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

Date of decision: 08.01.2024

+ **CRL.M.C. 954/2022 & CRL.M.A. 4134/2022**

ARUN KUMAR GOENKA Petitioner
Through: Ms.Rebecca M. John, Sr. Adv.
with Mr.P.S. Singhal, Mr.Pravir
Singh, Ms.Anushka Baruah and
Mr.Siddhant Malik, Advs.

versus

CENTRAL BUREAU OF INVESTIGATION Respondent
Through: Mr.Ripu Daman Bhardwaj, SPP
with Mr.Kushagra Kumar and
Mr.Abhinav Bhardwaj, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed by the petitioner challenging the Order dated 14.02.2022 (hereinafter referred to as 'Impugned Order') passed by the learned Special Judge (PC Act), CBI, Rouse Avenue Courts, New Delhi (hereinafter referred to as 'Trial Court') in CC No. 277/2019 titled ***CBI v. M/s Premier Vinyl Flooring & Ors..***

2. By the Impugned Order, the learned Trial Court was pleased to observe that once the respondent herein has filed the list of un-relied documents, the Court cannot get into another inquiry by assuming that the respondent herein may have not furnished the complete list of un-

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relied documents. The Court further held that there is no provision in the Code of Criminal Procedure, 1973 (In short, 'CrPC') which requires the Court to consider if the list of un-relied documents filed by the respondent herein is complete or not. The Court observed as under:

“35. If CBI has not filed any relevant document with charge-sheet or did not mention in the list of unrelieved documents, obviously the consequence would be against it. But all these facts can be well appreciated at the appropriate judicial stage in the trial. As noted above, the inquiry proceedings before charge has been going on for the last 20 years. This court when will consider the case of CBI for the purpose of charge, accused would be within their right to raise that CBI had intentionally withheld certain documents, which could have proved different facts or defence of accused persons. At this stage of the inquiry when this court cannot express anything on the facts and merits of the matter, it would be far too adventurous and delaying to go into the inquiry as to whether certain other documents were seized by the CBI or not and why same were not mentioned in the list of unrelieved documents. Investigating officer may be in its wisdom returned or did not keep any such documents. But this court would consider the consequence of the same at appropriate judicial stage.

36. I feel pained to note repeatedly in each of order of this court, that this matter is already 20 years or more old and has not reached to the stage of charge. Therefore, going into an inquiry which is otherwise not recognized under the law to ascertain if the list of unrelieved documents of CBI is complete or not, to my mind would rather defeat the judicial process. No doubt, it is to be ensured that documents which have tendency to prove the innocence of the accused, must come on the judicial record.

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But if for any reason same either not collected or withheld by the investigating agency, prosecution would suffer for the same. However, this fact can be well examined only at the stage of charge and not at this stage.

37. It has already come in the reply of CBI that it has already supplied some of the unrelieved documents. Certain unrelieved documents like 56 bills, documents pertaining to Indian Embassy in Turkmenistan has already been submitted in the court in compliance to the order dated 20.11.2013. Similarly, certain other documents of correspondence with Indian Embassy in Turkmenistan was also filed in the court as per the order dated 18.7.2019. Similarly, 14 swift messages, 25 goods arrival registers (unrelieved documents) were also filed in compliance to order dated 27.7.2019. Moreover, letter dated 20.7.98 and documents furnished along with the remand application dated 22.12.99 already part of judicial record.

38. It is matter of record that while hearing the arguments on these applications, CBI was given another opportunity by order dated 5.2.2022 to furnish any other documents, if any, lying on the file/case diary, apart from the documents lying in the Malkhana of the CBI. However, despite having given such opportunity, no other list of unrelieved documents has been filed.

39. Therefore, I find that there is no legal necessity for giving directions to the CBI to file any other list of unrelieved documents. Hence, the applications accused no.3 and 10 are hereby dismissed."

3. On the present petition, this Court, on hearing the counsels for the parties, on 14.03.2022, passed the following directions:

"In as much as it has been submitted on behalf of the petitioner that there are documents as had been prayed vide the application placed on record as Annexure P15 dated 17.01.2022

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which have not been supplied by the CBI so far with it having been submitted on behalf of the CBI by the learned SPP for the CBI that all documents in possession of the CBI have already been supplied to the petitioner except the case diary which the CBI would not supply, the list detailing the specific documents which are stated by the petitioner to be in possession of the CBI be filed during the course of the day with the copy being supplied to the CBI and the affidavit of the Investigating Officer in response to the aspect whether the said documents are available or not available with the CBI and whether they have been since supplied to the petitioner be placed on record within three days, in view of the factum that the charges in the matter have not been framed for the last twenty years.”

4. In compliance with the above Order of this Court, the petitioner supplied a list of un-relied documents to the respondent and filed the same before this Court under a cover of index dated 14.03.2022. In response thereto, the respondent, instead of filing the affidavit of the Investigating Officer, as was directed by the Order dated 14.03.2022, filed a Compliance Report dated 29.03.2022.

5. The learned senior counsel for the petitioner submits that in paragraphs 3(1), 3(3), and 3(7) of the Compliance Report, the respondent has admitted that certain documents have not been supplied to the petitioner in spite of repeated directions of the learned Trial Court as also of this Court. In support, she has drawn my attention to various orders of the learned Trial Court, including but not limited to the Orders dated 18.07.2019 and 05.02.2022, and of this Court dated 20.12.2021 passed in CRL.M.C. 3368/2021 titled ***Arun Kumar Goenka v. Central Bureau of Investigation.***

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6. On the other hand, the learned SPP for the respondent submits that as far as the documents contained in paragraphs 3(1) and 3(7) of the Compliance Report are concerned, the same cannot be supplied to the petitioner as they form part of the Case Diary. As regards the documents mentioned in paragraph 3(3), the respondent claims that they are protected by confidentiality, since they are diplomatic communications.

7. I have considered the submissions made by the learned counsel for the parties.

8. The learned Trial Court in its Order dated 05.02.2022, has observed as under:

“Before proceeding ahead to decide these applications on merits, I find that one more opportunity is being given to CBI/HIO to give a specific reply/report that CBI does not possess any other document except the documents referred in the list of unrelieved documents already filed. CBI is directed to clarify if documents lying in any other any other file/case diary, being unrelieved, list of the same be also filed. So that this aspect should be clear before this court proceed to decide these applications”

9. This Court vide the Order dated 20.12.2021 in CRL.M.C. 3368/2021 titled **Arun Kumar Goenka v. Central Bureau of Investigation** directed as under:

“6. During the course of arguments, it is submitted by learned SPP that respondent – CBI will supply the list of unrelieved documents to the petitioner and thereafter the petitioner can point out the documents which are required by him for the purpose of addressing arguments on charge.



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7. Accordingly, respondent – CBI is directed to supply the list of unrelieved documents to the petitioner within a period of one week and thereafter petitioner shall point out to the IO, the relevant unrelieved documents which are required by him for the purpose of addressing arguments and the said documents can be supplied to him within one week so that the matter may not get delayed any further.”

10. As noted herein above, by the order dated 14.03.2022 passed in the present petition, the petitioner was directed to submit a list of documents that it claims have not been supplied to it, and for the respondents to give a response to such list on whether such documents are available with the respondent and, if so, if they have been supplied to the petitioner.

11. Paragraphs 3(1), 3(3) and 3(7) of the Compliance Report are reproduced hereinbelow:

“1) That, in respect of the documents mentioned at Para 1 of the petition, it is submitted that bills of lading submitted by M/s Borneo Shipping Ltd. vide letter dated. 30.07.1998 was mentioned in the list unrelieved document at S.No.145. A copy of the said list of unrelieved document was already supplied to the accused person. Further, letter dated 18.11.1999 of M/s Borneo Shipping Ltd. related to M/s Borneo Maritime Ltd., Hongkong is available in case diary.

Xxxx

3) That, in respect of documents mentioned at Para 3 of the petition, it is submitted that references were sent to 19 different countries via Interpol and responses were received from some countries. Copies of these documents are available in the records of CBI, BSFB, New Delhi. These correspondences (mostly photocopies) are part of Case Diary and

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confidential files. As per the available records, these have not been supplied to accused persons.

Xxxx

7) That, in respect of documents mentioned at Para 7 of the petition, it is submitted that letter dated 31.07.1998 & 19.08.1998 of Canara Bank alongwith photocopy of report of M/s SGS India Ltd. is available in Case Diary file. M/s SGS India Ltd. had submitted these reports to Canara Bank and the Bank had forwarded a photocopy of these reports to CBI. As per the records, the same has not been supplied to accused to accused person."

12. In paragraph 3(1) of the Compliance Report, the respondent admits that there is a letter dated 18.11.1999 of M/s Borneo Shipping Ltd. related to M/s Borneo Maritime Ltd., Hongkong available in the Case Diary. The Case Diary would only mention the investigation and the fact of the receipt of the said letter, however, the document would certainly be available with the respondent.

13. The Supreme Court in **V.K. Sasikala v. State**, (2012) 9 SCC 771, has held as under:

"17. Seizure of a large number of documents in the course of investigation of a criminal case is a common feature. After completion of the process of investigation and before submission of the report to the court under Section 173 CrPC, a fair amount of application of mind on the part of the investigating agency is inbuilt in the Code. Such application of mind is both with regard to the specific offence(s) that the investigating officer may consider to have been committed by the accused and also the identity and particulars of the specific documents and records, seized in the course of investigation, which supports the conclusion of the investigating officer with regard to the

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offence(s) allegedly committed. Though it is only such reports which support the prosecution case that are required to be forwarded to the Court under Section 173(5) in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the investigating officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, it is not impossible to visualise a situation whether the investigating officer ignores the part of the seized documents which favour the accused and forwards to the court only those documents which support the prosecution. If such a situation is pointed by the accused and such documents have, in fact, been forwarded to the court would it not be the duty of the court to make available such documents to the accused regardless of the fact whether the same may not have been marked and exhibited by the prosecution? What would happen in a situation where such documents are not forwarded by the investigating officer to the court is a question that does not arise in the present case. What has arisen before us is a situation where evidently the unmarked and unexhibited documents of the case that are being demanded by the accused had been forwarded to the court under Section 173(5) but are not being relied upon by the prosecution. Though the prosecution has tried to cast some cloud on the issue as to whether the unmarked and unexhibited documents are a part of the report under Section 173 CrPC, it is not denied by the prosecution that the said unmarked and unexhibited documents are presently in the custody of the court. Besides, the accused in her application before the learned trial court (IA No. 711 of 2012) had furnished specific details of the said documents and had correlated the same with reference to specific seizure lists prepared by

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the investigating agency. In such circumstances, it can be safely assumed that what has happened in the present case is that along with the report of investigation a large number of documents have been forwarded to the court out of which the prosecution has relied only on a part thereof leaving the remainder unmarked and unexhibited.

18. In a recent pronouncement in Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1 to which one of us (Sathasivam, J.) was a party, the role of a Public Prosecutor and his duties of disclosure have received a wide and in-depth consideration of this Court. This Court has held that though the primary duty of a Public Prosecutor is to ensure that an accused is punished, his duties extend to ensuring fairness in the proceedings and also to ensure that all relevant facts and circumstances are brought to the notice of the Court for a just determination of the truth so that due justice prevails. The fairness of the investigative process so as to maintain the citizens' rights under Articles 19 and 21 and also the active role of the court in a criminal trial have been exhaustively dealt with by this Court. Finally, it was held that it is the responsibility of the investigating agency as well as that of the courts to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with law. It was also held that one of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Code of Criminal Procedure. The said scheme was duly considered by this Court in different paragraphs of the report.

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20. The declaration of the law in Manu Sharma (2010) 6 SCC 1 may have touched upon the outer fringe of the issues arising in the present case. However, the positive

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advancement that has been achieved cannot, in our view, be allowed to take a roundabout turn and the march has only to be carried forward. If the claim of the appellant is viewed in the context and perspective outlined above, according to us, a perception of possible prejudice, if the documents or at least an inspection thereof is denied, looms large. The absence of any claim on the part of the accused to the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused. Absence of such a claim, till the time when raised, can be understood and explained in several reasonable and acceptable ways. Suffice it would be to say that individual notion of prejudice, difficulty or handicap in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions. If the present appellant has perceived certain difficulties in answering or explaining some part of the evidence brought by the prosecution on the basis of specific documents and seeks to ascertain if the allegedly incriminating documents can be better explained by reference to some other documents which are in the court's custody, an opportunity must be given to the accused to satisfy herself in this regard. It is not for the prosecution or for the court to comprehend the prejudice that is likely to be caused to the accused. The perception of prejudice is for the accused to develop and if the same is founded on a reasonable basis it is the duty of the court as well as the prosecution to ensure that the accused should not be made to labour under any such perception and the same must be put to rest at the earliest. Such a view, according to us, is an inalienable attribute of the process of a fair trial that Article 21 guarantees to every accused.

21. The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been

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dealt with by the High Court. The question arising would no longer be one of compliance or non-compliance with the provisions of Section 207 CrPC and would travel beyond the confines of the strict language of the provisions of CrPC and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if in a given situation the accused comes to the court contending that some papers forwarded to the court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to the accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to agree with the view taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belatedly. This is how the scales of justice in our criminal jurisprudence have to be balanced.”

14. The above view in **Sasikala** (supra) was reaffirmed by the Supreme Court in **Ankush Maruti Shinde v. State of Maharashtra**, (2019) 15 SCC 470. It was held as under:

“10. It has to be uppermost kept in mind that impartial and truthful investigation is imperative. It is judiciously acknowledged that fair trial includes fair investigation as envisaged by Articles 20 and 21 of the Constitution of India. The role of the police is

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to be one for protection of life, liberty and property of citizens, that investigation of offences being one of its foremost duties. That the aim of investigation is ultimately to search for truth and to bring the offender to book.

***10.1.** Apart from ensuring that the offences do not go unpunished, it is the duty of the prosecution to ensure fairness in the proceedings and also to ensure that all relevant facts and circumstances are brought to the notice of the court for just determination of the truth so that due justice prevails. It is the responsibility of the investigating agency to ensure that every investigation is fair and does not erode the freedom of an individual, except in accordance with law. One of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by CrPC.*

***10.2.** Nothing is allowed by the law which is contrary to the truth. In Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudences of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human rights at a much higher pedestal and the accused is presumed to be innocent till proven guilty. The alleged accused is entitled to fair and true investigation and fair trial and the prosecution is expected to play a balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.*

***10.3.** As observed by this Court in V.K. Sasikala v. State (2012) 9 SCC 771, though it is only such reports which support the*

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prosecution case that are required to be forwarded to the Court under Section 173(5), in every situation where some of the seized papers and the documents do not support the prosecution case and, on the contrary, support the accused, a duty is cast on the investigating officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself.”

(Emphasis Supplied)

15. This Court in **Central Bureau of Investigation v. M/S. Inx Media Pvt. Ltd. & Ors.** Neutral Citation No.2021:DHC:3538, has held as under:

“13. In the present case after the Court has taken the cognizance and is in the process of supplying documents, applications have been filed under Section 207 Cr.P.C. wherein to ensure a fair trial, the impugned order has been passed by the learned Special Court keeping due regard to the fact that at that stage it was deciding neither the relevancy of the unrelayed documents nor whether they were of sterling quality.

14. Learned counsel for the CBI has vehemently relied upon the decision in *Debendra Nath Padhi* (supra). In the said decision Hon'ble Supreme Court clarified that the issue before it was not about the exercise of jurisdiction for quashing under Section 482 Cr.P.C. where alongwith the petition, the accused may file unimpeachable evidence of sterling quality and on that basis seek quashing, but about the right claimed by the accused to produce material at the stage of framing of charge. In the present case, the accused are not producing any document of their own but wanting to inspect and seek documents which are in the possession of CBI and are being kept back from the Court.

15. Further contention of CBI is that the documents can be sought under Section 91 Cr.P.C. only at the stage of defence and hence

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the stage for seeking inspection of the un-relied documents in possession of the CBI and kept in CBI Malkhana has not arrived. It is trite law that an accused can build the defence not only by leading defence evidence but even while cross-examining the prosecution witness. Further, a document which is relevant and is of sterling quality can also be looked into by the Court at the time of framing of charge and the Court is not barred to exercise its power to summon or rely upon the said document at the stage of charge, if it is of sterling quality and has a crucial bearing on the issue of framing of charge. Therefore, at the time of framing of charge an accused can bring to the notice of the Court that an un-relied document recovered during the course of investigation and kept back by the investigating agency is relevant and has a bearing on the prosecution case only if the accused is aware of the said document.

16. Indubitably, while passing an order of inspection of un-relied upon documents, the Court is bound to strike a balance between the competing interest of ensuring a fair trial to the accused as also maintaining the sanctity of further investigation, in case further investigation is to be carried on. Case of learned counsel for the CBI before this Court is that since further investigation is going on, permitting the accused or their representatives to inspect the documents lying in Malkhana will hinder the investigation. As noted above, the learned Trial Court directed the CBI to supply copies of all the pages/ part thereof, or the entire document to the accused persons in relation to documents only a few pages or part of document were being relied by the CBI. In relation to the documents which have not been filed in the Court, the learned Trial Court did not direct the CBI to produce the said documents in Court and held that the ends of justice would be met if the accused persons are permitted to inspect the said documents lying in the Malkhana of CBI and to find out if any

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such document is relevant or vital for their defence or is of sterling quality to demolish the very case of prosecution and after making inspection learned counsel representing these accused shall let the Court know the details of these documents so that copies thereof can be supplied to them.

17. By the impugned order, the learned trial Court has already clarified that the permission to conduct inspection being granted by the Court was not in respect of those documents in relation to which the investigation by the CBI was still pending. Therefore, the apprehension of the CBI that inspection would hinder in the further investigation is wholly unwarranted. Claim of learned counsel for the CBI is that the CBI at the moment cannot pre-empt which document would be necessary for the further investigation. In the present case charge sheet has already been filed and thus the claim of CBI that it is not aware which document would be relevant for further investigation is unwarranted."

16. In view of the above, and the repeated directions of the learned Trial Court and of this Court, the respondent cannot refuse to supply a copy of the letter referred to in paragraph 3(1) of the Compliance Report to the petitioner. In the Compliance Report, there is no reason given for not supplying these letters to the petitioner. In view of the directions passed by this Court as also by the learned Trial Court, these documents must also be supplied to the petitioner.

17. Similar direction is passed with respect to the Letters dated 31.07.1998 and 19.08.1998 of the Canara Bank, which are mentioned in paragraph 3(7) of the Compliance Report.

18. As far as the documents mentioned in paragraph 3 (3) are concerned, as the respondent is claiming confidentiality, it shall file an



affidavit in that regard claiming such confidentiality before the learned Trial Court and such application/affidavit shall be considered by the learned Trial Court in accordance with law.

19. The documents as directed to be furnished by the respondent to the petitioner by the present order, must be furnished within a period of three weeks from today.

20. It is made clear that this Court has not expressed any opinion on the merits of the claim of the petitioner or of the respondent, on the substantive allegations made in the petition and/or the relevance or the effect of these documents.

21. As the Compliance Report is not supported by the affidavit of the Investigating Officer, though this was directed to be done by the Order dated 14.03.2022 of this Court, the respondent shall file an affidavit of the IO affirming the contents of the Compliance Report. Such affidavit be filed before this Court within a period of three weeks, after supplying a copy thereof to the learned counsel for the petitioner.

22. The present petition along with the pending application is disposed of in the above terms.

NAVIN CHAWLA, J

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Click here to check corrigendum, if any

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