(2014) 02 AHC CK 0177

Allahabad High Court

Case No: Criminal Misc. Application Nos. 46295 and 46631 of 2013

R.P. Mishra and Others		APPELLANT
	Vs	
State of U.P. and Another		RESPONDENT

Date of Decision: Feb. 18, 2014

Acts Referred:

- Constitution of India, 1950 - Article 21
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 161(3), 162(1), 164, 207(3)
- Evidence Act, 1872 - Section 10, 11, 12, 13, 14

Citation: (2014) 2 ACR 1462 : (2014) 3 ADJ 215 : (2014) 3 ALJ 523

Hon'ble Judges: Amreshwar Pratap Sahi, J

Bench: Single Bench

Advocate: D.S. Mishra, Advocate for the Appellant; Anurag Khanna, Advocate for the Respondent

Final Decision: Allowed

Judgement

Amreshwar Pratap Sahi, J.

These two applications u/s 482 Cr.P.C. invoke the extraordinary jurisdiction of the High Court for quashing of the impugned order dated 11th December, 2013 passed by the Special Judge, C.B.I., Court No. 1, Ghaziabad in Special Case No. 49 of 2011 on various grounds, in particular, questioning the authority of the Court below to prohibit the counsel for the applicant-accused from confronting the prosecution witnesses during cross-examination with statements previously recorded by the C.B.I. and the Local Police.

The case in hand is the affectionately tolerated G.P.F. Scam in the District Court at Ghaziabad in which some of the accused-applicants occupied a seemingly respectful post.

I have heard Sri D.S. Mishra alongwith Sri Abhishek Kumar for the accused-applicants and having heard them, it appears that the larger question which is posed is in the background as to "Who will judge the Judges". The applicants though in a guarded way, virtually pose this question inquiringly, but respectfully, so as to virtually test the fairness of the trial Judge, and the impartiality of this Court as well, to allow them to put questions during cross-examination to the witnesses for the prosecution, who are none other than, accused turned approvers. The applicants crave for a fair trial constitutionally protected under Article 21 of the Constitution of India as they feel hurt by the impugned order of the Court below, that denies them access to facts, which they presume may be forthcoming on cross-examination to their aid. This, they seem to expect, as anticipation is the magnifying glass of coming events. This order is however no attempt to either forecast their strategy or to uncover their intentions, but the trial has arrived at a stage when the accused assert such rights as conferred by the provisions of Section 145 of the Indian Evidence Act, 1872.

Sri Daya Shanker Mishra, with his reputed vigorous oratory in vernacular Hindi, has earnestly pleaded that the trial Court has adopted an unfair approach by denying the applicants the opportunity of a comprehensive cross-examination of the prosecution witnesses on the strength of their previous statements, so as to invite the Court''s attention to possible contradictions that may be material, by virtue of any positive statement or otherwise, and also connected with relevant facts relating to the case. He contends that a prohibitory approach of the trial Court is severely injurious for a fair trial and the order impugned outrageously disrupts fair procedure as guaranteed to the defence u/s 145 of the Indian Evidence Act, 1872.

2. He submits that it amounts to abandoning a legal requirement by the Court for no plausible and sustainable reason. It is not only a denial of the rights of the accused-applicant, but also brings about an abrupt end to a legal process that is wanted by law to be continued, so as to uncover correct facts and bring the trial to a rational conclusion. The impugned order in his submission sweeps off a vital link of the trial required to be religiously observed under the statute by the Court.

3. Sri Mishra and Sri Abhishek Kumar have relied on 13 judgments through a compilation handed down to the Court that are as follows to substantiate their submissions:

1. C.B.I. v. State of U.P. and others, Application u/s 482 No. 8128 of 2012.

2. Nandini Satpathy Vs. P.L. Dani and Another,

3. Mahabir Mandal and Others Vs. State of Bihar,

4. V.K. Sasikala Vs. State rep. by Superintendent of Police,

5. R. Shaji Vs. State of Kerala,

6. Purshottam Jethanand Vs. The State of Kutch,

7. AIR 1947 67 (Privy Council)

8. Tahsildar Singh and Another Vs. The State of Uttar Pradesh,

9. Narayan Chetanram Chaudhary and Another Vs. State of Maharashtra,

10. Lalchand v. State of Haryana, LAWS (SC)-1983-10-37

11. Noor Khan Vs. State of Rajasthan,

12. Sudevanand Vs. State,

13. Birendra Chandra De and Others Vs. The State,

4. They have however extensively read paragraphs 43 to 58 of the judgment dated 26.8.2013 of a learned Single Judge of this Court in Criminal Misc. Application u/s 482 No. 8128 of 2012 C.B.I. v. State of U.P. and others, in relation to the same case as presently involved, to urge that the Court found it imperative to supply copies of such statements previously made, so as to allow the accused access into facts for the purpose of their defence that was required to be observed under law. The C.B.I. has not been acting fairly by withholding documents and facts that were necessary for the continuance of the trial. They further contend that the role of the investigation, prosecution and the Court below has been heavily criticised by another learned Single Judge while disposing of the Criminal Revision No. 3636 of 2013 and other connected revisions filed by the applicants against the order of refusal of the Court below to discharge the applicants vide judgment dated 5.2.2014.

5. It is therefore urged that in the aforesaid background, the resistant put forth by the Court at every stage and the steps taken by the C.B.I. to withhold necessary material itself indicates that the accused are heading for an unfair trial. The submission is that the refusal by the Court below, not allowing questions to be put on the basis of previous statements recorded to the prosecution witnesses, is one of the nails, if not the last, in the coffin.

6. The controversy therefore is limited to this grievance of the applicants that has been opposed vehemently by Sri Anurag Khanna, learned counsel for the C.B.I., contending that none of the rights of the accused are prejudiced, inasmuch as, the approach of the counsel for the defence before the Court below appears to be to enlarge the scope of the inquiry beyond the canvas of the allegations against the accused, on the basis of such documents, namely, the statements previously recorded which do not qualify at all as statements u/s 161 of the Criminal Procedure Code. He contends that the said documents are the gist of interrogation. Consequently, they cannot be made the basis for cross-examination as they are not statements previously recorded. He therefore contends that the applicants are not entitled to put any such questions on the strength of such documents and for that Sri Khanna has placed reliance on four judgments, three of the Apex Court and one

of the Himachal Pradesh High Court to the following effect which have been compiled and submitted alongwith his written submissions:

1. Narayan Chetanram Chaudhary and Another Vs. State of Maharashtra, .

2. State Rep. by Inspector of Police and Others Vs. N.M.T. Joy Immaculate,

3. Maha Singh Vs. State (Delhi Administration), .

4. State of H.P. Vs. Surinder Mohan and Others, .

The argument appears to be that the witnesses who have been put to cross-examination are approvers and therefore any statement given by them in the capacity of an accused, prior to having turned as approvers, cannot be made the basis for contradicting them during cross-examination. The contention appears to be that the accused applicants are trying to prolong and stretch the trial by introducing material that is absolutely alien to the case with no relevancy. Learned counsel therefore contends that the trial Court was justified in passing the impugned order which does not amount to prohibiting the accused so as to cause prejudice to them in the trial.

7. Sri Mishra for the accused, on such objections being taken, has urged that a perusal of the statements of the seven approvers that have been brought on record, would leave no room for doubt, that they are statements u/s 161 Cr.P.C. previously recorded and they are not the gist of interrogation as urged by the learned counsel for the C.B.I. He has invited the attention of the Court to such statements which have been filed as Annexure 6 to the application. He contends that the description of the said documents as a gist, which taken together run in more than 100 typewritten pages, is absolutely wrong, inasmuch as, they are full, complete and descriptive statements narrated in first person by the witnesses who have been declared as approvers by the prosecution. The contention therefore is that such statements clearly qualify as previous statements understood u/s 145 of the Indian Evidence Act and are not the gist of interrogation. He submits that the conclusion drawn by the trial Court is on a misreading of the judgments relied upon by the C.B.I. and on a complete misunderstanding of the contents of such documents which are nothing else than comprehensive statements of the witnesses u/s 161 Cr.P.C.

8. There is yet another dimension to be noted, namely, the charge-sheet dated 1.7.2010 filed by Nirbhay Kumar, Additional Superintendent of Police, C.B.I. ACB, Ghaziabad. The said charge-sheet records that investigation was also conducted with regard to the allegations of receipt of valuable things/services by various Judges/Judicial Officers. However, for want of sufficient evidence their names are not being recommended for prosecution. However, a report has been sent to the competent authorities for appropriate action for various acts of omission and commission.

9. The same charge-sheet also records the grant of pardon to seven persons who have turned approvers and they have been included in Column 12 of the charge-sheet.

10. Then the charge-sheet further proceeds to name the accused including the applicants for being put to trial.

There is another recital in the same charge-sheet for not taking action against 75 persons as their involvement could not be established or they had expired. In addition thereto, 19 persons, were recommended for discharge apart from six other persons who were named in the F.I.R. but not charge-sheeted. It is in this background that one has to further keep in mind the order of discharge in relation to 18 persons who have been extended the said benefit vide order dated 3rd June, 2011.

11. Before delving into the issues, it would be apt to refer to the judgment of the learned Single Judge between the parties in Criminal Misc. Application 482 No. 8128 of 2012 that was filed by the Central Bureau of Investigation in relation to the same subject-matter pertaining to the supply of such documents and statements on the basis whereof the applicants now pray for cross-examining the witnesses. At the very outset it may be put on record that Sri Anurag Khanna has informed that the said order dated 26th August, 2013 has not been assailed by the C.B.I. and to that extent it is final.

12. It would therefore be apt to refer to the said decision as the application under 482 Cr.P.C. filed by the C.B.I. was dismissed. While dealing with the distinction between a gist and a detailed statement the learned Single Judge has referred to the judgment in the case of Sunita Devi Vs. State of Bihar and Another, . It was held therein that supervision notes cannot be utilized by the prosecution as material or evidence against the accused and the accused at the same time cannot make any reference for that purpose.

13. It is in the aforesaid background that the learned Single Judge found that the statement of the seven approvers herein that was required u/s 161 deserves to be supplied to the accused. The learned Single Judge further held that the C.B.I. had not brought on record the said documents to allow the Court to ascertain as to what were the said documents, and on a query raised no specific reply came forth from the learned counsel for the C.B.I. The learned Single Judge has therefore treated the same to be a flimsy attempt not to supply the aforesaid statements of the witnesses to the accused for which there was no plausible reason. The Court also held that the predetermined attitude of the C.B.I. for not furnishing the copies of the statement was not appreciable, as the Court while considering the status of these approvers, who were earlier accused, came to the conclusion that a witness is a witness, and once the name of those seven persons finds place in the column of witnesses in the charge-sheet filed by the C.B.I. then the accused are entitled to cross-examine them

and further went on to observe in Paragraph 49 as follows:

Therefore, what is important to see is that whether a particular person''s name finds mention in the list of witnesses, and, if so, his statement, if recorded u/s 161(3) Cr.P.C. during investigation, must be supplied to the accused persons, without looking into any antecedents or status of such witness at one or the other time. A witness is a witness. Once he is in the list of witnesses of prosecution, it will attract Section 207(3). It has not been doubted by the prosecution that the seven persons who are accused approvers, their names find mention in the list of witnesses. That being so, the accused respondents would be entitled to cross-examine them and in that process, are also entitled to use their statements u/s 161(3), for the purpose of contradiction etc. They are legally entitled to confront those witnesses with their earlier statements, if so required. Whether it will actually be required or not is a matter not to be seen at this stage. It is right of the accused and has to be observed and protected. This is obligatory.

The aforesaid conclusion was drawn by the learned Single Judge after considering the arguments of the learned counsel for the C.B.I. and the judgments which have again been pressed into service before this Court and referred to hereinabove.

14. In my opinion, the C.B.I. therefore is not in a position to raise the same issue again and try to support the impugned order of the Court below that has disallowed the putting of questions on the basis of the same documents about which reference has been made by the learned Single Judge.

It would be relevant to refer to Section 161(3) and Section 162(1) proviso of the Criminal Procedure Code which indicates that the former relates to statements recorded during examination of witnesses by the Investigating Officer, whereas the latter relates to the statement of any person recorded by the Police under Chapter XII of the Code. Thus both are statements, one of the witnesses to the case and the other being statement of any person recorded by the Police. In the aforesaid background such statements are previous statements that qualify in terms of Section 145 of the Indian Evidence Act.

15. The said statements in the present case previously recorded in relation to the same witnesses have been brought on record as indicated above. I have extensively perused the same, and the manner in which the recitals are contained running into pages after pages, defies any logic of a precise or a gist of interrogation.

16. They are statements alleged to have been voluntarily tendered, the status whereof, can be related to previous statements, as described u/s 145 of the Evidence Act. The test therefore of relevancy or the questions being put to point out contradictions being relevant to the facts in issue, is a stage that will arrive only when such questions are put. But so far as allowing the defence to cross-examine on such material in terms of Section 145 of the Evidence Act is concerned, I am of the opinion, that the said statements are not mere gist of interrogations. The

description given in the statements and the contents thereof are statement of facts, whether relevant or irrelevant, and they are not the conclusion or supervision notes as sought to be described by the learned counsel for the C.B.I. The Court below therefore appears to have erred in accepting this description as suggested by the C.B.I. being not in consonance with Section 145 of the Evidence Act.

17. In order to understand the controversy it would be appropriate to refer to the word "statement", as Sri Khanna has attempted to describe the said statements as being only the gist of interrogation as held by the Court below. The word statement means an act of stating or that which is stated. It is often used to denote a formal account, either something said or written, in a formal or definite way. It can be described as an act of oral allegation or written declaration or enunciation setting forth facts. Thus stating or reciting or presenting verbally or on paper can be said to be an act of stating. It is thus a communication by telling or recounting facts that are disclosed or divulged orally or recorded as such, either on oath or otherwise. The nature of statement and its content has nowhere been defined under the Indian Evidence Act but a lucid consideration of the word statement has been made in three decisions that I have come across, namely, Muninajappa and Others Vs. State of Mysore, ; Bhogilal Chunilal Pandya Vs. The State of Bombay, ; Tahsildar Singh and Another Vs. The State of Uttar Pradesh, ; and another decision of a learned Single Judge of the Andhra Pradesh High Court in the case of The President, Shishu Vihar Bhagini Mandal, Hyderabad and Another Vs. Yellaiah, The judgments are self illustrative and therefore the same are not being quoted in extenso for supporting the conclusion drawn hereinabove.

18. The decisions relied on by Sri Khanna therefore do not come to the aid of the submissions advanced by him.

The accused can always apply u/s 311 Cr.P.C., or also can at the stage of entering upon defence as understood u/s 233 and 243 of the Cr.P.C. apply for summoning of any witness, and the Court shall there upon have to pass orders in this respect but can the accused be denied the opportunity to cross-examine the prosecution witnesses on the basis of previously recorded statements at this stage itself? On a perusal of Section 162(1) Proviso read with Section 145 of the Evidence Act, the answer in law is an emphatic No. A statement recorded u/s 164 Cr.P.C., as available in the present case and relied upon by the C.B.I., can be utilized for corroboration as well as contradiction.

19. In a criminal case, under the procedure of the Code, the trial moves on evidence including oral testimony. The process of admitting such evidence on record also involves examination of witnesses and their cross-examination. This is yet a dimension of fairness genetically derived from the principles of natural justice. It is in order to prevent any injustice or miscarriage of justice that such options are legally engrained. Thus it is an opportunity to unravel the truth for enabling the adjudicator to arrive at a just conclusion.

20. The suitable moment that is available to the defence at the stage of Section 231 or Section 242 Cr.P.C. is that which is contained in Section 145 of the Evidence Act. Denial of such opportunity on an unlawful pretext would be negating the principles of fair a trial. An order banning cross-examination for explaining statements previously recorded for pointing out contradictions, screens out the possibility of a truthful state of affairs that may turn out to be relevant for a fair trial. To completely shut out questions being put for pointing out contradictions as per Section 145, is to prevent uncovering of any possible hidden fact relevant to the fact in issue.

21. From the point of view of the defence, a misattempted cross-examination may be counter-productive. It may be suicidal or homicidal at this stage but if the questions are administered effectively it can also upset that has come up in direct evidence. To make such an attempt is the choice of the defence. It is not a matter of prophecy for the Court nor can there be a ban on the basis of a preconceived notion. This would be putting the cart before the horse and thereby stifling an event the happening whereof may be fruitful for the trial.

22. Consequently, the impugned order in the opinion of the Court does not conform to law to the aforesaid extent, and therefore the denial under the impugned order that P.W.-1 Anokhe Lal cannot be cross-examined on the basis of his previous statements, is an incorrect approach and the order to that extent deserves to be set aside. The same reasoning would equally apply for other witnesses.

23. However, there is another aspect which deserves to be introduced as a caveat in order to guide the Court for proceeding further in this matter. It has been observed that at times the attempt of the defence is also to introduce irrelevant cross-examination either on account of inexperience or deliberate attempt to prolong the trial. The questions put are also not in conformity with Section 146 of the Indian Evidence Act and it is for this reason that the Evidence Act itself u/s 146 to 153 makes provisions to allow the Court to prevent any such attempt by the defence. The relevancy of a fact in issue and its connection with the allegations against the accused can be assessed by the Court at the time when such questions are administered by the defence during cross-examination. The Court can step into and disallow any such questions which may appear it to be irrelevant. The Courts at times have taken care to see to it that the trial is not unnecessarily stretched beyond arguable limits by unwanted embellishments that may be designed for the gallery or to add scandalous spice for legal entertainment that may hamper a fair trial. Such tactics are not unknown and therefore the Court has ample powers to disallow such questions to be put to the prosecution witnesses that tend to digress from the facts in issue and are otherwise irrelevant.

The aforesaid power therefore stands preserved in the Court and the Court has to take care to be attentive and interject as and when the situation so arises.

24. I am persuaded to take the same view as was held by a learned Single Judge of Delhi High Court, during the proceedings in the 2G Scam in the case of R.K. Chandolia v. C.B.I. and others, Writ Petition (Criminal) No. 225 of 2012, decided on 11.4.2012. The Court has held in Paragraphs 18 to 20 as follows:

18. Thus, it can be said that the relevancy of evidence is of a two fold character; it may be directly relevant in the bearing on, elucidating, or disproving, the very merits of the points in issue. Secondly, it can be relevant in so far as it affects the credit of a witness. As regard the relevancy relating to a credit of a witness, the Court has to decide the same u/s 148 whether the witness is to be compelled to answer or not or to be warned that he is not obliged to answer. The Judge has the option in such a case either to compel or excuse. The provisions of Section 148-153 are restricted to questions relating to facts which are relevant only in so far as they affect the credit of the witness by injuring his character; whereas some of the additional questions enumerated in Section 146 do not necessarily suggest any imputation on the witness''s character. When we talk of the relevancy of the questions relating to character, unnecessarily provocative or merely harassing questions will not be entertained in this class of questions.

19. As per Section 151 and 152, the questions which are apparently indecent or scandalous or which appear to be intended to insult or annoy or are offensive in form, are forbidden. Such questions may be put either to shake the credit of witness or as relating to the facts in issue. If they are put merely to shake the credit of the witness, the Court has complete dominion over them and to forbid them even though they may have some bearing on the questions before the Court. But, if they relate to the facts in issue or are necessary to determine the facts in issue existed, the Court has no jurisdiction to forbid them. The Court cannot forbid indecent or scandalous questions, if they relate to the facts in issue. It is because what is relevant cannot be scandalous.

20. Having seen that though the ambit of cross-examination of a witness goes beyond his examination-in-chief, but there has to be relevancy of the questions as regard to the facts or to the creditworthiness of a witness. The counsels must exercise their right of cross-examination in a reasonable manner. They have their obligations no less than their privileges. They have no right of unlimited arguments or examination of witnesses, but only so much as would be relevant and reasonably necessary in the particular matter. When a Judge exercises his discretion and disallows a question being irrelevant on any count, the cross-examiner should accept the Court''s rulings without any demur or display of temper. The Court is entitled to expect such like acceptance of a ruling on the part of the counsel.

25. The defence counsel may put in sniping questions to a witness who may travel from certainty to doubt or may even deny having made an earlier statement during investigation. He may say that he does not know as to how the Investigating Officer or the Police has recorded it. This disowning of any previous statement can also

come forth to avoid contradictions by the witness which is also the purpose of cross-examination.

26. The Court has however to observe that there are more things that meet the eye. The Court has to examine the nature of the questions being put carefully and cautiously so as to discard them when necessary and not allow them to be put casually. The defence cannot be allowed to put questions for sheer publicity and advertisement. The relevance or irrelevance of the question however can be assessed only when such cross-examination is allowed within the parameters of the provisions as discussed hereinabove. The duty of the Court is to steady the course of trial and then arrive at an appropriate conclusion.

27. To understand the scope of relevancy one also has to scan the provisions contained in Sections 5 to 16 of Chapter II of the Evidence Act. An academically well considered judgment of a learned Single Judge of the Patna High Court (Hon. Shivaji Pandey, J.) in Chandra Shekhar Rai v. The State of Bihar and others, Criminal Misc. Application No. 26260 of 2011 decided on 19.6.2013, has delved into the finer points of relevancy that is desirable to be observed during cross-examination of witnesses for allowing or disallowing questions to be put on the basis of previously recorded material in the case diary. On the aforesaid touch stone the trial Court therefore has to observe such principles while proceeding with the cross-examination of the prosecution witnesses. The Court shall however neither make haste nor shall it allow its time to be wasted keeping in view the fact that the case continues to be monitored by the Apex Court in SLP (Civil) No. 12981 of 2008, Nahar Singh Yadav and another v. Union of India and others. Once the trial proceeds, the issue of relevancy and admissibility would be assessed at the time of the final arguments and conclusion of the trial and it may not be necessary for this Court to comment any further in view of the directions of the Supreme Court and also the judgments of this Court rendered previously and referred to hereinabove.

The order impugned dated 11.12.2013 to the aforesaid extent therefore is set aside with liberty to the Court below to proceed in the light of the observations made hereinabove without allowing the trial to be hampered in any way. Both the applications are accordingly allowed. It shall be open to the trial Court to pass appropriate orders in relation to the proceedings as and when occasion arises on the issue of relevancy and permissibility of the cross-examination of the prosecution witnesses under the parameters indicated above.