

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 2447 of 2019

With

CRAN 1 OF 2019

(Old No. CRAN 3985 of 2019)

Central Bureau of Investigation represented by Addl. Sp. CBI, ACB,

Kolkata.

Vs

Shri Mrinmoy Chandra, Ex-Chairman-cum-Managing Director,

Tea Trading Corporation of India Ltd. Kolkata & Ors.

For the Petitioner/CBI : Ms. Chandreyi Alam.

For the Opposite Parties : None.

Hearing concluded on : 15.01.2024

Judgment on : 01.02.2024

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against an order dated 06.12.2018 passed by the Learned Special Judge, 3rd Special Court, Bankshall, Kolkata, West Bengal in Spl. Case No.33/2007 arising out of RC-51(A)/1994 of CBI, ACB, Kolkata whereby the Learned Judge was pleased to pass an order stalling the trial proceedings in this case by directing CBI to obtain sanction order from the competent authority against Shri Prabir Kumar Basu (prosecution witness) for making him an accused and passed further order that after framing charges against said Shri Prabir Kumar Basu, trial in this case would commence.

2. FACTS:-

The petitioner, Central Bureau of Investigation, hereinafter referred to as CBI, had registered the case being RC No. 15(a)1994 in CBI, ACB, Kolkata Branch on 10.08.1994 against Shri Prasanta Kumar Mitra, Secretary, Bhim Chandra Sasmal, Manager (fin), N.K. Ghatak, Pay & Accounts Manager, D. Banerjee, Sr. Manager (Marketing), all of Tea Trading Corporation of India Ltd., and against M/s. International Linkers, a commission agent, on the basis of a source information.

3. It has been alleged in the FIR that S/Shri Prasanta Kumar Mitra, Secretary, Bhim Charan Sasmal, Manager (Fin), N.K. Ghatak, Pay & Accounts Manager, D. Banerjee, Sr. Manager (Marketing) all of Tea Trading Corporation of India Ltd., entered into criminal conspiracy

among themselves and with M/s. International Linkers, a commission agent, and in furtherance of the said criminal conspiracy they by abusing their respective official position as public servant, displayed undue favour to the said firm M/s. International Linkers by appointing the firm as Carrying & Forwarding Agency of T.T.C.I., and paid the firm a sum total of Rs. 4.5 Lakhs on account of security deposit which was encashed by the firm.

4. After completion of the investigation, Charge sheet was filed in the said case before the Learned Special Judge, 3rd Special (CBI) Court, Bankshall Court, Kolkata on 25.02.1997 against the accused persons namely S/Shri Mrinmoy Chandra, Ex-Chairman-cum-Managing Director, Prasanta Kumar Mitra, Secretary, Bhim Charan Sasmal, Manager (Finance), all three of tea Trading Corporation of India Limited, and Shri Krishna Lal Bhalla of M/s. International Linkers under Sections 120B/420/467/468/471/477A of IPC, and Section 13(2) r/w 13(1)(d) of P.C. Act, 1988. Investigation has substantiated that both Shri Mrinmoy Chandra and Shri Prasanta Kumar Mitra had instantly agreed to the request placed by accused Shri Krishna Lal Bhalla of M/s. International Linkers for sanctioning & granting Rs. 2 Lakhs as security advance, interest free against which Shri Krishna Lal Bhalla would reduce the house rent from Rs. 6000/- to Rs. 4000/- p.m. Thereafter a letter of acceptance was written on 18.12.1992 to Shri Krishna Lal Bhalla. But, there was no provision for such payment in the lease deed. As such Shri

Prabir Kumar Basu, Sr. Manager (Fin) strongly objected to the sanction by stating that the Corporation was facing financial crisis. In spite of said objection raised by Shri Prabir Kumar Basu, Sr. Manager (Finance), the proposal was finalized and a voucher for Rs. 2 Lakhs was prepared vide DR/496/CC dt. 05.02.1993 countersigned by Shri Mrinmoy Chandra, Managing Director of the organization, and only after approval of the higher authority, a cheque bearing no. 629435 dated 05.02.1993 for Rs. 2 lakhs drawn on SBI, Overseas Branch, Kolkata was issued in favour of Shri Krishna Lal Bhalla.

5. The investigation has substantiated that, S/Shri Mrinmoy Chandra, Prasanta Kumar Mitra, Bhim Charan Sasmal in pursuance of the criminal conspiracy told Sh. Prabir Kumar Basu, Sr. Finance Manager to prepare a Demand draft for Rs. 2 lakhs to be paid to Shri Krishna Lal Bhalla on the impression that, the earlier issued Cheque No. 626435 dtd. 05.02.1993 was cancelled. But as Shri Prabir Kumar Basu was reluctant to prepare the Demand Draft without confirmation from the Bank, accused Shri Mrinmoy Chandra Directed accused Shri Bhim Charan Sasmal to prepare the same and on the direction of accused Shri Mrinmoy Chandra, accused Shri Bhim Charan Sasmal prepared a Voucher No. DR/1227/B dtd. 22.02.1993 for Rs. 2,00,500/- (plus Rs. 500/- bank charges) and a draft was purchased against Cheque No. 982887 dtd. 22.02.1993 for the said amount on UBI, Shakespeare Sarani Branch, Calcutta.

6. The above findings during investigation, clearly reveal that prosecution witness Shri Prabir Kumar Basu, Sr. Manager (Finance) [cited as prosecution witness] was not in criminal conspiracy and as such, suggested not to issue any advance and also the second time, he did not prepare voucher, in spite of the false impression given by other accused public servants that the cheque issued earlier was cancelled. **That, said Shri Prabir Kumar Basu is a relevant witness to prove the charges against the above named accused public servants and as such he was not charge sheeted, rather listed as witness by the prosecution.**
7. The Learned Spl. Judge, 3rd Special (CBI) Court, Bankshall Court, Kolkata vide its order dated 25.02.1997 took cognizance of the offence, and after about 16 years, charges were framed by the Ld. Court against the accused persons on 17.05.2013. During trial, two accused persons namely Shri Prasanta Kumar Mitra and Shri Krishna Lal Bhalla expired.
8. In the instant case, prosecution has examined two witnesses namely Shri Sabhya Sachi Mitra and Subhabrata Roy and cross examination of witness Shri Prabir Kumar Basu was continuing. During cross examination, witness Shri Prabir Kumar Basu, deposed that he was the co-signatory in Exhibit – 5 (Cheque No. 982887 dated 22.02.1993 for Rs. 2 lakhs) along with accused Shri Bhim Charan Sasmal.
9. Thus, the Ld. Spl. Judge, 3rd Special (CBI) Court, Bankshall Court, Kolkata presumed his involvement in the commission of the offence and passed the said order dated 06.12.2018.

- 10.** As per the case of prosecution, Shri Prabir Kumar Basu was not involved in the criminal conspiracy and had objected to the proposal for sanctioning and granting of Rs. 2 lakhs as interest free security advance. Investigation has revealed that Shri Prabir Kumar Basu was directed by the accused persons Shri Mrinmoy Chandra and Shri Bhim Charan Sasmal to prepare the voucher and a draft was purchased against the cheque issued by Shri Prabir Kumar Basu and accused Shri Bhim Charan Sasmal. The Learned Special Court failed in appreciating the evidence of witness Shri Prabir Kumar Basu.
- 11.** An application under Section 319 Cr.P.C. was filed by accused Shri Mrinmoy Chandra before the Ld. Court praying for initiating proceedings against witness Shri Prabir Kumar Basu. A reply in opposition, had been filed on behalf of the prosecution i.e., CBI vehemently objecting to the contention of the accused/petitioner to proceed against witness Shri Prabir Kumar Basu as an accused in this case.
- 12.** On 06.12.2018 on hearing both sides Learned Special Judge, 3rd Special (CBI) Court, Bankshall Court, Kolkata passed an order stalling the trial/proceedings in this case by directing the prosecution (CBI) to obtain sanction order from the competent authority against Shri Prabir Kumar Basu (prosecution witness) for making him an accused and passed further order that after framing charges against Shri Prabir Kumar Basu, trial in this case would commence.

13. **Hence the revision**, on the ground that the order and suffers from material irregularities as the Learned Court ignored the evidence submitted by the Prosecution which proved the commission of crime by the four Accused/Respondent in this case, and no role of criminality surfaced in this case, in respect of the witness Shri Prabir Kumar Basu.
14. That as per the allegation leveled in the FIR of this case, registered with CBI, ACB, Kolkata there was no mention of allegation(s) leveled against the said Shri Prabir Kumar Basu, the then Sr. Manager (Finance & Accounts) of tea trading Corporation of India Ltd. (TTCI).
15. After conducting thorough investigation in the case RC51(a)1994, prosecution (CBI) had filed charge sheet before the Learned Court against, the following persons namely (i) Shri Mrinmoy Chandra (ii) Shri Prasanta Kr. Mitra (iii) Shri Bhim Charan Sasmal & (iv) Shri Krishna Lal Bhalla. **In order to prove the charges against the arraigned accused persons, Shri Prabir Kumar Basu, Sr. Manager (Finance) was considered as a competent witness in this case. Neither in the charge sheet, nor the FIR, said Shri Prabir Kumar Basu has been arraigned as an accused.** Therefore, it is stated by the CBI that as far as investigation of this case in concerned, instances of criminality of said Shri Prabir Kumar Basu has not come on record.
16. That the investigation has substantiated that, the accused persons namely S/Shri Mrinmoy Chandra, Prasanta Kumar Mitra, Bhim Charan Sasmal in pursuance of the criminal conspiracy told Shri Prabir Kumar

Basu, Sr. Finance Manager to prepare a Demand Draft for Rs. 2 lakhs to be paid to Shri Krishna Lal Bhalla on the impression that earlier issued Cheque No. 629435 dtd. 05.02.1993 was cancelled. But as Shri Prabir Kumar Basu was reluctant to prepare the Demand Draft without confirmation from the Bank, accused Shri Mrinmoy Chandra directed accused Shri Bhim Charan Sasmal to prepare the same, and on the direction of accused Shri Mrinmoy Chandra accused Shri Bhim Charan Sasmal prepared a Voucher No. DR/1227/B dtd. 22.02.1993 for Rs. 2,00,500/- (plus Rs. 500/- bank charges) and a draft was purchased against Cheque No. 982887 dtd. 22.02.1993 for the said amount on UBI Shakespeare Sarani Branch, Calcutta.

17. That, the investigation clearly revealed that the prosecution witness Shri Prabir Kumar Basu, Sr. Manager (Finance) [cited as prosecution witness] was not in criminal conspiracy and as such, he suggested not to issue any advance and also the second time did not prepare the voucher on the false impression given by the other accused public servants that the earlier (issued) cheque was cancelled. The said Shri Prabir Kumar Basu is a relevant witness to prove the charges against the above name accused public servants and as such he was not charge sheeted, rather listed as witness by the prosecution.
18. The petitioner (CBI) submits that the Learned Special Judge ignored and overlooked the material evidence and arguments of prosecution and did not properly appreciate the evidence available on record and also wrongly

interpreted the provision of law, and judgments of the Hon'ble Supreme Court of India. The Order dated 06.12.2018 of the Ld. Court is not proper and well reasoned in the eye of law and thus liable to be set aside.

19. It is submitted that the evidence on record clearly establish that said Shri Prabir Kumar Basu was not involved in the criminal conspiracy and is a prime witness to prove charges against the accused persons in this case.
20. And that it is expedient in the interest of justice to uphold the dignity of law by setting aside the impugned order of the Ld. Court dated 06.12.2018.
21. Learned counsel for the petitioner/CBI has relied upon the Judgment dated 10.01.2014 in **(2014) 3 SCC 92, Hardeep Singh Vs State of Punjab** and other appeals, wherein the Apex Court held that the Courts must invoke the extraordinary jurisdiction under Section 319 Cr.P.C., with great caution.

22. FINDINGS:-

The relevant findings of the Trial Court in respect of the order under challenge are as follows:-

"Spl. Case No. 33/07

Order No. 78

Dated 06.12.18

".....In order to decide the point in controversy I have examine the extent of involvement of Prabir Kumar Basu with the commission of alleged offence. As pointed out above the alleged offence centers round the double payment to the Landlord by issuing two cheques by the TTCL Authority in the interval of fortnight without ascertaining the

*encashment of first cheque. **In both the cheques the signatures of accd. B. Sashmal and Prabir Kumar Basu are present. The first cheque is not controversial for our purpose but the second cheque is the disputed cheque whereby double payment has been made to the Landlord.***

Now the question is, can Prabir Kumar Basu escape criminal liabilities taking the plea that he detected the crime and brought to the notice of the superior authority but the co-accused B.C. Sashmal and M. Chanda remained silent over the matter all along.

*In this regard I like to place on record the general exceptions in chapter IV of IPC which gives protection to the offender in special circumstances enumerated therein. One such protection is given U/s 76 IPC which provides that nothing is an offence which is done by a person under the order and direction of superior authority. In this case the plea of Prabir Kumar Basu is that he was misguided and misdirected by the co-accused to sign the disputed second cheque as one of the signatory. But there is no material on record to show that Prabir Kumar Basu was to sign the disputed cheque at the behest of any of the co-accused. Prabir Kumar Basu has stated in evidence that he informed the matter to Mr. B.C. Sashmal who was junior to him in the office and that he did not inform Accd. M.C. Chanda in writing about such irregularities and that he did not send any letter to the party for return of double payment. All this goes to show that Prabir Kumar Basu signed the disputed cheque without any protest and objection. **His very statement in evidence that in the year 1993 he noticed irregularities that there was double payment of Rs. 2 lakhs at his office for payment of security deposit to the Landlord at Delhi office shows that he cannot plead the ignorance of knowledge about the irregularities at the time of commission of offence though he disclosed it afterwards. Subsequent protest and objection after the commission of offence can not absolve an offender of his criminal liabilities nor can it dislodge the presumption of guilt.***

*Apart from the statement of PW-3 in evidence regarding signing of the disputed cheque there is no denying the fact that **Ext. 5 is itself a documentary evidence showing***

the implication of PW-3 in the commission of alleged offence.

So, no protection can be extended to PW-3 Prabir Kumar Basu under Sec 132 of Indian Evidence Act.

Ld. P.P., CBI, has alternatively urged before the court by citing a reference of case law of the Apex Court in CRA No. 454 of 2015 dated 16.03.2015 that the evidence of PW-3 can be obtained by the prosecution as an approver in accordance with law. Though, similar protection under Article 20(3) of Constitution of India can be given to a witness U/s 132 of Indian Evidence Act but the Apex Court in that decision has not decided the law whether such protection can be given to a witness who is also involved in the commission of offence in question for which the other accused are being tried and in the concluding para of the decision the Apex Court has directed the trial court to grant pardon to such witness in accordance with law and record his evidence afresh.

In view of the decision, just referred to above it is upto the prosecution to apply for tendering pardon to PW-3 in accordance with law. But the first step before treating a witness as approver he must be made an accused person. A witness cannot be an approver.

But before framing charge it is necessary to obtain sanction for prosecution against Prabir Kumar Basu from the competent authority as he was in service when cognizance was taken in this case.

.....prosecution is directed to obtain sanction against Prabir Kumar Basu from the competent authority within three months from this date in default necessary order will be passed.

To 06.03.2019 for awaiting sanction order against Prabir Kumar Basu and further order.

***Sd/-
Judge, 3rd Special
(CBI Designated) Court,
Bankshall Court, Calcutta.”***

23. This Court relies upon the Judgment in *Juhru & Ors. vs Karim & Anr.*, Criminal Appeal No. 549 of 2023, on 21.02.2023, wherein the Supreme Court held:-

“12. Section 319 Cr.P.C. contemplates that:

“...Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the Accused has committed any offence for which such person could be tried together with the Accused, the Court may proceed against such person for the offence which he appears to have committed.”

*13. Illuminating the scope of Section 319 Cr.PC, the Constitution Bench of this Court in **Hardeep Singh vs. State of Punjab, (2014) 3 SCC 92** laid down that:*

“57. Thus, the application of the provisions of Section 319 CrPC, at the stage of inquiry is to be understood in its correct perspective. The power under Section 319 CrPC can be exercised only on the basis of the evidence adduced before the court during a trial. So far as its application during the course of inquiry is concerned, it remains limited as referred to herein above, adding a person as an accused, whose name has been mentioned in Column 2 of the charge-sheet or any other person who might be an accomplice.”

X-X-X-X-X-

“105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not

necessarily tested on the anvil of cross-examination, **it requires much stronger evidence than mere probability of** his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. **In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC.** In Section 319 CrPC the purpose of providing if “it appears from the evidence that any person not being the accused has committed any offence” is clear from the words “for which such person could be tried together with the accused”. The words used are not “for which such person could be convicted”. There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused.”

14. This Court has very recently, in **Sukhpal Singh Khaira vs. The State of Punjab, (2023) 1 SCC 289**, succinctly explained the powers bestowed on the Court under section 319 Cr.P.C. and ruled that:

“15. At the outset, having noted the provision, it is amply clear that the power bestowed on the Court is to the effect that in the course of an inquiry into, or trial of an offence, based on the evidence tendered before the Court, if it appears to the Court that such evidence points to any person other than the accused who are being tried before the Court to have committed any offence and such accused has been excluded in the charge sheet or in the process of trial till such time could still be summoned and tried together with the accused for the offence which appears to have been committed by such persons summoned as additional accused.”

15. In **Hardeep Singh (Supra)**, it has been eloquently held that the word “evidence” in Section 319 Cr.P.C. has to be broadly understood and thus materials which have come before the Court in course of enquiry can be used for:-

- (i) corroboration of evidence recorded by Court after commencement of trial;
- (ii) for exercise of power under Section 319 Cr.P.C.; and

(iii) also to add an accused whose name is shown in column no.2 of the chargesheet.

It was further explained that statement made in examination-in chief also constitutes “evidence” and the Court while exercising power under Section 319 Cr.P.C. post commencement of trial, need not wait for evidence against person proposed to be summoned, to be tested by cross-examination.

16. *In **Sukhpal Singh Khaira (Supra)**, the Constitution Bench refreshed the guidelines that the competent court must follow while exercising power under Section 319 Cr.P.C. It was ruled that:-*

(i) if the competent court finds evidence or if application under Section 319 Cr.P.C. is filed, regarding involvement of any other person in committing the offence based on evidence “recorded at any stage in the trial” before passing of the order on acquittal or sentence, it shall pause the trial at that stage and the Court shall proceed to decide the fate of the application under Section 319 Cr.P.C.;

(ii) if the Court decides to summon an accused under Section 319 Cr.P.C., such summoning order shall be passed before proceeding further with the trial in the main case and depending upon the stage at which the order is passed, the Trial Court shall apply its mind to the fact as to whether such summoned accused is to be tried along with other accused or separately; and

(iii) if the power under Section 319 Cr.P.C. is not invoked or exercised in the main trial till its conclusion and if there is a split-up case, such power can be invoked or exercised only if there is evidence to that effect, pointing to the involvement of the additional accused to be summoned in the split-up (bifurcated trial).

17. *It is, thus, manifested from a conjoint reading of the cited decisions that power of summoning under Section 319 Cr.P.C. is not to be exercised routinely and the existence of more than a prima facie case is sine quo non to summon an additional accused. We may hasten to add that with a view to prevent the frequent misuse of power to summon additional accused under Section 319 Cr.P.C., and in conformity with the binding judicial dictums referred to*

above, the procedural safeguard can be that ordinarily the summoning of a person at the very threshold of the trial may be discouraged and the trial court must evaluate the evidence against the persons sought to be summoned and then adjudge whether such material is, more or less, carry the same weightage and value as has been testified against those who are already facing trial. In the absence of any credible evidence, the power under Section 319 Cr.P.C. ought not to be invoked.

23. The information available on record suggests that the trial is at the stage of defence evidence. The guidelines that the Trial Court must follow, while commencing the trial against Appellant No.1 have been extensively iterated by the Constitution Bench in **Sukhpal Singh Khaira (Supra)**, in the following terms:

“41 (III). What are the guidelines that the competent court must follow while exercising power under Section 319 CrPC?”

41.1 If the competent court finds evidence or if application under Section 319 of CrPC is filed regarding involvement of any other person in committing the offence based on evidence recorded at any stage in the trial before passing of the order on acquittal or sentence, it shall pause the trial at that stage.

41.2 The Court shall thereupon first decide the need or otherwise to summon the additional accused and pass orders thereon.

41.3 If the decision of the court is to exercise the power under Section 319 of CrPC and summon the accused, such summoning order shall be passed before proceeding further with the trial in the main case.

41.4 If the summoning order of additional accused is passed, depending on the stage at which it is passed, the Court shall also apply its mind to the fact as to whether such summoned accused is to be tried along with the other accused or separately.

41.5 If the decision is for joint trial, the fresh trial shall be commenced only after securing the presence of the summoned accused.

41.6 If the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the Court to continue and conclude the trial against the accused who were being proceeded with.”

24. In *R. Dineshkumar @ Deena Vs State Rep. By Inspector of Police and Ors., Criminal Appeal No. 454 of 2015 (arising out of SLP (Criminal) No. 9928 of 2014), on 16.03.2015*, the Supreme Court held:-

“28. The second requirement under Section 319 Cr.P.C. for a court to summon a person is that it must appear from the evidence that such a person has committed an offence. It is not necessary for us to analyse the full amplitude of the expression "evidence" occurring under Section 319, but it is axiomatic that the deposition made by a witness during the course of the trial of a sessions case is certainly evidence within the meaning of that expression as defined under Section 3 of the Evidence Act.

29. Having regard to the content of the deposition of PW64 at the trial of Sessions Case No.73 of 2009, whether his deposition can be treated as evidence within the meaning of that expression occurring in Section 319 of the Cr.P.C. in order to summon him as an accused to be tried along with the appellant herein and other accused already facing trial?

30. It was argued before the High Court as well as this Court that in view of the proviso to Section 132[6] of the Evidence Act, the content of PW64's deposition is not evidence within the meaning of Section 319 of the Cr.P.C. to form the basis for summoning of PW64 as an accused to be tried along with the other accused.

31. *The High Court on an elaborate consideration of the various authorities and the legal position came to the conclusion;*

"63. In view of all the above discussions, I hold that the evidence of the 2nd respondent, as a prosecution witness before the trial court, and the incriminating answers given by him amount to compelled testimony falling within the sweep of Section 132 of the Evidence Act and thus, he is protected by the proviso to Section 132 of the Evidence Act."

(emphasis supplied)

32. *The learned counsel for the appellant argued that PW64 is not entitled to the benefit of the immunity provided under the proviso to Section 132 of the Evidence Act as such evidence of PW64 is evidence voluntarily given by him before the Court and not evidence which PW64 was "compelled to give". The learned counsel submitted that having regard to the language of the proviso, it is only those answers (whose content is incriminatory) which a witness is compelled to give that cannot be proved against such witness in any criminal proceeding. But, if such incriminatory statements are made by a witness at the trial of a civil or criminal proceeding voluntarily without there being any compulsion, then the protection under the proviso to Section 132 is not available to such a person. The learned counsel placed heavy reliance on a decision in the case of *The Queen v. Gopal Doss & Another*, ILR 3 Mad. 271 and other judgments of the various High Courts which either followed or are in tune with *Gopal Doss* (supra) in support of his submission.*

39. *The scope of Section 132 of the Evidence Act fell for consideration of this Court in *Laxmipat Choraria & Others v. State of Maharashtra*, (1968) 2 SCR 624. Three appellants (brothers) were convicted for the offence under Section 120-B of the Indian Penal Code and Section 167(81) of the Sea Customs Act, 1878. Briefly stated the facts are that the three appellants before this Court were part of an international gold smuggling organization. The kingpin of the organization was a Chinese citizen living in Hong Kong. One Ethyl Wong, an Air Hostess of Air India*

was also a member of the abovementioned organization and carried gold on "several occasions". She was examined as a prosecution witness in the case. "She gave a graphic account of the conspiracy and the parts played by the accused and her own share in the transaction. Her testimony was clearly that of an accomplice."

40. *Before this Court, the main argument was that "Ethyl Wong could not be examined as a witness because (a) no oath could be administered to her as she was an accused person since Section 5 of the Indian Oaths Act bars such a course and (b) it was the duty of the prosecution and/or the Magistrate to have tried Ethyl Wong jointly with the appellants. The breach of the last obligation vitiated the trial and the action was discriminatory. In the alternative, even if the trial was not vitiated as a whole, Ethyl Wong's testimony must be excluded from consideration and the appeal reheard on facts here or in the High Court".*

41. *Dealing with the question whether Ethyl Wong should have been prosecuted along with other accused, this Court opined:*

"The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. Ethyl Wong was protected by s. 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness...."

42. *Dealing with the immunity conferred under Section 132, this Court held thus:*

"Now there can be no doubt that Ethyl Wong was a competent witness. Under Section 118 of the Indian Evidence Act all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them for reasons indicated in that section. Under Section 132 a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any criminal proceeding (among others) upon the ground that the answer to such question will incriminate or may tend directly or indirectly to expose him to a penalty or forfeiture of any kind. The safeguard to this compulsion is that no such answer which the

witness is compelled to give exposes him to any arrest or prosecution or can it be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. In other words, if the customs authorities treated Ethyl Wong as a witness and produced her in court, Ethyl Wong was bound to answer all questions and could not be prosecuted for her answers. Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks Section 132 (proviso). In India the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided but it was necessary to give this protection. **The protection is further fortified by Article 20(3) which says that no person accused of any offence shall be compelled to be a witness against himself.** This article protects a person who is accused of an offence and not those questioned as witnesses. A person who voluntarily answer questions from the witness box waives the privilege which is against being compelled to be a witness against himself, because he is then not a witness against himself but against others. Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself. In this respect the witness is in no worse position than the accused who volunteers to give evidence on his own behalf or on behalf of a co-accused. There too the accused waives the privilege conferred on him by the article since he is subjected to cross-examination and may be asked questions incriminating him."

[emphasis supplied]

43. In substance, this Court held that once the prosecution chose to examine Ethyl Wong as a witness she was bound to answer every question put to her. In the process, if the answers given by Ethyl Wong are self-incriminatory apart from being evidence of the guilt of the others she could not be prosecuted on the basis of her deposition in view of the proviso to Section 132 of the Evidence Act. This Court's conclusions that "in India the privilege of refusing to answer has been removed" and that "the safeguard to this compulsion" in our opinion, are clearly in tune with the dissenting opinion expressed by Ayyar, J. in Gopal

Doss's case. This Court opined that the proviso to Section 132 of the Evidence Act is a necessary corollary to the principle enshrined under Article 20(3) of the Constitution of India which confers a fundamental right that "no person accused of any offence shall be compelled to be a witness against himself." Though such a fundamental right is available only to a person who is an accused of an offence, the proviso to Section 132 of the Evidence Act creates a statutory immunity in favour of a witness who in the process of giving evidence in any suit or in any civil or criminal proceeding makes a statement which criminales himself. Without such an immunity, a witness who is giving evidence before a Court to enable the Court to reach a just conclusion (and thus assisting the process of law) would be in a worse position than an accused in a criminal case.

44. The sweep of Article 20 fell for consideration of this Court in *Nandini Satpathy v. P.L. Dani & Another*, (1978) 2 SCC 424. Justice V.R. Krishna Iyer spoke for the bench. (i) It was a case where a crime under the Prevention of Corruption Act and certain other offences under the Indian Penal Code came to be registered against Nandini Satpathy, former Chief Minister of Orissa.

(ii) This Court examined the scheme of Article 20(3) and Section 161(2) and opined that "..... we are inclined to the view, terminological expansion apart, the Section 161(2) of the CrPC is a parliamentary gloss on the constitutional clause". This Court also recognised that protection afforded by Section 161(2) is wider than the protection afforded by Article 20(3) in some respects. "...The learned Advocate General, influenced by American decisions rightly agreed that in expression Section 161(2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20(3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161(2). This latter provision meaningfully uses the expression 'expose himself to a criminal charge'. Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges. In Article

20(3), the expression 'accused of any offence' must mean formally accused in praesenti not in futuro - not even imminently as decisions now stand."

(iii) This Court opined that there is "cluster of rules" commonly grouped under the term 'privilege against self-incrimination'. The origins of such privilege against self-incrimination are traceable to a sharp reaction to the practice of the court of Star Chamber which readily convicted persons on the basis of self-incrimination. Such a rule of the common law is embodied in Article 20(3) of the Constitution of India.

(iv) This Court opined that the protection of Article 20(3) is available not only to a person who is facing trial for an offence before a Court of law but even to a person embryonically accused by being brought into police diary. In other words, 'suspects' but 'not formally charged' are also entitled for the protection of Article 20(3).

45. The rule against self-incrimination found expression in Indian law much before advent of the Constitution of India [under Article 20(3)]. Facets of such rule are seen in (i) Section 161 Cr.P.C., 1898. Sub-section (1) authorised a police officer investigating a case to examine any person "supposed to be acquainted with the facts and circumstances of the case". Sub-section (2) exempted such person from answering the questions "which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture". Section 161 of the Cr.P.C., 1973 corresponds to Section 161 of the Cr.P.C., 1898. Sub-sections (2) of both the old and new Code are substantially identical[7].

(ii) Another facet of the rule against self-incrimination finds expression in Sections 25[8] and 26[9] of the Evidence Act which make a confession made to a police officer or a confession made while in the custody of the police inadmissible in evidence.

(iii) The proviso to Section 132 of the Evidence Act, in our opinion, embodies another facet of the rule against self-incrimination.

46. Section 132 existed on the statute book from 1872 i.e. for 78 years prior to the advent of the guarantee

under Article 20 of the Constitution of India. As pointed out by Justice Muttusami Ayyar in Gopal Doss (supra), the policy under Section 132 appears to be to secure the evidence from whatever sources it is available for doing justice in a case brought before the Court. In the process of securing such evidence, if a witness who is under obligation to state the truth because of the Oath taken by him makes any statement which will criminate or tend to expose such a witness to a "penalty or forfeiture of any kind etc.", the proviso grants immunity to such a witness by declaring that "no such answer given by the witness shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding". We are in complete agreement with the view of Justice Ayyar on the interpretation of Section 132 of the Evidence Act.

47. The proviso to Section 132 of the Evidence Act is a facet of the rule against self incrimination and the same is statutory immunity against self incrimination which deserves the most liberal construction. Therefore, no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Evidence Act on the basis of the "answer" given by a person while deposing as a "witness" before a Court.

48. In the light of our above discussion, we are of the opinion the High Court rightly refused to summon PW64 as an accused to be tried alongwith the appellant and others.

49. *Before we part with this case, we must also place on record that during the argument and in the written submission filed on behalf of the appellant, a point is sought to be made that PW64 could not have been examined as a witness without securing pardon under Section 306 Cr.PC.*

52. *The High Court recorded the conclusion that the examination of PW64 as a prosecution witness without securing pardon under Section 306 Cr.PC is illegal if PW64 is a party to the conspiracy alongwith A2 and A3 without assigning any reason in support of such a conclusion.*

53. *The question whether prosecution could have examined somebody as a witness against whom there is some material indicating his participation in a crime fell for the consideration of this Court on two occasions in Laxmipat Choraria & Others v. State of Maharashtra, AIR 1968 SC 938 and A.R. Antulay v. R.S. Nayak & Another, (1988) 2 SCC 602.*

54. *We have already taken note of the relevant facts and the decision of this Court in Choraria case. The relevant facts of A.R. Antulay case are as follows. Before the "trial Court" it was contended by Antulay that the examination of some of his alleged co-conspirators as witnesses and proposal to examine some more of them is legally not tenable and they must be arrayed as accused. Such a contention was negated by the trial Judge. Aggrieved by the same, Antulay carried the matter in appeal to this Court. Unfortunately, the majority judgment did not consider this aspect. It is only Justice Venkatachaliah, as His Lordship then was, who in his dissenting judgment considered this aspect and held as follows:*

"133. An accused person cannot assert any right to a joint trial with his co-accused. Normally it is the right of the prosecution to decide whom it prosecutes. It can decline to array a person as a co-accused and, instead, examine him as a witness for the prosecution. What weight is to be attached to that evidence, as it may smack of the testimony of a guilty partner, in crime, is a different matter. Prosecution can enter Nolle prosequere against any accused-person. It can seek to withdraw a charge against an accused person. These propositions are too well settled to require any further elaboration. Suffice it to say that the matter is concluded by the pronouncement of this Court in Laxmipat Choraria v. State of Maharashtra: 1968CriLJ1124 where Hidayathullah J referred to the argument that the accomplice, a certain Ethyl Wong in that case, had also to be arrayed as an accused and repelled it, observing:

Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks Section 132 (proviso).

...The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a

smugglers' ring. Ethyl Wong was protected by Section 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence.

134. On this point, really, appellant cannot be heard to complain. Of the so called co-conspirators some have been examined already as prosecution witnesses; some others proposed to be so examined; and two others, it would appear, had died in the interregnum. The appeal on the point has no substance and would require to be dismissed. We must now turn to the larger issue raised in the appeal."

55. In the light of the above two decisions, the proposition whether the prosecution has a liberty to examine any person as a witness in a criminal prosecution notwithstanding that there is some material available to the prosecuting agency to indicate that such a person is also involved in the commission of the crime for which the other accused are being tried requires a deeper examination.

56. Unfortunately before us, except asserting the proposition no clear submissions are made in this regard. In the circumstances, we do not propose to examine the proposition in the present case. However, in view of the fact Section 307 Cr.P.C. authorizes even a Court conducting trial to tender pardon to such a person, we believe that the ends of justice in this case would be met by directing the trial Court to grant pardon in favour of PW64 after following the appropriate procedure of law and record his evidence afresh."

25. CONCLUSION:-

Thus keeping with the view of the Hon'ble Apex Court in the Judgments relied upon by this Court, PW-3, Prabir Kumar Basu is entitled to the benefit of Section 132 of the Evidence Act and also

**Section 307 of the Cr.P.C. (R. Dineshkumar @ Deena Vs State Rep.
By Inspector of Police and Ors. (Supra)).**

- 26. CRR 2447 of 2019 is allowed.**
- 27.** The order dated 06.12.2018 passed by the Learned Special Judge, 3rd Special Court, Bankshall, Kolkata, West Bengal in Spl. Case No.33/2007 arising out of RC-51(A)/1994 of CBI, ACB, Kolkata, **being not in accordance with law is set aside.**
- 28. The Trial Court shall proceed with the trial from the date prior to the date of the order under revision.**
- 29.** All connected applications, if any, stand disposed of.
- 30.** Interim order, if any, stands vacated.
- 31.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 32.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)