

**IN THE COURT OF SHRI HASAN ANZAR,
SPECIAL JUDGE, PC ACT (CBI-03),
ROUSE AVENUE DISTRICT COURT, NEW DELHI**

*CBI Vs. Seema Mutneja & Ors.
CC No. 75/2019
Date of Institution : 10.08.2015
IA No. 08/2024*

09.04.2025

ORDER

1. An application under section 348 of BNSS (Corresponding to Section 311 Cr.P.C.) {*hereinafter to be referred as “application”*} is moved on behalf of the prosecution seeking recall/examination of some of the witnesses, already examined as well as examination of a fresh witness.

2. Briefly stated the relevant facts for the disposal of the present application are that a case under section 120B r/w 420, 467, 468 and 471 IPC and 13(2) r/w 13(1)(d) of Prevention of Corruption Act 1988 and substantive offences thereof was registered on the basis of the complaint of Dy. General Manager, Canara Bank, Circle Office, New Delhi interalia alleging that cash credit facility was encashed by misrepresentation of the facts and bills etc. were altered and the goods were directly consigned to the buyers in Kabul by altering the name of the consignee which caused pecuniary loss to the bank.

3. A charge sheet under section 120-B r/w 420, 467, 468 and 471 IPC and 13(2) r/w 13(1)(d) of PC Act was filed against the accused persons

which included public servants and private persons.

4. It is contended by the Ld. Public Prosecutor for the CBI that while examining the prosecution witnesses, the relevant documents could not be exhibited inadvertently during the recordal of their statements and as such it is prayed that prosecution be permitted to examine the witnesses so that the documents which could not be exhibited earlier can be exhibited. It is also contended that some of the witnesses were left out inadvertently in the charge sheet by not including their names in the list of the witnesses, although the documents qua these witnesses were filed with the charge sheet. It is contended that no prejudice shall be caused to the accused persons as they would get sufficient opportunity to cross examine the witness(s).

5. It is further contended that examination of the witness(s) is very much necessary and essential for the just decision of the case.

6. The separate replies of the application were filed on behalf of the accused persons.

7. It is contended on behalf of A-1 & A-3 that in the garb of the present application, the prosecution is trying to fill up the lacuna at a very belated stage as the case is at the stage of final arguments for considerable length of time. It is also contended that application appears to be an attempt on the part of the prosecution to delay the culmination of the trial. It is also contended that the witnesses proposed to be examined

were already examined between November 2017 to April 2018 and no reasons whatsoever were furnished in respect of the inordinate delay in moving the present application. It is also contended that witnesses who were not cited as a witness by the prosecution cannot be cited as an additional witness at a belated stage without disclosing the reason. It is also contended that present application was filed after the acquittal of the accused persons vide judgment dated 03.06.2024, in the case titled as *CBI Vs. Harpreet Fashion Pvt. Ltd.*, so that arguments in the present case are not heard and the decision is avoided. It is also contended that powers under section 348 of BNSS are required to be exercised with utmost caution, circumspection and being discretionary power, it should not be used to prolong the proceedings. It is also contended that extensive arguments were already advanced before predecessors of the court and even detailed arguments including rebuttal arguments were filed by both the sides and it sound quite inconceivable that prosecution would be oblivious to the desirability and the justification of the witnesses already examined and other additional witnesses as proposed to be examined.

8. It is also contended that mere change of a public prosecutor would not be a ground to permit the recall of the witnesses already examined. It is also contended that in the garb of the present application, the prosecution is trying to conduct *de-novo* trial.

9. It is contended on behalf of A-2 that application lacks necessary particular or ingredients meriting the exercise of powers under section

348 of BNSS. It is also contended that a bare perusal of the application would indicate that none of the witness as proposed to be recalled has anything to do with the contents of the documents or its preparation. It is also contended that non-applicants/accused have already disclosed their respective defence in the form of statement under section 313 Cr.P.C. and the prosecution cannot be permitted to fill its lacuna. It is also contended that unlike other investigating agency the charge sheet filed in the court is duly vetted by different officials in hierarchy and, therefore, it is incomprehensible that it would miss the scrutiny of these competent officers qua examination of the necessary witnesses for the purposes of bringing the documents into record.

10. It is contended on behalf of A-6 that application has been filed solely with a view to fulfill the lacuna in its case. Similar contentions as advanced on behalf of A-1 & A-3 were also reiterated by the Ld. Counsel for A-6.

11. It is contended on behalf of A-7 that application has failed to make out any case for belated examination or recall of the witnesses as same would cause great prejudice to the accused as well as harassment to the witnesses. It is also contended that application has failed to disclose with sufficient clarity as to what facts were not disclosed by the witnesses while under examination. It is also contended that after pronouncement of the judgment in the connected matter in case titled as *CBI Vs. Harpreet Fashion Pvt. Ltd.*, the prosecution is trying to fill up the lacunae.

12. It is contended on behalf of A-8 that the witnesses proposed to be examined/recalled were the witnesses in three connected cases and their depositions were on similar lines and by moving the present application, the prosecution is trying to fill up the lacuna and no explanation has been provided as to why the documents were not put to the witnesses at the relevant time and such an act cannot be called as an inadvertence. The application was vehemently opposed on the grounds similar to other accused persons.

13. Ld. Counsel for A-9 apart from reiterating the submissions made by other accused persons, contended that by virtue of the present application, the prosecution is trying to fill up the gaps and lacuna in its case. It is also contended that in the detailed written arguments filed on behalf of the prosecution, the prosecution did not deem it material to raise any issue qua the examination of the witnesses in relation to the present case.

14. Ld. Counsel for A-4 submitted that he is adopting the submissions filed by other accused persons.

15. Ld. Counsel for the accused persons have relied upon Umar Mohd. Vs. State of Rajasthan, 2007(14) SCC 711; State of NCT of Delhi Vs. Shiv Kumar Yadav, 2016(2) SCC 402; AG Vs. Shiv Kumar Yadav & Anr., Crl. Appeal Nos. 1187-1188 of 2015; Swapan Kumar Chatterjee Vs. CBI, 2019(14) ACC 328; Vijayan Vs. State of Kerala (1999); Mohanlal Shamji Soni Vs. Union of India (1991); Rajaram Prasad Yadav

Vs. State of Bihar, AIR 2013 SC 308.; Zahira Habibullah Sheikh & Anr. Vs. CBI, AIR 2006 SC 1367; Natasha Singh Vs. Central Bureau of Investigation (State) (2013) 5 SCC 741; Manju Devi Vs. State of Rajasthan & Anr, (2019) (6) SCC 203; Sushil Ansal Vs. State NCT Delhi, Crl MC 2107/2021 and Harendra Rai Vs. The State of Bihar & Ors., Crl. Appeal No. 1726/2015.

16. I have considered the submissions made on behalf of both the sides as well as the written submissions filed on behalf of some of the accused persons.

17. Section 348 of BNSS (Corresponding to Section 311 Cr.P.C.) provides that the court at any stage of inquiry/trial of proceedings could summon any person as a witness or recall any person already examined. It further provides that the examination, summoning or recall or re-examination of any person may be directed if the court is of the opinion that such evidence is essential for the just decision of the case.

18. In *State (NCT of Delhi) vs. Shiv Kumar Yadav, (2016) 2 SCC 402* it was observed that “*object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The legislature in*

its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties.”

19. In ***Rajaram Prasad Yadav v. State of Bihar, (2013) 14 SCC 461***, it was a case in which the complainant was examined but he did not support the prosecution case. On account of subsequent development, he filed an application for his recall under Section 311 CrPC which was declined by the trial court but allowed by the High Court, the Hon’ble Supreme Court restored the order passed by Trial Court and held that ***such recall and re- examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.***”

20. Section 311 Cr.P.C. as interpreted by the superior court provides that recall and re-examination of any person is permitted, if the same is in the interest of justice and requires for the just decision of the case and the evidence as proposed to be tendered is necessary to the issues before the court. The power under Section 311, Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. It cannot be used to fill a lacunae or make out a new

case.

21. It would be appropriate to refer relevant paragraphs of the two pages application moved on behalf of the prosecution detailing the reasons for examination of the witness(s) are as follows:-

4. That two witnesses, as mentioned in the Annexure 'B' to this application, has been left out inadvertently, though the documents to be proved by these witnesses have been cited in the list of documents of charge-sheet.

5. That, it is further submitted that (PW-33) Sh. Prakash P. Mallya, (PW-26) Sh. R.K.Anand, (PW-34) Sh. H.K.Yadav, (PW-21) Sujeen Paulose & (PW-20) Om Prakash Jinagal have been examined, **however, some of the documents referred in Annexure 'A' to this application could not be exhibited as these documents were, inadvertently, not put to them during their examination.**

6. That these are material witnesses and are required to be examined to prove the documents mentioned in Annexures to this application for just decision of the case and the same will not cause any prejudice to accused persons as they will have opportunity to cross examine these witnesses.

7. Therefore, recalling of of PW-33) Sh. Prakash P. Mallya, (PW-26) Sh. R.K.Anand, (PW-34) Sh. H.K. Yadav, (PW-21) Sujeen Paulose, (PW-20) Om Prakash Jinagal is necessary to prove these documents and for just decision of the case and the same will not cause any prejudice to accused persons as they will have opportunity to cross examine these witnesses.

22. It is relevant to mention that vide separate statement as recorded on 14.02.2025, the prosecution did not press for the recall of the witnesses i.e. PW23 Shri Raj Kumar Anand, PW-32 Shri Hari Kishan Yadav, PW-35 Shri Sujeen Paulose and Shri Sandeep Vichare and accordingly, the present application is only confined to consider whether PW-33 Shri Prakash P. Mallya & Shri Om Prakash Jinagal (as mentioned

in Annexure 'A') and Shri Hemant Chaudhary as an additional witness for the examination before the court.

23. The reason assigned in the application as well as during the course of the oral arguments on behalf of the prosecution to recall Shri Prakash P. Mallya was to the effect that certain documents could not be proved (vide para no. 4 of the application).

24. A close perusal of the documents vide Ex.D-10 and D-12 which the prosecution is intending to prove through Shri Prakash P. Mallya would unveil that Shri Prakash P. Mallya was neither the maker nor the author of the documents i.e. D-10 and D-12. Shri Prakash P. Mallya was the Sanctioning Authority who had sanctioned the grant of credit facility vide Ex.PW14/2 (D-11). It is also relevant to mention that Shri Prakash P. Mallya was examined as a prosecution witness on 15.11.2017 i.e. about 7 or 8 years ago. The reasons assigned in the application was to the effect that the prosecution is intending to prove the said documents are not sustainable as he was neither the author nor its maker. His statement under section 161 Cr.P.C. was only related to the manner in which the credit facility was granted to the borrower in forms of various office notes which are duly exhibited during his evidence. Neither the application nor during the course of oral argument, any justification was given by the prosecution as to why it intends to recall Shri Prakash P. Mallya and, therefore, no grounds whatsoever makes out to recall Shri Prakash P. Mallya.

25. PW-24 Shri Om Prakash Jinagal (mentioned as PW-20 in the application) was examined on 03.04.2018 and he had deposed that vide Ex.PW-24/1 (D-166), the documents were seized from him. The seized documents are basically D-168 which the prosecution is trying to prove qua PW-24 and testimony of PW-24 is to the same effect. It is noteworthy to mention that in the charge sheet, it was mentioned that statement of Shri Om Prakash Jinagal has not been recorded. It is also not the case of the prosecution that PW-24 Shri Om Prakash Jinagal was maker or author of the documents and therefore, Shri Om Prakash Jinagal would not be able to prove any of the documents as contended on behalf of the CBI. Specialized Agency such as CBI, seizes number of documents either from an individual or from an Organization or the Bank and invariably the documents which were or are seized from a particular official who may or might not be author or maker of such a document except that the documents were seized from such an official. When a prosecuting agency asserts that the person from whom the document was seized was either the maker or the author of the document or is conversant with the signatures of the maker of the document such an averment should be clearly mentioned either in the charge sheet or in the statement of the witness as recorded under section 161 Cr.P.C. Unfortunately, the application is totally silent on this aspect and even during the course of the arguments, it was also not explained as to how PW-24 could prove the documents as referred in D-168. However, in the interest of justice, all the documents as referred in D-168 which were about 28 (26 + 2) in numbers were perused and it is noted that PW-24 has no concern or relation with those documents except that the

documents were seized from him and the prosecution has neither argued that documents D-168 were ever dealt by PW-24 and the said fact is also not disclosed in the application and if the witness proposed to be recalled has not dealt with the document in any capacity then how he could prove or exhibit the document as averred in the application and it appears from the perusal of the deposition of PW-24 that then relevant Ld. PP for the CBI at that point of time took a conscious decision of not putting the document as mentioned in D-168 and even no statement the witnesses was recorded to the effect that he had dealt any documents as mentioned in D-168 at any stage.

26. It is contended on behalf of the prosecution with respect to the additional witness Shri Hemant Chaudhary that relevant documents qua him were made part and parcel of the charge sheet, however, inadvertently, his name was not included in the list of the witnesses and it is also contended that in the connected case i.e. ***CBI Vs. Gunjit Singh Mutneja & Ors.***, his statement under section 161 Cr.P.C. was also recorded and he was examined as PW31.

27. Shri Hemant Chaudhary was not cited as a witness in the present case. It is also evident from the record that documents vide D-60 and D-61 were seized from him vide Ex.PW37/2. The seizure memo was proved by Shri B.M. Pandit. A close look at D-60 and D-61 would reveal that D-60 is copy of the airway bill no. AP186810015984 dated 20.09.2006 and photocopy of airway bill no. AP186810016220 dated 27.09.2006 indicating that M/s Ginna World had exported the goods by

utilizing the services of M/s Airworld Cargo, 512, DDA Building No. 1, Janak Place, Janakpuri Distt. Centre, New Delhi which is a proprietorship concern of Shri Hemant Chaudhary and by virtue of these documents, the prosecution is intending to establish that airway bills as submitted with the bank were materially different/forged.

28. The shipper copy of the Airways Bills i.e. AP186810015984 dated 20.09.06 and photocopy of airway bill no. AP186810016220 dated 27.09.06 which were collected from Shri Hemant Choudhary, proprietor of Airworld Cargo Services shows that there was no alteration in the Airways Bills of shipper's copy, whereas the copy of Bill submitted to Bank shows alteration and had camouflaged the export transactions to Afghanistan and shown the documents to be routed through a bank from Dubai. It is alleged that airway bills were actually meant for Tajmeet Import & Export, Kabul, Afghanistan as only its descriptions were mentioned on the actual bills (cutting free) but to get it discounted from the bank typed insertion with respect to name of the foreign importers based at Dubai and consignee bank based at Dubai were made in the airways bills and after insertions these bills were presented to the bank for discounting. Any elaborate discussion might cause prejudice to both, prosecution and the defence, and non-examination of Shri Hemant Chaudhary appears to be an inadvertent lapse on the part of the prosecution.

29. Number of judgments were cited on behalf of the accused persons, as to how and at what stage, the power under section 311 Cr.P.C. (348

BNSS) could be exercised i.e. the mere change of a counsel would not be a ground to permit the recall of the witnesses already examined. No new facts are to be introduced and mere *ipse dixit* statement that the recall of the witnesses are required for the just decision of the case. Extreme arguments to the effect that grave and severe prejudice would be caused, if the witnesses are proposed to be examined.

30. The proceedings of the case would reveal that application has been moved with considerable delay at the stage of the final argument and more particularly, when arguments were advanced before the predecessor of the court and the lengthy written arguments including rebuttal arguments/supplementary arguments were filed on behalf of the prosecution. In the application which was moved by the prosecution, number of witnesses were proposed to be recalled or examined in the court, however, the prayer for examination of some of the witnesses was dropped. Albeit some delay has been caused, however, the essential question would be the necessity and the need to examine a particular witness in relation to a document. Although, no clear explanation was provided by the prosecution in its application as to why the present application is being moved at such a belated stage, however, it could be gathered from the arguments made before the court that the case file was being handled by number of different prosecutors and it appears that there was some oversight in not examining the relevant witness at an appropriate stage, although the documents were part of the charge sheet and one of the reasons of the error could be the voluminous nature of the record and the lack of coordination between investigating agency and the

prosecution. The necessity to examine Shri Hemant Chaudhary has already been explained and moreover, number of witnesses, proposed to be recalled/examined, were already dropped by the prosecution. The documents as proposed to be brought on record through Shri Hemant Chaudhary are essential for the just decision of the case. In so far as the submission of the Ld. Counsels that prosecution has tried to become wiser by examining the witnesses after acquittal in one of the connected matter, no longer holds goods as different cases are to be considered on the basis of the facts of its own case and mere similarity in some other case would not be a ground to deny the examination/recall of the witness, and moreover, only one witness is proposed to be examined.

31. Recently, Hon'ble Delhi High Court in *Sonu Vs. Central Bureau of Investigation, CrI. MC 1309/2023 dated 17.02.2025* has considered plethora of judgments of Hon'ble Supreme Court relating to the exercise of power under section 311 Cr.P.C. and was pleased to observe :-

52. The crux of the aforesaid judicial precedent reinforces the broad discretionary powers conferred upon courts under Section 311 of the CrPC, emphasizing that the primary duty of a court is to ensure that no relevant evidence is excluded from consideration if it is essential for a just decision of the case.

53. The Hon'ble Supreme Court has consistently held that procedural constraints must not prevent the courts from exercising its inherent powers to recall witnesses or summon additional evidence when necessary to arrive at the truth. The guiding principle remains that a trial should not result in an inchoate or speculative decision due to an incomplete evidentiary record, and the courts must exercise their discretion judiciously to summon or recall witnesses if the evidence sought to be introduced is germane to the just determination of the case.

32. It was further observed in *Sonu (Supra)* :

67. Further, it is essential to distinguish between a genuine violation of right to a fair trial and a situation where a party merely loses the benefit of a procedural lapse. The key question is not whether the accused's tactical advantage has been diminished but whether they have been deprived of the fundamental safeguards of cross-examination, rebuttal or access to the evidence.

68. However, this Court finds that no prejudice has been caused to the accused/petitioner in the present case. The submission of the complete document does not introduce any new facts or allegation but only provides a complete version of a document that was already in the case record. Furthermore, the accused will be given the opportunity to cross-examine the re-called witnesses regarding the additional details in the document and thus, the ability to test the evidence through cross-examination defeats any claim of procedural unfairness.

33. By examining Shri Hemant Chaudhary, the prosecution is not bringing in fresh evidence but seeking only rectification or correction in the inadvertent error by examining the relevant witness qua the record which is sought to be proved by the prosecution in order to present the relevant evidence in support of its case. The admission of fresh evidence, if it materially alters the case of prosecution, might not be permissible in a given case, however, the inadvertent error in not examining the relevant witness can certainly be taken into consideration while exercising powers under section 348 BNSS and the proposed examination of Shri Hemant Chaudhary does not result in filling up any lacunae of the prosecution. Moreover, the accused persons will get the full opportunity to cross-examine the witness qua the documents which are sought to be brought on record by the prosecution.

34. In "*Varsha Garg Vs. State of M.P.*", (Crl. Appeal No.1021/2022,

SLP(Crl.) No. 2239/2022), it was observed by the Hon'ble Supreme Court in relation to Section 311 Cr.P.C. as under :

“32. The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasis that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.

38. Having dealt with the satisfaction of the requirements of Section 311, we deal with the objection of the respondents that the application should not be allowed as it will lead to filling in the lacunae of the prosecution's case. However, even the said reason cannot be an absolute bar to allowing an application under Section 311.

39. In the decision in *Zahira Habibullah Sheikh v. State of Gujarat*, which was more recently reiterated in *Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd.*, the Court specifically dealt with this objection and observed that the resultant filling of loopholes on account of allowing an application under Section 311 is merely a subsidiary factor and the Court's determination of the application should only be based on the test of the essentiality of the evidence. It noted that:—

28. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. **Sometimes the examination of witnesses as directed by the court may result in what is thought to be “filling of loopholes”. That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on**

the facts of each case, and has to be determined by the Presiding Judge.

35. It would be appropriate to refer to the *P. Sanjeeva Rao vs State Of A.P. on 2 July, 2012 in Criminal Appeal Nos. 874-875 Of 2012* where scope of Section 311 was highlighted and in Para no. 16, an earlier decision of the Supreme Court was quoted.

16. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.

36. Mere delay in moving the application or the case is at the stage of final arguments or the application is moved after a change of counsel are not the sole determining factors for rejecting the application and the test is to consider whether the documents/examination of witness is essential for the just decision of the case.

37. Considering the totality of the facts and circumstances and in view of the above mentioned discussion, the application U/s 348 BNSS is partly allowed. The prosecution is permitted to examine Shri Hemant Chaudhary subject to the availability of the witness and not more than one opportunity shall be provided to the prosecution.

38. With these observations, the application stands disposed of.

*(Announced in the open court
today i.e. on 09.04.2025).*

(HASAN ANZAR)
Special Judge (PC Act) CBI-03,
RADC/New Delhi/09.04.2025.