

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

CRIMINAL APPLICATION NO. 282 OF 2021

1. Mangat Rai Shori
2. Ravinder Kumar S/o Late Prabhu Dayal ...Applicants

Versus

1. Central Bureau Of Investigation
2. The State of Maharashtra ...Respondents

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Ms. Misbah Solkar a/w Mr. Pratik Karande, Ms. Sumaiya Khan i/by Mr. Aditya Talpade, Advocate for the Applicants.

Mr. H. S. Venegavkar, Special P. P. for Respondent No.1 - CBI.

Mr. Y. M. Nakhwa, APP for the Respondent No.2 – State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 16th JUNE, 2023.

PER COURT:

1. This is an application under Section 482 of the Code of Criminal Procedure challenging the order dated 08.01.2020 passed by the Special Judge (C.B.I.), Gr. Bombay in C.B.I. Special Case No.95 of 2009 allowing Application Exhibit No.150 and recalling PW-11 and PW-17 to depose in the Court for the assigned purpose.

2. R.C. No.01(A)2009-CBI/ACU-VII/New Delhi was registered on 29.01.2009, on the basis of preliminary enquiry No.01/(A)2008/CBI/ACU-VII under Section 120-B IPC r/w

Sections 11 & 12 and 13(2) r/w Section 13(1)(d) of Prevention of Corruption Act, 1988 against Shri. Mangal Rai Shori, the then Addl. S.P. CBI, EOW, Mumbai and Shri. Ravinder Kumar, Superintendent customs alleging that, Mr. Shori has informed contemplated action to Shri. Ravinder Kumar. Mr. Shori obtained pecuniary favour in the form of AIR tickets from Shri. Ravinder Kumar. These tickets were booked through Shri. Sunil Suri. Two cases were registered on 24.09.2005 against Shri. Ravinder Kumar. Mobile No.9869408494 and 9819826520 of Mr. Shori were intercepted during August 2005 to November 2005. From the transcription of intercepted calls it is evident that Mr. Shori and Mr. Ravinder Kumar had talked frequently with each other. Mr. Shori passed information regarding two cases. Transcription also contains the conversation which shows that, Mr. Shori had demanded illegal gratification from Ravinder Kumar in the form of tickets for Journey to Delhi. Charge-sheet was filed.

3. Learned Advocate for the applicants submitted that the application was preferred belatedly after examining 19 witnesses. It is a settled law that the application under Section 311 of Cr.P.C. cannot be made to fill up the lacuna. The grounds for recalling PW-17 was that, Certificate under Section 65-B of the Evidence Act

is required to be obtained from the said witness in respect of a C.D. marked as Exhibit-B (Article "M") which is in fact the copy of another C.D. marked as (Art. N/2). Thus, the said CD marked as Exhibit-B for which the Certificate under Section 65-B(4) of the Evidence Act is intended to be obtained is in fact the copy of another CD marked as 'A' (Article N/2) on which some data has been said to be copied from the hard disk of the computer allegedly containing original recordings of intercepted calls of two mobiles. CD marked as 'A' is not a listed document but was produced by prosecution at belated stage. The trial Court has allowed the application of prosecution for recalling PW-17 for obtaining certificate under Section 65-B(4) of the Evidence Act and CD marked as 'B' which is a copy of another CD which is said to be containing output of a computer and which itself is secondary evidence subject to production of a certificate under Section 65-B(4) of the Evidence Act. There is no question of permitting the prosecution to obtain certain clarifications as mentioned in the certificate given by PW-11. The order passed by the learned Judge is contrary to the well established principles of law. The evidence tried to be adduced by the prosecution has no legal sanctity.

4. Learned counsel for the Respondent No.1/C.B.I. however submitted that during investigation of the case, SP, CBI, SU, Mumbai requested SP, SU, Chennai to convert CD containing the backup calls into 'Wav' form for the purpose of investigation of the case. SP, CBI, SU Chennai prepared two CD's into 'Wav' form and sent all CD's to DIG, CBI, New Delhi vide letter dated 25.06.2009. As per deposition of PW-17 Mr. Raju, original CD containing backup calls of mobile no.9869408494 and 9819826520 were sent by SP, CBI, SU, Mumbai to him for converting the CD into 'Wav' form for investigation. The original CD was forwarded by Vinayak Apte (PW-11). It was placed on record. The original CD containing backup calls of two mobile numbers was forwarded by SP, CBI, SU, Mumbai to PW-17 for conversion into 'Wav' form for investigation and the same was converted by PW-17 and the same is also on record. Original CD in which the data from hard disk has been transferred is also on record. Law permits copies made from the original by mechanical process, there is no prohibition of production of a CD which contains a data in a converted form from another CD. Further examination of PW-11 was prayed for clarification about call content and call related information. The purpose of Section 311 of Cr.P.C. is to recall the witness for the just decision of the case. No prejudice would be caused to the defence

as they have right to cross examine the witnesses.

5. From the application and the orders passed by the learned Special Judge it appears that the Court had directed the prosecution to trace out the CD in which data from hard disk has been transferred and further to comply the provisions of Section 65-B(4) of the Evidence Act. The learned Special Judge has analyzed all these aspects and considering the objection of the defence has allowed the said application. While allowing the said application it was observed that, while recording the evidence of PW-9 Mr. Sunil Suri, the Court had observed that the electronic evidence i.e. CD is lacking requisite certification under Section 65-B(4) of the Evidence Act and on being objected by the Advocate for the accused, the Court vide order dated 16.09.2019 directed the prosecution to trace out the CD in which the data from hard disk has been transferred and also to see whether such secondary evidence is at par as per the requirement of Section 65-B(4) of the Evidence Act. It is the case of the prosecution that, PW-11 Mr. Vinayak Apte had given certificate regarding call content and call related information of subject mobile phones which was recorded by SU Mumbai. It is the matter of record that, said calls were recorded by software from the hard disk and later on backup was

taken on CD. The said CD which contains the data regarding the recorded telephone calls is the output of the computer system which is at Article 'N/2'. The backup calls were sent by S.P CBI, SU Mumbai to PW-17 Mr. Raju, who was than SP, SU, Chennai were converting said C.D. into 'Wav' form for the purpose of investigation in the matter. PW-17 Mr. Raju had converted the CD and forwarded the same to the authority concerned. However, he could not produce the required certificate for the same. The learned Special Judge then observed that the prayer for prosecution to recall PW-17 who had converted the CD and forwarded the same to the authority for the purpose of issuing requisite certificate under Section 65-B(4) of the Evidence Act, is the fact, which is required to be established by prosecution for the just decision of the case. Similarly, PW-11 Mr. Vinayak Apte furnished the certificate under Section 65-B(4) of the Evidence Act, for the call content and call related information of said mobile numbers. The prosecution intended to seek clarification about the call content and call related information from the said witness in respect of which, he could not depose inadvertently. By assigning cogent reasons, the learned Special Judge allowed the said application. I do not find any reason to take a different view of the matter and deviate from the reasons assigned by trial Court while passing impugned order. The

submissions of applicants are devoid of merits. From the factual aspects of the matter, it is evident that for the just decision of the case, it is necessary to recall the said witnesses. Hence, no case is made out to interfere in the impugned order.

ORDER

Criminal Application No.282 of 2021 is rejected and disposed of accordingly.

(PRAKASH D. NAIK, J.)