

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

CRIMINAL APPLICATION (APL) NO.544 OF 2021

Mukesh P. Meena

An adult Indian Inhabitant of Mumbai

Aged about 46 years, Occ: Service,

Having permanent address at,

Vill/Post Bamanwas, Taluka: Bamanwas,

Dist: Sawai Madhopur,

Rajasthan

... Applicant

Vs

CBI ACB Mumbai

Having their Mumbai Region Office

Address at Plot No.C-35/A, G-Block,

Bandra-Kurla Complex, Bandra (East)

Mumbai-400050

... Respondent

...

Mr. Asutosh Shukla with Mr. Pradosh Tiwari for the
Applicant.

Mr. K.S.Patil for the Respondent-CBI..

CORAM : SANDEEP K. SHINDE J.
DATE : NOVEMBER 26, 2021.

Judgment :

Rule.

2 Rule made returnable forthwith. With consent of the learned counsel for the parties, matter is taken up for final hearing forthwith.

3 This application under Section 482 of the Code of Criminal Procedure, 1973 (“Cr.P.C.” for short) challenges the order dated 30th March, 2021, by which the Special Judge, CBI, Greater Bombay, declined to direct investigator to produce the documents sought by the applicant (accused) in CBI Special Case No.45 of 2019.

4 Back-ground facts giving rise to this application are as under:

The Central Bureau of Investigation registered a regular case BA1/2018/A0012 on a written complaint 25th April, 2018 against the applicant, Deputy Commissioner of Customs and others under Section 120-B of the Indian Penal Code, 1860 and Section 7,13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. After completion of investigation, charge-sheet was filed on 28th November, 2019 against the applicant and seven others. Whereafter, applicant-accused approached the trial Court with the prayer that entire material available with the investigator, which was not made part of the charge-sheet, be summoned under Section 91 of the Cr.P.C. Applicant sought production of following documents;

- (i) Statements of witnesses,
- (ii) Call Detail Records
- (iii) Internal reports, recommendations of supervisory officers,
- (iv) Opinion of law officers,

- (v) Findings recorded by the Investigating Officer on the complaint given by the applicant,
- (vi) Comments recorded by the Deputy Inspector General and Joint Director of the Central Bureau of Investigation on draft investigation report placed before them,
- (vii) Rebuttal findings given by the investigating officer on the representation given by the applicant,
- (viii) Correspondence between the Central Bureau of Investigation and Customs Department from the date of registration of the First Information Report,
- (ix) Report with comments of the Superintendent of Police, CBI, Anti Corruption Bureau, submitted on investigation report produced before
- (x) Copy of comments of the Investigating Officer or any other proper officer of the CBI with regard to representation of Sandip Yadav (Accused No.6)
- (xi) Proof of submission of the Investigating Officers or any other proper officer of the CBI and comments on representation of the applicant and Sandip Yadav (co-

accused) to the Sanctioning Authority,

(xii) Sanction order issued by sanctioning authority,

(xiii) CFSL report along with a) auditory report, b) spectrogram report and work-sheet,

(xiv) Comments recorded by DIG and Joint Director on draft investigation report,

(xv) Comments of Legal Department/ Dy. Legal advisor on draft investigation report,

(xvi) Rebuttal findings of Investigating Officer,

(xvii) Note Sheet of opinion of SP (CBI),

(xviii) Opinion of Investigating Officer on application of Mr. Kunal Kashyap officer of Customs Department for his deputation in CBI,

(xix) Seizure Panchanama of Mobile Phone,

(xx) Any other report regarding Cell Phone Data recovery,

(xxi) Proof of submission of Law Officer Report to CVC

5 The Central Bureau of Investigation agreed to produce sanction order; CFSL report; CD and DVR recorder

alleged to have been used during the course of the investigation; entire Call Detail Records for the month of April, 2018 in respect of mobile used by the applicant and CDR for the month of April, 2018 in respect of mobile used by co-accused Sandeep Yadav and Chandrashekhar Rane; seizure panchanama for mobile phone of applicant, co-accused Sandeep Yadav; another report recording cell phone data recovery. However, the CBI declined to produce documents relating to draft investigation report submitted by Investigating Officer to Supervisory Officer. CBI, relied on the Criminal Manual, 2005, Chapter 19 thereof and claimed that contents of Supervisory Officers' report being ordinarily classified as "Confidential", the same cannot be produced for claiming privilege under Section 124 of the Indian Evidence Act, 1871.

6 The CBI denied that in the course of the investigation, it had recorded statement of Divesh Mahendra Gupta and Sahadev Rade Gupta.

7 The CBI declined to produce statements of custom officer Abhinav Kumar Shrivastav and Yashwant Banarkar, Superintendent on the ground that prosecution does not propose to examine them as witnesses.

8 The learned Trial Court declined to summon Investigator to produce the documents, sought, by the applicant-accused on the ground that, by seeking production of these documents, under Section 91 of the Cr.P.C., applicant seems to be trying to set up his defence at the stage of framing of charge, which was not objective of Section 91 of the Cr.P.C. The learned Judge, therefore, even, did not, examine the 'necessity' or 'desirability' of the documents of which production was sought. The learned trial Court relied upon the judgment of the **State of Orissa v. Debendra Nath Padhi, AIR 2005 SC 359.**

9 Aggrieved by this order, applicant-accused, has invoked inherent jurisdiction of this Court under Section 482 of the Cr.P.C.

10 Heard the learned counsel for the applicant and the learned counsel for the CBI. Perused the application, replies filed by the Investigating Officers and the impugned order.

11 Here, in this case, application, under Section 91 of the Cr.P.C. was moved at the stage of framing of charge wherein applicant pleaded, (Paragraphs 7 and 8), that production of aforesaid documents, is necessary for proving, the innocence of the applicant (*emphasis supplied*) and also to assist this Hon'ble Court to decide the charges levelled against him. Applicant, also, pleaded that aforesaid documents are necessary to be brought on record as by taking aid of aforesaid documents, applicant will be in better position and rebut the charges levelled against him

and assist this Hon'ble Court (*emphasis supplied*). In this application, applicant has raised following two grounds amongst others;

Ground (aa) That applicant sought production of said documents as are necessary to substantiate his non-involvement and false implication in the present case and hence, he has right to claim copies of the documents as well as request the Court for production of documents as same should be brought before the Hon'ble Court in the interest of justice;

Ground (bb) That "Even at the stage of charge, the Court can consider the documents in favour of the applicant, which are of sterling quality and, therefore, such documents would assist the Court in framing the charge or discharging the applicant (*emphasis supplied*). Evidently, therefore, production of the documents, was sought at the stage of framing charge, either for proving the innocence or for rebutting the charges levelled against him.

12 Therefore, first question falls for consideration is;

(1) Whether accused has right to seek production of documents at the stage of framing charge, which are in custody of Investigating Agency/officer, but were not produced along with the report ?

13 The Apex Court has answered first question in judgment in the case of **Debendra Nath Padhy (Supra)** and held that;

“any document or other thing envisaged under Section 91 , can be ordered to be produced on findings that the same is necessary or desirable for the purpose of investigation, enquiry, trial or other proceedings under the Code and foremost requirement of the section is about document being necessary or desirable and the necessity or desirable would have to be seen with reference to the stage when a prayer is made for production” and further held that, “If any document is necessary or desirable for defence of accused, the question of invoking Section 91 at the initial stage of framing of the charge would not arise since defence of the accused is not relevant at that stage.” Thus, held that “so far as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence.”

Yet, in the case of **Nitya Dharmananda and Anr. v. Gopal Sheelum Reddy and Anr. (2018) 2 SCC 93** after referring to the judgment in the case of **Debendra Nath Padhy (Supra)**, Apex Court has held in paragraph eight that;

“While ordinarily the Court has to proceed on the basis of material produced with the charge-sheet for dealing with the issue of charge, but if the Court is satisfied that there is material of sterling quality, which has been withheld by the Investigator, the Court is not debarred from summoning or relying upon the same even if such document is not part of the charge-sheet.”

AND further held that,

“ It does not mean that the defence has a right to invoke Section 91 of the Cr.P.C. de hors the satisfaction of the Court, at the stage of charge.”

14 Thus, settled law is, although at the stage of framing of charge, the defence has no right to invoke Section 91 of the Cr.P.C., yet, at the appropriate stage, the Court is empowered to summon production of such documents, which is not part of the charge-sheet but of

sterling quality, which has been withheld by the investigator to ensure fair and impartial trial. The first question is answered accordingly.

15 In the case in hand, applicant was seeking production of about twenty-three documents. Except the statement Abhinav Kumar Shrivastava (Custom Officer) and Yashwant Banarkar (Superintendent) recorded under Section 161 of the Cr.P.C., other documents or things were, in the nature of reports submitted by the Investigating Officer to Supervisory Officer in terms of Chapter 19 of the Criminal Manual, 2005 CBI. Such report submitted by the Investigating Officer to the Supervisory officer is stated to be 'confidential' document and it's primary purpose is to apprise the Superior Officer and law officers of the CBI the result of the enquiries with a view to assess the merits and de-merits of a case and facilitate the passing of the final orders thereon by the Competent Authority. In the case of **Sunita Devi v. State of Bihar and Anr. (2005) 1 SCC**

608, the Apex Court in paragraph no.27 has held as under;

“ Notice of internal communication between the two witnesses of the prosecution are not to be supplied to the accused wherein most of the documents being in the nature of internal correspondence, prosecution has correctly denied to produce the same claiming privilege under Section 124 of the Indian Evidence Act, 1871.”

“

16 For that reason, prosecution has rightly declined to produce these documents, which were in the nature of supervisory notes, of which the primary purpose was to apprise the superior officer, the result of investigation/enquiry before , “submitting the Final Report” in the Court.

17 In, so far as statement of Abhinav Shrivastava, Custom Officer and Yashwant Banarkar, Superintendent are concerned, investigator has declined to produce it on the ground that prosecution does not propose to examine these two witnesses and thus, relied on the provisions of Section 173(5) of the Cr.P.C. It reads as under;

“173. Report of police officer on completion of investigation -

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report—

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.”

18 Here in this case, the applicant is seeking directions to investigator, to produce statements of two witnesses recorded by him under Section 161 of the Code of Criminal Procedure, 1973, by invoking Section 91 of the Cr.P.C. Thus, second question is; “Whether expression “Document or other thing” employed in Section 91 of the Cr.P.C., includes a statement of witnesses recorded under Section 161(3) of the Cr.P.C.

Section 91(1) reads as under:

“91. Summons to produce document or other thing

(1) Whenever any Court or any officer in charge

of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order. “

. This Section, therefore, empowers the Court to issue summons or written order to the person in whose possession or power such document or thing is believed to be, requiring him to produce it, at the time and place stated in the summons or order. Therefore, a plain reading of Section 91 empowers the Court to direct production of any “document or other things”. Expression “Document” is not defined in the Code. However, Section 2(y) of the Code says, words and expressions used in the Code and not defined, but defined in the Indian Penal Code, 1860 have the meaning respectively assigned to them in the Code.

. Expression “Document” is defined under Section 29 of the IPC. It reads as under:

"29. "Document" —

The word "document" denotes any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

Explanation 1 — It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Illustrations

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document. A cheque upon a banker is a document.

A power-of-attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

Expression "Document" is also defined in the Indian Evidence Act, 1872, which means any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used or which may be used, for the purpose of recording that matter. Illustrations are:

"Illustrations

A writing³ is a document;

3Words printed lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document."

Expression "Document" defined in Black's law dictionary is "Something tangible on which words, symbols or marks are recorded and the deeds, agreements, title papers, letters, receipts and other written instruments used to prove a fact. As against this expression, "Statement" is not defined in the Code nor in the Indian Evidence Act, 1872. Statement in its dictionary meaning is "the act of stating or reciting". Black's law dictionary defines, statement, is a verbal assertion or nonverbal conduct intended as an assertion

OR

An account of a person's knowledge of crime, taken by police pursuant to their investigation of the offence.

19 Under Section 161 of the Cr.P.C., police officer reduces into writing any statement made to him in the

course of the investigation and the person whose statement is reduced into writing is not required to sign such document. Statement recorded by the police during the investigation is inadmissible in evidence and its' only purpose is to contradict witness in the manner provided under Section 145 of the Indian Evidence Act, 1872. As against this, 'document' denotes any matter expressed upon any substance by means of letters intended to be used as evidence of that matter. When, documents including electronic records being produced for inspection of the Court, such documents are called 'documentary evidence' within the meaning of expression "Evidence" under the Indian Evidence Act, 1872. Therefore, for all purposes, in substance or form or otherwise, the statement of witness is not a "Document" defined under Section 29 of the Indian Penal Code, 1860. It is, therefore, to be stated that expression "Document" or other thing" used under Section 91 of the Cr.P.C. excludes statement of witness recorded under Section 161 of the Cr.P.C. In so far as

expression “Other thing”, used under Section 91 is concerned, it would mean material collected other than documents in the course of the investigation like, muddemal, etc. It is, therefore, to be held that expression “Documents or other thing” used in Section 91 of the Cr.P.C. excludes the statements of witnesses recorded under Section 161 of the Cr.P.C. As such, for the reasons, stated above application moved by the applicants under Section 91 of the Cr.P.C. seeking directions to the investigator to produce statements of witnesses recorded under Section 161(3) of the Cr.P.C. was not maintainable. The second question is answered accordingly.

20 Be that as it may, herein the application under Section 91 of the Cr.P.C. was moved at the stage of framing the charge, which according to the accused, if produced would help him in rebutting charges levelled against him. It is settled law that at the stage of framing the charge, the learned trial Court is required to consider whether there are

sufficient grounds to proceed against the accused and at that time, the trial Court is required to consider only police report referred to under Section 173 of the Code and documents sent with. The only right the accused has at that stage is of being heard and nothing beyond that. Expression “hearing his submissions” of the accused cannot mean opportunity to file material but confined to material produced by the police in this case. The averments in application moved under section 91 as well as grounds taken up in the application before this Court clearly indicate and suggest that application was seeking production of documents for its consideration, while framing the charge which is not permissible, as this right, is not acknowledged in the Code.

21 For the aforestated reasons, no interference is called for in the impugned order. Although the application is rejected, applicants are granted liberty to move an application for production of statements of Abhinav

Shrivastava and Yashwant Banarkar, at the appropriate stage of trial.

22 Rule is discharged.

23 Application is disposed of.

(SANDEEP K. SHINDE, J.)