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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on:- 12th September, 2018

+ CRL.M.C. 2463/2015 & CrI.M.A. 8534/2015 (stay)

D R I

..... Petitioner

Through: Ms. Geetanjali for Mr. Satish
Aggarwal, Standing counsel.

versus

VIPIN SEHGAL

..... Respondent

Through: Mr. Arhum Sayeed, Adv.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The petition at hand was filed in May, 2015, invoking jurisdiction of this court under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.), challenging the order dated 12.01.2015 of the Court of Chief Metropolitan Magistrate in criminal complaint case (No. 36/1/1996) which was instituted by the petitioner against the respondent alleging offences punishable under Sections 132 and 135 of the Customs Act, 1962 with reference to certain acts of commission or omission relating to the period of August, 1994.

2. The Chief Metropolitan Magistrate, by the impugned order, had restricted the opportunity for the petitioner to examine only such witnesses at the stage of proceedings post framing of charge as had been examined earlier at the stage of pre-charge evidence, thereby

upholding the contention of the respondent against the prayer for two additional witnesses including one Rajvir Singh Juneja to be examined.

3. While resisting the prayer in the present petition, the respondent has placed reliance on decision of a learned single Judge of this Court in *DRI vs. Raghubir Singh 2016 (333) ELT 253 (Del.) and Crl.M.C. 806/2012 decided on 27.03.2012*, his further grievance being that the prosecution in the criminal case is becoming unending given the slow pace at which it is moving, it now being already twenty two years old.

4. When the matter was called out, a proxy counsel appeared for the counsel for the petitioner and was granted passover on the ground Mr. Satish Aggarwal, Advocate was busy elsewhere. The counsel would not appear even thereafter. Midway the hearing, the proxy counsel without even seeking leave of the court, also left the court room, though returning after sometime. The previous proceedings would show that the petitioner has not been diligent in rendering effective assistance even in adjudication upon this petition pending for over three years.

5. Having heard the learned counsel for the respondent and having gone through the record, this court finds substance in the grievance raised in the petition.

6. A criminal case arising out of a complaint, though lodged by a public servant, given the nature of accusations levelled therein with reference to the provisions of Customs Act, 1962 requires to be tried as a case instituted otherwise than on police report under Chapter XIX of Cr.P.C. The provisions contained in Sections 244 – 246 of Cr.P.C.

are relevant for the present controversy. They , to the extent relevant, read as under:

244. Evidence for prosecution.—(1) When, in any warrant-case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

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*245. When accused shall be discharged.—
(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.*

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*246. Procedure where accused is not discharged.—
(1) If, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.*

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(4) If the accused refuses to plead, or does not plead or claims to be tried or if the accused is not convicted under sub-section (3), he shall be required to state, at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken.

(5) If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and reexamination (if any), they shall be discharged.

(6) The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross examination and re-examination (if any), they shall also be discharged.

(emphasis supplied)

7. It is clear from the above-noted scheme of the procedure for trial of warrant cases instituted otherwise than on police report that the complainant is called upon to lead evidence at a stage which is commonly known as ‘pre-charge’. Ideally, going by the expressions used (*take all such evidence as may be produced in support of the prosecution*)’ in Section 244(1) of Cr.P.C., the complainant must adduce its evidence in entirety at the stage of pre-charge evidence and it is only thereafter that the trial court Magistrate takes a call as to whether the accused is entitled to be discharged or, conversely, as to whether charge is made out for he to be put to trial thereupon, in terms of further provisions contained in Section 246. Sub-section (1) of Section 246, however, shows that the decision on the issue as to whether charge has been made out or not can be arrived at by the Magistrate not necessarily after the entire evidence intended to be produced by the prosecution has come on record. It may do so “*at any previous stage of the case*” as well. The provision contained in sub-section (6) of Section 246 further clarifies that the law does not insist on the entire evidence to be produced at the stage anterior to framing of charge. The words “*evidence of any remaining witnesses for the prosecution shall next be taken*” appearing in the said clause leaves no

room for doubt that the reliance of the complainant (or prosecution) cannot be restricted to the evidence that had been tendered at the stage of pre-charge evidence. Instead, the evidence presented at the stage of pre-charge may be supplemented by the ‘*remaining*’ evidence.

8. The ruling in *Raghubir Singh* (supra), as referred to by the respondent had a distinct fact-situation. Even otherwise, it failed to take note of the provision contained in Section 246 of Cr.P.C. and, consequently, does not commend itself to be followed by this court.

9. At this stage, the learned counsel for the respondent fairly concedes that the prosecution cannot be restricted in its reliance on the witnesses who had been examined at the stage of pre-charge evidence. The order dated 12.01.2015, contrary to such position of law, thus, will have to be set aside. It is ordered accordingly. For clarity, it is added that the prosecution will have the liberty to examine the two additional witnesses for which it had made a prayer at the post-charge evidence, this in addition to such witnesses as had been examined earlier at the stage of pre-charge.

10. While parting, this court, however, records its agreement with the grievance of the respondent as to the inordinate delay in conduct of the trial on the complaint presented by the petitioner. Twenty two years have already passed and there seems to be no end to the prosecution which seems to be turning into persecution. A citizen cannot be subjected to such harassment. There will have to be some sense of urgency and expedition. The mis-fortune is that the petitioner has not demonstrated any resolve to show expedition even in the

petition at hand which has remained pending over three years, its counsel not inclined to appear on the matter being called out.

11. In the above facts and circumstances, it is directed that the petitioner will be entitled to produce all its remaining witnesses on two specific consecutive dates which shall be fixed for such purpose by the trial court upon receipt of copy of this order. In case of any default on the part of the petitioner, its right to lead further evidence will stand exhausted and closed, and no indulgence to be shown. The respondent/accused is stated to be now sixty seven years old. The trial court shall make endeavour to conclude the trial as expeditiously as possible preferably within six months from the date next fixed before it.

12. The petition and the pending applications stand disposed of.

Dasti under the signatures of Court Master.

R.K.GAUBA, J.

SEPTEMBER 12, 2018/uj