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

Date of decision: 28.11.2019

+ CRL.M.C. 4459/2019 & CRL.M.A. 35191/2019

SYED ASHRAF @ S.A SUBHANI Petitioner
Through Mr. Archit Upadhayay, Adv.

versus

C.B.I Respondent
Through Mr. Rajesh Kumar, SPP with Ms.
Santwana and Mr. Ravi Rai, Adv.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

1. Vide the present petition, the petitioner/accused seeks direction, thereby to set aside the impugned Order & Judgment passed by Sh. Ramesh Kumar, Addl. Session Judge, Tis Hazari Courts, Delhi dated 06.07.2019 in Crl. Rev. No. 193/2019.

2. The present petition is filed on the ground that on 26.03.2018, the statement of Sh. K.E.V Nair, DSP (Retired) CBI was recorded by the Trial Court as PW-28 who got exhibited the statements of prosecution witnesses recorded under Section 161 of Cr.P.C., which are as follows:-

a) Ex. PW 28/C (statement of Smt. M. Shanta);

- b) Ex. PW 28/D (Statement of Sh. R. Harish);
- c) Ex. PW28/E & EX.PW28/E1 (Statement of of Sh. S. Girish);
- d) Ex. PW 28/F (statement of Sh. J. Venu); and
- e) Ex. PW28/G & Ex.PW28/G1 (statement of Sh. N. Narayana)

3. Learned counsel appearing on behalf of petitioner submits that on 27.07.2018, the petitioner/revisionist filed an application for objection of exhibiting statements, however, the learned ACMM dismissed the said application vide order dated 08.02.2019, holding that statement of PW 28 namely K.E.V Nair was recorded in the presence of his Counsel and no such objection was taken. It is further observed as under:-

".....just by exhibiting of statements of witnesses by PW 28/ IO is in no way going to prejudice the accused in his defense as just by exhibiting these statements u/s 161 CrPC of PWs, as mentioned above, the statements of the witness does not gets proved. By putting exhibits over them by PW28 only proves that they were recorded by him and nothing more. The authenticity of the contents thereof shall be proved only by the persons/PWs whose statements have been recorded."

4. On being aggrieved by the order passed by the learned Trial Court, the petitioner on 28.03.2019, filed revision petition and the same was dismissed by observing as under:-

"Since, the said statements u/s 161 Cr.P.C. have been recorded by the IO, there is no legal impediment in

getting the statements exhibited by its author, in accordance with law. However, authenticity and relevancy of the statements of the witnesses recorded u/s 161 Cr.P.C. can be considered by the Court, at the time of arguments, after they are duly proved."

5. Learned counsel for the petitioner submits that Ld. Session Court did not appreciate the arguments of the petitioner/revisionist in the correct perspective and has wrongly interpreted in the impugned order. The Hon'ble Supreme Court of India and various Hon'ble High Courts in catena of judgments have held that the statements recorded under section 161 Cr.P.C. can only be used for a limited purpose i.e. for confrontation and contradiction only. Moreover, Section 162 Cr.P.C. clearly puts a bar on the use of statements recorded under Section 161 Cr.P.C. As per the proviso of section 162 (1) of Cr.P.C. the statement cannot be used by the prosecution without the permission of the Court and that too only for the purpose to contradict such witness in the manner provided by Section 145 of Evidence Act. Section 145 of the Evidence Act, 1872 says that:

"a witness may be cross examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him"

6. Learned counsel further submits that the impugned Order & Judgment suffers from complete non-application of mind. The learned Session Court ought to have appreciated the fact, that on 26.03.2018, statement of PW 28 was recorded and the petitioner filed the said application on the next date of hearing i.e. on 27.07.2018.

7. Learned counsel further submits that the sole question for consideration is not about the authenticity or mode of production of the exhibited statements but the fact that whether the statement recorded by an IO during the investigation under Section 161 Cr.P.C. can be exhibited through any other witness, and especially through the deposition of IO without any confrontation and contradiction as enumerated under Section 145 of Indian Evidence Act or/and beyond the provision of Section 162 Cr.P.C.

8. The issue raised in the present petition has already been dealt by this Court in the case of ***Bhupinder Singh Sikka vs. CBI: (2011) 2 CCR 307***, in **Crl. Appeal. No. 124/2001** decided on 25.03.2011 and held as under:-

“13. The learned counsel for the Appellant has contended that a witness can be confronted by his previous statement under Section 162 Cr.P.C., only after the same is duly proved. Thus, the statement has to be exhibited either by

the maker of the statement or by the investigating officer who recorded the same. In a case where the witness turns hostile from his previous statement, there are bleak chances of his admitting the previous statement. Confronted with a similar situation, it was held in Nqa U Khine & Ors. v. Emperor AIR 1935 Rangoon 98 that those parts of the statements to the police which are used in cross-examination to contradict the witness must be proved and brought onto the record. This can ordinarily be done by the admission of the witness that he made the statement, or by examination of the police officer who recorded it. If the latter course is necessary, in order to avoid delay there can be no objection to allowing cross-examination subject to subsequent proof of the statement. In the present case, PW1 in his cross-examination by the learned APP has admitted that his statement was recorded under Sec. 161 CrPC by the Investigating Officer PW8, who has also admitted that he CrI.A. 124/2001 had recorded the statement of the Complainant under Sec. 161, CrPC. However, the said statement has not been exhibited. The objection, if any, as to the mode of proof should have been taken by the Appellant at the time of trial as was held by the Hon'ble Supreme Court in Phool Kumar v. Delhi Admn. (1975) 1 SCC 797 and Ashfaq vs State (Govt. Of NCT of Delhi) (2004) 3 SCC 116 .”

Accordingly, it is held that exhibiting the statement under Section 162 Cr.P.C. by the IO is not illegal. Even otherwise just by exhibiting the statements of witnesses by PW 28/ IO is in no way going to prejudice the accused in his defense, as merely by exhibiting the statements of the witness, the statements do not get proved. Exhibiting of these statements by PW-28 only proves that the statements they were recorded by him but nothing more.

The authenticity of the contents thereof shall be proved only by the persons/PWs whose statements have been recorded.

9. In view of the legal proposition and discussion, I find no illegality and the perversity in the impugned order dated 06.07.2019.

10. I hereby make it clear that the statement exhibited by Ex.PW28 is only to establish that, he recorded the statements and has proved his signatures, thereon, however, the said statement shall not be used against the petitioner/accused until and unless the witness comes before the court and depose against the petitioner. Only at that time, the deposition shall be considered as per law.

11. The petition is accordingly dismissed.

12. Pending application stands disposed of.

13. Dasti.

(SURESH KUMAR KAIT)
JUDGE

NOVEMBER 28, 2019

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