

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION No. 1229 OF 2018

Santosh Javerchand Sethia

...Petitioner

Vs.

The C.B.I. & Anr.

...Respondents

Mr. P.B. Patil a/w. Ram Tahilramani, Advocate for the Petitioner

Mr. S.R. Shinde, Advocate for the CBI

Mrs. N.S. Jain, APP for the State

CORAM : NITIN W. SAMBRE, J.

DATE: MARCH 19, 2018

P.C.

1. In Special Case No. 80 of 2001 on February 4, 2009, while recording the examination-in-chief of prosecution witness, the Court passed an order having noticed that the accused in the said case since is not assisting the Court, hence the bunch of ledger-sheets which contains entries with regard to the accounts can be explained through a detailed affidavit of the witness. It was also ordered that the said affidavit be termed as the Examination-in-chief of the witness with an opportunity to cross examine by the accused person.

2. The learned counsel for the Petitioner – Accused No.2 informs that the

evidence which is termed by the Court to be Examination-in-chief, particularly as regards the ledger sheets to be proved through an affidavit, cannot be termed as a substantive piece of evidence within the meaning of Section 296 of Cr.P.C. r.w. Section 137 of the Evidence Act. According to him, unless the Court observed the demeanor of witness, the Court should not permit recording of evidence through an affidavit in criminal trial. Next submission of Shri Patil is Accused No.1, who was deaf and blind for whose benefit the order was passed permitting the examination-in-chief by way of an affidavit, has expired. As such, the object of the order qua evidence by Affidavit under section 296 of Cr.P.C. r/w. Section 137 of the Evidence Act has extinguished and there has to be a fresh examination-in-chief of the witness No.1. Support is drawn from the judgments of the Apex Court in the matters of **State of Punjab Vs. Naib Din [(2001) 8 Supreme Court Cases 578]** and **Pushkar Damle Vs. State of Maharashtra & Anr. [2013 ALL MR (Cri) 4375]** by Mr. P.B. Patil.

4. The learned counsel for the Respondent opposed the claim and submits that the order which was passed in 2009 is sought to be questioned indirectly after unexplained delay of more than 8 years. According to him, there is no substantive prejudice to the Petitioner-Accused as he will get an opportunity to cross examine the said witness. He submits that the prosecution is pending since

2001 and, as such, this Court should be slow in causing interference.

4. Considered the rival submissions. The Special Judge- CBI Court, Greater Mumbai on February 4, 2009 while recording evidence of PW-1 noticed that the Accused No.1 who is deaf and blind has applied for legal aid which prayer was pending consideration.

5. The Learned Special Judge, thereafter noticed, there are bunch of ledger-sheet containing various entries about accounts. The Learned Court permitted PW-1 to file an affidavit explaining the said entries and ordered that the same be considered as Examination-in-chief of the said witness. In addition, it is to be noted that the Learned Special Judge has recorded Examination-in-Chief of the said witness in part and, thereafter, proceeded to pass the aforesaid order.

6. After the aforesaid order was passed, the PW-1 has filed an affidavit explaining the entries on the record by affidavit dated 7th of March, 2009.

7. At this stage of the trial in 2018 i.e. after a period of 9 years, application is moved by the Petitioner for upsetting the earlier order passed in 2009 without offering any explanation for delayed period. Apart from above, the order dated February 4, 2009 passed by the Special Judge was not at the behest of the Accused No.1 who claimed to have been expired. Rather it is upon satisfaction of the requirement under section 296 of Cr.P.C. r/w. 137 of the Evidence Act,

the order came to be passed by the Learned Special Judge.

8. Once the Examination-in-Chief was already produced by the said witness in the form of an affidavit before the Learned Special Judge way back in 2009, the present attempt on the part of the Accused No.1 by taking shelter of death of accused No.1, is with an intention to protract the trial, which act needs to be deprecated in strong words. In the aforesaid background, reliance place by the learned counsel for the Petitioner on the two judgments of the Apex Court i.e. **State of Punjab (supra.)** and **Pushkar Damle (supra.)** will be of hardly any assistance. In both these cases, the order pursuant to the provisions of Section 296 of Cr.P.C. r/w. Section 137 of the Evidence Act was not given effect to. Whereas, in the present case, it is already given effect to as way back in 2009 and the examination-in-chief of PW-1 in the form of affidavit is already received by the Learned Special Judge. Apart from above, the Learned Special Judge has recorded the Examination-in-Chief of the said witness, thereby observing the demeanour of the said witness before passing order on February 4, 2009.

9. The evidence in the form of an affidavit which is given colour of examination-in-chief, is in relation to various entries in the ledger sheets, explained by the PW-1 and the Petitioner accused has every right to cross

examine the said witness. In that view of the matter, in my opinion, no case for interference is made out. The Petition is dismissed.

[NITIN W. SAMBRE, J.]