

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

% **Date of Decision: 3rd July, 2017**

+ **CRL.M.C. 4773/2016 & CrI. M.As. 19855/2016**

ASHOK SIRPAUL

..... Petitioner

Through: Mr.Sumeet Verma, Adv. with
Mr. Abhijeet Sharma, Adv.

versus

CENTRAL BUREAU OF INVESTIGATION

..... Respondent

Through: Ms.Sanjeev Bhandari, Spl. P.P
for CBI with Mr.Philomon
Kani Handa,Adv.

Mr.Ajay Digpaul, CGSC for
UOI

CORAM:

HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT

I.S. MEHTA, J.

1. The instant petition is arising out of the dismissal of the application filed by the petitioner under Section 311 Cr.P.C. vide order dated 03.10.2016 passed by the learned Special Judge(PC

Act)(CBI)-3, South, Saket Courts, New Delhi in C.C. No. 26/12 titled as *CBI vs. S.P. Manickam & Ors.*

2. The brief facts stated are that the petitioner/accused in R.C. No. 01(S)/91-SIU(X)/CBI/ND under Section 120B read with Sections 420/467/468/471 IPC read with Section 13(2)/13(1)(d) PC Act during the pendency of the trial at the stage of statement of the petitioner/accused moved an application dated 17.09.2016 under Section 311 Cr.P.C. in the Court of the learned Special Judge(PC Act)(CBI)-3, South, Saket Courts, New Delhi in C.C. No. 26/12 titled as *CBI vs. S.P. Manickam & Ors.*, seeking recall of PW1- Arjun Kumar, PW13- S. Maianthony, PW15- Hazari Singh and PW23- Ajit Singh for cross-examination on behalf of petitioner/accused No.2 and M/s Glonare & Alloys Pvt. Ltd./accused No.3.
3. Thereafter, the respondent/CBI filed reply to the aforesaid application move by the petitioner therein praying for rejection of the said application of the petitioner in the interest of justice.
4. Consequently, the learned Special Judge vide impugned order dated 03.10.2016 dismissed the aforesaid application of the petitioner for want of any sufficient and valid reason for recalling of PW1, PW13, PW15 and PW23.

Hence the present petition.

5. The learned counsel for the petitioner has submitted that the instant application moved by the petitioner is a bonafide application as the earlier counsel has not cross examined the witnesses on the material point.

6. The learned counsel for the petitioner has further submitted that he just wants to put a suggestion that the witness has wrongly identified the signatures of the petitioner on certain documents and to ask whether he made statement under Section 161 Cr.P.C. regarding identification of the signature of the petitioner. Reliance is placed on the following judgments:-

- i. *Natasha Singh vs. CBI (State)*; 2013 (3) JCC 1808.
- ii. *P. Sanjeeva Rao vs. State of A.P.*; 2012 (3) JCC 1867.
- iii. *Hoffman Andreas vs. Inspector of Customs, Amritsar*; (2000) 10 SCC 430.
- iv. *Anurag Sood vs. State (NCT of Delhi)*; CrI. M.C. 169/2017 decided on 10.01.2017.

7. The learned counsel for the CBI has submitted that full opportunity to cross-examine the witness was given to the petitioner and the petitioner failed to make out any cogent reason and the same has not been pleaded in his application. The application is vague and liable to be rejected. He has relied on the judgment of the Honb'le Supreme Court in the case *State (NCT Of Delhi) vs. Shiv Kumar Yadav And Another*; (2016) 2 SCC 402.

8. The whole question hinges around whether dismissing the application under Section 311 Cr.P.C. moved by the petitioner will cause grave injustice/prejudice to him?

The answer is **YES**.

9. The examination of a witness as lead under Section 137 of the Indian Evidence Act, 1872 means his examination-in-chief, his cross-examination and if any ambiguity does arises to the Court re-

examination by the former. The main object of cross-examination is to find out the truth and detection of falsehood in human testimony to reach to the right conclusion for just decision of a case pertaining to the incident . The right of cross-examination under Section 137 of the Indian Evidence Act, 1872 is a well guarded device for discovering the truth to which the witness has deposed in his statement, i.e. Examination-in-chief. Therefore, the right of cross-examination is a statutory right which vests in a party to the proceedings.

10. The application under Section 311 Cr.P.C. moved by the petitioner is reproduced as under:-

"APPLICATION UNDER SECTION 311 CR.P.C SEEKING RECALL OF PW-1; ARJUN KUMAR, PW-13: S. MAIANTONY, PW-15: HAZARI SINGH & PW-23: AJIT SINGH; FOR CROSS-EXAMINATION ON BEHALF OF ACCUSED NO.2 AND 3

MOST RESPECTFULLY SHOWETH:

1. That the applicants are undergoing trial before this hon'ble court for last more than a decade and the stage of the trial is that it is listed for recording of statement under Section 313 Cr.P.C of the accused persons.
2. That the accused no. 2 and 3 engaged a new counsel in the month of April, 2016 who applied for certified copy of the entire record, since the same was not available with the accused persons.
3. That the certified copy of the record was made available recently to the counsel for accused persons. On examining the same, it was revealed that most of the prosecution witnesses have not been cross-examined on behalf of the accused no. 2 and 3.
4. That in order that the trial is not further delayed, the present application is confined to only four prosecution witnesses, three of whom have not at all been cross-

examined on behalf of accused no. 2 & 3 and even the one cross-examined has been done so very briefly and vaguely. The witnesses sought to be recalled for cross-examination on behalf of the applicants are as follows:

- i. PW-1: Arjun Kumar (Asst. Manager in Indian Bank, R.P Bagh branch)*
- ii. PW-3: S. Mariantony (Officer in Indian Bank, R.P Bagh branch)*
- iii. PW-15: Sh. Hazari Singh (Clerk in M/s Global Linkers)*
- iv. PW-23: Ajit Singh (Officer in Oriental Bank of Commerce, S.E branch, New Delhi)*

PRAYER

In view of the aforementioned facts and circumstances, it is most humbly and respectfully submitted that this hon'ble court may be graciously pleased to recall the aforementioned four prosecution witnesses for cross-examination on behalf of accused no. 2 and . Any other order or further orders in favour of accused, which this hon'ble court may deem fit and proper on the facts and in the circumstances of the case, may also be passed."

11. The reply on behalf of the respondent/CBI to the application under Section 311 Cr.P.C. moved by the petitioner/accused is reproduced as under:-

"REPLY ON BEHALF OF CBI TO THE APPLICATION OF ACCUSED ASHOK SIRPAL (A-2) AND M/S. GLOBARC & ALLOYS PVT. LTD. (A-3), SEEKING RECALL OF PW-1, PW-13, PW-15 & PW-23 FOR CROSS EXAMINATION

Most respectfully sheweth:-

- 1. That the case is pending trial before this Hon'ble Court on the stage of "statement of accused" and is fixed for today i.e. 01.10.2016.*
- 2. That in reply of accused application, it is submitted that accused Ashok Sirpal (-2) and M/s Globarc & Alloys Pvt. Ltd. (A-3), were given an opportunity to cross examine PW-1 Sh. Arjun Kumar, PW-13 Sh. S. Mariantony, PW-15 Sh. Hazari Singh & PW-23 Sh. Ajit Singh. Their counsel denied to cross examine PW-1, PW-13, PW-15 and cross examined PW-23.*

3. It is further submitted that the evidence is complete and the case is on the stage of "statement of accused" and the accused filed this application for the purpose of vexation of delay or for defeating the ends of the justice.

PRAYER

It is, therefore, prayed that the application of accused Ashok Sirpal (A-2) and M/s Globarc & Alloys Pvt. Ltd. (A-3), seeking recall of PW-1, PW-13, PW-15 & PW-23 for cross-examination, may be rejected in the interest of justice."

12. The petitioner through the instant petition is praying for recalling the prosecution witnesses PW1- Arjun Kumar, PW13- S. Maianthony, PW15- Hazari Singh and PW23- Ajit Singh for cross-examination.
13. The statement of PW1- Arjun Kumar was lastly recorded on 20.04.2006 wherein on the said date the petitioner/accused No.2 and the accused No.3 were not present and the statement of PW1 was recorded in their absence. The order-sheet dated 20.04.2006 is reproduced as under:-

"20. 4. 06

*Pr: Sh. Prabhat Kumar, Spl. PP for CBI
Accused S.P. Manicken on bail
Cl. Sh. Kuljeevan Goyal*

An application for exemption has been filed on behalf of A-2 who is Director of A-3.

Heard. In view of the averments made in the application, the exemption allowed for today only. In the application, it is stated that the witnesses present be examined in his absence and the identity is not disputed.

PW 1 examined and discharged. No other PW is present.

For RPE, to come up on 17.7.06. Two PWs namely PW C.P. Waman and PW N. Ravinderan be summoned for the date fixed.

Today an application u/s 205/317 Cr.P.C has been filed on behalf of A-1 S.P. Manickem for grant of exemption from personal appearance. Copy furnished to ld. Spl. PP.

For reply & arguments on the application, to come up on the date fixed i.e. 17.7.06.

SPL. JUDGE, CBI/20.4.06"

The order sheet dated 20.04.2006 does not disclose who moved the application for exemption on behalf of the accused No.2 on that date. Further, Prabhat Kumar Spl PP was present on behalf of the CBI and accused No.1 S.P. Manikam was present with his counsel Kuljeevan Goyal which otherwise means that on 20.04.2006 the statement of PW1 was recorded in absence of accused 2 and accused No.3 as well as in absence of their counsel S.S. Narula.

14. The statement of PW13- S. Marianthony was lastly recorded on 29.04.2008 wherein on the said date the petitioner/accused No.2 and the accused No.3 were not present and the statement of PW13 was recorded in their absence. The order-sheet dated 29.04.2008 is reproduced as under:-

"29. 4 . 08

Present: Spl. PP Prabhat Kumar for CBI

Both accused are absent on whose behalf exemption applications have been filed. For the reasons mentioned therein, heard and allowed only for today.

PW13 cross examined and discharged. No other PW is present. Two more PWs with prior intimation to the accused be summoned for next date.

For P.E., to come up on 30.5.08.

*Special Judge/CBI/ND
29. 4. 08"*

The order-sheet dated 29.04.2008 does not show the presence of the counsel for the accused No.2 and accused No.3 nor the exemption application moved on behalf of the accused No.2 and accused No.3 is available on record for both the dates, i.e. 20.04.2006 and 29.04.2008. Further, Prabhat Kumar Spl PP was present on behalf of the CBI which otherwise means that on 29.04.2008 the statement of PW13 was recorded in absence of accused 2 and accused No.3 as well as in absence of their counsel S.S. Narula.

15. The statement of PW15- Hazari Singh was recorded on 13.10.2008 wherein on the said date the accused No.1 was present on bail and petitioner/accused was not present and the statement of PW13 was recorded in his absence. The order-sheet dated 13.10.2008 is reproduced as under:-

"13.10.08

*Present: Sh. Prabhat Kumar, Public Prosecutor for the CBI.
Accused Manikam is present on bail.
Accused Ashok Sirpal is absent.
He is exempted through Sh. S.S. Narula, Adv.
Accused persons are represented by Sh. S.S. Narula and Sh. Kuljeevan Goel, Advocates.*

Three witnesses are examined and discharged. No other witness is present or served. Adjourned for remaining prosecution evidence for 15.10.08, date already fixed.

Spl.Judge/CBI/13.10.08"

The order-sheet dated 13.10.2008 shows the presence of the counsel S.S. Narula for the petitioner/accused No.2 who is exempted on an application of exemption moved by his counsel but the same is not on the record. However, on the said date as per the record PW14-Subhash Oberoi, PW15-Hazari Singh and PW16-Vijay Kumar Tekriwal were examined and none of the aforesaid witnesses were cross-examined by the counsels of the accused persons reasons best known to the circumstances arising on the said date. The question arises, if the counsels of the accused persons were present why they have not cross-examined the witnesses on the said date and filled the application under Section 311 Cr.P.C. at the later stage.

16. The statement of PW23- Arjun Kumar was recorded on 03.02.2010 wherein on the said date both the accused were not present and the statement of PW23 was recorded in their absence. The order-sheet dated 03.02.2010 is reproduced as under:-

"03.02.2010

Present: Sh.S.N.Pathak, Ld. P.P for the CBI

Both the accused are absent.

Sh. Kuljeevan Goel and Sh.S.S. Narula, Advocates, have moved separate applications on behalf of accused S.P.Manikam and Ashok Sirpal seeking their exemption from personal appearance for today only on their medical grounds. It is further submitted that they do not dispute their identity and having no objection, if the proceedings are taken including the evidence in their absence.

Heard. In view of the submissions made in the court, they are exempted from personal appearance for today only with the direction to be present on the next date of hearing.

PW22 B.S.Chahal and PW23 Ajit Singh are examined and discharged. Witnesses be summoned in accordance with law.

To come up for remaining prosecution evidence on 04.03.2010.

(Amar Nath)

*Special Judge CBI Rohini Delhi
03.02.2010"*

The order-sheet dated 03.02.2010 shows the presence of the counsel S.S. Narula for the petitioner/accused No.2 and the presence of Kuljeevan Goel for the accused No.1 who are exempted on an application of exemption moved by their counsels. Further, S.N. Pathak PP was present on behalf of the CBI. Since the witness PW23 has been cross-examined on the aforesaid date the plea of engaging of a new counsel loses its significance for further cross-examination.

17. The principles of rule of law and due process are closely linked with human rights protection which culminates into a fair trial. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law.
18. In the instant petition the statements of the prosecution witnesses, i.e. PW1, PW13 and PW15, were recorded in the Court but the petitioner is not explaining in the instant petition as to what were the compelling circumstances for not having his presence before the trial Court. The only plea taken is that the statements were recorded in absence of the petitioner.

19. On the other hand the prosecution is taking a different stand.

Moreover, it is not coming on the record for the fairness to say why the petitioner/accused No.2 was given exemption on each date and the statements of the prosecution witnesses were recorded in his absence, which is giving rise to the plea of the present cause.

20. However, looking into the above facts and circumstances, to avoid serious prejudice going to be caused qua against the petitioner, as the witnesses, i.e. PW1, PW13 and PW15, are the material witnesses and they have not been able to cross-examined by the petitioner due the circumstances discussed above. The right to cross-examination which leads to fair trial requires to be extended. Reliance is placed on the judgment of the Apex Court in the case ***Zahihra Habibullah Sheikh vs. State of Gujarat; (2006) 3 SCC 374.***

21. Therefore, in view of the above discussions the present petition is allowed to the extent of cross-examination of PW1- Arjun Kumar, PW13- S. MaianTony and PW15- Hazari Singh only and the impugned order dated 03.10.2016 passed by the learned Special Judge(PC Act)(CBI)-3, South, Saket Courts, New Delhi in C.C. No. 26/12 is set aside to this extent only.

22. The lower Court is directed give opportunity to the petitioner to cross-examine the witnesses, i.e. PW1- Arjun Kumar, PW13- S. MaianTony and PW15- Hazari Singh, in accordance with law in his/petitioners presence. Parties are directed to appear before the lower Court on 20.07.2017.

23. Let one copy of this judgment be sent to the concerned Court.
All the pending applications (if any) are disposed of accordingly.
Lower Court Record be sent back forthwith. No order as to costs.

I.S.MEHTA, J

JULY 03, 2017

