

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH**

1. CRM-M No.3659 of 2018  
Date of Decision: May 16<sup>th</sup>, 2018

Shabbir Ahmad Laway @ Shabbir Kala  
...Petitioner  
Versus

Central Bureau of Investigation, Chandigarh  
...Respondent

2. CRM-M No.6218 of 2018

Mohammad Ashraf Mir and others  
...Petitioners  
Versus

Central Bureau of Investigation, Chandigarh  
...Respondent

3. CRM-M No.5412 of 2018

Y (name withheld)-prosecutrix  
...Petitioner  
Versus

Central Bureau of Investigation, Chandigarh  
...Respondent

**CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH**

Present: Mr. Karambir Singh Nalwa, Advocate  
for the petitioner(s) (in CRM-M Nos.3659 and 6218 of 2018).

Mr. Rajat Khanna, Advocate  
for the petitioner (in CRM-M No.5412 of 2018).

Mr. Sumeet Goel, Advocate  
for CBI.

**AUGUSTINE GEORGE MASIH, J.**

By this order, I propose to decide three petitions preferred under Section 482 Cr.P.C. which were taken up for hearing together at the request of counsel for the parties as they arise out of the same trial but challenging two different orders.

*Shabbir Kala Versus Central Bureau of Investigation, Chandigarh* and *CRM-M No.6218 of 2018* titled as *Mohammad Ashraf Mir and others Versus Central Bureau of Investigation, Chandigarh*, challenge is to the order dated 17.01.2018 passed by the learned Special Judge, CBI Court, Chandigarh, whereby application dated 15.01.2018 preferred by the petitioners under Section 311 Cr.P.C. for recall of PW-1 Y (name withheld)-prosecutrix, for further examination, stands dismissed.

3. In *CRM-M No.5412 of 2018* titled as *Y (name withheld)-prosecutrix Versus Central Bureau of Investigation, Chandigarh*, challenge has been posed by the petitioner-prosecutrix to the order dated 25.02.2016 passed by the learned Special Judge, CBI Court, Chandigarh, dismissing her application requesting for her re-examination sent through post which was received in the Court on 30.10.2015.

4. This Court would first proceed to decide two petitions, where the challenge is to the order dated 17.01.2018 i.e. *CRM-M No.3659 of 2018* titled as *Shabbir Ahmad Laway @ Shabbir Kala Versus Central Bureau of Investigation, Chandigarh* and *CRM-M No.6218 of 2018* titled as *Mohammad Ashraf Mir and others Versus Central Bureau of Investigation, Chandigarh*.

5. Briefly the facts are that FIR No.20/2006 dated 14.03.2006 was registered at Police Station Shaheed Gang, Srinagar, under Section 67 of the Information Technology Act, 2000. Statement of the prosecutrix was recorded on March 15<sup>th</sup>/16<sup>th</sup>, 2006, followed by supplementary statement on 04.05.2006. Thereafter a Notification was issued by the Government of India on 09.05.2006 entrusting the investigation of the case to the Central Bureau of Investigation (hereinafter referred to as 'CBI').

On 10.05.2006, CBI registered RC No.1(S)/2006/SCR-III/New Delhi, under Section 67 of Information Technology Act, 2000, Sections 3, 4, 5, 6, 7 of Immoral Traffic (Prevention) Act, 1956 and Sections 376, 292, 34 Ranbir Penal Code.

6. Special leave petition was preferred by CBI before the Hon'ble Supreme Court praying for transfer of the trial outside the State of Jammu and Kashmir, which petition was allowed and the trial was transferred to the Court of District and Sessions Judge, Chandigarh. Charge-sheet was filed against the petitioners and thereafter the trial proceeded. Prosecutrix appeared before the trial Court and was examined as PW-1 on 07.04.2007 and thereafter cross-examined on 24.04.2007, 25.04.2007, 26.04.2007 and 27.04.2007.

7. An application under Section 311 Cr.P.C was filed by one of the co-accused namely K.C. Padhi on 19.12.2012 followed by another application dated 05.04.2013 filed by another co-accused namely Mohammad Ashraf Mir for recalling PW-1 (prosecutrix) for re-examination as the prosecution had given up mother-Rafeeqa and husband-Irfaan Ahmad Khan of the prosecutrix as witnesses. These applications were considered by the learned Special Judge and dismissed by order dated 22.01.2014. The said order was challenged by K.C. Padhi only in *CRM-M No.27028 of 2014* titled as *K.C. Padhi Versus State through Central Bureau of Investigation (CBI), Sector 30, Chandigarh*, which was dismissed by this Court vide order dated 28.03.2017. Mohammad Ashraf Mir did not challenge the order dated 22.01.2014 passed by the trial Court rejecting his application.

8. An application purported to be sent through post by PW-1

(prosecutrix) was received by the trial Court on 30.10.2015, wherein it was stated that the prosecutrix had given her statement in Court earlier under pressure and threat of CBI and, therefore, prayed that she be re-examined in the case. The Special Judge, CBI Court, Chandigarh, considered the said letter as an application and called upon the CBI to verify as to whether the said application has been submitted by the prosecutrix or not? After verification, CBI filed a reply that the prosecutrix had denied having written the said letter as well as the signatures being her's thereon. The Court considered the same and dismissed it vide order dated 25.02.2016, which remained unchallenged till the filing of CRM-M-5412 of 2018 on 07.02.2018, which has now been preferred by the prosecutrix after a delay of two years.

9. On 16.11.2017, mother of the prosecutrix namely Rafeeqa appeared as DW-5 and got recorded her statement where she asserted that PW-1 (prosecutrix) was in the custody of CBI for about 1½ years in relation to this case and was not allowed to meet anyone. Husband of the prosecutrix Irfaan Ahman Khan appeared on 12.12.2017 as DW-7 and also asserted the same.

10. After the recording of the statements of these two witnesses, initially an application dated 15.01.2018 under Section 311 Cr.P.C. by five accused namely Anil Sethi, Mohammad Ashraf Mir, Shabir Ahmad Laway, Shabir Ahmad Langu and Maksur Ahmad for recalling PW-1 (prosecutrix) for further examination, was filed before Special Judge, CBI Court, Chandigarh.

11. The ground laid out for recall of PW-1 (prosecutrix) for further examination has been asserted to be the statement of the defence witnesses

Rafeeqa DW-5 and Irfaan Ahmad Khan DW-7, who had deposed that the prosecutrix was never sexually exploited by any of the accused as claimed by CBI and that she was major at the time when her marriage was solemnised with DW-7 Irfaan Ahmad Khan on 15.05.2004, whereas the alleged incidence is of the year 2006. What is being sought to be asserted is that PW-1 (prosecutrix) was major at the time when the incident had taken place and when the FIR in question was registered against the petitioners. Reliance has also been placed upon the letter which is asserted to be written by Y-the prosecutrix which has been received by the trial Court on 30.10.2015, wherein request had been made that she be allowed to be re-examined as her deposition before the Court was under constant pressure and threat of CBI. It was stated that since new facts have surfaced on the judicial file on account of deposition of the defence witnesses DW-5 and DW-7, referred to above, recalling of PW-1 (prosecutrix) has been necessitated for the just and fair decision of the case. No prejudice would be caused to the prosecution nor would it, in any manner, amount to filling the lacuna in the evidence of the defence, rather it would enable the Court to reach a just decision in the case.

12. The application moved by the accused was contested by the prosecution by taking the plea that the earlier applications moved by two of the accused under Section 311 Cr.P.C. for recalling PW-1 (prosecutrix) stood dismissed by the Court and the challenge thereto by one of the accused has also been rejected by the High Court and, therefore, the present application is not maintainable. Factum of non-disclosure by Mohammad Ashraf Mir that he had earlier filed an application under Section 311 Cr.P.C., which has been dismissed by the trial Court amounts to

approaching the Court with unclean hands. As regards the age of the prosecutrix is concerned, it is asserted that PW-1 had been cross-examined in detail and so also PW-12, who was the principal of the school, who has proved the date of birth of the prosecutrix on the basis of records. As regards the alleged application of the prosecutrix, which was received through post on 30.10.2015 mark DX, the said application stands dismissed by order dated 25.02.2016 and there is no challenge thereto. Recall of PW-1 (prosecutrix) would amount to *de novo* trial which would not only prejudice the prosecution but would further delay the trial as the case is fixed for arguments and the present application has been filed only to delay the trial and avoid decision on merits of the case.

13. On 17.01.2018, when the application under Section 311 Cr.P.C. was taken up for hearing but prior to the arguments, one of the applicants-accused namely Anil Sethi made a statement in Court and requested for dropping his name from the application, which was accepted. The Court proceeded to dismiss the said application after arguments of the remaining four applicants by order dated 17.01.2018, which has been impugned in these two petitions.

14. It is the contention of learned counsel for the petitioners that the present application under Section 311 Cr.P.C. is maintainable as there is no bar as such for moving another application under Section 311 Cr.P.C. when an earlier application has been dismissed, especially with the new facts emerging during trial. In any case, except for Mohammad Ashraf Mir (petitioner No.1 in CRM-M No.6218 of 2018), none of the petitioners had earlier filed any application under Section 311 Cr.P.C. It is asserted that DW-5 and DW-7, who are mother and husband of PW-1 (prosecutrix)

respectively, have stated in their deposition in Court that the prosecutrix was never sexually exploited at any point of time and in any case, she was major when the alleged incidence is stated to have taken place resulting in the registration of the FIR and, therefore, necessity for moving an application under Section 311 Cr.P.C. was felt by the petitioners. Further, the prosecutrix was under pressure of CBI being in its captivity when she gave her statement in Court and she wanted to now truthfully depose in the Court and for that, she had sent a letter through post which was received on 30.10.2015 (mark DX) making allegations therein against CBI that she was forced, pressurised and put under threat to depose in a particular manner. Counsel have taken me through the statements of the prosecutrix as also the defence witnesses, referred to above, apart from mark DX. He, with reference to mark DX, asserts that the principles of natural justice have not been followed and adhered to by the trial Court while considering the said application which was received through post. Elaborating this, his submission is that the allegations were against the CBI and it was the same agency which was called upon by the Court to respond thereto, thus, the Court has not properly appreciated the importance of the said document and has brushed it aside without giving it a serious thought. Reliance has been placed upon judgments of Hon'ble Supreme Court in *Uma Nath Pandey and others Versus State of Uttar Pradesh and another* (2009) 12 Supreme Court Cases 40, *A.U. Kureshi Versus High Court of Gujarat & Anr.* 2009 (11) SCC 84, *Mohd. Yunus Khan Versus State of U.P. and others* 2010 (10) SCC 539, *Kumaon Mandal Vikas Nigam Ltd. Versus Girja Shankar Pant* 2001 (1) SCC 182 to explain the principle of natural justice.

15. Counsel for the petitioners submits that the Court should have exercised its powers under Section 311 Cr.P.C. while giving an opportunity to the accused to substantiate their assertions. Referring to the provisions of Section 311 Cr.P.C., he has asserted that the Court has wide powers and when any of the parties has projected a point with regard to there being a situation where recall of the prosecutrix has become essential for the correct decision of the case, the Court should have allowed the same. His submission is that fair trial has been a casualty and the Court has merely proceeded on presumptions and assumptions. Asserting his submissions and supporting the same with reference to Section 311 Cr.P.C. and the judgments of various Courts, he submits that present petition deserves to be allowed and the learned trial Court has failed to exercise its powers as it has not been able to appreciate the true ambit of the Section. In support of these contentions, he has placed reliance upon the following judgments:-

- (i) *State Delhi Administration Versus Ramesh Kumar 1990 Rajdhani LR 177*
- (ii) *Jeo Mirza Versus State of Punjab 1995(3) R.C.R. (Criminal) 26*
- (iii) *Sharawan Singh Versus State of Rajasthan 2005(2) Cri.CC 755*
- (iv) *Himanshu Singh Sabharwal Versus State of M.P. and Ors. 2008(2) R.C.R. (Criminal) 267*
- (v) *Khushwinder Singh and another Versus State of Punjab 2007 (1) R.C.R. (Criminal) 531*

16. On the other hand, learned counsel for respondent-CBI has supported the impugned order passed by the learned Special Judge, CBI Court, Chandigarh, by reiterating the reasons, as have been assigned by the

trial Court. He has pressed into service the factual aspect and the circumstances through which the case has developed and proceeded. Contradicting the arguments of the counsel for the petitioners, he contends that the prosecutrix was not in custody of CBI, rather she was in protective custody and that too in compliance with the orders passed by the Court for the reason that her life was under threat. CBI has only complied with the orders passed by the Court. Allegations, as have been made with regard to tutoring, pressurising and threatening the prosecutrix, have been assertively denied. He has referred to the cross-examination of the prosecutrix to support his submissions. As regards the application mark DX, his stand is that the same is neither signed by the prosecutrix nor has it been written by her. Statement of the prosecutrix was recorded voluntarily in camera proceedings. Evidence of PW-1 (prosecutrix) stood concluded on 27.04.2007 and the alleged application/letter was received through post by the Court on 30.10.2015, which is after a lapse of seven years. Had there been actual threat or pressure given by CBI to the prosecutrix, there was no reason why she would not have come forth and stated so. The said application stood dismissed by the trial Court on 25.02.2016 and the said order stands. It is now that the said order is being sought to be challenged after a period of two years and that too when the case is ripe for final decision. Consolidating the apprehensions for which the prosecutrix was being given protection by the Court and the same are coming true with the accused putting pressure on the prosecutrix. Prayer has thus been made for dismissal of the petitions as the trial Court has rightly exercised its powers under the statute.

17. I have considered the submissions made by the counsel for the

parties and having gone through the pleadings, the documents on record and as referred to during arguments as also the judgments on which reliance has been placed but do not find myself in agreement with the submissions of the counsel for the petitioners.

18. No doubt, under the Code of Criminal Procedure, there are wide powers conferred upon the Court when it comes to summoning any person as a witness and this Court had an occasion to delve into the said aspect with reference to Section 311 Cr.P.C. while considering *Criminal Revision No.3592 of 2017* titled as *Khatta Singh Versus Central Bureau of Investigation, Chandigarh and others*, decided on 23.04.2018, where it was held as follows:-

*“To understand the powers, which have been given to the trial Court under the Statute, reference to the provision itself would be essential. Section 311 Cr. P.C. reads as follows:-*

*“311. Power to summon material witness, or examine person present. Any Court may, at any stage of any enquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”*

*A reading of the above Section would show that there are two parts in it. The first part is primarily permissive one, which gives discretionary authority to the Court enabling it to exercise its powers at any stage of inquiry, trial or other proceedings under the Code. It can summon any person as a witness, examine any person in attendance, who may not even be summoned as a witness and can recall and re-examine any person already examined. This power could be put into*

*service at a stage when the parties have after leading their evidence closed the same and even when they had concluded their final arguments, meaning thereby that the discretion of the Court can be exercised any time prior to the pronouncement of the judgment. This is because in the first part, the word used is 'may'. However, while exercising that discretionary powers under the first part, the second part mandates and imposes an obligation on the Court either to summon, examine or recall or re-examine any person, if, in the opinion of the Court, evidence of such person appears to be essential to the just decision of the case but this power also is to be exercised prior to the final pronouncement of the judgment. More the discretion given to the Court, more discipline and circumspection is required to be exercised by the Court while invoking such powers and should be in consonance with the provisions of the Statute.*

*Hon'ble Supreme Court, in the judgment of Mohanlal Shamji Soni' case (supra), on which reliance has been placed by both the parties, has, in paras 9, 10 and 18 while dealing with the powers of the Court under Section 311 Cr. P.C., observed as follows:-*

*“9. The very usage of the words such as 'any court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.*

*10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the*

*Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties with-holds any evidence which could be produced and which, if produced, be unfavorable to the party withholding such evidence, the court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the New Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or reexamine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the*

*ends of justice would be defeated.*

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*18. The next important question is whether Section 540 gives the court carte-blanche drawing no underlying principle in the exercise of the extra-ordinary power and whether the said Section is unguided, uncontrolled and uncanalised. Though Section 540 (Section 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or the cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.”*

*The Court has further proceeded to refer to various judgments and summed up the principle in para-27 as follows:-*

*“27. The principle of law that emerges from the views expressed by this court in the above decisions is that the Criminal Court has ample power to summon any*

*person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.”*

*It would not be out of way to mention here that the Hon'ble Supreme Court has, relying upon the judgment in Rameshwar Dayal vs. State of U.P., 1978 (2) SCC 518, concluded that where any fresh evidence is admitted against the accused, the accused should be given an opportunity to rebut that evidence as this right is engraved in the principles of natural justice as the Statute has armed the Court with all the powers to do full justice between the parties which cannot be done until both the parties are properly heard. Maxim of audi alteram partem was sought to be engraved and inherent in the provisions contained under new Section 311 Cr. P.C. These principles have been reiterated in all subsequent judgments, which have been passed by the Supreme Court and the various High Courts, of course, applying those principles on the given facts and circumstances of each case.*

*It would not be out of way to mention here that the Hon'ble Supreme Court, in the case of Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others, 2004 (2) RCR (Criminal) 836 in para-46 thereof, has observed that it is a bounden duty of the Court to arrive at the truth and subserve the ends of justice. Observing with caution that Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine any witness and this power is only given to the Court which is required to exercise the same not merely at the bidding of any party or person but is a power conferred and discretion vested in the Court so as to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by the Courts to power under this Section only for the purpose of discovering relevant facts or*

*obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.*

*It is, thus, the bounden duty of the Court to step in by enforcing law so as to see that the truth does not become a casualty at the hands of procedures, which are being sought to be projected in the form of fetters, in exercise of discretionary powers of the Court. However, this power has to be exercised with great care and caution.*

*It can, thus, be concluded that the broad principles are laid down under the Statute itself which has further been elaborated and explained by the Courts in various judgments with the cardinal rule being that these principles would be applied uniformly depending upon the facts and circumstances of each case. No general principle or rule can be laid down in exercise of such discretionary powers of the Court except that the only guide for the Court would be the object of arriving at a just decision of a case with a further rider that the evidence appears to be essential for the said purpose. In case a decision is reached by the Court that the evidence is essential for the just decision of the case, then the Court is bound to summon and examine or recall and re-examine any such person whether he is a witness or not and has been examined earlier or not and examine or recall any person including a person who is in attendance.”*

19. With the principles referred to above in mind, the facts and circumstances in the present case have to be now looked into to decide the plea of the petitioners with reference to the application which they have moved under Section 311 Cr.P.C.

20. The aspects which have been pressed into service by the petitioners for asserting that application under Section 311 Cr.P.C. for recall of PW-1 (prosecutrix) would be essential is the change of circumstances and new facts having coming to light in the light of the evidence of DW-5

Rafeeqa and DW-7 Irfaan Ahmad Khan, who are mother and husband of

PW-1 (prosecutrix) respectively. What has been asserted is that in their statements, they are alleging PW-1 (prosecutrix) to be a major at the time of commission of offence and that she has never been sexually exploited. Without delving into details of facts lest it may prejudice the rights of parties, suffice it to say that these would not be new facts which have come to light requiring recall of prosecutrix as this was always the stand taken by the accused in their defence.

21. The second aspect which has been highlighted is that PW-1 (prosecutrix) was in captivity and custody of CBI prior and during examination in Court and thus her evidence being under threat, pressure and influence of CBI requires to be re-looked for the reason that the two above referred to witnesses i.e. DW-5 and DW-7 have so stated in Court, specially when seen in conjunction with the letter received through post by the CBI Court on 30.10.2015 mark DX, where she is alleged to have shown inclination to depose afresh again, cannot be accepted as the said aspect has been thoroughly pressed into service by the accused when she was cross-examined.

22. That apart, letter mark DX was treated as an application which was duly considered and reasoned order dated 25.02.2016 passed by the trial Court rejecting the authenticity thereof. There was no challenge to the said order from any quarter for two years till the filing of CRM-M No.5412 of 2018 and that too on 07.02.2018 which is after the dismissal of the application of the accused filed under Section 311 Cr.P.C. by the trial Court by order dated 17.01.2018 and after a challenge thereto on 24.01.2018 in CRM-M No.3659 of 2018 before this Court. The accused were well aware of this decision by the trial Court. This Court would not

like to further delve into this issue lest any observations made herein may not be taken as opinion on merits which may affect the independent decision of the trial Court in any manner.

23. Independent of the fact of dismissal of the application mark DX by the trial Court, in para 18 of the impugned order dated 17.01.2018, zimni order dated 07.04.2007 has been reproduced which was passed prior to examination of the prosecutrix in Court where she had categorically denied a suggestion of threat and pressure at the hands of CBI and had further said that she is in protective custody of Chandigarh Police and no CBI Officer is meeting her when it was pointed out and a request was made by the counsel for defence that she be not kept under the protective custody of CBI lest it would prejudice the accused in their cross-examination and to avoid tutoring by CBI. The Court, despite the statement, as above, of the prosecutrix, proceeded to order that she be continued in protective custody of Chandigarh Police till the recording of her statement is complete and the CBI officers should not attempt to contact her till her examination is over. This, in itself, is a complete answer to the argument of the counsel for the petitioner. The trial Court had taken extra care and caution to ensure that even apprehensions of the accused are dispelled what to say of actual prejudice. It is worth mentioning here that the prosecutrix was cross-examined for the first time after passing of the order dated 07.04.2007 on 24.04.2007 and thereafter on 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> April, 2007. The plea thus now being sought to be put forth by the petitioners with reference to the prosecutrix being in custody of CBI cannot be accepted, rather the same is not at all tenable.

24. None of the pleas, as have been put forth and projected by the

petitioners, carry any weight and the same appears to be a last ditch attempt on their part to delay the culmination of the proceedings. The impugned order dated 17.01.2018, as passed by the learned Special Judge, CBI Court, Chandigarh, being based upon proper appreciation of the facts and circumstances of the case and in accordance with law, do not call for any interference by this Court. Therefore, these two petitions i.e. *CRM-M No.3659 of 2018* and *CRM-M No.6218 of 2018* deserve dismissal while upholding the impugned order.

25. Now moving on to *CRM-M No.5412 of 2018* titled as *Y-prosecutrix Versus Central Bureau of Investigation, Chandigarh*, where the challenge is to the order dated 25.02.2016 (Annexure P-2) by which the learned Special Judge, CBI Court, Chandigarh, had dismissed the alleged application of the petitioner-victim which was received through post on 30.10.2015, where she is alleged to have asserted that the statement which she had given in the Court, was under threat and pressure of CBI and that she wanted to give a fresh statement in Court, there is an inordinate and unexplained delay of almost two years on the part of the petitioner in approaching this Court.

26. Facts in brief of the case have been given in para 5 to 11 of the order above and are not being repeated herein but for decision of this petition, few dates require to be mentioned. Examination of the prosecutrix concluded on 27.04.2007 and thereafter she was no more in the protective custody of the Chandigarh Police as per zimni order dated 07.04.2007 referred to above of the trial Court. Application under Section 311 Cr.P.C. was filed by K.C. Padhi on 19.12.2012 and another by Mohammad Ashraf Mir on 05.04.2013 for re-examination of the prosecutrix

PW-1-petitioner herein. These applications were dismissed on 22.01.2014 by Special Judge. It was more than one year nine months thereafter that an alleged letter (mark DX) by post was received by the trial Court on 30.10.2015 purported to be of the petitioner which is after a period of seven years of her having deposed in Court and being no more in protective custody since then.

27. For the sake of reference to facts, it may be mentioned here that the Hon'ble Supreme Court transferred the trial out of Jammu and Kashmir State because of certain factors including the fact that accused in this case were not only rich and influential persons but included high ranking Officers also, apprehensions were expressed and it was because of these reasons that the Court proceeded to order the prosecutrix to be kept under protective custody. Rest of the sequence of events as enumerated in the earlier part of this order speak for themselves culminating in passing of the order dated 17.01.2018 by the trial Court rejecting another application under Section 311 Cr.P.C. for recall of the prosecutrix

28. It is now that a challenge to the order dated 25.02.2016 has been posed through this petition. At the cost of repetition it is stated that the present petition has been filed on 07.02.2018 after a period of a few days short of two years after the passing of the impugned order on 25.02.2016 (Annexure P-2) and that too only after the dismissal of an application under Section 311 Cr.P.C. filed by the accused vide order dated 17.01.2018 passed by the Special Judge, CBI Court, Chandigarh, which stood challenged in this Court by filing CRM-M No.3659 of 2018 on 24.01.2018. This shows that this petition has been filed later in time. It cannot be accepted that the petitioner was not aware of the order dated 25.02.2016, especially in the

light of the admitted relationship of the petitioner with the witnesses, who had appeared as defence witnesses (as mentioned in the earlier part of the order). This petition cannot be said to have been moved *bonafidely*.

29. This Court in the facts and circumstances of the present case would not like to comment further for the reason that final judgment has to be passed by the trial Court, lest it prejudices parties in any manner.

30. The present petition, therefore, deserves dismissal.

31. In view of the above, all the above three petitions stand dismissed.

32. Any observation made hereinabove shall have no effect or bearing on the merits of the case pending before the trial Court in any manner.

**May 16<sup>th</sup>, 2018**  
*Puneet*

**(AUGUSTINE GEORGE MASIH)**  
**JUDGE**

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No