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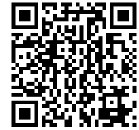

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: 22.05.2024

\+ **CRL.M.C. 4107/2023 & CRL.M.A. 5116/2024**

CENTRAL BUREAU OF INVESTIGTATION ..... Petitioner

Through: Mr. Atul Guleria, SPP for CBI with Mr. Shubham Goyal, Advocate.

versus

R. VASUDEVAN & ORS. ..... Respondents

Through: Mr Kapil Sibal, Sr. Advocate, Mr Mohit Mathur, Sr. Advocate, Mr P. K. Dubey, Sr. Advocate with Mr Atul Buchar, Advocate for R-1.
Mr. P.K. Dubey, Sr. Advocate with Mr. Arshdeep Khurana, Mr. C. Kanojia, Ms. C.B. Bansal, Mr. Mudit Jain, Mr. Ayush Goswami and Mr. Rudraksh Nokra, Advs. for R-2.
Mr. Vinod Kumar, Mr. Rohit Bhardwaj, Mr. Harsh Srivastava, Mr. Ankur Khurana, Mr. Shashank Sharma and Mr. Shiv Nath Sawhney, Advs. for R-3.

\+ **CRL.M.C. 8885/2023 & CRL.M.A. 33170/2023**

CENTRAL BUREAU OF INVESTIGTATION ..... Petitioner

Through: Mr. Atul Guleria, SPP for CBI with Mr. Shubham Goyal, Advocate.

versus

R. VASUDEVAN & ORS. ..... Respondents

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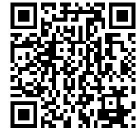

Through: Mr. Rajiv Nayyar and Mr. Arunabh Choudhary, Sr. Advocates with Mr. Arshdeep Khurana, Mr. Mudit Jain, Mr. Harsh Srivastava, Mr. Rudraksh Nakra and Mr. Ayush Goswami, Advs. for R-1.
Mr. P.K. Dubey, Sr. Advocate with Mr. Arshdeep Khurana, Mr. C. Kanojia, Mr. Mudit Jain, Mr. Ayush Goswami, Mr. Harsh Srivastava and Mr. Rudraksh Nokra, Advs. for R-2.
Mr. Vinod Kumar, Mr. Rohit Bhardwaj, Mr. Harsh Srivastava, Mr. Ankur Khurana, Mr. Shashank Sharma and Mr. Shiv Nath Sawhney, Advs. for R-3.

CORAM:
HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

CRL.M.C. 4107/2023 & CRL.M.A. 5116/2024

1. The present petition has been filed seeking following relief:-

> "*(i) Set aside the impugned order dated 13.05.2022 to the extent of dismissal of application for placing on record Hard Disks containing video footage dated 23.11.2009 of Hotel Sheraton as additional documents;*
>
> *(ii) Direct the Ld. Special Judge to take on record Hard Disks containing video footage dated 23.11.2009 of Hotel Sheraton as additional documents.*"

2. The petitioner/CBI had filed an application under Section 91 CrPC seeking to place on record hard disks (hereinafter also referred to as

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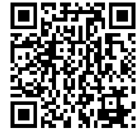

'HDDs') containing video footage dated 23.11.2009 of Hotel Sheraton as additional documents.

3. In the application it is alleged that the relevant extracts from the said HDDs containing video footage were filed in the form of CD and also supplied to the accused persons, but the High Court while discharging accused no.3 and accused no.5 *vide* order dated 20.11.2014 passed in Crl.M.C. 2455/2012 & CRL.REV.P.385/2012 had observed that *"audio and video CDs in question are clearly inadmissible in evidence for want of required certificate in terms of Section 65B of the Evidence Act."* Therefore, it became imperative for the just decision of the case to place on record HDDs containing video footage, the same being primary evidence, to prove the allegations levelled in the chargesheet against the accused persons.

4. The learned Special Judge *vide* impugned order dated 13.05.2022 dismissed the aforesaid application filed by the petitioner/CBI, *inter alia,* observing as under:

(i) The record shows that it is the case of the CBI that hard disks are not relied upon documents and this fact was also admitted by the CBI in response to the query raised by the High Court in Crl. M.C. 2455/2012.

(ii) Once it is an admitted case of the CBI that hard disks would not be relied upon in the trial then it is estopped from raising the same issue. The CBI has moved an application only after the High Court has held that audio and video CDs are inadmissible in evidence, only to fill up the lacunae and that too after a considerable period of time of more than five years when 26

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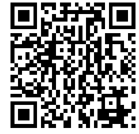

witnesses have already been examined before the court.

(iii) Admittedly, the CBI has challenged the judgment of the High Court dated 20.11.2014 passed in Crl.M.C.2455/2012 before the Hon'ble Supreme Court of India by filing a SLP (Crl.) No.3713-3716/2015, which is stated to be pending before the Hon'ble Supreme Court of India and a perusal of the SLP shows that CBI has also taken the issue of hard disks (HDDs) as a ground of challenge before the Hon'ble Supreme Court of India, therefore, the application would not be maintainable on account of pendency of the said matter before the Hon'ble Supreme Court of India.

5. Mr. Atul Guleria, SPP for the petitioner/CBI submits that at the stage when statement was made by the petitioner/CBI that hard disks would not be relied upon, the CDs on which the extracts from the hard disks had been recorded had not been declared inadmissible for want of certificate under Section 65B of the Indian Evidence Act.

6. He submits that production of hard disks is necessary or desirable for the purpose of trial as the CCTV footage which corroborate the meeting between the accused persons is a foundational piece of evidence to establish the charge of conspiracy and corruption. He places reliance on the decision of the Hon'ble Supreme Court in ***V. K. Sasikala vs. State: (2012) 9 SCC 771***, to contend that Section 91 empowers the court to issue summons for production of any document or other thing which the court considers necessary or desirable for the purposes of any investigation, inquiry, trial or another proceeding under the provisions of the Code.

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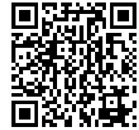

7. He submits that even otherwise this Court can allow placing on record additional evidence in the form of hard disks for the just decision of the case under Section 311 CrPC. He further contends that though under Section 311 CrPC, lacuna cannot be allowed to be filled in the prosecution case but lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from the witnesses.

8. Placing reliance on the decision of the Supreme Court in ***Zahira Habibulla H. Sheikh and Ors. vs. State of Gujarat & Ors.: (2004) 4 SCC 158,*** learned counsel contends that Section 311 CrPC and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of the Court to elicit all necessary materials by playing an active role in the evidence collecting process. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to serious pitfalls or dereliction of duty on the part of the prosecuting agency. The relevant part of the said decision on which emphasis was laid reads thus:

> *"43.* ***The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record.*** *Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not*

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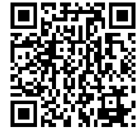

> *acting in the requisite manner.* ***The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.****"*
>
> (emphasis supplied)

9. Mr. Guleria submits that the application under Section 91 CrPC was filed by the petitioner / CBI on 13.03.2020 i.e. when the prosecution evidence was going on, but the learned Trial Court took more than two years to decide the application and subsequent thereto the present petition is pending before this Court since last one year approximately. According to Mr. Guleria, the right of the petitioner stood crystalized on 13.03.2020, therefore, the question of delay in filing the application does not arise.

10. He submits that no outer limit for concluding a criminal trial could be set, especially in criminal cases relating to corruption in public offices. To make good his contention, reliance was placed by him on the decision of the Hon'ble Supreme Court in ***P. Ramachandra Rao v. State of Karnataka (2002) 4 SCC 578.***

11. Additionally, he submits that ultimate objective of a criminal trial is to unearth complete truth before reaching a lawful conclusion so that ends of justice are subserved. He submits that in cases relating to high level corruption in public offices, it is the bounden duty of the Trial Court to not stifle a legitimate prosecution in a nonchalant manner. In support of his submission, reliance has been placed on the decision of the Hon'ble Supreme Court in ***V. K. Sasikala*** *(supra)****, Zahira Habibulla H. Sheikh***

VERDICTUM.IN

(supra) and ***Mohanlal Shamji Soni vs. Union of India & Anr.: 1991 Supp. (1) SCC 271***. He submits that the learned Trial Court has erred in law in failing to perform its bounden duty to ensure that best evidence should come on record.

12. It is further contended by Mr Guleria that while rejecting the application of the petitioner under Section 91 CrPC seeking permission to place on record original video footage, the learned Trial Court has placed reliance on the judgment dated 20.11.2014 passed in Crl.M.C.2455/2012, whereby the video CDs were held to be inadmissible and also on the fact that the SLP preferred against the said order is still pending. He submits that the learned Trial Court failed to consider that findings given in order dated 20.11.2014 are relating to CDs and the question of admissibility of the CDs is pending before the Hon'ble Supreme Court but the pendency of the said SLP has no bearing on the prayer seeking permission to place on record original hard disks.

13. He submits that the documents can be brought on record at any stage of the trial and such trial ends only with the pronouncement of sentence and not merely upon closure of evidence. To buttress his contention, Mr Guleria places reliance on the decision in ***Sukhpal Singh Khaira vs. The State of Punjab: (2023) 1 SCC 289***, the relevant part of which reads as under:

> *"29.* ***The above aspects would indicate that even after the pronouncement of the judgment of conviction, the trial is not complete since the learned Sessions Judge is required to apply her/his mind to the evidence which is available on record to determine the gravity of the charge for which the accused is found guilty****; the role of the particular accused when there is more than one accused involved in an offence*

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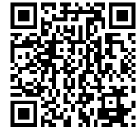

> *and in that light, to award an appropriate sentence.* ***Therefore, it cannot be said that the trial is complete on the pronouncement of the judgment of conviction alone, though it may be so in the case of acquittal as contemplated under Section 232CrPC****, since in that case there is nothing further to be done by the learned Judge except to record an order of acquittal which results in conclusion of trial."*
>
> (emphasis supplied)

14. He further contends that the concession given by the petitioner/CBI regarding non-reliance on original hard disks is a concession in law thus, the same will not operate as estoppel. Further, the said concession was only conditional as the petitioner/CBI had categorically reserved its right to rely on the hard disks (HDDs) in future.

15. Referring to the provisions of Section 165 of the Indian Evidence Act, 1872 he submits that the court cannot dispense with primary evidence of a document and for this reason also the learned Trial Court ought to have allowed the petitioner/CBI to place on record the original hard disks, which is the primary evidence.

16. It is thus, urged by Mr. Guleria that the impugned order be set aside and consequently the application under Section 91 CrPC filed by the petitioner / CBI be allowed.

17. *Per contra*, Mr Kapil Sibal, learned senior counsel for the respondent no.1 submits that in the present case the FIR was registered as early as on 23.11.2009 and the hard disks were seized by the CBI from PW-5, namely, Amrit Ghotra *vide* seizure memo dated 28.11.2009. Thereafter, the CDs of the extracts of said hard disks were forwarded by CBI, Kolkata to CBI,

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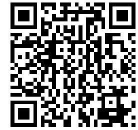

Delhi on 18.12.2009. The chargesheet was filed on 04.10.2010 but despite the hard disks having been seized prior to filing of chargesheet, the same were neither deposited in the learned Trial Court in terms of Section 102 CrPC nor made part of the chargesheet.

18. Mr. Sibal submits that an application seeking filing of hard disks came to be filed only on 13.03.2020, but prior thereto on different occasions the petitioner / CBI took categorical stand not to rely upon the hard disks.

19. He submits that in the reply dated 17.01.2012 given in response to the application dated 24.12.2011 of the accused no.3 filed under Section 207 CrPC whereby copy of the hard disks were sought, it was stated by the CBI that the hard disks/clones have not been supplied nor have they been deposited in the Court as same are not being relied upon at present. Even the IO who had filed chargesheet stated that the copies of all relied upon documents have been supplied to the accused persons in terms of Section 207 CrPC.

20. According to Mr. Sibal, the charges were framed by the learned Special Judge on 24.05.2012. Even thereafter an inspection application was filed by accused no.5 and the same bears an endorsement that no CD mentioned in seizure memo i.e. D-26 was found on record. Likewise, 15 CDs mentioned in D-19 were not on record. To buttress his contention, Mr. Sibal invited attention of the Court to the said inspection application dated 13.07.2012.

21. Further referring to the statement of Amrit Ghotra, who was examined as PW-5 by the CBI, Mr. Sibal submits that the said witness has only proved the seizure memo (D-26) but neither hard disks nor CDs have been proved

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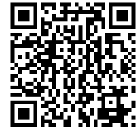

through him.

22. Inviting the attention of the Court to the additional submissions dated 26.09.2014 filed by the CBI in Crl.M.C.2455/2012, Mr. Sibal contends that in response to the queries of the Court during the proceedings on 04.07.2014 and 22.08.2014 in Crl.M.C.2455/2012 and Crl.Rev.P.385/2012 *[petitions of accused challenging the order on charge and the charges framed]*, CBI reaffirmed that it had made a statement that hard disks will not be relied upon in the trial. The relevant queries no.17 and 19 and response thereto, reads thus:

> *"Q-17:Did CBI made a statement in the Trial Court that the Hard Disk containing the video recording and the Hard Disk containing the audio recordings would not be relied upon in the trial? Legal positions thereof?*
>
> *Ans: **Yes**. However the Hard Disk of Hotel Sheraton in sealed condition are available to assist the court with regard to the purity/authenticity of the video footage dated 23.11.2009.*
>
> *XXXX XXXX XXXX*
>
> *Q-19: Where are the 15 CDs along with 6 CDs of sample voices sent to CFSL and 2 Hard Disks of Hotel Sheraton?*
>
> *Ans: The above articles in sealed condition (15 CDs along with 6 CDs of sample voices with seal of CFSL) are lying in the Malkhana of CBI."*
>
> (emphasis supplied)

23. He submits that subsequently a decision was rendered by this Court on 20.11.2014 passed in Crl.M.C. 2455/2012 and Crl.Rev.P. 385/2012, whereby accused no.3 and accused no.5 were discharged and the video CD, as well as, audio CD, were held to be inadmissible. The said decision was

VERDICTUM.IN

challenged by the petitioner/CBI before the Hon'ble Supreme Court of India by filing an SLP (Crl.) No.3713-3716/2015, which is still pending.

24. Mr Sibal submits that total 24 witnesses have been examined by the CBI, of which 13 witnesses were examined post 2018, but it is only on 13.03.2020 that the petitioner/CBI filed an application under Section 91 CrPC seeking permission to place on record the hard disks, after the respondents/accused had revealed their entire defence.

25. Mr. Sibal submits that application under Section 91 CrPC came to be dismissed *vide* impugned order dated 13.05.2022 and the present petition was filed on 30.05.2023 but no stay of the trial proceedings was either insisted upon or granted. In the meanwhile, the trial and the final arguments were concluded and the judgment was reserved for pronouncement. He submits that at this stage the process of pronouncing the judgment cannot be impeded. Reliance in this regard was placed on decision dated 02.02.2024 of Hon'ble Supreme Court in ***Manoj Daga v. Sanjay Nilkanth Derkar, SLP(C) No. 1674-1675 of 2024.***

26. Mr Mohit Mathur, learned Senior Counsel, who also appeared on behalf of the respondent no.1, submits that a right of an accused under Section 207 CrPC is a facet of Article 21 of the Constitution of India and it ensures fair trial. According to him, Section 207 CrPC imposes a duty on the prosecution to supply all relied upon documents. Expanding on his argument, he submits that the hard disks were consciously and deliberately excluded from the trial and the accused persons led their defence and completed the entire trial premised on the stand of the petitioner/CBI that the hard disks will not be relied upon.

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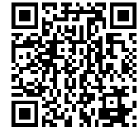

27. He submits that it is the requirement of law that all documents through which the prosecution seeks to prove its case are to be supplied to the accused at the inception so as to enable the accused to prepare his defence accordingly. At a later stage, the prosecution cannot be permitted to fill up lacunae. In support of his contention, Mr. Mathur places reliance on the decision of the Hon'ble Supreme Court in ***Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal & Ors.: (2020) 7 SCC 1***.

28. He submits that the petitioner/CBI had made a categorical statement of fact that it shall not rely upon the hard disks during the trial and this concession of fact cannot be withdrawn and is binding on the petitioner/CBI. According to him the present is not a case of inadvertence wherein hard disks were mistakenly not relied upon and not deposited in Court but it is a concession / informed decision taken by the CBI not to rely upon the hard disks during trial which was communicated to the accused in unequivocal terms.

29. He submits that the hard disks sought to be placed on record cannot be permitted also for the reason that it will cause grave prejudice to the accused persons for the reason that the accused persons have disclosed their entire defence during the trial.

30. Next, it is submitted by Mr Mathur that the reason which has been put forth by the petitioner/CBI for not making the hard disks part of the documents in the chargesheet through which the prosecution now seeks to prove its case, is that video CD made from the said hard disks was being relied upon by the petitioner/CBI, however, subsequently, this Court vide judgement dated 20.11.2014 held the video CD as inadmissible, which

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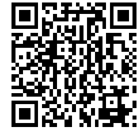

furnished the reason to place on record the primary evidence in the form of hard disks. Repelling this argument of the petitioner/CBI, Mr. Mathur invites the attention of the Court to the order dated 02.05.2012 of learned Trial Court *(page 16 of documents filed by the respondent no.1)*, to contend that it had come on record as early as in May 2012 that the CD does not contain the portion of allegation of chargesheet sought to be proved through the said CD and despite that knowledge the petitioner/CBI never made an endeavour to file/prove the hard disks by making the same as part of the list of documents in the chargesheet.

31. He further submits that even after the judgment dated 20.11.2014, the petitioner/CBI did not seek to place on record the hard disks and proceeded with the trial. According to him, in fact, prosecution witnesses from PW-12 to PW-24 were examined by the petitioner/CBI from 2018 to 2020. He submits that the application under section 91 CrPC came to be filed only on 13.03.2020 after a delay of over 08 years from the knowledge of fact that the CD does not contain the portion of allegation of chargesheet and after a delay of almost 06 years from the date of judgment dated 20.11.2014.

32. He contends that even the present petition was filed after a delay of one year from the date of impugned order dated 13.05.2022 but intriguingly, in the petition, the CBI did not file an application seeking interim relief. In the absence of the interim relief, the trial proceeded and terminated in terms of provisions of Section 353(1) CrPC and the judgment was reserved by the learned Trial Court.

33. Mr. Mathur submits that once a judgment is reserved for pronouncement, the only remedy that is equally available to both the

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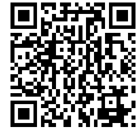

prosecution and the accused depending on the outcome of the case, is an appeal. Placing reliance on the decision in ***Vinod Kumar Singh vs. State of Rajasthan: 2008 SCC OnLine RAJ 418***, Mr Mathur contends that trial stands terminated on the reserving of a case for pronouncement of judgment and no application under Section 311 CrPC, or for that matter under section 91 CrPC, could be entertained at that stage.

34. Lastly, Mr Mathur contends that Article 21 of the Constitution of India also ensures fairness in the trial and the prosecution cannot fill lacunae in its case and accused cannot be taken by surprise at the end of trial, once he has argued his entire case and revealed his defence, as well as, position in law. He, therefore, urges the Court that the petition of the petitioner/CBI be dismissed.

35. I have heard the learned SPP for the petitioner, as well as, the learned Senior Counsel for the respondents and have perused the material on record.

36. It is not in dispute that the hard disks were seized by the CBI prior to the filing of chargesheet, but the same were neither deposited with the learned Trial Court in terms of Section 102 CrPC nor were made part of the chargesheet.

37. From the record it is evident that the petitioner/CBI at following stages had spelled out its stand in unequivocal terms that it will not be relying upon the hard disks during trial:

i.In the reply dated 17.01.2012 filed to an application dated 24.12.2011 of accused no.3 under Section 207 CrPC whereby copy of the hard disks were sought, it was stated by the CBI that the hard disks/clones have not been supplied nor have they been deposited in the Court as

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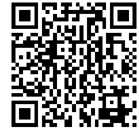

same are not being relied upon at present.

ii. The IO who had filed chargesheet, namely, D.S. Chauhan, was examined on oath as CW-1 on 22.02.2012. He stated that the copies of all relied upon documents have been supplied to the accused persons in terms of Section 207 CrPC. Thus, the proceedings under Section 207 CrPC were closed as complied with on the basis of above stand of the CBI / statement of IO.

iii. The additional submissions dated 26.09.2014 filed by the CBI in Crl. M.C. 2455/2012, in response to the queries of the Court during the proceedings on 04.07.2014 and 22.08.2014 in Crl.M.C.2455/2012 and Crl.Rev.P.385/2012 *[petitions of accused challenging the order on charge and the charges framed]* the CBI reaffirmed that it had made a statement that hard disks will not be relied upon in the trial.

38. Subsequent thereto, the trial proceeded and the CBI examined all the witnesses and closed its evidence on 01.11.2023 in terms of Section 242 CrPC. Thereafter, the defence also closed its right of defence evidence under Section 243 CrPC. Then, the statement of the accused under Section 313 CrPC was recorded on 21.11.2023 and additional statement under Section 313 CrPC was recorded on 13.12.2023. Thus, it goes without saying that at various stages of the trial the accused persons must have unfolded their entire defence premised on the concession made by the petitioner/CBI to the effect that it would not be relying upon the hard disks, therefore, if at this stage the petitioner/CBI is allowed to place on record the hard disks, it will cause grave prejudice to the accused.

39. It is a cardinal principle of criminal jurisprudence that the accused is

VERDICTUM.IN

to be supplied with all documents that the prosecution seeks to rely upon, before the commencement of the trial. There cannot be piecemeal disclosure of material on which the prosecution seeks to base its case. The requirement to disclose the entire incriminating material prior to framing of charge stems from the right of the accused of fair opportunity to meet the case of the prosecution and to effectively put forth the defence.

40. To elaborate, such requirement is imperative to afford a meaningful opportunity to the accused to defend at the following stages - firstly, prior to commencement of trial to enable the accused to contest the framing of charge and seek discharge. Secondly, in case the accused fails to seek discharge, he should have fair opportunity to cross-examine prosecution witnesses and put his defence to them. Thirdly, to enter on his defence and adduce any evidence in support thereof.

41. Thus, requirement of such full disclosure is an extremely valuable right and an essential feature of the right to a fair trial as it enables the accused to prepare for the trial before its commencement. Reference in this regard may be had to the decision of Hon'ble Supreme Court in ***Arjun Panditrao Khotkar (supra)***, wherein the Court while adverting to the question that at what stage certificate under Section 65-B of the Evidence Act could be placed on record, both in the context of civil cases, as well as, the criminal trials, observed as under:

> *"52. We may hasten to add that Section 65-B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , this Court did observe that such certificate must accompany the electronic record when the*

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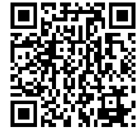

same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. ***When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of CrPC.***

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54. It is pertinent to recollect that the stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet. When a criminal court summons the accused to stand trial, copies of all documents which are entered in the charge-sheet/final report have to be given to the accused. Section 207 CrPC, which reads as follows, is mandatory. Therefore, the electronic evidence i.e. the computer output, has to be furnished at the latest before the trial begins. The reason is not far to seek; this gives the accused a fair chance to prepare and defend the charges levelled against him during the trial. The general principle in criminal proceedings therefore, is to supply to the accused all documents that the prosecution seeks to rely upon before the commencement of the trial. The requirement of such full disclosure is an extremely valuable right and an essential feature of the right to a fair trial as it enables the accused to

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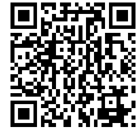

prepare for the trial before its commencement.

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56. Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under Sections 91 or 311 CrPC or Section 165 of the Evidence Act. *Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law.*

(emphasis supplied)

42. Concomitant with an unfettered right of fair trial that flows from Article 21 of the Constitution of India, there is a corresponding duty cast upon the criminal courts under Section 207 CrPC to ensure that all documents that the prosecution seeks to rely upon are supplied to the accused before the commencement of trial.

43. No doubt it is the duty of the criminal court to allow the prosecution to correct an error in the interest of justice[1] at the later stages as well but in criminal trials where the Courts decide to exercise their powers to allow evidence to be brought at a later stage under Sections 91 or 311 CrPC or

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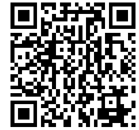

Section 165 of the Evidence Act, the same is not to be done for filling up the lacunae during the trial but only where the prosecution has mistakenly not filed a document. At the same time Court has also to ensure that permitting such evidence at a later stage in the Criminal trial should not result in serious or irreversible prejudice to the accused.[2]

44. In ***Mohanlal Shamji Soni*** (supra) the Hon'ble Supreme Court while dealing with provisions of Section 540 of the Criminal Code of Procedure 1898 which is *pari materia* with Section 311 CrPC, 1973 held that lacuna left by the prosecution cannot be allowed to be filled to the disadvantage of the accused or to cause serious prejudice to the defence of the accused. The relevant observations read thus:

> *"18...Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results.* ***Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused*** *or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties."*
>
> (emphasis supplied)

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[1] Mina Lalita Baruwa v. State of Orissa, (2013) 16 SCC 173

[2] State of Karnataka v. T. Naseer @ Nasir @ Thandiantavida Naseer @ Umarhazi @ Hazi & Ors., 2023 SCC OnLine SC 1447 ; Arjun PanditRao Khotkar (supra) [para 56]

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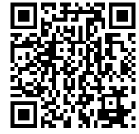

45. Likewise, in ***Rajendra Prasad v. Narcotic Cell*, (1999) 6 SCC 110**, the Hon'ble Supreme Court in the context of Section 311 CrPC observed that mistakes of not adducing proper evidence or failing to bring relevant material on record could be permitted to be rectified only when such mistakes are due to any "oversight" or "inadvertence". The relevant observations read as under:

> *"8. **Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna**. **No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified**. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."*
>
> (emphasis supplied)

46. Similarly, a three Judge bench in **Arjun Panditrao Khotkar** (supra), observed that in a criminal trial it is assumed that the prosecution has concretised its case against an accused before commencement of the trial and the prosecution ought not to be allowed to fill up any lacunae during a trial. It was further observed that the only exception to this general rule is where the prosecution had "mistakenly" not filed a document, as recognised in CBI v. R.S. Pai.[3] The relevant extract reads as under:

[3] (2002) 5 SCC 82

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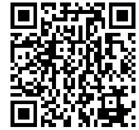

> "55. **In a criminal trial, it is assumed that the investigation is completed and the prosecution has, as such, concretised its case against an accused before commencement of the trial. It is further settled law that the prosecution ought not to be allowed to fill up any lacunae during a trial**. As recognised by this Court in *Central Bureau of Investigation v. R.S. Pai*, (2002) 5 SCC 82, **the only exception to this general rule is if the prosecution had "mistakenly" not filed a document, the said document can be allowed to be placed on record**. The Court held as follows:
>
> > '**7.** From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. **If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court**.'"
>
> (emphasis supplied)

47. In the present case the FIR was registered on 23.11.2009 and the hard disks (HDDs) were seized by the petitioner/CBI from PW-5 Amrit Ghotra on 28.11.2009 whereas the charge sheet was filed on 04.10.2010. The justification given by the petitioner/CBI for not filing the hard disks earlier with the charge sheet is that it is only after the judgment dated 20.11.2014, whereby a Coordinate Bench of this Court held audio and video CDs as inadmissible, there arose an occasion to place the hard disks on record.

48. This submission of the petitioner/CBI is noted to be rejected.

VERDICTUM.IN

Pertinently, after passing of the order dated 02.05.2012 by the learned Trial Court, it had become apparent that the clipping/footage to support the allegation in the chargesheet that three accused persons had met in the lobby of hotel in question, could not be traced in the CD, but despite the said fact coming to the notice of the petitioner/CBI, it did not make any application for bringing the hard disks on record.

49. Even subsequent to the judgment dated 20.11.2014, the application under Section 91 CrPC was filed only on 13.03.2020 i.e., after a delay of over almost six years from the date of the said judgment. In the meanwhile, the trial proceeded. As submitted by the respondents, the prosecution witnesses from PW-12 to PW-24 were examined by the petitioner/CBI from the year 2018 to 2020. The present petition itself came to be filed after a delay of over one year from the date of the impugned order dated 13.05.2022. Intriguingly, no stay of the trial proceedings was insisted upon nor an application seeking interim relief was filed by the petitioner/CBI. Resultantly, the trial advanced to the final stage and subsequently terminated in terms of Section 353(1) CrPC[4]. What remains is the pronouncement of judgment.

50. The facts discussed above show that it was a conscious and well

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[4] 353(1) CrPC reads as under:
1) The **judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court** by the presiding officer **immediately after the termination of the trial** or at some subsequent time of which notice shall be given to the parties or their pleaders,

1. by delivering the whole of the judgment; or
2. by reading out the whole of the judgment; or
3. by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

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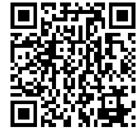

informed decision of the petitioner/CBI not to file the hard disks alongwith the final report before the commencement of trial. Even the subsequent lackadaisical approach of petitioner/CBI as noted above makes it evident that it is not a case of an inadvertent mistake or where the petitioner could not file hard disks with the final report under Section 173 CrPC due to oversight nor it is a case where the hard disks were not available for being so filed. Therefore, when the aforesaid *dicta* are applied to the factual matrix of the present case, it is found that the test to produce additional material in the form of hard disks is not satisfied.

51. The trial had commenced with the framing of charge more than a decade back on 24.05.2012. Needless to say, a fair trial is a sacrosanct principle under Article 21 of the Constitution of India and it takes within its sweep the conception of a speedy trial. The sword of Damocles cannot be allowed to forever hang on the heads of accused, falling unpredictably at the whims of the prosecution seeking to produce additional documents at will. Considering the fact that delay in the present case is caused by the petitioner/CBI and such delay has led the trial to conclude, any interference at this stage will not only violate the constitutional guarantee of a speedy trial but will cause grave prejudice to the respondents/accused who have disclosed and unfolded their entire defence.

52. In ***Manoj Daga (supra),*** the Hon'ble Supreme Court in an SLP against the order of the NCLT deprecated the entertaining of a writ petition by the High Court under Article 227 of the Constitution at the stage when arguments had been addressed before the NCLT. The Supreme Court further observed that the High Court ought not to have impeded the process

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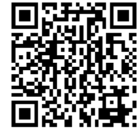

of pronouncement of judgment by the NCLT. The relevant part of the judgment reads as under:-

> *"4 The High Court was not justified in entertaining a writ petition under* Article 227 *of the Constitution at the stage when arguments had been addressed on the IA filed by the petitioner, raising an objection to the maintainability of the main petition before the NCLT. The High Court ought not to have impeded the process of the NCLT pronouncing the judgment. Thereafter, if any of the parties was aggrieved by the order of the NCLT, it was open to them to pursue their rights and remedies in accordance with law."*

53. It also needs to be adverted to that any document or other thing envisaged under Section 91 CrPC can be ordered to be produced for *"the purpose of investigation, inquiry, trial or other proceedings under the Code"*. In the context of trial, pendency of the trial is a pre-requisite for ordering production of any document therein. A perusal of sub-section (1) of Section 353 CrPC shows that the stage for pronouncement of judgment in a criminal case comes after the termination of trial. Therefore, at this stage giving a direction or permission to file additional documents, when the trial has concluded and the case is fixed for pronouncement of judgment, will not be in the interest of justice especially when it is the lack of alacrity on part of the petitioner/CBI which is responsible for this situation.

54. Reliance placed on the decision of ***Sukhpal Singh Khaira*** (supra) to contend that trial concludes with the imposition of sentence, is misplaced in the context of the present case. In the said case, question involved was whether additional accused could be summoned to stand trial after the other accused had already been convicted, in view of the phrase *"could be tried*

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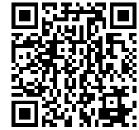

together with the accused" contained in Section 319(1) CrPC. In this backdrop it was held that where there are more than one accused and if one or more among them are acquitted and the others are convicted, the trial would stand concluded only as against the accused who are acquitted and the trial will conclude against the convicted accused with the imposition of sentence. At the same time, it was also observed that the 'conclusion of trial' is to be understood as the stage before pronouncement of the judgment. The relevant extract reads as under:

> *"23. ……. Obviously, when such power is to summon the additional accused and try such a person with the already charged accused against who the trial is proceeding, it will have to be exercised before the conclusion of trial.* ***The connotation "conclusion of trial" in the present case cannot be reckoned as the stage till the evidence is recorded, but, is to be understood as the stage before pronouncement of the judgment as already held in Hardeep Singh***[5] *since on judgment being pronounced the trial comes to a conclusion since until such time the accused is being tried by the court."*
>
> (emphasis supplied)

55. Further, Section 91 CrPC and the title of Chapter VII - *'Process to compel the production of things'* – in which the said Section occurs, presupposes that when the document is withheld or not produced, process may be initiated to compel production thereof from the custody of someone else, whereas the present is a case where the petitioner/CBI was in custody of the hard disks and it had voluntarily taken well informed and conscious decision not to file the hard disks and then did not act with promptitude despite being alive to the developments that – (i) the footage to support the

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[5] Hardeep Singh v. State of Punjab, (2014) 3 SCC 92

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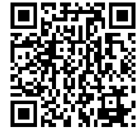

prosecution version that three accused persons had met in the lobby of hotel in question could not be traced in the CD as observed in order dated 02.05.2012, and (ii) later the CDs were held to be inadmissible by the High Court in its judgment dated 20.11.2014. For this reason, as well, Section 91 CrPC will not come to the aid of the petitioner / CBI.

56. There is yet another facet of the issue involved. The stand taken by the petitioner / CBI is that the concession given by the petitioner regarding non-reliance on original hard disks is a concession in law, thus, the same will not operate as estoppel. This contention of the petitioner is not tenable, inasmuch as repeated stand taken not to rely on the hard disks cannot be said to be a concession in law but is a concession on fact. Premised on the said concession the trial proceeded. If at this stage, the concession given by the petitioner is allowed to be withdrawn, it will cause prejudice to the accused persons who disclosed their entire evidence at different stages of the trial relying upon the said concession. It is trite that concession made on facts can be withdrawn only if it is shown that the concession had been made either on misapprehension or on misrepresentation of facts.[6] It is not the case of the petitioner/CBI that such a concession of fact was made by it either on misapprehension or on misrepresentation of facts.

57. The upshot of above discussion is that the learned Trial Court was justified in dismissing the application of the petitioner/CBI under Section 91 CrPC. No ground is made out by the petitioner to interfere with the decision of the learned Trial Court. Therefore, the petition lacks merit and is accordingly, dismissed.

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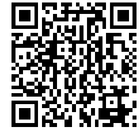

CRL.M.C. 8885/2023

58. The present petition has been filed seeking following relief:-

> *"i) Set aside the impugned order dated 09.06.2023 passed in C.C. no. 144/2019 arising out of RC-03(A)/2009/CBI/ACU-IX/N.D.C.S u/s Sec 120-B IPC r/w Sec. 7, 8, 9, 12 and 13(2) r/w 13(1)(d) of PC Act 1988, titled CBI versus R. Vasudevan & Ors, presently pending before the court of Sh. Ashwani Kumar Sarpal, Special Judge- PC Act-08, Rouse Avenue Courts, Central District, New Delhi."*

59. The challenge in the present petition is to the order dated 09.06.2023, which undisputedly is corollary of the order dated 13.05.2022, impugned in Crl.M.C. 4107/2023. The said petition has already been dismissed as above.

60. *Vide* impugned order dated 09.06.2023 the learned Special Judge (PC Act), CBI-08 has discarded the statements of the witnesses who had been cited to prove the audio and video recording in the CDs relating to the accused persons.

61. As noted in the earlier part of this judgment, the said audio and video CDs were held to be inadmissible by the judgment of this Court dated 20.11.2014 passed in Crl.M.C.2455/2012 for want of required certificate in terms of Section 65B of the Evidence Act. In this factual backdrop the learned Special Judge observed that it is of no use to call the prosecution witnesses to prove the same. Consequently, the witnesses who had to prove the CDs of audio and video recording of intercepted calls and the CCTV footage, respectively, were dropped holding that they cannot be permitted to

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Balu Sudam Khalde and Anr. vs. State of Maharashtra; 2023 SCC OnLine SC 355 (para 35)

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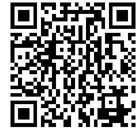

be examined.

62. The petitioner/CBI has though, challenged the judgment of this Court dated 20.11.2014 passed in Crl.M.C.2455/2012 before the Hon'ble Supreme Court of India by filing the SLP (Crl.) 3713-3716/2015, but the same is stated to be still pending before the Hon'ble Supreme Court, therefore, the finding recorded in the said judgment that audio and video CDs in question are inadmissible in evidence for want of required certificate in terms of Section 65B of the Evidence Act, have not yet been reversed.

63. Further, this Court in the earlier part of the judgment has also taken a view that the petitioner/CBI cannot be permitted to bring hard disks on record at this stage.

64. Therefore, there is no occasion for the petitioner/CBI to prove either the said CDs or the hard disks. Accordingly, the witnesses cited to prove the audio and video recordings are no more the relevant witnesses. Thus, there is no infirmity in the impugned order whereby the said witnesses have been dropped and not permitted to be examined by the petitioner/CBI.

65. In view of the above discussion, the petition is dismissed. All the pending applications are disposed of.

VIKAS MAHAJAN, J.

MAY 22, 2024
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