

IN HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JSMMU

CRM(M) No. 28/2024

Reserved on : 02.2.2024

Pronounced on:

07.02.2024

Amit Kumar son of Ram Kumar resident
of Garor Sonipat Haryana at present
District Jail Amphala

.....petitioner(s)

Through :- Ms Zainab Shamas Watali Advocate

V/s

UT of Jammu and Kashmir Th. SHO
Police Station ANTF Gandhi Nagar
Jammu

.....Respondent(s)

Through :- Mr. Pawan Dev Singh Dy.AG

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1 The petitioner is facing criminal trial in FIR No. 14/22 registered under Sections 8/20/29 of NDPS Act in the Court of learned Second Additional Sessions Judge, Jammu ['trial Court']. The matter is yet to be taken up by the trial Court for framing of charge.

2 With a view to contest framing of charge, an application under Section 91 Cr.PC came to be filed by the petitioner before the trial Court to call for the Tower location (CDR) of Airtel Mobile No. 9034909052 and Jio Mobile No. 8708236962 belonging to the petitioner and also the Tower Location (CDR) of two mobile numbers of co-accused, namely Ombir. A request was also made to call for the record of toll tax paid through the

Fastag affixed to the Hyundai Creta car of the petitioner bearing Registration No. HR29AV-3483 at Ban Toll Plaza, Nagrota on 14.10.2022 along with CCTV footage of 14.10.2022. The application was filed on the ground that the petitioner and co-accused are suffering incarceration for the last more than ten months for no fault of their. The petitioner is a business man who deals in sale and purchase of apples and in connection thereof, he along with his friend were coming back from Kashmir on 14.10.2022. The petitioner, who was travelling in the Hyundai Creta Car was stopped by some persons in civil clothes immediately after they crossed Nashri Tunnel. On enquiry, it was found that the men in civil clothes were members of a team of Police from Police Station ANTF Gandhi Nagar Jammu. It was alleged that the ANTF team took the petitioner and co-accused to the office of ANTF Gandhi Nagar, Jammu. The petitioner claims that they went to Ban Toll Plaza and even paid toll tax through fastag affixed on the wind screen of the vehicle. It was also alleged in the application that the ANTF Team switched off the phones of the petitioner and the co-accused before they were taken out of the Police Station ANTF. The Hyundai Creta Car of the petitioner was taken by the ANTF people to a place on bypass Sidhra, Narwal, also known as Bagh-e-Bahu Morh Jammu where they handcuffed the petitioner and the co-accused. The ANTF team which had fabricated a cavity inside the fuel tank of Creta car, took out some stuff and informed the petitioner that it was charas. The petitioner along with co-accused were arrested and a false case under Sections 8/20/29 NDPS act was slapped upon them. It is submitted that the documents which the petitioner is asking for would show to the Court that the entire drama leading to recovery and arrest of the petitioner and co-accused was stage managed by the ANTF team of Gandhi Nagar, Jammu. The tower location

would indicate how the petitioner and the co-accused moved from Ban Toll Plaza to Gandhi Nagar and then to Bagh-e-Bahu Morh on Sidhra road, Narwal.

3 The application was resisted by the prosecution. In its objections, learned APP submitted that the challan which is subjudice in the trial Court is fixed for framing of charge on 17.10.2023. The petitioner is a kingpin of a gang of narcotic smugglers who smuggle narcotics from Kashmir to other parts of the country and has established his network. The offence committed by the petitioner is serious, heinous and non-bailable and carries rigorous imprisonment, ranging from 10 to 20 years. It was also submitted that the required CDR and other documents which had already been procured by the Investigating Officer ['I.O'] are annexed with the challan. That apart, the CCTV footage, tower locations and toll tax data are being stored for a specified period of time and, thereafter, get deleted/erased automatically.

4 The application was considered by the trial Court in the light of rival submissions made by learned counsel appearing for the petitioner and the prosecution and the case law on the point. The trial Court concluded that at the time of framing of charge, an accused does not have a right to produce any material or documents to contest framing of charge, for, the charge is required to be framed solely on the basis of challan and the material produced by the prosecution along with it. It was, thus, opined that the petitioner had no right to seek production of any documentary evidence at the stage of framing of charge by invoking Section 91 Cr.P.C, for, the accused cannot be permitted to place on record documentary evidence which may constitute his defence. On the basis of this reasoning, the trial Court vide order dated 6.11.2023 rejected the application. It is this order of

the trial Court dated 06.11.2023 which is called in question in this petition filed under Section 482 Cr.PC.

5 Having heard learned counsel for the parties and perused the material on record, it is necessary to first advert to the scope of Section 91 of Cr.PC. Section 91 reads as under:

“91. *Summons to produce document or other thing.*

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed--

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority”.

6 From a plain reading of Section 91, it is evident that it does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 pre-supposes that when the document is not produced, process may be initiated to compel production thereof. Section 91, as is apparent from its reading, is wide enough to enable the Court to seek production of any document or other thing which is necessary or desirable for the purposes of any investigation, enquiry, trial or other proceedings under the Code. The width of powers conferred upon the Court or any officer in-charge of a Police Station under Section 91 Cr.PC is unlimited, but there are inbuilt inherent limitations as to the stage

or point of time of its exercise, commensurate with the nature of proceedings as also the compulsions of necessity and desirability, to fulfill the task or achieve the object.

7 Whether the material produced by or sought to be produced by the accused can be considered at the stage of framing of charge was a question for determination before a three-judge Bench of the Supreme Court in the case of **State of Orissa vs Debendra Nath Padhi, (2005) 1 SCC 568**. The Supreme Court, after surveying the law on the point, unanimously held that at the stage of framing of charge, the trial Court can consider only the material produced by the prosecution and there is no provision in the Code which would confer a right upon the accused to file any material or document at that stage which right was held available to the accused only at the stage of trial. Delving on the scope of Section 91 Cr.PC the three-Judge Bench concluded that the accused cannot, at the stage of framing of charge, be permitted to invoke section 91 CrPC to seek production of any document which may be relevant to prove his innocence. The observations made by the Supreme Court in para (25) are noteworthy and, therefore, the same is set out below:

“25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code'. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking [Section 91](#) at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the section.

In so far as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or accused. If under Section 227 what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by Court and under a written order an officer in charge of police station can also direct production thereof”.

8 It is, thus, trite that the entitlement of the accused to seek order under Section 91 CrPC would ordinarily not come till the stage of defence. The necessity and desirability of the documents sought to be produced for the purpose of investigation, enquiry, trial or other proceedings, is to be examined considering the stage when such prayer for summoning and production of document or other material is made. In no case, Section 91 can be invoked as a matter of right to seek production of document, whether in possession of the accused or some other person, which may be necessary to prove the defence of the accused. However, in a later case of **Rukmini Narvekar vs. Vijaya Satardekar and others, (2008) 14 SCC 1**, a two-Judge Bench of the Supreme Court again considered the same issue and held that it cannot be said to be an absolute proposition of law that under no circumstances can the Court look into the material produced by the defence at the time of framing of charge, though this should be done in very rare cases i.e where defence produces some material which is of sterling quality and convincingly demonstrate that the whole prosecution case is totally absurd or concocted. In **Nitya Dharmananda @ K. Lenin vs Sri Gopal Sheelum Reddy, (2018) 2 SCC 93**, the position of law

enunciated in the case of **Debendra Natgh Padhi** (supra) was reaffirmed. In paragraph (8) of the judgment, it was held thus:

*“8. Thus, it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge sheet. It does not mean that the defence has a right to invoke **Section 91 Cr.P.C.** de hors the satisfaction of the court, at the stage of charge”.*

9 The little distinction in the legal proposition which was made by the Supreme Court in the case of Nitya (supra) is that if, at the stage of framing of charge, the Court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the Court is not debarred from summoning or relying upon the same even if such document is not a part of the charge-sheet. The Supreme Court, however, cautioned that holding so, should not be taken to mean that defence has a right to invoke section 91 Cr.PC *de hors* the satisfaction of the Court, at the stage of framing of charge. The aforesaid position of law stated by the Supreme Court is restated in the Draft Criminal Rules and Practice, 2021 framed by the Supreme Court in **“Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, in RE vs State of Andhra Pradesh and others, (2021) 10 SCC 598.**

10 In the aforesaid case, the directions have been issued to all the High Courts to take immediate steps to incorporate the Draft Rules, 2021 as part of the Rules governing criminal trials and to ensure that the existing Rules on the subject are modified and promulgated

within six months of passing of the order. Rule 4 of the Draft Rules, 2021 reads thus:

“4. *Supply of documents u/sections 173, 207 and 208 Cr.P.C:*

Every Accused shall be supplied with statements of witness recorded under Sections 161 and 164 Cr.PC and a list of documents, material objects and exhibits seized during investigation and relied upon by the Investigating Officer (I.O.) in accordance with Sections 207 and 208 Cr. PC.

Explanation: The list of statements, documents, material objects and exhibits shall specify statements, documents, material objects and exhibits that are not relied upon by the Investigating Officer”.

11 From a reading of Rule 4 reproduced above, it is evident that a right has been conferred on the accused to be supplied with statements of witnesses recorded under Sections 161 and 164 Cr.PC and a list of documents, material objects and exhibits seized during the investigation and relied upon by the I.O. However, the explanation makes it equally obligatory to provide a list of statements, documents, material objects and exhibits that are not relied upon by the I.O. It , therefore, shows that the Rule 4 of the Draft Rules, 2021 which are required to be incorporated by all the High Courts in their criminal Rules of practice, clearly acknowledges the right of the accused to know about the details of the material collected by the I.O during investigation whether relied upon or not by him in the final report.

12 On the conspectus of the legal position enunciated by the Supreme Court in the cases of **Debendra Padhi, Rukmini Narvekar and Nitya** (supra), it would be trite law that at the stage of framing of charge, the Court is only supposed to restrict its consideration to the charge-sheet and the material produced with it by the prosecution. The defence has no right to invoke Section 91 Cr.PC to prove his innocence.

Such documents, if necessary and desirable, can be produced by the accused or by some other person at the asking of the accused at the time of leading his defence. However, if the Court is satisfied that there is a document or material of sterling quality which has been withheld by the investigator or prosecutor, it can summon and rely upon the same even if such document is not a part of the charge-sheet. An application under Section 91 CrPC at the instance of the accused would lie even at the stage of framing of charge if the accused makes out a case that there is a document or material of sterling quality lying with the I.O, but has not been submitted to the Court along with the charge-sheet and such document or material is necessary and desirable for the purposes of framing of charge. Such material and document could be amongst the material and document which, though, was available with or produced before the I.O during investigation, yet the same was not relied upon by him in the final report. Rule 4 of the Draft Rules of 2021 lends support to this proposition.

13 In the instant case, it is not the grievance of the petitioner that some documents or material produced before I.O during investigation or otherwise available with him has not been produced in the Court along with challan and that such document or material is necessary and desirable for framing of charge. Rather, it is a case where the prosecution has clearly stated that the requisite CDRs, call details etc., have already been made part of the final report submitted to the trial Court. The petitioner has invoked Section 91 Cr.PC to seek production of CDRs of four Mobile numbers, two belonging to the petitioner and two to his co-accused and also CCTV footage and fastag receipts of toll at Ban Toll Plaza. All these documents were neither available with the

I.O nor were they sought to be produced before him during investigation. From a plain reading of the application filed by the petitioner and the grievance projected by him therein, it clearly transpires that the petitioner wants to lead his defence and prove his innocence even at the stage of framing of charge. If such course is permitted, the Court will have to conduct a mini trial at the stage of framing of charge which is not permissible in law.

14 In view of the clear exposition of law by the Supreme Court in the supra judgments and the discussion made above, I find no illegality or infirmity in the order passed by the trial Court. This petition is, therefore, found to be without merit and the same is, accordingly, dismissed. It is made clear that dismissal of this petition shall not come in the way of the petitioner to move an application under Section 91 Cr.PC for production of requisite documents at an appropriate stage. Needless to say that in case any such application is made, the trial Court shall consider and dispose of the same on its merits in accordance with law.

(SANJEEV KUMAR)
JUDGE

Jammug
07 .02.2024
Sanjeev

Whether the order is speaking : Yes
Whether the order is reportable : Yes