

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 1072 OF 2023**

Bharat Manharlal Shah .. Appellants
Versus
State of Maharashtra and anr. .. Respondents
...

Mr. Amit Desai, Sr. Adv, a/w Mr. Vijjay Garg, Mr. Gopal Krishna Shenoy, Ms. Pooja Kothari, Mr. Tejas Popat i/b Rashmikant and Partners for the applicant.
Mr. H.S. Venegavkar a/w Mr. Ayush Kedia, for CBI, respondent no.2.
Mr. S.R. Agarkar, APP for the State.

**CORAM: BHARATI DANGRE, J.
DATED : 30th AUGUST, 2023**

P.C:-

1 In CBI Special Case No.43 of 2001, an application was filed by the accused no.3, objecting to the interposing of the witnesses before completion of the cross-examination of two witnesses i.e. Sanjeev Swamy (PW-7) and Shweta Bhende (PW-16).

The sequence of events reveal that PW-16 was examined on 6/05/2015 and her cross-examination was deferred and on 8/05/2015, an application was filed by the accused for deciding the objection raised, on marking of documents, which was ultimately decided on 5/01/2015, and the order was assailed before the High Court and on 10/06/2015, stay was granted.

The trial commenced but the cross-examination of PW-16 was not complete and serious prejudice is claimed if other witness is examined before the cross-examination is allowed to be completed.

2 As far as PW-7 is concerned, during his cross-examination by accused no.3 on 15/02/2014, he deposed about various documents received by him from Dadar branch and he showed his willingness to produce the documents on search. Accordingly, on 28/03/2014, he produced the same before the Court and which were exhibited.

The accused no.3 moved an application to further cross-examine PW-7 on these documents and this application was allowed and directions were issued to issue witness summons.

However, since the matter was stayed, the trial commenced only on 10/02/2021.

Hence an application was moved to recall PW-7 for cross-examination but on account of Covid and certain other contingencies, the witness could not be cross-examined.

3 In this aforesaid scenario, the cross-examination of PW-7 and PW-16 could not be concluded and hence, an application below Exhibit-311 was filed for completion of the cross-examination of these two witnesses before proceeding with examination of other witnesses ahead.

This resulted in an order being passed by the Special CBI Court on 27/07/2022 where, by referring to the discretion

vested in the wake of Section 231(2) of Cr.P.C, it was specifically concluded as under:

“It is no more a question as to which witness is to be examined first. It is directed in unambiguous terms to the CBI to secure presence/availability of PW-7 and PW-16.”

4 Consequent, to the above observation, the CBI was directed to submit the final report about the availability of PW-7 for cross-examination, either in person or through video conferencing, and similarly, directions were issued to the CBI to make efforts to secure presence of PW-16 for her pending cross-examination at the instance of the accused no.3. It was clearly directed that the CBI/prosecution shall call further witnesses thereafter.

5 Subsequent to this order, prosecution filed an application (Exhibit-343) to issue witness summons to six witnesses and this was strongly objected by the accused, by inviting attention of the Court to it's earlier order dated 27/07/2022.

The Special Judge took note of the said order and recorded that the prosecution had filed application for issuance of summons to PW-7 and PW-16, and it was allowed.

As per the summons report, the witness summons of PW-7 was served upon his wife, who informed that the witness was out of country. As far as PW-16 is concerned, the summons report intimated that she was not residing at the given address and she had left the flat 12 years ago and upon enquiry being made, her whereabouts could not be tracked.

Though the CBI was directed to secure presence of these witnesses on the next date, it failed to do so and rather the Court observed that it even failed to inform the Court about the steps taken to ascertain their availability and this made the learned Judge derive an inference that the prosecution has delayed the examination of the witnesses and no bonafide attempt to comply with the earlier order are reflected from the conduct of the prosecution.

6 In the wake of the aforesaid observation, now the learned Judge take a sudden U-turn and record that the case is more than 20 years old and it is pending for trial and there is direction from the High Court to expedite the trial but, for the witnesses being produced by the CBI, the further trial cannot be delayed and therefore, a conclusion is drawn that, there would be no serious infringement of the rights of the accused, if the other witnesses are taken to the witness-box preceding the cross-examination of PW-7 and PW-16.

7 The learned Senior Counsel Mr. Desai would emphasize on the earlier order passed by the CBI Court on 27/07/2022, which had justified the cross-examination of PW-7 and PW-16 to be concluded before any other witnesses and according to him, the said order has taken into consideration, the correct position of law as regards the cross-examination of the witnesses by relying upon the decision in case of *Lalu Alam V/s. State of W.B. (2002 SCC Online Cal 325)* and the learned Judge has appreciated the legal scenario prevailing and by referring to the proposition of law on the said point has rightly directed the

CBI to ensure the availability of PW-7 and PW-16 for their cross-examination. However, according to Mr. Desai, in the impugned order, the learned Judge has given a complete go-by to the said procedural aspect only on the ground that the prosecution was not able to produce these witnesses and this reasoning, according to Mr. Desai, is completely flawed since in the earlier order, it was permitted to conduct cross-examination of PW-7 can be conducted through video conferencing and as far as PW-16 is concerned, it is the specific submission of Mr. Desai that she is very much available on the fresh address and if the summons are issued on the said address, her presence can be secured.

8 The learned counsel Mr. Venegavkar do not dispute the factual aspect of the matter and would submit that the CBI has taken all efforts to secure presence of these witnesses. The learned Judge has recorded the reason why they could not be produced and derived the conclusion that it is an attempt to prolong the trial which is in fact, not the case according to him.

9 The only difficulty, which is posed by the learned Judge in the impugned order is about the presence of the two witnesses. When the earlier order dated 27/07/2022 is perused, the directions to the CBI clearly set out that, PW-7 should be made available for cross-examination, either in person or through video conferencing. The impugned order also make reference to the High Court of Bombay Rules for video conferencing for Court, 2022, but it is perfunctorily recorded that arranging of the video-conferencing would take considerable

time.

The learned Judge has gone clearly wrong here.

He has not even attempted to initiate the process for arranging the video-conferencing and in the era of modern technology and particularly when the Bombay High Court has rules framed to that effect, I do not think that the learned Judge ought to have deferred the cross-examination of this witness on this flimsy ground.

As far as PW-16 is concerned, who stepped into the witness box on 8/05/2015, had recorded her address to be '601, Saishraddha CHS, Bhavani Shankar Road, Dadar (W), Mumbai-400 028', and this address is distinct from the one on which the summons were issued. In such a scenario, when in the year 2015, the witness herself has given the new address, the CBI should issue the summons to her on this new address and if despite this, she is not served, it can make an appropriate request for appropriate order being passed by the Court.

It is not open for the CBI or even to the learned Judge to infer that this witness is not available.

10 In order to maintain the continuity of the proceedings, and particularly when in the order dated 27/07/2022, just an year before when the impugned order is passed, it is imperative for the CBI as well as the Court to abide by the same order, being well reasoned and founded on the settled position of law, as regard the discretion to be utilized in fixing the sequence of examination/cross-examination the

witnesses as per Section 135 of Evidence Act. There is no reason to deviate from all of a sudden, the procedure decided to be adopted.

11 In the wake of the above, the order passed by the CBI Court on 5/07/2023, directing issuance of summons to the witnesses mentioned in the application (Exhibit 343) shall be deferred till the cross-examination of PW-7 and PW-16 is conducted either by securing their presence in the Court or through video-conferencing, by making necessary arrangements. It is only upon the exercise being carried out, the order dated 5/07/2023 directing issuance of witness summons as per Exhibit 343 shall be given effect to.

Mr. Desai clarify that amongst the two witnesses PW-7 shall precede PW-16, and the learned Judge shall be mindful of the aforesaid sequence.

(SMT. BHARATI DANGRE, J.)