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

RESERVED ON –25.07.2023.

% ***DATE OF DECISION ON – 29.08.2023.***

+ CRL.M.C. 4407/2023

P. SASI

..... Petitioner

Through: Mr. N. Hariharan, Sr. Adv. with Mr. Raiyaz Ahmed Bhat, Mr. Siddharth S Yadav, Mr. Prateek Bhalla, Mr. Vaibhav Sharma, Mr. Punya Reksha Angara, Mr. Varun Deswal, Mr. Sharian Mukherji, Mr. Mueed Sha, Advs.

versus

CBI

..... Respondent

Through: Mr. Anupam S. Sharma, SPP for CBI with Ms. Harpreet Kalsi, Mr. Prakarsh Airan, Mr. Ripudaman Sharma and Mr. Abhishek Batra, Advs.

**CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA**

J U D G M E N T

DINESH KUMAR SHARMA,J:

1. The present petition has been filed challenging the order dated 28.07.2022 whereby the learned Special Judge, CBI vide impugned order sustained the objection of learned PP for CBI that the defense



cannot be permitted to confront the witness PW-18 **Mathew Samuel** in the cross-examination with the portion of his deposition recorded before the commission.

2. Briefly stated that the facts are that on 06.12.2004 a case bearing RC No. AC1A0006/2004 was registered against the petitioner under Sections 7/9/35 and 13(1)(d) of the Prevention of Corruption Act, 1988.
3. In backdrop Zee Television telecasted a story about the alleged corruption in the defence establishment of this country in March 2001. The story was based on a sting operation carried out by Tehlka.com wherein about 100 tapes had been allegedly recorded. The Tehlka.com claimed that the content from the so-called original tapes was copied to VHS tapes running into 100 hours. The said content was edited to produce the story of 4 and ½ hours that was telecasted on Zee Television. Thereafter, Government of India vide Gazette notification dated 24.03.2001 constituted a commission under Section 3 of the Commission of Inquiry Act.
4. The terms of reference for the commission were as under:
 - “a) To inquire whether the transaction relating to Defence and other procurements referred to in the videotapes and transcripts have been carried out in terms of prescribed procedure and imperatives of national security;*
 - b) To inquire whether in any of the aforesaid procurement transactions, illicit gains have been made by persons in public office, individuals, and any other organization as alleged, and if so, to what extent;*



- c) To suggest action that may be taken in respect of persons who may be found responsible by the Commission for their acts of commission and/or omission in respect of transactions referred to in sub-clause (a) and above;*
- d) To inquire into all aspects relating to the making and publication of these allegations and any other matter arises from or is connected with or incidental to any act, omission or transaction referred to in sub-clause (a) and (b) above;”*
5. Accordingly, Justice K. Venkataswamy Commission of Inquiry was constituted. Justice K. Venkataswamy was succeeded by Justice S.M. Phukan. However, the said commission did not submit any report as the Government of India abolished the said commission and entrusted the investigation to Central Bureau of Investigation.
 6. The controversy in the present case in short is while PW-18 was being cross-examined on 18.07.2022 before the learned Trial Court, the learned defence counsel sought permission of the court to question the witness on the basis of the detailed deposition of the witness before Justice K. Venkataswamy Commission of Inquiry contained in two volumes. This was objected to by learned PP of the CBI on the ground it has no relevance to the present prosecution and it is barred by virtue of Section 6 of Commission of Inquiry Act.
 7. The perusal of the proceedings dated 18.07.2022 of the Learned Special Judge reveals that on the query of the court it was clarified that the record of the said Commission of Inquiry does not constitute the part of the charge-sheet. However, the learned defence counsel insisted that the deposition of this witness before the said Commission of



Inquiry is in fact a previous statement and thus, the witness can be confronted in respect of a contradiction in the said previous statement in accordance with Section 145 of the Indian Evidence Act. However, this was opposed by learned PP for CBI on the ground that the said statement was not made before any court of law or in the course of investigation before the investigating officer.

8. It is pertinent to mention that on 27.02.2020 during the cross-examination of PW-18, the two affidavits, Ex.PW-18/D1 and Ex.PW-18/D2, were introduced in court for the first time. Therein, the witness identified his signatures on both the affidavits and stated that the same were filed during the proceedings of the enquiry commission.
9. Learned Trial Court observed that the submission of learned defence counsel that prosecution has relied upon the witness's two affidavits, Ex.PW-18/D1 and Ex.PW-18/D2, filed before the commission is not born out from the record as the affidavits were introduced in the cross-examination of this witness conducted on 27.02.2020. Further, vide its impugned order dated 28.07.2022, the learned Trial Court distinguished distinguished the judgment of **Sajjan Kumar Vs. CBI** in CRL.REV.328/2012 decided on 03.08.2012 from the present case. Learned Special Judge noted that in the case of **Sajjan Kumar (supra)** the prosecution tendered the affidavits and statements it relied upon in prosecution evidence inferring the deduction that any examination in chief which is not permitted to be subject to cross-examination cannot be read in evidence. However, in the present case, it was during the cross examination of the witness by the defense that the documents/affidavits were brought on record for the first time. It



was also observed that the record of the Commission of Inquiry was not even mentioned in the examination in chief of the witness nor does not form part of the chargesheet. Learned Trial Court also noted that the rest of the judgements relied upon by the petitioner are prior to and thus, subject to the judgment of Hon'ble Supreme Court in ***Kehar Singh and Others vs State*** AIR 1988 SC 1883 wherein the bar under Section 6 of the Commission of Inquiry Act, 1952 was re-affirmed to prohibit the use of previous statements at the stage of trial to cross-examine to contradict or impeach the credit of the witness.

10. Taking these facts into account along with Section 6 of the Commission of Inquiry Act, 1952 as well as Section 145 of the Indian Evidence Act and relying upon the judgment of the Apex Court in ***Kehar Singh (supra)***, the Learned Trial Court sustained the objection of the learned PP for CBI and inter alia rejected the request of learned defence counsel to confront the witness PW-18 for cross-examine with portion of his deposition recorded before the commission.
11. Aggrieved of this the petitioner has filed the present petition and challenged the impugned order on the ground that the judgment in ***Kehar Singh and Others vs State*** was rendered in the peculiarity of the factual matrix of case and the prayer of the appellant in that case was considered in light of the sensitive nature of the enquiry and the fact that the proceedings were conducted by the commission in camera.
12. The order has also been challenged on the ground that the primary evidence against the petitioner happens to be the tapes supposedly recorded during the sting operation and the transcripts which were prepared by Tehlka.com and Union of India. It has been stated that



these tapes/transcripts were not handed over to the CBI by the officials of Tehlka.com. The said tapes/transcripts were produced before the Commission of Inquiry after the telecast of its edited version on Zee Television wherein the proceedings conducted examined various officials of Tehekla.com including PW-18. Thereby, the petitioner possesses the right to rely upon the aforementioned evidence for his defence. The petitioner submitted that the learned Trial Court had not appreciated that the petitioner is entitled to question the vagueness of any or all of the aforesaid evidence / material for the purpose of his defence and for contradicting a witness. It has been submitted that the order of the learned trial court declining such a request, is in fact a grave miscarriage of justice.

13. Mr. N. Hariharan, learned senior counsel for the petitioner, submitted that these tapes and transcripts were handed over to the commission much before the registration of the case to the commission and **Mr. Anirudh Behal and Mr. Mathew Samuel**, had been examined as witness before the commission.
14. Learned senior counsel submits that the material used by the respondent in the trial against the petitioner happens to be these very tapes, transcripts and documents and therefore the statement of the witnesses specially **Mr. Anirudh Behal and Mr. Mathew Samuel** before the commission qualify as previous statement.
15. Learned counsel submits that it is pertinent to mention here that the trial of the present case is not a proceeding against **Mr. Anirudh Behal or Mr. Methew Samuel**.
16. Learned senior counsel submits that the judgement of **Kehar Singh**



(*Supra*) pertains to peculiar facts and circumstances and hence, is not applicable in the present case. It has further been submitted that the decision in *Kehar Singh (Supra)* failed to harmonize the provisions of Section 6 of the Commission of Inquiry Act and Section 145 & 155 of the Indian Evidence Act as the judgment is silent on the right of a third accused person. Further, the decision does not deliberate upon the accused's right to a fair trial with respect to when such a deposition may become relevant as previous statement.

17. Learned senior counsel submits that *Kehar Singh (Supra)* neither examines nor considers that Section 145, 155 and 157 of the Indian Evidence Act confers a statutory right to an accused person in a trial which bears an intimate nexus to the right to a fair trial under Article 21. Learned senior counsel further submitted that in *Kehar Singh (Supra)* the court was not made aware of the decisions with right to cross-examine in the **Union of India V T.R. Varma** AIR 1957 SC 882 and **Khem Chand v Union of India** AIR 1958 SC 300.
18. It has further been submitted that right to cross-examine is an essential feature of natural justice and is an integral part of a fair trial which is a fundamental right of the accused guaranteed by Article 21. Reliance has also been placed on **State of J&K vs. Bakshi Ghulam Mohammed** AIR 1967 SC 122, **Nirmal Singh vs. State of Punjab** 2009 1 SCC 441, **Sunil Mehta vs. State of Gujarat** 2013 9 SCC 209 and **Manoj vs. State of MP** (2023) 2 SCC 353.
19. Learned senior counsel submitted that the intent behind Section 6 was to enable truthful depositions before the commission and the same cannot be interpreted to allow statements to be made with immunity



later in a criminal trial leading to an innocent third person's incarceration.

20. Learned senior counsel submits that ***Kehar Singh (Supra)*** did not examine the wider effect of Section 6 of shielding a person from cross-examination in the trial. It has been submitted that Section 6 of the Commission of Inquiry act simply contemplates protection from self-incrimination in subsequent civil and criminal proceedings.
21. Learned senior counsel submits that if the prosecution examines a witness and uses the material in the trial of a third person with respect to the same subject matter that he deposed on before the commission, the protection under Section 6 of the Act would not be invoked. The protection under Section 6 will be subordinate to the right to fair trial of the accused which includes the right to cross-examine effectively.
22. Learned senior counsel submits that the protection of Section 6 would be available to **Mr. Anirudh Behal and Mr. Methew Samuel** as they cannot be prosecuted on the basis of their evidence before the commission. However, the protection ceases to operate when their evidence could result in the conviction of an innocent person without affording the accused the right to cross-examine and confront their evidence effectively.
23. Mr. Anupam S. Sharma, learned special counsel for the CBI has vehemently opposed the revision petition and submitted that though it is an admitted position that PW-18 had in fact deposed before the Commission of Enquiry, however the deposition of PW-18 filed by way of an affidavit Ex.PW-18/D1 and Ex.PW-18/D2 before the said commission has neither been relied upon by the prosecution nor forms



part of the report under Section 173 Cr.P.C. nor was it a part of his cross-examination in chief.

24. Mr. Anupam S. Sharma, learned special counsel submitted that Section 6 of the Commission of Inquiry Act completely prohibits the use of any statement made by a person before the Commission of Inquiry either to be used against him or subject to any civil or criminal proceeding except a prosecution for false evidence.
25. The reliance has been placed on **Shri Ram Krishna Dalmia vs Shri Justice S. R. Tendolkar & Others** 1958 AIR 538, 1959 SCR 279 and **State Bank Of India Thr. General Manager vs National Housing Bank & Ors** AIR 2013 SC 3478.
26. Learned special counsel submitted that in *Kehar Singh (Supra)*, it has been made clear that perusal of Section 6 of the Commission of Inquiry Act intends to protect and provide immunity to the witness and thus, prohibits the use of previous statement at the trial for the purpose of cross-examination to impeach his credit.
27. Learned special counsel submitted that perusal of Section 5A(3) along with Section 11 of the Commission of Inquiry Act, 1952 makes it evident that the bar under Section 6 of the said Act applies to any statement made in furtherance of the procedure being followed either under Section 5A(3) and Section 11 of the Act. It has been submitted that the legislature in its wisdom has clearly ensured that a statement under Section 6 of the Act may not be used for any other purpose or any other proceeding; except in the case of prosecution for giving a false evidence.
28. Learned special counsel submitted that there can be no dispute to



the proposition that an accused has the right to fair trial and therefore, a reasonable opportunity to defend himself in trial should be provided to him. However, when a legal bar exists in a special statute, the accused cannot be permitted to flout such a bar.

29. Learned special counsel submitted that the case of ***Sajjan Kumar (supra)*** is clearly distinguishable as the judgment in that case was passed in view of the peculiar facts of the case such as:

- a. The affidavits filed and statement made before the commission therein was the foundation of the case.
- b. The witness extensively referred to affidavits as well as statement before the commission with a view of corroborate her deposition during trial despite the bar under Section 6 of the Act.
- c. The documents in the form of affidavits and statements made before the commission were relied upon by the prosecution to prove the charges against the accused.

30. Learned special counsel submitted that, therefore, the decision in ***Sajjan Kumar (supra)*** was passed in light of the peculiar facts of the case guided largely by the test of prejudice and principle of right of accused to fair trial and cannot be said to apply to the present case. It has further been submitted that the audio tapes which were recorded during the conversation between the petitioner and PW-18 as well as the transcript for the same have been exhibited by the respondent and the petitioner has extensively cross-examined PW-18 on those aspects. In any case, the exhibited tapes and transcripts are documents and not a statement, whereas the bar under Section 6 of the Commission of



Inquiry Act is only applicable to the statements made before a Commission of Enquiry.

31. Learned senior counsel for the petitioner has predominantly based his case upon three factors. Firstly, in **Sajjan Kumar Vs. CBI 2012 SCC OnLine Delhi 4027** the material produced before the Commission was allowed to be used for the purpose of cross-examination of prosecution witnesses. Secondly, the Apex Court while deciding in **Kehar Singh** did not take into account various material aspects including the right to fair trial and the right of cross-examination and thirdly, if the defence is not allowed to confront the prosecution witness with the affidavit filed before the commission, it will be in violation of Section 145, 155 and 157 of the Indian Evidence Act.

32. Section 6 of the Commission of Inquiry Act provides as under:

“No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement:

Provided that the statement:

(a) is made in reply to a question which he is required by the Commission to answer, or

(b) is relevant to the subject matter of the inquiry”

33. The scope of the commission was came up for discussion before the Supreme Court in **Shri Ram Krishna Dalmia vs Shri Justice R.S. Tendolkar & Others** 1958 AIR 538, 1959 SCR 279 wherein it was inter alia held that:

“The Commission has no power to adjudication in the sense of



passing an order which can be enforced proprio vigore. A clear distinction must, on the authorities, be drawn between a decision which, by itself, has no force and no penal effect and a decision which becomes enforceable immediately or which may become enforceable by some action being taken.”

34. It was further inter alia held that the statement made by any person before the Commission of Inquiry is wholly inadmissible in evidence in any future proceedings civil or criminal under Section 6 of the Act. This was reiterated by the Hon’ble Supreme Court in **State Bank Of India Thr. General Manager vs National Housing Bank & Ors** AIR 2013 SC 3478 wherein it was inter alia held as under:

“52. It is well settled by a long line of judicial authority that the findings of even a statutory Commission appointed under the Commissions of Inquiry Act, 1952 are not enforceable proprio vigore as held in Ram Krishna Dalmia v. Justice S.R. Tendolkar and others [AIR 1958 SC 538] and the statements made before such Commission are expressly made inadmissible in any subsequent proceedings civil or criminal. The leading judicial pronouncements on that question were succinctly analysed by this Court in (2001) 6 SCC 181, Paras 29-34 : (AIR 2001 SC 2637 : 2001 AIR SCW 2571). Para 34 of the judgment inter alia reads:-
"34..... In our view, the courts, civil or criminal, are not bound by the report or findings of the Commission of Inquiry as they have to arrive at their own decision on the evidence placed before them in accordance with law."

35. It was further inter alia held that the statement made before such



commission cannot be used as evidence before any civil or criminal court.

36. The High Court of Madhya Pradesh also in **Puhupram and Ors. v. State of Madhya Pradesh and Ors.**, 1968, MPLJ 629 inter alia held that the statement of Section 6 of the act are wholly inadmissible in evidence in any future proceedings civil or criminal.
37. Similarly, the High Court of Orissa in **Amosh Satrusalya And Others vs State Of Orissa** 2017 (180) AIC 848, inter alia held as under:

“8. It would be appropriate to take note of the fact that in this case, the prosecution has not relied upon statement of the investigating officer made before the Commission. It was the petitioners who requested the learned trial Court to call for the copy of such statement made before the Commission for confronting the witness with reference to such statement as part of their defence. It cannot be disputed that the statement made by any person before the Commission of Inquiry under Section 6 of the 1952 Act is wholly inadmissible in evidence in any future proceedings, civil or criminal against him except a prosecution for giving false evidence by such statement. In the case of State Bank of India v. National Housing Bank and Ors, reported in MANU/SC/0759/2013: A.LR. 2013 S.C. 3478, it is held that the statements made before the Commission of Inquiry cannot be used as evidence before any civil or criminal Court. It should logically follow that even the conclusions based on such statements can also not be used as evidence in any Court.

9. No doubt the accused has a right to get a fair trial and



therefore, reasonable opportunity to defend himself in the trial should be provided by the trial Court. However, when there is some legal bar in some special statute, in the name of reasonable opportunity, the accused cannot be permitted to flout such bar.

10. In view of law laid down by the Hon'ble Supreme Court, it is clear that the statement of the investigating officer (P.W. 17) before the Commission which was sought to be called for by the defence for the purpose of confrontation to him is not permissible, as such statement cannot be used in the criminal trial for confronting the witness to contradict him or to impeach his credit.”

38. It is pertinent to mention here that in this case the defence had sought to confront the investigation officer with the statement made by him before the commission of enquiry.

39. Similarly, the High Court of Gujarat in **DhruvbenGuraldasBalani v. State of Gujarat** 2018 Cri.L.J. 1457, after noting in detail the law laid down in **Sajjan Kumar** inter alia held it as under:

“37. The peculiar features in the Delhi High Court decision only in the context of the facts may be noted as under:

(1) The affidavits filed and the statement made before the commissions by PW No.1 was the foundation of the case of the prosecution.

(ii) The witness-PW No.1 extensively referred to the affidavits as well as her statement before the commissions with a view to corroborate her deposition during the trial despite the provision contained in section 6 of the Act. The documents, in the form of



affidavits and statement made before the Commissions, were relied upon by the prosecution to prove the charges against the accused.

(iii) No objection was raised by any of the parties regarding the admissibility of the documents either during the examination-in-chief or cross-examination.

(iv) The court took the view that no evidence could be read against the accused if not subjected to cross-examination. According to the Delhi High Court, the implication would be that the affidavits and the statement and the deposition in that regard would not be read in favour of the prosecution and against the accused.

38. I am of the view that even on facts, the case of the Delhi High Court is distinguishable. In my view, no error, not to speak of any error of law, could be said to have been committed by the Trial Court in rejecting the application Exh.265. The Trial Court has assigned cogent reasons relying on the decision of the Supreme Court in the case of Kehar Singh (AIR 1988 SC 1883) (supra). I see no good reason to disturb the order in exercise of my supervisory jurisdiction under Article 227 of the Constitution of India.

39. With all humility at my command, it is difficult for me to follow the dictum as laid down in the Delhi High Court decision. The Delhi High Court decision proceeds more on the test of prejudice and the principle that it is a right of the accused to have a fair trial. However, once the statement makes it very clear and,



more particularly, when interpreted by the Supreme Court that the statement made before the Commission cannot be used for the purpose of contradiction, then the same should put an end to the entire debate.”

40. It is also noteworthy to the observations made in **DhruvbenGuraldasBalani**(*supra*) which inter alia held as under:

“41. In the case at hand, what is sought to be relied upon, is the fact that the police statement of the witness recorded under section 161. Cr.P.C is, by and large, the same like the statement made by the witness before the Commission and secondly in the second statement of the witness under section 161 of the Cr.P.C., certain inconsistencies emerging in the first statement and the statement recorded before the Commission is sought to be explained. Indisputably, in the case on hand, the prosecution does not rely upon any of the statements made before the commission. The only thing highlighted, very vehemently, is the inconsistencies between the statements of the witness recorded before the commission and before the Trial Court.

42. The dictum as laid by the Supreme Court in the case of Kehar Singh (AIR 1988 SC 1883) (supra) is very clear. The Supreme Court had made it very clear that the plain reading of section 6 prohibits use of the previous statements at the trial either for the purposes of cross-examination to contradict the witness or to impeach his credit.

43. Section 6 of the Commission of inquiry Act guarantees immunity to a witness. It clearly stipulates that a person making a



statement in course of examination before the Commission, enjoys certain protection, inasmuch as no statement made by a person in course of giving evidence before the Commission shall subject him to, or be used against him. in an civil or criminal proceeding. This protection is guaranteed in order to create confidence on the person to speak truth nothing but the truth before the Commission and not to hide anything. At the same time, the person is also cautioned that taking advantage of such immunity if he makes a false statement before the Commission, he would be prosecuted. The "statement" as per Section 6 of the Act is explained to be a "statement" made in reply to a question which he is required by the Commission to answer. Perusal of Sections 145, 155 and 157 of the Evidence Act clearly indicates that a previous statement can only be used for contradiction or for corroboration. The restrictions imposed under Section 6 of the Commission of Inquiry Act stipulating that a statement made by a person before the Commission cannot be used either for the purpose of contradiction in cross-examination of the said witness or for the purpose of impeaching his credibility, is aimed to protect the witness and to provide immunity to the said person.”

41. It is also necessary to refer to the judgment of **Sajjan Kumar**(*supra*)case wherein this court inter alia held as under:

“26. At this stage, it would be appropriate to take note of the fact that in Kehar Singh's case, the prosecution did not rely upon any affidavit filed or statement made before the Commissions. It was the accused who requested for the copies of the statement of



witnesses made before the Commission, to contradict the witness with reference to such statements as part of defence. Therefore, the facts of the case before this Court are altogether different.”

42. Thus, the analysis of the above said judgments would make it clear that the present case is distinguishable from the law laid down in the **Sajjan Kumar** case. The present petition is liable to be dismissed; firstly, the CBI has not relied upon any material placed before the Commission of Inquiry Act. Secondly, the affidavits which are sought to be produced for the purpose of confrontation by the accused were not relied upon by the prosecution in the examination in chief and were only brought during the cross-examination of PW-18. Thirdly, it has consistently held by the Constitutional Courts that the evidence produced before a Commission constituted under The Commission of Inquiry Act is inadmissible in a future proceeding except for the purposes as laid down in Section 6 of the Act.
43. It is also pertinent to mention that the impugned order does not suffer from any perversity or illegality. Hence the present petition stands dismissed.

DINESH KUMAR SHARMA, J

AUGUST 29, 2023/AR/AJ