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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 06th August, 2018

Pronounced on: 24th August, 2018

+ CRL.M.C. 1114/2016 & CRL.M.A. 4797-99/2016, 4999/2016

AJAY SINGH CHAUTALA

..... PETITIONER

Through: Mr. P.S. Patwalia, Sr. Adv. with
Mr. Dhruv Sheoran, Mr. Amit
Sahni & Mr. Archit Upadhyay,
Mr. Harsh K. Sharma, Ms.
Vaibhavi Sharma, Mr. Rohit
Gaur, Mr. Pulkit Jain & Mr.
Vivek Punia, Advs.

versus

**THE CENTRAL BUREAU OF
INVESTIGATION**

..Respondent

Through: Ms. Rajdipa Behura, Spl. PP for
CBI with Mr. Philomon Kani,
Ms. Kriti Handa, Ms. Hansika
Sahu & Ms. Damini K.,
Advocates.

+ CRL.M.C. 1520/2015 & CRL.M.A. 5573/2015

ABHAY SINGH CHAUTALA

..... Petitioner

Through: Mr. Amit Sahni, Mr. Harsh K.
Sharma, Ms. Vaibhavi Sharma,
Mr. Rohit Gaur, Mr. Pulkit Jain
& Mr. Vivek Punia, Advs.

versus

STATE OF NCT OF DELHI (CBI)

..... Respondent

Through: Ms. Rajdipa Behura, Spl. PP for
CBI with Mr. Philomon Kani,
Ms. Kriti Handa, Ms. Hansika
Sahu & Ms. Damini K.,
Advocates.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER

1. These two petitions invoking the inherent jurisdiction of this court under Section 482 of the Code of Criminal Procedure, 1973 (Cr. PC) take exception to similar orders passed by the Special Judge (Prevention of Corruption Act) in two different criminal cases – CC No.1/12 and CC No.3/12 – arising out of the same first information report no. RC2(A)/2006 –ACU-VII (FIR) of Central Bureau of Investigation (CBI) in which the petitioners herein are the respective accused, each being tried on the charge for the offence under Section 13(2) read with Section 13(1)(e) of Prevention of Corruption Act, 1988. Since they give rise to common questions of law against similar background, they are being decided by this common order.

2. The FIR investigation into which has resulted in the prosecution of the petitioners herein was registered on 03.04.2006 by the CBI. The reports under Section 173 of the Code of Criminal Procedure, 1973 (Cr.PC) were submitted in each case on 24.12.2009. The Special Judge took cognizance on the said reports (charge-sheet) and issued process summoning each of the petitioners herein as accused persons.

3. In the charge-sheet leading to the prosecution of the petitioner of the first captioned matter, reliance was placed on the evidence of 173 witnesses and 226 documents, copies of the statements of such witnesses and documents having been submitted with the police report. Similarly, in the case against the petitioner in the second captioned matter, reliance was placed on the evidence of 160 witnesses and 141 documents.

4. It appears the Special Judge after securing the presence of the petitioners in each case put them on trial on charges which were framed based, *inter alia*, on the aforementioned material. The cases thus entered the stage of trial.

5. On 13.02.2013, the CBI moved an application in the case against the second petitioner seeking permission to place reliance on the evidence of 97 additional witnesses and 44 additional documents, lists whereof were submitted as Annexures 'A' and 'B' to the said application. A similar move was made in the case against the first petitioner, by another application moved on 30.05.2013, whereby request was made for CBI to be permitted to place reliance on the evidence of 106 additional witnesses and 30 additional documents, copies whereof were submitted as Annexures 'A' and 'B' to the said application.

6. In each of the aforesaid applications, it was sought to be explained that scrutiny of the statements of witnesses and documents had revealed that some of the witnesses and documents relied upon had not been cited with the charge-sheet "*inadvertently*". It was submitted that the said additional witnesses and documents were

“highly necessary for the just decision of the case”, the non production of the same earlier being “not intentional or deliberate”.

7. The applications were resisted by the petitioners. The Special Judge, however, by similar orders in each case, passed on 13.05.2013 and 08.08.2018, allowed the prayer(s) of the CBI, rejecting the objections of the defence recording observations – extracted to the extent they are common or similar – to the following effect :

“In considered opinion of this Court, the Police Report filed U/s. 173 Cr. PC cannot be deemed to be a document which cannot later on be supplemented. In case there is any lapse on part of Investigating Officer or even of the Investigating Agency in not placing on record complete list of witnesses and documents at the initial stage, obviously, prosecution should not be made to suffer for the same as in any case it is the interest of justice which has to be taken into consideration by the Court while disposing of application of the type which is being disposed off by way of present order.

As regards apprehension of prejudice caused to the accused, as was expressed by ld. Counsel during course of his submission, it is made clear that in case the documents sought to be placed on record by the prosecution relate to any of the witnesses already examined in this case and if ld. Counsel deems it necessary to further cross-examine such a witness, he would be at liberty to move appropriate application for recalling the witness for the purpose of further cross-examination and such an application would be treated on merits as and when it is moved.

Keeping in view the aforesaid and the settled principle of law as laid down by various judicial pronouncements, the application is allowed and prosecution is permitted to place on record the

documents mentioned in the application and the list of witnesses alongwith statements U/s. 161 Cr. PC (if recorded) of such witnesses and is also directed to hand over copies thereof to the accused before proceeding further with the present matter...”

8. In the case against the first petitioner, the Special Judge also recorded the following observations :-

“As regards submissions made by ld. Counsel regarding prosecution being precluded from re-agitating the point in question, a perusal of the record reveals that A-1 had earlier moved an application seeking summoning and production of documents in possession of CBI. The said application moved by accused Ajay Chautala came to be registered as M.No.47/2012. It was in reply dated 18.02.2013 to the said application that it had been claimed on behalf of CBI that additional documents and list of witnesses which were being filed alongwith the reply be taken on record. Subsequently, on 13.05.2013, the application in question (M.No.47/12) was sought to be withdrawn by ld. Counsel for the applicant as being not pressed in view of order dated 13.02.2013 passed by this Court in CC No.03/12 in respect of application M.No.53/12 and 54/12. It was on this request made by ld. Counsel for accused Ajay Chautala that his application M.No.47/12 was permitted to be withdrawn as not pressed and consequently reply filed on behalf of CBI also became inconsequential. In these circumstances, it cannot be said that prosecution had withdrawn its earlier application or was accordingly precluded from agitating the point again...”

9. While taking the above view, the Special Judge referred, *inter alia*, to the rulings of the Supreme Court reported as *CBI vs. R.S. Pai and Anr.*, (2002) 5 SCC 82; *Rajaram Prasad Yadav vs. State of Bihar*

and Anr., (2013) 14 SCC 461, as indeed of a learned single judge of this court in *Amarjit Singh vs. the State and Ors.*, 19 (1981) DLT 443 besides judgment of a learned single Judge of Rajasthan High Court reported as *Alarakh vs. State of Rajasthan*, 1986 Cri. LJ 1794.

10. In the case of *R.S. Pai* (supra), after investigation the CBI had filed a charge-sheet and while the case was pending consideration of the question of charge, it had moved an application for production of “additional documents” which request was rejected. The Supreme Court examined the permissibility of such additional material to be brought on record in light of the provision contained in Section 173 Cr. PC and ruled thus :

“7. From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court. In our view, considering the preliminary stage of prosecution and the context in which the police officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which the prosecution proposes to rely, the word “shall” used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to

rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under Section 173(4) of the Code of Criminal Procedure, 1898 was considered by this Court in Narayan Rao v. State of A.P. [AIR 1957 SC 737 : 1958 SCR 283 : 1957 Cri LJ 1320] (SCR at p. 293) and it was held that the word “shall” occurring in sub-section (4) of Section 173 and sub-section (3) of Section 207-A is not mandatory but only directory. Further, the scheme of sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to the investigation. In such cases, there cannot be any prejudice to the accused. Hence, the impugned order passed by the Special Court cannot be sustained.

(emphasis supplied)

11. The learned counsel for the petitioners have submitted that the ruling of *R.S. Pai* (supra) cannot be used to give unbridled power to the investigating agency to bring on record the material piecemeal, particularly after the charge has been framed the trial having commenced. It has their submission that the ruling in *R.S. Pai* (supra) related to the “preliminary stage” and can have no application to the cases at hand in as much as charges having been framed, the petitioners (accused) are being taken by surprise by the additional material which may cause serious prejudice. In the submission of the

learned counsel the additional material on which reliance is sought to be placed was not gathered by any further investigation. It is also their argument that the trial having commenced such further evidence can be brought before the court only if a case is properly made out for the criminal court to exercise its power under Section 311 Cr. PC. Referring to the decision in *Rajaram Prasad Yadav* (supra), it was submitted that the Special Judge has improperly allowed the requests in the two cases without examining the relevancy of the evidence of the additional witnesses or of the additional documents.

12. The applications on which the impugned orders were passed were not presented under the label either of Section 173 or Section 311 Cr. PC. The additional evidence for which permission was sought has not been gathered by any further investigation. The CBI was candid enough to admit that such material should have been included in the charge-sheet(s) as had been presented in the first place. It regrets the “*inadvertent*” omission in that regard.

13. Undoubtedly, no material that is not germane to the gravamen of the charge, which is laid against the accused, can be permitted to be brought in as evidence. This is the letter and spirit of the provision contained in Section 136 of the Indian Evidence Act, which reads as under :-

136. Judge to decide as to admissibility of evidence. — When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

14. The discretion and initiative to muster and present the supportive evidence before the criminal court, generally speaking, rests within the prosecution (or the complainant). After all, the defence banks on presumption of innocence and the onus to prove guilt is of the accuser. Therefore, the law does not shackle the prosecution in any strait-jacket as to the nature or extent of evidence (oral or documentary) while requiring the same to be submitted with report of investigation (or complaint) save by general guidance that it be “sufficient” to make out “reasonable grounds” to show culpability [Section 170 read with Sections 173 and 203]. It is expected that the prosecution would act responsibly and present with its case only such evidence as is relevant and admissible. The presiding judge controls the presentation of evidence allowing only what may be lawfully adduced. The law, however, also recognizes the possibility that evidence that is “material” and “essential to the just decision” may, at times, get overlooked, be omitted or come to light later. In order to take care of such evidence which would be additional to the one

presented by the prosecution (or complainant) at the inception, specific power to allow the same is conferred on the court by the provision contained in Section 311 Cr. PC which reads thus :

“311. Power to summon material witness, or examine person present :

Any Court may, at any stage of any inquiry, 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.”

15. The principles summarized governing the exercise of power under Section 311 Cr. PC as culled out in the case of *Rajaram Prasad Yadav* (supra) need to be kept in mind. The court ruled thus :

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.PC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 Cr.PC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 Cr.PC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 Cr.PC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the

discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 Cr.PC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

16. The above-noted guidelines via-a-vis the exercise of power under Section 311 Cr.PC leave no room for doubt that while the collation and presentation of evidence in the first instance or at preliminary stages – as in case of *R.S. Pai* (supra) – is within the prerogative of the prosecution (or complainant) and (save for judicial scrutiny as to relevancy, admissibility or mode of proof) cannot be trammelled or curtailed, in the subsequent stages of the criminal process before the court, the permission to introduce additional material must be controlled and regulated by the court not only on the touchstone of relevancy etc. but also with due regard to possibility of prejudice. There cannot be a *carte blanche* for the prosecution in this regard.

17. It is not even the argument of the petitioners that the additional material (testimony of the witnesses and documents) that is sought to be adduced would change the nature of the case against them. It does appear that the Special Judge, by the impugned orders, has not subjected each additional witness or additional document to scrutiny to confirm the relevancy of the evidence brought through them to the charge that has been framed against the petitioners. But then, the submission of the prosecuting agency that such additional material is “*highly necessary for the just decision of the case*” has to be assumed at this stage to have been made with some sense of responsibility. Be that as it may, while presiding over the trial, the Special Judge would be duty bound and expected to ascertain and reconfirm the relevancy and admissibility of the evidence in terms of command of Section 136 of the Evidence Act, 1872 quoted above. The objections to the

relevancy or admissibility, if any, raised by the defence (the petitioners) would need to be considered and adjudicated upon at each such stage.

18. Given the reasons set out in the impugned orders, it cannot be said that the discretionary power to allow additional evidence to be brought on record has been exercised arbitrarily. There is nothing shown from which it could be inferred that the additional material has been crafted and presented to fill in lacunae. The trial judge has taken a very balanced view of the matter by permitting even recall of witnesses already examined for further cross-examination by the defence counsel in the light of additional material permitted to be adduced. The discretionary power available to the trial court, thus, has been used most judiciously and there is no likelihood of any prejudice thereby to be caused to the petitioners.

19. For the above reasons, the petitions are found to be devoid of merit and they are consequently dismissed. This disposes of the pending applications as well.

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(R.K. GAUBA)
JUDGE

AUGUST 24, 2018

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