

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

CRIMINAL WRIT PETITION NO.291 OF 2023

Vijaya Chandramohan Khot
and another

.... Petitioners

Versus

The State of Maharashtra
and another

.... Respondents

Mr. Ashutosh S. Khandeparkar, Advocate for the Petitioners.

Mr. S.R. Agarkar, APP for the Respondent No.1-State.

Mr. Kuldeep S. Patil, Advocate for Respondent No.2-CBI.

CORAM : SARANG V. KOTWAL, J.

DATE : 11th JANUARY, 2023

P.C. :

1. The petitioner has challenged the two orders passed by the CBI Special Court, Greater Mumbai in CBI Special Case No.52/2016. These impugned orders were passed on Exhibit-99 dated 24.11.2022 and on Exhibit-100 dated 2.12.2022.

2. The brief history leading to filing of this petition is as follows :

The petitioners herein are the common accused in two special cases i.e. Special Case No.52/2016 and

Special Case No.124/2015. Both the cases are being tried before the same Court. Special Case No.124/2015 was in respect of the offences of fraud and misappropriation as also under Section 13(1)(d) read with 13(2) of the Prevention of Corruption Act; whereas Special Case No.52/2016 involves the offence under section 13(1)(e) read with 13(2) of the Prevention of Corruption Act, 1988.

3. The subject matter of both these impugned orders are the facts related to Special Case No.52/2016.

4. In Special Case No.52/2016, the prosecution opened their evidence by examining the Sanctioning Authority R. Ramamurthy as PW-1. In paragraph-2 he has referred to a proposal from CBI. He deposed that after having gone through the documents he found that it was alleged that the petitioner Vijaya had committed misappropriation of funds to the tune of Rs.3.65 Crores and there was a wrongful loss to the Oriental Insurance Company. According to him, he had applied mind and came to the conclusion that it was a fit case for proceeding further.

Then he accorded the sanction on 15.9.2016 in his capacity as the Sanctioning Authority as he was Deputy General Manager of Oriental Insurance Company Ltd. The sanction order dated 15.9.2016 was produced on record of Special Case No.52/2016 at Exhibit-25.

5. Exhibit-25 mentions that between the period 1.1.2012 to 27.2.2015 Smt. Vijaya working as Assistant Manager in the Oriental Insurance Company Ltd. had acquired immovable and movable assets to the tune of Rs.1,36,77,840/- in her name and in the names of her family members. After deduction of acceptable expenditure the disproportionate assets were to the tune of Rs.74,10,566/-.

Thus, the recitals in the sanction order refers to the case involving disproportionate assets which was the subject matter of Special Case No.52/2016. However, the examination-in-chief of PW-1 referred to the misappropriation of funds to the tune of Rs.3.65 Crores that obviously was the separate subject matter pertaining to Special Case No.124/2015. Thus, there was mismatch

between the deposition and the sanction order which he had produced. The deposition was in respect of another sanction which he had accorded for misappropriation of Rs.3.65 Crores which was the subject matter of Special Case No.124/2015. The prosecution realized this discrepancy after the evidence-close purshis was given.

6. The prosecution, therefore, filed an application vide Exhibit-98 for recalling the sanctioning authority PW-1 R. Ramamurthy. It was mentioned in the application dated 22.11.2022 in Exhibit-98 that in Special Case No.52/2016 during examination of the sanctioning authority he proved the sanction given by him but the facts disclosed by him were related to other case i.e. Special Case No.124/2015. For that purpose, to clear that fact, a prayer was made for recalling of the sanctioning authority.

7. This application was opposed by the accused.

8. On 24.11.2022, the prosecution preferred another application vide Exhibit-99 for withdrawing Exhibit-98 with liberty to file fresh application. It was mentioned in

the application that the prosecution wanted to modify the application for recalling of the witness.

9. Learned Special Judge for CBI vide his order dated 24.11.2022 permitted the prosecution to withdraw application at Exhibit-98 with liberty to file appropriate application in accordance with law.

10. After that, the prosecution preferred fresh application on 24.11.2022 for recalling of the witness. In this application at Exhibit-100, slightly important elaborate averments were made and paragraph-2 of PW-1's deposition in Special Case No.52/2016 was mentioned. It was stated that there was ambiguity because of that paragraph.

11. This application was also opposed by the accused.

12. Finally, on 2.12.2022 the learned trial Judge allowed the second application below Exhibit-100 for recalling of the witness .

13. Learned Judge referred to two judgments of the

Hon'ble Supreme Court in the case of Mohanlal Shamji Soni Vs. Union of India & Anr. reported in AIR 1991 SC 1346 and in the case of Rajendra Prasad Vs. Narcotic Cell through its Officer-in-charge, Delhi reported in AIR 1999 SC 2292. It was observed that it was duty of the Court to ensure that fairness in the criminal procedure was not hampered or threatened in any manner. In the present case, the prosecution had already produced the sanction order on record, however, some important facts relating to the present case were to be brought on record. For that purpose no prejudice would be caused to the accused. Learned Judge then allowed the application. He directed the CBI to fix a date on which the witness was to be called; and further directed the prosecution to inform the details regarding the questions which the prosecution wanted to ask to the said witness, so that the defence could cross examine him. It was observed that the accused was entitled to conduct cross-examination of the recalled witness. With these observations, the application was disposed of.

14. The prosecution furnished following four questions :

- “1. Whether you received the request from CBI for Sanction at relevant time?
2. What document you received?
3. What procedure adopted by you to accord Sanction?
4. What was the case against the accused for which you accorded the sanction?”

15. Learned counsel for the petitioners has taken exception to these orders: first, permitting withdrawal of the first application for recalling of the witness; and then secondly, for allowing application Exhibit-100 for recalling the sanctioning authority. According to learned counsel for the petitioners there was no clarity in the order. There was no reason why the first application was permitted to be withdrawn. The entire procedure amounts to filling-up lacuna in the prosecution case. This was done after the evidence was closed by the prosecution. This procedure of recalling the witness, at this stage, was not permissible.

16. According to him, there was no ambiguity in the evidence of PW-1 and, therefore, his recall was not necessary.

17. He submitted that a Single Judge of this Court in the case of **Nayna Rajan Guhagarkar Vs. State of Maharashtra** reported in **2022 (1) Bom C.R. (Cri) 105** has observed that recalling of the witness i.e. the complainant and the pancha after the arguments, tantamounted to filling up lacuna in the case and it was not permissible.

18. These submissions were opposed by the learned counsel for CBI. He submitted that recalling of the sanctioning authority was not for the purpose of filling-up lacuna. The sanctioning authority was deposing in the Court after eight years. He has produced the sanction order on the record; however while deposing, inadvertently, he had referred to the facts of the other case in which also he was the sanctioning authority. He submitted that this discrepancy came to light before the trial was over and, therefore, it was not too late to correct the discrepancy. In

the interest of justice it was necessary to recall the sanctioning authority so that the contents of the sanction which is already on record are duly proved. He submitted that no prejudice would be caused to the accused as she was permitted to cross-examine the sanctioning authority. He submitted that no new evidence was to be introduced through the sanctioning authority and the sanction order was already on record which was produced through him.

19. I have considered these submissions and I have perused the judgments referred to hereinabove. In **Mohanlal Soni's** case (supra), the Honb'le Supreme Court has observed that it is the duty of the Court not only to do justice but to ensure that the justice is done. In order 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

re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who is expected to be able to throw light upon the matter in dispute. This Section is expressed in the widest possible terms which do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution.

20. In the case of **Rajendra Prasad** (supra), the observations in paragraphs-7 & 8 are important which are as under :

“7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the Court could not 'fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage “to err is human” is the recognition of the possibility of making mistakes to which humans

are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. 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. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.”

21. Section 311 of Cr.P.C. 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.”

22. In the present case, the defence is not taken by surprise. The sanction pertaining to Special Case No.52/2016 is already on record at Exhibit-25. The only discrepancy was that the sanctioning authority had not referred to the contents of Exhibit-25 but had deposed about the sanction in the other case i.e. in Special Case No.124/2015. This clearly is an inadvertent discrepancy which had crept-in, in the evidence of PW-1. Therefore, recalling the witness for properly proving Exhibit-25 which is already on record and explaining the corresponding facts will not amount to filling-up lacuna in the prosecution case. Learned Judge has in fact asked for the questions which are likely to be asked in advance. That exercise was in fact for the benefit of the accused so that they are not taken by surprise at all. This certainly will not cause any prejudice to the accused. The accused is permitted to cross-examine the

witness.

23. Reliance of learned counsel on the judgment of **Nayna Guhagarkar** (supra) is not relevant in the facts of the present case, because, in that case the complainant and the pancha were recalled after the arguments and written submissions were heard. In those particular facts of that case, recalling of those witnesses were not permitted. However, the facts in the present case are entirely different. As mentioned earlier, the sanction is already on record. Recalling of the witness is only for proving its contents properly and for bringing the facts leading to passing of the sanction order on record by PW-1 R. Ramamurthy.

24. In this view of the matter, I do not find any error in the impugned order passed below Exhibit-100. I do not find substance in the submission that at the first instance the order permitting withdrawal of Exhibit-98 was not in accordance with law. That application was withdrawn with liberty to file a fresh application with better particulars. It accordingly was done by filing an application below

Exhibit-100. Even in that procedure no prejudice was caused to the accused.

25. Based on this discussion, I do not find any merit in this writ petition. The petition is accordingly dismissed.

PRADIPKUMAR
PRAKASHRAO
DESHMANE

Digitally signed by
PRADIPKUMAR
PRAKASHRAO
DESHMANE
Date: 2023.01.16 15:37:22
+0530

Deshmane (PS)

(SARANG V. KOTWAL, J.)