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

Reserved on: 30.09.2020
Pronounced on: 21.10.2020

\+ CRL.M.C. 1867/2020

MR. ARVIND KEJRIWAL & ANR. .... Petitioners

Through Mr. N. Hariharan Sr. Adv. with Mr.Mohd. Irsad and Mr. Badar Mahmood, Advs. for petitioner No.1
Mr. Dayankrishnan, Sr. Adv. with Mr. Mohd. Irsad and Mr. Badar Mahmood, Advs. for petitioner No.2

versus

STATE NCT OF DELHI .... Respondent

Through Mr. Rahul Mehra, St. Counsel (Crl.) with Mr. Amit Chadha, APP for the State with SFIO Karan Singh Rana, 1O (SHO Mukherjee Nagar)
Mr.Siddharth Luthra, Sr. Adv. with Ms. Stuti Gujral, Mr. Krishna Datta Multani, M. Akshay Sehgal, Mr.Yuvraj Paul and Ms. Ipsita Agarwal, Advs. for R-2/Complainant

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T

1. Present petition has been filed under sections 482/483 Cr.P.C. read with Article 227 of the Constitution of India seeking quashing of the

impugned order dated 24.07.2019 passed by learned ASJ (MPs/MLAs cases), Rouse Avenue Court Complex, New Delhi in CR.REV. No.7/2019 titled as *Manish Sisodia & Anr. vs. State & Anr*. whereby the said Court did not allow to supply some crucial documents as prayed/required in the application under Section 207 Cr.P.C. filed on the behalf of the accused in this case, without following the procedure as prescribed under Cr.P.C.

2. The chargesheet in FIR No 54/2018 under section 186/323/353/332/ 342/149/504/506-II/120-B/109/114/34 IPC filed on 13.08.2020 before learned ACMM, Patiala House Court against the petitioners and named as accused. The Petitioner No.1 herein filed an application under section 207 Criminal Procedure Code for supply of certain deficient documents inter alia including the copy of the statement of one witness Sh.V.K. Jain recorded on 21.02.2018 and audio/video recording of the examination of the petitioners. Barring the supply of legible copy of the documents mentioned in the application learned ACMM declined the supply of the statement dated 21.02.2020 of the V.K Jain and held that as per prosecution no statement under section 161 Cr.P.C. was recorded of Mr.V.K. Jain on 21.02.2020 and therefore same cannot be supplied.

3. Being aggrieved, preferred the Revision Petition No. 7/2019 before

the Ld. ASJ (MPs/MLAs), Rouse Avenue, New Delhi. However, on 24.07.2019, the same was disposed of by stating that *"since it is a record of oral examination of Sh. V. K. Jain by the IO and is noted in the case diary, this report does not take the place of statement under Section 161 Cr.PC and is therefore, not to be given to the accused. However, the same may be used during the trial as an aid to the trial by the learned Trial Court and also as per provisions of subsection 3 of Section 172 Cr.PC. So far as the second prayer of the revisionists that they be provided audio-video recording of their interrogation is concerned, the submission of learned counsel for Additional CP/EOW is that there is no provision under which the revisionists can demand their statements recorded by the Investigating Officer. He submits that the relevant date is when the charge-sheet is filed and not when the statement is recorded. He submitted that on the date of filing of charge-sheet, the revisionists were accused and not witnesses. He submitted that nothing has been discovered pursuant to their statements. There is no information relating to the fact thereby discovered which may be proved. He submits that the revisionists already know what statement they had made to the Investigating Officer and they cannot confront any prosecution witness with their statements. The learned counsel for the*

revisionists could not show any provision of law entitling the revisionists with their statements recorded during interrogation. Therefore, the prayer of the revisionists for supplying them a copy of audio-video recording of their statements during interrogation is declined. The revisionists, however may call for these recordings during trial subject to the learned Trial Court considering its production necessary or desirable for the purposes of trial. "

4. Mr.Hariharan, learned Senior Advocate appearing on behalf of the petitioner has submitted that although in the impugned order the learned ASJ noted in para 28 *"that this court had called for the case diary. A perusal the same shows that Sh. V. K. Jain had joined investigation at PS Civil Lines on 21.02.2018 and he was 'examined in-depth' and a 'report' was prepared contents of which are the same as the contents of the document referred by the revisionists as statement of Sh. V. K. Jain."* Learned senior advocate argued that the prosecution has withheld the statement of witness Mr. V K Jain recorded on 21.02.2018 because it did not suit the prosecution case and helped in falsely implicating the petitioners. This concealment was exposed by Ld. ASJ in its order when he perused the case diary of the case. Thus, the grievance of the petitioners is that copy of statement ought to have been supplied to the petitioners but same was not supplied.

5. Further submitted that the chargesheet has three statements of Mr V K Jain:

22.02.2018	Statement under section 161 & 164 Cr.P.C.
09.05.2018	Statement under section 161 Cr.P.C.

6. Learned senior counsel pointed out that in the statement of V K Jain dated 09.05.2018 which is part of the chargesheet says, *"In continuation with the statement dated 21.02.2018",* which prosecution covers that the same is typographical error. This all because they are trying to conceal/withheld the crucial part of evidence which is against the principle of "*Criminal Jurisprudence*" and in violation of the basic principle of natural justice, free and fair trial. A plain reading of this section 207 Cr.P.C makes it amply clear that under this provision the accused is entitled or have right to take the complete copy of chargesheet and other documents in regarding of the case from the prosecution. Section 207 Cr.P.C. reads as under:-

> *"207. Supply to the accused of copy of police report and other documents. In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-*

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under subsection (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173: Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused: Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

7. A bare reading of provisions contained in Section 207 of Cr.P.C. shows that it is the obligation of the Magistrate to see that all the documents which are necessary for the accused for proper conduct of his defense, are furnished to him well before the trial. This includes relied upon and not

relied but prosecution cannot pick and choose.

8. Further submitted, it is settled law that an impartial and fair opportunity in a trial is the legal right of an accused and justice can only be ensured if the rules of procedure are diligently adhered to. No court shall allow breach of these principles. In this regard, relied upon the observations made in ***Shakuntala vs. State of Delhi: ILR (2007) I Delhi 1005.*** It is submitted that fair and just investigation is a hallmark of any investigation. It is not the duty of the investigating officer to strengthen the case of prosecution by withholding the evidence collected by him. If an Investigating Officer withholds the evidence collected by him, the accused has a right to rely upon that evidence and tell the Court to take that evidence into account while framing the charges. The Court while framing charges may not take into account the defence of the accused for the document in custody of the accused which were not produced by the accused before the Investigating Officer or which did not form part of the investigation but the court is duty bound to consider the evidence collected by the Investigating Officer during the investigation of the case.

9. It is argued that a conjoint reading of Section 173(5), 173(6) and first proviso attached to Section 207 of Cr.P.C. leaves no scope of doubt that it is

the bounden duty of the police officer to forward to the Magistrate all the statements mentioned in sub-section (5)(b) of Section 173 of Cr.P.C. without any exception so as to enable the Magistrate to discharge his duty under Section 207 of Cr.P.C. by furnishing copies of such statements to the accused. In case the police officer considers that the disclosure of any part of such statements would not be expedient in the public interest nor essential in the interest of justice, he is supposed to append a note in his forwarding memorandum to the Magistrate to that effect along with his reasons for withholding such statements or parts thereof from the accused. Wherever any such reservation is made by the police officer, it still lies within the discretion of the Magistrate whether to allow such request or not and it is only in the event where Magistrate agrees with the reasons given by the police officer for not supplying any statement or part thereof to an accused, he may order accordingly while agreeing with the objection raised by the police official.

10. To strengthen his arguments, Mr.Hariharan has relied upon the case of ***Manjeet Singh Khera vs. State of Maharashtra: (2013) 9 SCC 276***, whereby the Hon'ble Supreme Court noting its earlier decision in ***V.K. Sasikala vs. State: (2012) 9 SCC 771*** did not answer specifically as to

whether the prosecution should supply those documents which are not forwarded with the charge sheet when the accused person demands them as the said issue did not arise and held as under:

> *"8. The Court also noticed that seizure of large number of documents in the course of investigation of a criminal case is a common feature. After completion of the process of investigation and before submission of the report to the court under Section 173 Cr. PC, a fair amount of application of mind on the part of the investigating agency is inbuilt in the process. These documents would fall in two categories: one, which supports the prosecution case and other which supports the accused. At this stage, duty is cast on the investigating officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, many times it so happens that the investigating officer ignores the part of seized documents which favour the accused and forwards to the court only those documents which support the prosecution. If such a situation is pointed out by the accused and those documents which were supporting the accused and have not been forwarded and are not on the record of the court, whether the prosecution would have to supply those documents when the accused person demands them? The Court did not answer this question specifically stating that the said question did not arise in the said case. In that case, the documents were forwarded to the court under Section 173(5) Cr. PC but were not relied upon by the prosecution and the accused wanted copies/ inspection of those documents. This Court held that it was incumbent upon the trial court to supply the copies of these documents to the accused as that entitlement was a facet of just, fair and transparent investigation/trial and constituted an inalienable attribute of the process of a fair trial which Article 21 of the*

Constitution guarantees to every accused."

11. On the objection raised by the counsel for respondent no.2 (complainant) that order dated 22.04.2019 passed by learned ACMM has not been challenged, however, learned counsel for the petitioners relied upon the case of ***Kunhayammed & Ors. vs. State of Kerala & Ors.: (2000) 6 SCC 359*** whereby held as under:

> *"Incidentally we may notice two other decisions of this Court which though not directly in point, the law laid down wherein would be of some assistance to us. In* ***Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatraya Bapat AIR 1970 SC 1****, this Court vide para 7 has emphasized three pre conditions attracting applicability of doctrine of merger. They are : i) the jurisdiction exercised should be appellate or revisional jurisdiction; ii) the jurisdiction should have been exercised after issue of notice; and, iii) after a full hearing in presence of both the parties. Then the appellate or revisional order would replace the judgment of the lower court and constitute the only final judgment. In Sushil Kumar Sen Vs. State of Bihar AIR 1975 SC 1185 the doctrine of merger usually applicable to orders passed in exercise of appellate or revisional jurisdiction was held to be applicable also to orders passed in exercise of review jurisdiction. This Court held that the effect of allowing an application for review of a decree is to vacate a decree passed. The decree that is subsequently passed on review whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one. The distinction is clear. Entertaining an application for review does not vacate the decree sought to be reviewed. It is only when the application for review has been allowed that the*

decree under review is vacated. Thereafter the matter is heard afresh and the decree passed therein, whatever be the nature of the new decree, would be a decree superseding the earlier one. The principle or logic flowing from the above-said decisions can usefully be utilised for resolving the issue at hand. Mere pendency of an application seeking leave to appeal does not put in jeopardy the finality of the decree or order sought to be subjected to exercise of appellate jurisdiction by the Supreme Court. It is only if the application is allowed and leave to appeal granted then the finality of the decree or order under challenge is jeopardised as the pendency of appeal reopens the issues decided and this court is then scrutinising the correctness of the decision in exercise of its appellate jurisdiction."

12. On the other hand, respondent no.1/State has filed status report whereby stated that on 21.02.2018, Sh.V.K. Jain was called at Police Station and he joined investigation. He was examined on that day by the Investigating Officer and the same has been recorded in the Case Dairy and the said statement has also been reproduced at page 31 of the petition by the petitioner but no statement under section 161 Cr.P.C. was recorded. The statement under section 161 Cr.P.C. of V.K. Jain was got recorded on 22.02.2018 and 09.05.2018. It is correct that in the statement dated 09.05.2018 of V.K. Jain, it is mentioned that *"it is in continuation to my earlier statement dated 21.02.2018, recorded under section 161 Cr.P.C. and 164 Cr.P.C."* In the remand order of co-accused persons namely Sh.Prakash

Jarwal and Sh.Amanatullah Khan, learned MM, Ms.Shefali Bernala Tandon, Tis Hazari Courts, has recorded the date of statement of V.K. Jain as 21.02.2018. In reply to the above facts, it is stated that the above date of 21.02.2018 is a typographical error, as it is matter of record that both statement under section 161 Cr.P.C. and 164 Cr.P.C. of witness V.K. Jain were got recorded on 22.02.2018 only. Moreover, the fact of recording of the same date (21.02.2018) in the order of learned MM dated 23.02.2018, is the submission made by the Defense Counsel and not by the prosecution. Further stated that as per the impugned order of learned Session Court dated 24.07.2019, detailed examination of case diary was done by the learned ASJ, in Crl.Rev. 7/19. The entire case diary was got called by learned ASJ and relevant pages have been duly counter signed by the learned Judge.

13. Mr.Siddharth Luthra, learned senior counsel appearing on behalf of respondent no.2/complainant and submitted that the issues arising in the present Petition interalia,;

i. Firstly; whether any Statement under Section 161 CrPC of Sh.V.K. Jain was recorded on 21.02.2018, and if not, can the Notes of the I.O. in the case diary be directed to be supplied to the Accused?;

ii. Secondly; whether under Section 173(5) & (6) and Section 207 CrPC,

anything other than what is prescribed can be supplied to the Accused?

16. It is the stand of the investigating agency that on 21.02.2018, PW V.K. Jain, was called for examination but no statement under section 161 Cr.P.C. was recorded. On 22.02.2018, however, his statements were recorded both under sections 161 Cr.P.C. and 164 Cr.P.C. On 23.02.2018, during the remand proceedings of co-accused persons, a purported statement under section 161 Cr.P.C. of Shri V. K. Jain recorded on 21.02.2018 was placed on record by the accused themselves. This document was not produced by or claimed to be a statement under Section 161 Cr.P.C. by the investigating agency/ prosecution.

17. Learned senior advocate submitted that there is a typographical error in V. K. Jain's statement under section 161 Cr.P.C. dated 09.05.2018 which mentions that statements under Section 161 and 164 Cr.P.C. were recorded on 21.02.2018 However, both these statements were in fact recorded on 22.02.2018. Under Section 173(5) & (6) and Section 207 Cr.P.C., what is to be supplied to an accused are the specified documents and no more. It is what the Prosecution proposes to rely upon what can be supplied and the accused cannot seek supply of a document which they have produced and

which the Prosecution does not choose to rely upon. This is an alternate submission to the earlier submission that the purported Statement of 21.02.2018 is not a statement under Section 161 Cr.P.C. Therefore, the mere mention of a Statement of 21.02.2018 in the Statement under Section 161 Cr.P.C. of 09.05.2018 is of no significance and that finding is consistently made by both the Ld. Magistrate and the Ld. Sessions Court and there is no occasion for the Petitioners to question the findings of the two courts which are neither perverse nor illegal nor liable to be set aside.

18. Learned counsel raised the issue, whether Sh. Manish Sisodia having not even sought the documents under Section 207 Cr.P.C. could maintain a revision petition or the present petition under section 482 Cr.P.C. to seek supply of the purported statement dated 21.02.2018?

19. It is submitted that though the application under section 207 Cr.P.C. does not reflect which Accused had moved before the Trial Court, however, the Ld. Magistrate records that Sh. B.S. Joon, Advocate was representing Sh. Arvind Kejriwal, Sh. Jarwal and Sh. Amanatullah Khan. That being the position, the first Petitioner before this Court and before the Revisional Court had no grievance whatsoever and could not have maintained a challenge to the Order dated 22.04.2019. Furthermore, in order to overcome

this hurdle, pursuant to Order dated 21.05.2019 Sh. Arvind Kejriwal was added as a Petitioner. However, the Criminal Revision Petition on behalf of Sh. Manish Sisodia as well as this Petitioner, is unsustainable as framed.

20. Further raised objection, whether the petition is belated and the explanation given in Paras 6 – 8 is false to the knowledge of the Petitioners?

21. Mr.Luthra submitted that in Paras 6, 7 & 8 of the Petition, the Petitioners have sought to justify the delay in challenging the revisional order which is 14 months old having been passed on 24.07.2019 on the ground that there was no occasion for them to seek supply of documents till the Order dated 24.08.2020 was passed by the Coordinate Bench of this Hon'ble Court. In this regard, it is submitted that when the Order was passed on 22.11.2018, the next date in the Trial Court was on 07.12.2018, when an adjournment was required to be sought. It is only on 07.12.2018 the Application under Section 207 Cr.P.C. was filed, as reflected in Para 1 at Page 49 of the Application.

22. Further submitted, this Court on 14.03.2019 in Writ Petition (Crl.) No. 3559/2018 made it clear that proceedings under Section 207 Cr.P.C. will continue pursuant to which the Application under Section 207 Cr.P.C. was decided by the Trial Court on 22.04.2019 and by the Sessions Court on

24.07.2019. Despite this, Petitioners chose not to challenge the Revisional Order passed on 24.07.2019 for 14 months. Further, on 24.08.2020, the Petitioners while agreeing to the matter for being listed for consideration on charge, only sought time to prepare arguments and did not mention any alleged requirement to comply under Section 207 Cr.P.C. which demonstrates that despite the order dated 14.03.2019 and the Revisional Order dated 24.07.2019, the Petitioners have been delaying the matter by choosing not to seek supply of documents which they claimed to be entitled to, including the challenge in the present petition.

23. To strengthen his arguments, he has relied upon a case of ***Rajesh Chetwal vs. State: Crl. M.C. 1656/2011 passed by this Court on 24.08.2011*** which is relevant whereby observed as under:

> *"10.So far as the question of application of provisions of the Limitation Act is concerned, I agree with the contention of the petitioner that the same is not applicable and to this extent the judgment of the Single Judge in Enforcement Directorate Vs. Ajay Bakliwal (supra) & Inder Mohan & Othrs Vs The State (supra)is not in dispute. But the question which arises for consideration is as to whether the petitioner is barred by principle of inordinate delay and laches on the part of the petitioner in invoking the powers of the High Court under Section 482, Cr.PC.*
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> *11. There is no dispute that Section 482 Cr.PC starts with a non-obstante clause and that being unfettered by any*

provision of law contained in Cr.PC, the High Court is conferred with the powers to pass orders to prevent the abuse of process of law or to secure the ends of justice. There is also no dispute about the fact that no period of limitation has been prescribed by the Limitation Act within which a petition under Section 482 Cr.PC ought to be filed. But the contention which the learned counsel for the petitioner has failed to address convincingly is that the principle of laches or inordinate delay is not applicable to a petition under Section 482 Cr.PC. In this regard, I disagree with the contention of the learned counsel for the petitioner that the principle of laches or inordinate delay is not applicable to the provisions of Section 482 Cr.PC. In this regard, it may be pertinent to refer to a few judgments of other High Courts which have dealt with similar question.

12. In ***Bata & Others versus Anama Behera: 1990 Crl.LJ 1110****, the learned single Judge of the Orissa High Court observed as under :-*

> *"Though for filing an application under section 482 there is no limitation, the application should be filed within a reasonable time, so that the progress of the case is not disturbed at a belated stage. A revision petition challenging an order can be filed within 90 days from the date of the order similarly a period of 90 days which is at par with a revision petition should be treated as reasonable time for filing an application under section 482 and if it is filed beyond the period of 90 days the applicant would have to explain the cause of the delay."*

13. Similarly in Gopal Chauhan versus Smt. Satya & Anr., 1979 Crl.LJ 446, it was observed that a petition under Section 482 Cr.PC and Article 227 of the Constitution of India filed after expiry of 3 years from the date of summoning ought not to be entertained when the

case is fixed for the stage of evidence and that too, when the petitioner has approached the Revisionist Court.

14. Thus, although the question of inordinate delay and laches has not been dealt with in many cases but the fact remains that a party who invokes the jurisdiction of the High Court for the purpose of quashing of FIR and the consequent proceedings by embarking on to show that the ingredients of Section 409 or 420 IPC are not made out, is not only required to meet the test of expeditious dispatch of approaching to the Court but he should also be able to show that the facts are so glaring that it calls for interference of the High Court rather than raising the disputed questions of fact. In the present case, the FIR was admittedly registered in the year 1999 and a charge sheet had also been filed in the same year. Therefore, the petitioner was aware as to what are the accusations against him when he appeared before the Court for the first time in 1999 as a complete set of the charge sheet must have been supplied to him. If at all, the petitioner felt that there was a case for quashing of FIR, he ought to have approached the Court at the earliest possible stage. I agree with the observation made by the Orissa High Court that if a revision against an order of summoning could be filed within a period of 90 days then ordinarily a period of 90 days should have been sufficient to invoke the jurisdiction of High Court under Section 482 Cr.PC. Admittedly, this has not been done and if the period is calculated from 1999, the present petition has been filed after more than 11 years and, therefore, there was inordinate delay and laches on the part of the petitioner for which not even an iota of explanation is forthcoming in the petition.

15. Even if, the contention of the learned counsel for the petitioner that the cause of action for filing the petition accrued to the petitioner only after 09.052009 when the charges against him under Section 409 and 420 IPC were framed, is taken to be correct even then from the date of

framing of the charge, there has been a lapse of almost two years in invoking the jurisdiction of this Court. As I have observed hereinabove that a revision against an order ought to be filed within a period of 90 days and the said period has been held by Orissa High Court to be reasonable and sufficient to invoke the revisionary power of a Court, then ordinarily the said period can also be said to be reasonable in normal circumstances while preferring a petition under Section 482 Cr.PC while as in the instant case, there is a lapse of almost two years without there being even an iota of averment in the petition as to what the petitioner was doing during these two years. The learned counsel during the course of argument, had made a submission that he was recently engaged and when on being engaged he found that the charge against the petitioner was not sustainable, he preferred the present petition under Section 482 Cr.PC.

16. I do not agree with the contention of the learned counsel for the petitioner that the change of counsel should be the ground for entertaining a belated petition under Section 482 Cr.P.C. If that is permitted to be done, then there will be a spate of cases filed by the parties on the plea that the counsel who has filed the petition has been engaged recently as a consequence of which no trial before the Trial Court would be either able to proceed or get concluded.

17. For the reasons mentioned above, I am of the considered opinion that the present petition is highly belated and inordinately delayed as the charge sheet was filed in the year 1999 and since then the petitioner was aware of the allegations against him. Even if the date of cause of action for filing the petition is taken from the date of framing of charge then also there is delay of almost two years in invoking the jurisdiction of the High Court. Therefore, the petition is totally misconceived and the same is accordingly dismissed."

24. He further relied upon the following decisions—

(a) Bata vs. Amana Behra: 1989 SCC Online Ori 325

(b) Neerja Bhargava vs. State of NCT of Delhi & Anr.: 2015 SCC Online Del 12505;

(c) Dr. G. Ramachandrappa vs. Padma Ramachandrappa: 2010 Cri LJ 2666;

25. Learned senior advocate has also raised an issue that whether the records of the Case Diary can be sought despite the bar under Section 172(3) Cr.P.C.?

26. It is submitted that bar under Section 172(3) Cr.P.C. has been retained to Section 172 even after the amendment to Cr.P.C. vide Act 5 of 2009, effective from 31.12.2019. In the course of an investigation, the I.O. may question many persons and would record all the proceedings so carried out in the Case Diary, which is the mandate of Section 172 Cr.P.C. In this regard, he has cited the case of ***State of NCT of Delhi vs. Ravi Kant Sharma: (2007) 2 SCC 764*** whereby held as under:

> *"In a given case the investigating officer may record circumstances ascertained during investigation in the case diary in terms of Section 172 Cr.P.C. It is only when the investigating officer decides to record the statement of witnesses under Section 161 Cr.P.C. that he becomes obliged to make a true record of the statement which*

obviously will not include the interpretation of the investigating officer of the statements or the gists of statement."

27. He further relied upon the case of ***Sunita Devi vs. State of Bihar & Anr.: (2005) 1 SCC 608***, wherein it was observed by the Hon'ble Supreme Court that: -

"The supervision notes can in no count be called. They are not a part of the papers which are supplied to the accused. Moreover, the informant is not entitled to the copy of the supervision notes. The supervision notes are recorded by the supervising officer. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilized against him. The object is to enable the accused to defend hiself properly. The idea behind the supply of copies is to put him on notice of what he had to meet at the trial. The effect of non-supply of copies has been considered by this Court in Noor Khan v. State of Rajasthan, AIR (1964) SC 286 and Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr.. [2003] 7 SCC 749. It was held that non-supply is not necessarily prejudicial to the accused. The Court has to give a definite finding about the prejudice or otherwise. The supervision notes cannot be utilized by the prosecution as a piece of material or evidence against the accused. At the same time the accused cannot make any reference to them for any purpose. If any reference is made before any court to the supervision notes, as has noted above they are not to be taken note of by the concerned court. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorized access to the official records. We, therefore, direct the Chief Secretary of each State and

Union Territory and the concerned Director General of Police to ensure that the supervision notes are not made available to any person and to ensure that confidentiality of the supervision notes is protected. If it comes to light that any official is involved in enabling any person to get the same appropriate action should be taken against such official. Due care and caution should be taken to see that while supplying police papers supervision notes are not given."

28. Mr.Luthra submitted that rationale in ***Sunita Devi (supra)*** was further followed in ***Sidharth & Ors. vs. State of Bihar: (2005) 12 SCC 545***. Reliance may also be placed on ***Naresh Kumar Yadav vs. Ravindra Kumar & Ors.: (2008) 1 SCC 632*** wherein it was interalia held that:

"13. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilized against him. The object is to enable the accused to defend himself properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. The effect of non-supply of copies has been considered by this Court in Noor Khan v. State of Rajasthan (AIR 1964 SC 286) and Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr. (2003 (7) SCC 749). It was held that non-supply is not necessarily prejudicial to the accused. The Court has to give a definite finding about the prejudice or otherwise. Even the supervision notes cannot be utilized by the prosecution as a piece of material or evidence against the accused. If any reference is made before any court to the supervision notes, as has noted above they are not to be taken note of by the concerned court. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorized

access to the official records."

29. Further argued that the judgments [***Sunita Devi (supra) and Naresh Kumar Yadav (supra)]*** have been overruled by a 5-judge Constitutional Bench of the Hon'ble Supreme Court in Para 92.12 of ***Sushila Aggarwal vs. State: (2020) 5 SCC 1*** on a different issue, i.e., limiting the grant of anticipatory bail to a particular period of time. Such issue is not in question in the present case. In this view of the matter, the gist of what is recorded cannot be sought to be supplied by the Petitioner being barred under Section 172(3) Cr.P.C. Moreover, the High Court Rules framed by this Court in Chapter XII, Rule 1 & Rule 3 recorded as under:

> *[1] When accused is entitled to see Police diaries or statement of a witness recorded by Police—The Police diaries called for under Section 172 of the Code of Criminal Procedure should not be shown to accused persons, or to their agents, or pleaders, except under the circumstances stated in the second clause of Section 172 of the Code, that is, when they are used by a Police Officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such Police Officer. Sessions Judges and District Magistrates should issue such orders as are necessary to guard against the Police diaries being inspected by person not entitled to see them. The right of an accused person to be furnished with a copy of a statement of a person whom the prosecution proposes to examine as its witness, whether this statement has been recorded in a police diary or otherwise, is dealt with in Sections 162 and 173*

of the Code.

Note—These restrictions do not apply to a person duly authorized to conduct the prosecution in any case.

[3] Use of Police diary by Court - As to be manner in which Police diaries may be used by Courts, the following remarks should be borne in mind: The Provision of Section 172, that any Criminal Court may send for the Police diaries, not as evidence in the case but to aid it in an inquiry or trial empowers the Court to use the diary not only for the purpose of enabling the Police officer who complied it to refresh his memory, or for the purpose of contradicting him, but for the purpose of tracing the investigation through its various stages the intervals which may have elapsed in it, and the steps by which a confession may have been elicited, or other important evidence may have been obtained. The Court may use the special diary, not as evidence of any date, fact or statement referred to in it, but as containing indications of sources and lines of inquiry and as suggesting the names of persons whose evidence may be material for the purpose of doing justice between the State and the accused.

Should the Court consider that any date, fact or statement referred to in the Police diary is, or may be, material, it cannot accept the diary as evidence, in any sense, of such date, fact or statement, and must, before allowing any date, fact or statement referred to in the diary to influence its mind, establish such date, fact or statement by evidence.

Criminal Courts should avail themselves of the assistance of Police diaries for the purpose of discovering sources and lines of inquiry and the names of persons who may be in a position to give material evidence, and should call for diaries for this purpose."

30. It is further submitted that it is not obligatory on part of the police

officer to record any statement made to him and he may do so if he feels it necessary. In this regard, reference may be drawn to the decisions in ***Zahira Habibullah H. Sheikh and Anr. vs. State of Gujarat & Ors.: (2004) 4 SCC 158*** wherein it was held:

> *"71. ... Sub-section (1) of Section 161 of the Code provides that the competent police officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Requirement is the examination by the police officer concerned. Sub-section (3) is relevant, and it requires the police officer to reduce to writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records. Statement made by a witness to the police officer during investigation may be reduced to writing. It is not obligatory on the part of the police officer to record any statement made to him. He may do so if he feels it necessary. What is enjoined by the section is a truthful disclosure by the person who is examined. ..."*

31. Reference may also be made in this regard to the 41st Report of the Law Commission of India, wherein the Commission took the following view with respect to Section 161 Cr.P.C.:

> *""...14.9. It is of course true that the discretion allowed to a police-officer to record, or not to record, any statement made to him during investigation is expressed in absolute terms. Such wide discretion naturally attracts suspicion. We can therefore readily understand why the previous Reports suggested some limitation which would*

help to guide the exercise of this discretion. When, however, we come to consider the concrete situation with which the law here seeks to deal, we find that there is for practical purposes no point in imposing a restriction on the judgment of the investigating officer. The reason is this. A police-officer investigating a crime has to question, and then to examine orally, a large number of persons, many of whom may have no useful information to give and much of the information is later found to be pointless. It would be too great a burden on him if he should be required by law to reduce into writing every statement made to him; nor would it serve any purpose apart from distracting attention from the main task.

It was for this reason, we think, that the Law Commission suggested, in the earlier Report, that the statement of only those persons whom the prosecution proposed to produce at the trial need be recorded. Even this requirement seems to us to be unworkable. The investigator does not always know what the result of his investigation is going to be; nor does he necessarily know who will be produced at the trial. The proposed guide line is not therefore a helpful guide, and we would hesitate to suggest it as such. Our view is that there is no need to place any fetter on the discretion of the police-officer at the stage of investigation.

...

...Any apprehension, therefore, that because of negligence or dishonesty a police-officer my misuse his discretion in this connection, does not appear well-founded in practice, however plausible it may appear on theoretical considerations. We feel it is better to leave it to the investigating officer to record only what, in his judgment, is worth recording and leave the rest to departmental instructions and supervision. The permissive and discretionary provisions now contained in section 161 ["may examine orally" in sub-section (1) and

"may reduce into writing" in sub-section (2)] should not be fettered down in any way. ..."

32. While concluding his arguments, Mr.Siddharth Luthra submitted that the Ld. Magistrate has rightly exercised his discretionary powers in his jurisdiction, therefore, this is not a fit case for exercise of extraordinary powers under section 482 Cr.P.C. and accordingly, the petition deserves to be dismissed.

33. I have heard learned counsel for the parties at length and perused the material available on record.

34. As discussed above, learned counsel for the parties relied upon the judgments rendered by this Court and the Hon'ble Supreme Court. The main issue to be considered by this Court is that; whether statement of witness V.K. Jain recorded on 21.02.2018 but not signed by IO of the case, is to be considered as a statement recorded under section 161 Cr.P.C. If yes, further question arises whether relied upon judgments by the respondents are applicable in the facts and circumstances of the present case.

35. The petitioners have placed copy of statement of V.K. Jain, which is reproduced as under:

"Case FIR No.54/18, Dated 20/02/18, U/s 186/332/353/120-B/342/504/506(II)/323/34 IPC, PS Civil Lines, Delhi

Examination of Sh. Vinod Kumar Jain S/o Late Sh. Kalu Ram Jain R/o H. No.57, Mera Bai Institute of Technology Campus Maharani Bagh, Delhi, age 60 years, Mobile No.XXXXXXXXXX (Note:- Number is marked by the court).

ब्यान किया कि मैं पत्ता उपरोक्त पर अपने परिवार के साथ रहता हूँ ओर August 2017 में IAS सेवानिवृत हुआ हूँ । मैं 1984 Batch का DANCS officer हूँ और 2001 Batch का IAS officer हूँ। मै पिछले Sep. 2017 से Hon'ble CM साहब के office में Adviser-cum-consultent appointed हूँ | जो दौराने examination Sh. V.K. Jain ने दिनांक 19/02/18 घटना की details बतलायी जो इस प्रकार से है :-

(1):- दिनांक 19/02/18 को समय करीब 7:56 PM पर Dy CM Sh Manish Sisodiya जी का फ़ोन आया की Chief Secretary Sh Anshu Prakash से meeting करनी है |

(2):- समय करीब 8:19 PM पर Dy CM की बात को Sh. Vibhav PA to CM को phone किया और C.S से meeting के बारे में पूछा |

(3):- समय करीब 8:21 PM पर Pravesh Ranjan Jha को phone किया और कहा की C.S को इन्फॉर्म कर दो कि CM 12 बजे रात को meeting लेना चाह रहे है |

(4):- समय करीब 8:24 PM पर Pravesh Ranjan Jha का call आया जो मैं call attend नहीं कर पाया मैंने call back किया तो उसने बतलाया की CS phone नहीं उठा रहे है |

(5):- समय करीब 8:44 PM पर CS को मैंने call किया और CM साहब की meeting के बारे में बतलाया |

(6):- समय करीब 9:00 PM पर मैंने Dy CM साहब को meeting के confirmation के बारे में बतलाया और 9:04 PM Bibhav PA to CM को भी meeting के बारे में बतलाया |

(7):- समय करीब 9:05 पर मैंने CS साहब को meeting के बारे में दोबारा बतलाया की meeting 12 बजे रात में होनी है |

(8):- समय करीब 10:00 PM पर मेरे पास CS साहब का phone आया कि वे meeting के लिए आ जायेंगे |

(9):- समय करीब 11:21 PM पर CM साहब का phone आया और पूछा की CS से बात हो गयी क्या तो मैंने कहा की CS साहब से बात हो गयी है और वो meeting के लिए आ जायेंगे |

(10):- समय करीब 11:26 PM पर अपने घर से CM office के लिए निकला था और CS को भी call किया था | में समय करीब 12:00 बजे मैं CM residence पर पहुँच गया था | मैं waiting room में wait कर

रहा था |
(11):- समय करीब 12:05 AM पर CS साहब CM residence पर meeting के लिए आ गए थे और Bibhav मुझे और CS साहब को लेकर meeting room में गए थे | जहां पर पहले से ही CM Sh Arvind Kejriwal, Dy CM Sh Manish Sisodiya और Sh Rajesh Gupta MLA, Sh Nitin Tyagi MLA, Madan Lal MLA कमरे में entry gate की सामने वाली दीवार के साथ chairs पर बैठे हुए थे और कमरे में entry gate के right side पर सोफे पर Sh Amanat-Ulla Khan MLA और Sh. Prakash Jarwal MLA बैठे हुए थे | entry gate के साथ वाली दीवार के साथ सोफे पर Ajay Dutt MLA, Sh Praveen Kumar MLA बैठे हुए थे | मुझे मालूम नहीं था कि meeting में MLA's भी आये हुए है | meeting room में CS साहब Sh. Amanat-Ulla Khan MLA और Sh. Prakash Jarwal MLA के बीच में उसी सोफे पर बैठ गए थे और में Sh. Rajesh Gupta MLA आदि के साथ बैठ गया था |
जो CM साहब ने meeting शुरू करते हुए CS साहब से कहा कि MLA'S आये हुए है और उनकी कुछ problems/issues है जिनके बारे में MLA's आपसे बात करना चाहते है | जो 4-5 MLA's CS साहब से एक साथ पूछना शुरू कर दिया था जो Door Step Delevery of Ration और Advertisement Fund release के बारे में और slow processing of files के बारे में बाते कर रहे थे| इसी दौरान मैं washroom चला गया था और जब वापिस आया तो CS meeting से निकलकर जा रहे थे और CM साहब ने मुझे भी कहा कि मैं भी meeting over हो चुकी है और मैं भी जा सकता हूँ | में वापिस घर आ गया |
Question:- क्या आपके सामने CS साहब के साथ किसी प्रकार की बदसलूकी या हाथापाई हुई थी ?
Ans:- मैं meeting के दौरान कुछ समय के लिए washroom गया था उस दौरान क्या हुआ था मैं कह नहीं सकता|"

36. It is not in dispute that V.K. Jain was called on 21.02.2018 in the Police Station and he joined investigation. It is also not in dispute that he was examined by the IO on that day and the said fact recorded in the case dairy. But, stand of prosecution and respondent no.2 complainant is that on 21.02.2018, statement of V.K. Jain was not recorded under section 161 Cr.P.C.

37. Undisputedly, in the remand order of co-accused namely Prakash Jarwal and Amanatullah Khan, Learned Metropolitan Magistrate, Tis Hazari Courts, Delhi, has recorded the date of statement of V.K. Jain as 21.02.2018. However, in reply to above facts, it is stated that above date of 21.02.2018 is a typographical error, in fact both statements under section 161 Cr.P.C. and 164 Cr.P.C. of witness V.K. Jain were got recorded on 22.02.2018. Moreover, the fact of recording of statement dated 21.02.2018 in order of learned MM dated 23.02.2018 is the submission made by the defence counsel, not by the prosecution.

38. In view of above, it is pertinent to mention here that in para 28 of impugned order dated 24.07.2019, learned ASJ has recorded that on perusal of '*Case Diary'* it shows that witness V.K. Jain was examined in Police Station on 21.02.2020 in depth and a report was prepared. The case diary

further shows that after examination, V.K. Jain was relieved from the investigation after giving him necessary instructions. Learned Judge further observed that since it is a record of oral examination of V.K. Jain by the IO and is noted in the '*Case Diary'*, the said examination does not take place of statement under section 161 Cr.P.C. and is thereby not to be given to the accused. However, the same may be used during the trial.

39. As argued by Mr.Hariharan, the prosecution has withheld the statement of witness V.K. Jain recorded on 21.02.2018 because it did not suit the prosecution case. However, it is not in dispute that in the statement of V.K. Jain dated 09.05.2018 which is part of chargesheet says that *"In continuation with statement dated 21.02.2018"*, to which prosecution covers by stating that the same is typographical error.

40. Section 161 Cr.P.C. is relevant, which is reproduced as under:

> ***"161. Examination of witnesses by police.***
> *(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.*
> *(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.*

> *(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records."*

41. This Court in ***Ashutosh Verma vs. CBI: 2014 SCC OnLine Del 6931*** has observed that even at the stage of scrutiny of documents under section 207 Cr.P.C., the Court shall supply all the documents to the accused even if the same were not relied upon by the prosecution. Further observed that the accused can ask for the documents that withheld his defence and would be prevented from properly defending himself, until all the evidence collected during the course of investigation is given to the accused. Also observed that if there is a situation that arises wherein an accused seeks documents which support his case and do not support the case of prosecution and IO ignores these documents and forward only those documents which favours the prosecution, in such a scenario, it would be the duty of IO to make such documents available to the accused.

42. In ***Shakuntla (supra)***, this Court held that the Courts while framing charges may not take into account the defence of the accused or the documents in custody of the accused which were not produced by the accused before the Investigating Officer or which did not form part of the

investigation but the Court is duty bound to consider the evidence collected by the Investigating Officer during the investigation of the case. However, in the case in hand, some documents were withheld by IO and not placed on record with chargesheet which is against the scheme provided under section 173(5) & 173(6) Cr.P.C., the said sections are reproduced as under:

> *173(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate alongwith the report-*
>
> *a. all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;*
>
> *b. the statements- recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.*
>
> *173(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject- matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request."*

43. Accordingly, a conjoint reading of section 173(5), 173(6) and first proviso attached to section 207 of Cr.P.C. leaves no scope of doubt that it is bounden duty of the police officer to forward all the statements to the

Magistrate, mentioned in sub-section (5) (b) of Section 173 Cr.P.C. without any exception so as to enable the Magistrate to discharge his duty under section 207 of Cr.P.C. by furnishing copies of such documents to the accused.

44. It cannot be disputed that the duty of the investigating agency is to do free and fair investigation by bringing to the notice of the Court all the evidences collected during the investigation without pick and choose the one which does not support them. The accused has been provided with definite right under the provisions of Cr.P.C. and the constitutional mandate to face the charge against him by a fair investigation and trial.

45. It is pertinent to mention here that in para 58 of the impugned order, learned Sessions Court has differentiated the judgment of the ***State of NCT of Delhi vs. Ravikant Sharma & Ors.: (2007) 2 SCC 764*** and discussed in detail and opined that the said judgment is not applicable in the present case. However, amendment in section 172 Cr.P.C. in the year 2009 made the judgment mentioned above, inapplicable to the case in hand as the '*Case Diary'* is a composite case diary including the statements recorded under section 161 Cr.P.C.

46. Whereas, the prosecution has completely denied that no statement was

recorded on 21.02.2018 and only the oral statement is made by V.K. Jain. However, admittedly, in '*Case Diary'*, it is mentioned that he is giving statement in continuation of statement given on 21.02.2018. Thus, stand of prosecution cannot be accepted which is contrary to their own record.

47. It is pertinent to mention here that in the impugned order dated 24.07.2019, learned Revisional Court has recorded that since it is a record of oral examination of V.K. Jain by IO and is noted in the case diary, this statement cannot be given being not recorded under section 161 Cr.P.C., however, the same may be used during trial.

48. The aforementioned opinion, in my view, is perverse because of the reason that the statement dated 21.02.2018 is not oral but written one and said statement has been mentioned in various other documents and orders as discussed above, thus, it acquires the status of section 161 Cr.P.C. Moreover, if statement dated 21.02.2018 is not taken into consideration at the time of passing the order on charge, which is part of police record, at subsequent stage, however, during trial it cannot be relied upon and benefit of the same will not be available to the accused person.

49. Regarding limitation, although delay is duly explained in the petition, however, there is no applicability of Limitation Act on Section 482 Cr.P.C.

being the inherent powers of this Court. The said section is starting itself with a non-obstante clause (Notwithstanding) therefore, this Court has power to exercise inherent powers where there is miscarriage of justice and abuse of process of law. Non-applicability of Limitation Act and non-providing of limitation period in Cr.P.C. with regard to Section 482 Cr.P.C., the intention of the legislature was not to restrict this Court to use these powers in appropriate cases. Thus, raising the issue of limitation period about Section 482 Cr.P.C. is itself contrary to the intention of legislature and the very section itself. In this regard, judgments relied upon by the respondent no.2 (complainant) are not applicable, as facts and circumstances of those cases are different from the case in hand.

50. As far as the issue of source of document is concerned, the Hon'ble Supreme Court and various High Courts including the case of ***Pushpadevi M. Jatia vs. M.L. Wadhavan & Ors.: (1987) 3 SCC 367*** relied upon by respondent no.2 (complainant) held that the source of the evidence is not material, as long as it is admissible under the law, the same may be considered. If evidence is relevant, it is admissible irrespective of how it is obtained.

51. Regarding the issue that order dated 22.04.2019 of learned ACMM

has not been challenged by the petitioners, but only challenge the Revisional order, however, in my opinion, this issue is no more *res integra* which has been decided in ***Kunhayammed (supra)***.

52. In view of above facts and law discussed, it is the prime duty of the Investigating Agency to do free and fair investigation, thereafter, bring to the notice of the Court all the evidences collected without pick and choose. The Investigating Agency has no power to appreciate the evidence, it rests with Court.

53. Accordingly, I found merits in the present petition. Consequently, the impugned order is hereby set-aside.

54. Consequently, the Trial Court is directed to consider statement dated 21.02.2018 of V.K. Jain, which is part of '*Case Diary'* and placed on record by the accused, at the time of passing the order on Charge.

55. In view of above observations, the present petition is allowed and disposed of.

56. The order be uploaded on the website forthwith.

(SURESH KUMAR KAIT)
JUDGE

OCTOBER 21, 2020/ab