

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

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Reserved on: 19th December, 2016

Decided on: 20th March, 2017

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CRL.M.C. 3408/2016

D N UPADHYAY

..... Petitioner

Represented by: Ms. Sunita Tiwari, Adv.

versus

C B I

..... Respondent

Represented by: Sh. Narender Mann, Special
PP for CBI with Mr. Manoj
Pant, Adv.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. An important issue which arises of consideration in the present petition is whether documents seized by the police during investigation and not relied upon with the charge sheet can be retained by the investigating agency and not returned to the accused or the person authorized to retain those documents.

2. A brief exposition of facts. RC Nos.0049(A)2003 DLI and 0050(A)2003-DLI (in short '49A/2003' and '50A/2003' respectively) were registered by the CBI against Vijay Kumar Manchanda, D.N. Upadhyay and others. On 11th September, 2003 documents were seized from the residence of D.N. Upadhyay vide seizure memo dated 11th September, 2003 and retained by the prosecution. In the two charge sheets, not even the seizure memo by which the documents were seized was relied upon what to say about the seized documents.

3. Vide judgment dated 30th April, 2016 D.N. Upadhyay has been acquitted in RC No.49A/2003 however trial is pending in RC No.50A/2003. In R.C. No.50A/2003 D.N. Upadhyay filed an application for return of documents seized as they were not filed in the Court however on the statement of learned Spl. PP the CBI that the documents were required in the case as bank had suffered pecuniary loss despite no FIR has been lodged on that count, the application of D.N. Upadhyay was dismissed on 28th September, 2010. During trial, the CBI concluded its evidence in RC No.50A/2003 in 2015 thus D.N. Upadhyay filed a second application for return of documents on 20th May, 2016. However, again a reply was filed that the documents were still required. D.N. Upadhyay filed yet another application for release of unrelayed documents wherein the CBI filed a reply that documents release of which was sought by D.N. Upadhyay in RC 49A/2003 may not be released and the order be kept in abeyance till disposal of RC No.50A/2003.

4. Vide the impugned order dated 9th June, 2016, the application of the petitioner was dismissed for the reason that earlier also similar application were dismissed on 28th September, 2010 and since trial in RC 50A/2003 was pending, there was no ground to release the documents including FDR/NSC.

5. When the matter came up before this Court on 6th December, 2016, this Court passed the following order-

“The issue raised by the petitioner is whether the CBI can continue to retain documents seized during a search though the same are not relied upon in the course of the trial for the purposes of prosecution evidence. Learned counsel for the petitioner submits that two FIRs were registered against the petitioner being RC No.0049(A)2003 DLI and RC No.0050(A)2003 DLI under Sections 120B/420/467/468/471 IPC and 13(2) read with 13(1)(d)

of the Prevention of Corruption Act, 1988 (in short the PC Act). The petitioner has already been acquitted in RC No.0049.

On an application filed by the petitioner after acquittal, the learned Trial Court directed that the FDR/ NSCs recovered during search be returned to the petitioner. However, when the petitioner filed an application before the CBI for return of the documents the same was denied on the ground that the documents were also recovered in RC No.0050/2003 wherein trial was still pending.

On a query raised to the learned Special PP for the CBI as to which of the documents from the seizure memo dated 11th September, 2003 in the two RCs noted above have been relied upon by the prosecution in trial of RC No.0050/2003, learned Special PP fairly submits that even the seizure memo has not been relied upon by the prosecution in the two chargesheets.

This Court sought a reply from the learned Spl. PP for the CBI bringing to his attention Clauses 13.31 and 14.21 of the CBI Criminal Manual wherein it is mandated that the seized/ requisitioned documents and records should be scrutinized promptly and necessary action should be taken to return the documents and records which are not concerned with the case under enquiry/ investigation and necessary orders taken from the Court in regard to their custody and disposal under Section 451/452/457 Cr.P.C.

Concerned DIG/ Head of Branch CBI will file an affidavit before the next date as to why it still wants to retain the documents which it does not rely upon.

List on 19th December, 2016.”

6. In response to the order dated 6th December, 2016, DIG, CBI has filed the reply affidavit relevant portion of which reads as under-

- “2. I have gone through the records of the case RC-49/2003 and RC-50/2003, maintained in the ordinary course of affairs and therefore am competent to swear this Affidavit.*
- 3. That during the course of the investigation of the above case search were conducted on 11.3.2003 at the office and*

- the residence of the petitioner and during the search of the house of the petitioner, the CBI seized articles as mentioned in the Seizure Memo dated 11/09/2003, which were jointly seized in two cases i.e. RC-49/2003 and RC-50/2003 as the petitioner was an accused in both the cases.*
- 4. That the records of the case as maintained in the case diary were duly submitted before the Court concerned during the course of the investigation of the case. After completion of investigation, the charge-sheets were filed in both the cases. That the trial of the case arising out of RC No.50/2003 is pending before the Court of Ms. Anju Bajaj Chandna, CBI, Patiala House Courts, Delhi and presently at the stage of Prosecution Evidence.*
 - 5. That the complainant/victim bank had suffered huge losses due to the criminal misconduct of the petitioner/accused, and therefore to protect and safeguard the public money, and also that the seized documents may be required during the course of trial, the documents seized from the residence of the petitioner/accused were retained.*
 - 6. That the petitioner had earlier filed an application for release of documents seized vide search memo dated 11/09/2003, which was dismissed by the Court of Shri O.P. Saini, Spl. Judge, Patiala House Court, New Delhi vide order dated 28.09.2010. Since, there was no fresh ground for the release of the documents, therefore, the CBI opposed the release of the seized documents before the Court of Ms. Anju Bajaj Chandna, CBI, Patiala House Courts, Delhi, keeping in view the loss suffered by the Bank. Accordingly, the order dated 09.06.2016 was passed by the Hon'ble Court of Ms. Anju Bajaj Chandna, Spl. Judge, CBI Cases, Patiala House Court, New Delhi.*
 - 7. That the CBI has been retaining the seized documents in compliance of the aforesaid orders of the trial Court which has rejected the plea of the petitioner twice in this regard keeping in view the quantum of the pecuniary loss to the*

bank. Otherwise the CBI has no objection for the release of the seized Documents.

8. *That further, the IOs/HIOs have been sensitized on the instructions contained in Clause 13.31 and 14.21 of CBI Crime Manual. Accordingly, written instructions vide Instruction No.11/2016 dated 15.12.2016 have also been issued. A copy of the instructions is annexed as Annexure A.”*
7. *Clauses 13.31 and 14.21 of the CBI Crime Manual read as under-*
“Order of Courts to be obtained regarding seized Property

13.31. All properties seized during investigation under the provisions of the Cr.P.C. should invariably be forwarded to the Court in order to obtain orders under Section 457 Cr.P.C. for their custody during the pendency of the case. No case property relevant to the trial should be retained by CBI after the trial of the case has commenced unless it has been so ordered by the Court of competent jurisdiction.

Return of Documents and Records

14.21 The seized/requisitioned documents and records should be scrutinized promptly and necessary action should be taken to return the documents and records, which are not concerned with the case under enquiry/investigation or with any offence. Wherever necessary, orders of the competent Court should be obtained for the custody and disposal of the case property in accordance with the provisions of Sections 451, 452 and 457 Cr.P.C. All the documents/material objects/other items seized during the course of investigation should be promptly sealed/packed in a scientific manner and deposited in the Property Room (Malkhana). The details of these must be entered in the Malkahna Sub-Module of CRIMES or in the Malkhana Register, wherever the SubModule is not operational. The documents/items could be got issued by the Investigating Officer, as and when required, for the purpose of investigation etc. against proper receipt. These must be returned to

the Malkhana as soon as these are no longer required by the Investigating Officer. All such issues and receipt shall be entered in the Malkahna sub-module of CRIMES or in the Temporary Issue Register, wherever the Sub-Module is not operational. Every I.O. shall be personally responsible for the safe custody of these documents, at all stages of the investigation. Property Room incharge will ensure that the issued items are not retained by the I.O. for an unduly long time and are returned to the Malkhana promptly. He will make sure that the Officer, who is transferred from the Branch/Unit, has returned all the documents/items issued him to the Property Room before he is relieved by the Branch/Unit. The Branch SP will monitor this matter.”

8. Further Sections 451, 452 and 457 Cr.P.C. also mandate that the case property recovered during the course of investigation is required to be disposed of expeditiously and provide for a complete mechanism for the disposal of the case property pending inquiry/ investigation and on conclusion of the trial. Sections 451, 452 and 457 Cr.P.C. read as under-

“451.Order for custody and disposal of property pending trial in certain cases.- When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation.- For the purposes of this section, "property" includes –

- a) property of any kind or document which is produced before the Court or which is in its custody,*
- (b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.*

452. Order for disposal of property at conclusion of trial.-
(1) When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond, with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside on appeal or revision.

(3) A Court of Session may, instead of itself making an order under sub-section (1), direct the property to be delivered to the Chief Judicial Magistrate, who shall thereupon deal with it in the manner provided in sections 457, 458 and 459.

(4) Except where the property is livestock or is subject to speedy and natural decay, or where a bond has been executed in pursuance of sub-section (2), an order made under sub-section (1) shall not be carried out for two months, or when an appeal is presented, until such appeal has been disposed of.

(5) In this section, the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise

457.Procedure by Police upon seizure of property.- (1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.”

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.”

9. Supreme Court in the decision reported as (1977) 4 SCC 358 Smt. Basavva Kom Dyamangouda Patil Vs. State of Mysore & Anr. dealing with disposal of case property held:

“4. The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject-matter of an offence is seized by the police it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice.

The High Court and the Sessions Judge proceeded on the footing that one of the essential requirements of the Code is that the articles concerned must be produced before the Court or should be in its custody. The object of the Code seems to be that any property which is in the control of the Court either directly or indirectly should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal. In a criminal case, the police always acts under the direct control of the Court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the Court exercises an overall control on the actions of the police officers in every case where it has taken cognizance.”

10. In the present case the documents seized are not even case properties because the same have not been relied upon in the two trials. Since the documents are not even relied upon documents/case property, the CBI cannot object to the return of the same to its authorized person. Neither in the present petition nor before the learned Trial Court, it is the case of CBI that the documents recovered belonged to some other person and not the petitioner or that the petitioner is not the rightful owner. The only ground urged by CBI is that since the Bank has suffered a heavy loss, documents which include FDRs/ NSCs be not released. As noted in the two criminal prosecutions launched by CBI, the petitioner has been acquitted in one and in the other in its prosecution the CBI has not relied even on the seizure memo of the documents, what to say of the documents. In case the bank has suffered a loss it is entitled to take appropriate proceedings against the petitioner, however CBI cannot seek retention of these documents on a may be proposed action of the Bank.

11. Consequently, setting aside the impugned order dated 9th June, 2016, the application of the petitioner is allowed. CBI is directed to release the

documents seized vide seizure memo dated 11th September, 2003 to the petitioner forthwith.

12. Petition is disposed of.

(MUKTA GUPTA)
JUDGE

MARCH 20, 2017
‘v mittal’

