant of the case. All these witnesses were Australian citizens however, Ms. JH was presently residing at Nairobi, Kenya. Thus the two witnesses required to be examined were at Australia and the third at Nairobi, Kenya.
3. The learned Trial Court vide the impugned order noted that a perusal of the record revealed that the Court had already issued process to the three witnesses on several occasions and summons were sent through concerned Ministry of Home Affairs, Government of India along with the written consent sent by the CBI to incur all expenses of summoning and stay of the above witnesses in India, in connection with their examination in this case however, the three witnesses have not given their consent to come and depose in India. Thus relying upon the decision of the Supreme Court reported as 2003 (4) SCC 601 State of Maharashtra vs. Dr. Praful B. Desai the learned Special Judge allowed the application.

4. During the course of hearing, it was pointed out to this Court that CBI in the list of witnesses along with the charge sheet or even in the second list of witnesses did not name Mr. RJH, father of Ms. JH as a witness. A specific query was put to the learned counsel for the CBI as to how summons were issued to this witness and the CBI was directed to file an affidavit in this regard vide order dated 2nd February, 2017. An affidavit of Shri Surender Singh, Deputy Superintendent of Police, CBI has been filed on 9th February, 2017 wherein it is admitted that though Mr. RJH was not cited as a witness, it is claimed that repeated summons were issued to Mr. RJH by the learned Trial Court which have not been challenged before this Court. Hence in the present petitions, the petitioners cannot claim that Mr. RJH be not examined as a witness.

5. Learned senior counsel for Atul Jain has handed over certified copies of the application filed by the CBI dated 8th August, 2014 and the order pursuant thereto. A perusal of the application dated 8th August, 2014 seeking more time to serve summons on Ms. JH, reveals that though in the application, CBI was referring only to issue summons to Ms. JH, daughter of Mr. RJH however, in the prayer clause it was prayed “In view of the above facts & circumstances it is most respectfully prayed that, fresh summons may please be issued giving at least 6 months time in the name of M/s JH and Mr. RJH.” The underlined words have been added in hand in the prayer clause of the application.

6. On the application of the CBI dated 8th August, 2014 order was passed by the learned Special Judge noting that an application has been filed by the learned P.P. for CBI for fixing a long date for service of summons upon Ms. JH and the witness Ms.JH be summoned for 30th September, 2014 and

summons be further handed over to HIO for being forwarded to the Ministry of Home Affairs as per rules. Other witnesses were directed to be summoned for 11th September, 2014. Despite their being no order for summoning Mr. RJH, in view of the prayer in the application of the CBI wherein names of both Ms. JH and Mr. RJH were noted in hand, summons were issued to both of them.

7. Indubitably, the petitioners have not challenged the various orders dated 30th September, 2014, 15th January, 2015, 18th February, 2015 and 11th March, 2015 wherein names and reference to the three witnesses from Australia have been made. However, non-challenge of the said orders does not imply that while challenging the order dated 5th May, 2016 directing examination of the three Australian witnesses through video conferencing the petitioners are debarred from laying a challenge to the examination of Mr. RJH.

8. In CrI. Rev. P. Nos. 448/2016 and 539/2016 in para 3 (g) in the narration of facts the petitioners Atul Jain and Syed Sadakat have specifically stated that Mr. RJH was not included as a prosecution witness and in the grounds it has been urged that Mr. RJH is father of Ms. JH and his examination is not pivotal for the case. In CrI. M.C. No. 528/2016 in ground (C) petitioner Lalit Aggarwal, has taken the specific plea that summoning of witness RJH is illegal and against the provisions of Code of Criminal Procedure as he was not cited as a witness in the charge sheet nor his statement was recorded under Section 161 Cr.P.C. It is also stated that no application under Section 311 Cr.P.C. was filed by CBI to examine this witness.

9. The petitioners have invoked the power of revision/inherent power of this Court and any illegality committed during the course of trial before the learned Trial Court can be corrected by this Court. Admittedly Mr. RJH was not cited as a witness either in the list of witness along with the charge sheet or even in the second list of witnesses. No application under Section 311 Cr.P.C. was filed by the CBI for summoning Mr. RJH as a witness before the Court. Thus the Trial Court had no occasion to apply its mind to the relevancy of examination of Mr. RJH as a witness. The manner in which Mr. RJH was summoned by adding in hand in the applications seeking more time for effecting service of summons on Ms. JH is totally uncalled for. Thus, the impugned order to the extent it directs examination of Mr. RJH through video conferencing is illegal and is liable to be set aside. Needless to state that if an appropriate application is filed by CBI for examination of Mr. RJH under Section 311 Cr.P.C., the same will be decided by the learned Trial Court in accordance with law with due notice to the accused.

10. As regards examination of Ms. JH and Mr. KJP, the objections raised are that the application has been filed after 13 years and that Ms. JH was present in Kenya with which country, India had no extradition treaty. The objection of the petitioners that the application seeking examination of the witnesses through video conferencing was filed belatedly after 13 years, deserves to be rejected for the reason that during trial after efforts were made to examine the witnesses and they could not be produced, the application was filed for their examination through video conferencing. CBI could have filed the application for examination only after the witnesses were served and they did not consent to come to Delhi, India for their examination. The process would certainly have taken time. The petitioners are being tried for

serious offences punishable under Sections 120B/347/354/365/364/367/471 IPC besides the petitioner Atul Jain being charged for offence punishable under Section 509 IPC as well. Hence merely because the application was filed after 13 years examination of the two witnesses cannot be denied.

11. The plea that there is no extradition treaty with Kenya also deserves to be rejected for the reason that though Ms.JH is presently in Kenya but she is an Australian citizen and Mr.KJP is also an Australian citizen, presently in Adelaide, Australia. India has an extradition treaty with Australia and thus merely because presently Ms. JH is in Kenya her examination at Kenya through video conferencing cannot be declined.

12. In Dr. Praful B. Desai (supra) the Supreme Court while dealing with the issue of examination of witnesses, whose presence cannot be obtained easily noting the provisions of Sections 284 and 285 Cr.P.C. which permits examination of witnesses on commission, held that recording of evidence by video conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the accused. The Supreme Court also noted that as a matter of prudence, evidence by video conferencing in open court should be only if the witness is in a country which has an extradition treaty with India and under whose laws Contempt of Court and perjury are also punishable.

13. As noted above, Ms. JH and Mr. KJP are both Australian citizens and India has an extradition treaty with Australia. Thus India having no extradition treaty with Kenya is not relevant to the present case. Finding no merit in the objections raised, the impugned order to the extent it directs examination of Ms. JH and Mr. KJP, through video conferencing is upheld.

14. Petitions and applications are disposed of permitting the CBI to examine Ms. JH and Mr. KJP through video conferencing and in respect of Mr. RJH, CBI would be at liberty to file an appropriate application under Section 311 Cr.P.C. which, if allowed, he may also be examined through video conferencing.

(MUKTA GUPTA)
JUDGE

FEBRUARY 16, 2017
‘vn’

