

Mohd Hashim vs State Of Gncet Of Delhi And Ors & Ors on 14 March, 2022

Author: Chandra Dhari Singh

Bench: Chandra Dhari Singh

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IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(CRL) 2213/2020 & CRL.M.A. 18150-51/2020, CRL.M.
3767/2021, CRL.M.A. 3769/2021, CRL.M.A. 4586/2021, C
12339/2021, CRL.M.A. 17874/2021 & CRL.M.A. 18609/202
MOHD HASHIM

Through: Mr. O.N. Sharma, Adv

versus

STATE OF GNCT OF DELHI AND ORS & ORS. Responde

Through: Mr. Rajesh Mahajan, ASC for St
along with Insp. Pawan Kumar,
Special Cell/S.R.

Mr. Medikanshu Tripathi and M
Ashiwan Mishra, Advocate for
UPEIDA

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH
ORDER

% 14.03.2022

1. The instant writ petition under Article 226/227 of the Constitution of India read with Section 483 of the Code of Criminal Procedure, 1973 (hereinafter "Cr.P.C.") has been filed by the petitioner seeking following prayers:

"a) Pass a writ of mandamus or any other writ/order/direction of like nature as may be appropriate for fair, just and unbiased investigation by any other independent agency like CBI or as may deem fit and appropriate in the facts & circumstance and allow the present writ petition and set aside the impugned order dated 24.12.2020 passed by Ld. Spl Judge NDPS, New Delhi.

b) Be pleased to pass a writ of mandamus/ order or direction of like nature for summoning and production of lacion place and time of call record of mobile number of searching officer SI Nishant Suran respondent No. 2 from the spot at 12:15 A.M. on 14.10.2020 as claimed and by blocking rest of the details in sealed cover so as at least hon'ble court at least can peruse.

c) Be pleased to pass appropriate writ/ direction or order as may be appropriate, just, reasonable and fairness in the interest of justice.

d) Be please & may call for the records of FIR 182/2019 U/s 21/29 NDPS Act P.S Spl Cell/SR pending in the court of Shri Ajay Kumar Jain Ld ASJ, Spl Judge NDPS/New Delhi and next date 11.01.2021 if deem fit and proper for perusal.

e) Pass such any other order/s or direction/s which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. Learned counsel appearing on behalf of petitioner submitted that the accused Mohd. Hashim has been falsely implicated in the present case by the Police officials. It is further submitted that the entire alleged recovery was planted over the accused. The signatures of the accused were taken forcefully on blank papers and his confessional statement was fabricated.

3. It is submitted that the petitioner with co-accused namely Sabbir and Naresh Kumar were unlawfully arrested by the Investigating Officer from their workshop in Barabanki on 11th October, 2019 at about 09.30 P.M., brought them to Delhi on 12th October, 2019 and kept them in illegal custody. It is further submitted that the petitioner with co-accused persons were made to sit in Maruti Ertiga Police Car, DL I CX 7519, at rear seat while the Investigating Officer was sitting in front by side of the Driver and passed through Plaza Bara toll Bara, Haidergarh, U.P. at 11:09:29 and this was recorded in CCTV at the said Toll Plaza. It is also submitted that the said car also crossed the Agra-Lucknow Toll Plaza without paying toll claiming the car to be a Police Vehicle, and the same was also recorded in CCTV at Agra-Lucknow Toll Plaza. It is submitted that no legal assistance was given to the petitioner at the time of remand until 15th October, 2019 and even the family members were not informed by the police.

4. Learned counsel appearing on behalf of petitioner submitted that alleged recovery of 25 kgs of heroine, which is huge commercial quantity of contraband, had been planted over the accused and the Police left the real culprits and apprehended the present accused persons. It is submitted that the accused persons were illegally picked up and arrested on the night of 11th October, 2019 at Barabanki and the Police officials deliberately did not seize the mobile phones, despite the fact that the accused persons had mobile phones and left them at Barabanki itself, so that their locations could not be traced. During investigation, neither the shop was raided nor any search was conducted at the house of the accused. It is further submitted that therefore, the relevant CDR and CCTV footage are required to be brought on record to falsify the prosecution case.

5. It is vehemently submitted that the Police did not join any other local Police officials or the Traffic Police officials at the time of recovery of the contraband. The application under Section 91 of the Cr.P.C. and application under Section 156 (3) read with Section 156A of the Cr.P.C. were filed before the lower Court for fair and proper investigation and to bring certain evidence on record to falsify the case of the prosecution. The said application under Section 91 of the Cr.P.C were dismissed by the Special Judge, NDPS Act, Patiala House Courts, New Delhi vide order dated 24th December, 2020, without assigning any reason or without following the mandate of the Hon'ble Supreme Court

given in several judgments.

6. Learned counsel appearing on behalf of petitioner submitted that the Hon'ble Supreme Court in case of Suresh Kumar vs. Union of India, 2015 3 RCR CrI 340, has held that an accused can be allowed to summon Call Details Records of the mobile/telephone of concerned Police Officers to show that the Police Officers were not near the location of recovery. But the ratio of the said judgment has not been followed by the Special Judge while passing the impugned order.

7. It is submitted that while passing the impugned order, the Trial Court has failed to appreciate the fact that there cannot be a fair trial unless the investigation itself is fair. Moreover, it shall strengthen the case of the prosecution if the documentary electronic evidence was brought on record. In the absence of the same, oral evidence need to be discarded in view of the Section 59 of the Indian Evidence Act, 1872. The Court below has also not considered the aspect of Section 5/9/65B/136 and Section 165 of the Indian Evidence Act.

8. Learned counsel appearing on behalf of petitioner submitted that the impugned order passed by the Court below is illegal, contrary to the law established by this Court as well as the Hon'ble Supreme Court and deserves to be set aside.

9. Per contra, Mr. Rajesh Mahajan, learned ASC for State vehemently opposed the instant writ petition and submitted that the order dated 24th December, 2020 passed by learned Special Judge, NDPS Act, Patiala House Courts, New Delhi is a well-reasoned order which justifies no interference by this Hon'ble Court. It is further vehemently submitted that the pleas taken by the petitioner in his application before the learned Trial Court were highly belated and an afterthought. It is also submitted that there are no merits in the arguments advanced by the learned counsel appearing on behalf of the petitioner that he has been falsely implicated in the instant case.

10. Learned ASC for State submitted that the submissions or contentions raised by the petitioner in his defence may be raised and tested at appropriate stage before the Trial Court and not by way of present proceedings. It is also submitted that investigation is the prerogative of the Investigating Agency and accused cannot direct the investigation to be carried out in any particular manner or on the lines of the defence.

11. Learned ASC further submitted that on 13th October, 2019, specific information was received by SI Nishant Suran that two persons namely Naresh and Mohd Hashim (petitioner herein), were indulged in illegal trade of heroine, would come to deliver a consignment of heroine with one person in a silver Swift Car at Barapulla Bridge, towards Lajpat Nagar Main Road, Delhi. Accordingly, a raiding team was formed, and a trap was laid near Barapulla Bridge, towards Lajpat Nagar Main Road, Delhi at about 11:40 P.M. One Swift Car bearing Registration No. UP 32 FB 2748 arrived at the spot. Thereafter, Mohd Hashim, Naresh Kumar and Sabbir were apprehended near the spot. After all the legal proceedings and compliances, a total of 25 kgs heroine was recovered. 5 Kg of contraband was recovered from the possession of the three persons each and 10 kgs of heroine was recovered from secret cavity of the aforesaid car. It is categorically submitted that accused persons were not found in the possession of mobile phones during their arrest. Their arrest was affected

from the place and in the manner as mentioned in the chargesheet and accompanying documents and not as alleged in the petition. It is submitted that the pleas taken by the petitioner are devoid of any basis and liable to be rejected.

12. Learned ASC submitted that in compliance of the order dated 30th December, 2020 passed by the Coordinate Bench, prompt measures and necessary steps were taken to intimate the service providers to preserve the call records and the relevant agencies to preserve the CCTV footages. It is submitted that reply received from Agra-Lucknow Expressway reveals that since their storage capacity is only for 30 days, they do not have records of CCTV footage pertaining to dates in October, 2019. It is further submitted that in view of the facts and circumstances, the instant writ petition is nothing but a gross misuse of process of law and there are no illegalities in the impugned order passed by the Court below.

13. Heard learned counsel for the parties and perused the record including the status report, contentions made in the petition and impugned order dated 24th December, 2020 passed by the Court below.

14. The cardinal issue which requires adjudication in the instant petition is in the nature of the power conferred on the Court or any Officer in charge of the Police Station under Section 91 of the Cr.P.C. For convenience, Section 91 of the Cr.P.C. is reproduced 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."

15. A plain reading on the above quoted provision makes it evidently clear that the powers conferred therein are enabling in nature, aimed at arming the Court or any Officer of the Police Station concerned to enforce and to ensure production of any document or other things, "necessary or

desirable", for the purpose of any investigation, inquiry, trial or other proceedings under the Code, by issuing summons or written orders to those in possession of such materials. Therefore, sine qua non of an order under this Section is consideration of the Court that the production of the documents concerned is desirable and necessary for the purpose of trial. The Hon'ble Supreme Court, in the case of State of Orissa vs. Debendra Nath Padhi, 2005 (1) SCC 568 held as under:

"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. Insofar 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 a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.

26. Reliance on behalf of the accused was placed on some observations made in the case of Om Parkash Sharma v. CBI [(2000) 5 SCC 679 : 2000 SCC (Cri) 1014] . In that case the application filed by the accused for summoning and production of documents was rejected by the Special Judge and that order was affirmed by the High Court. Challenging those orders before this Court, reliance was placed on behalf of the accused upon Satish Mehra case [(1996) 9 SCC 766 :

1996 SCC (Cri) 1104] . The contentions based on Satish Mehra case [(1996) 9 SCC 766 : 1996 SCC (Cri) 1104] have been noticed in para 4 as under: (SCC p. 682) "4. The learned counsel for the appellant reiterated the stand taken before the courts below with great vehemence by inviting our attention to the decision of this Court reported in Satish Mehra v. Delhi Admn. [(1996) 9 SCC 766 : 1996 SCC (Cri) 1104] laying emphasis on the fact that the very learned Judge in the High Court has taken a

different view in such matters, in the decision reported in *Ashok Kaushik v. State* [(1999) 49 DRJ 202] . Mr Altaf Ahmed, the learned ASG for the respondents not only contended that the decisions relied upon for the appellants would not justify the claim of the appellant in this case, at this stage, but also invited, extensively our attention to the exercise undertaken by the courts below to find out the relevance, desirability and necessity of those documents as well as the need for issuing any such directions as claimed at that stage and consequently there was no justification whatsoever, to intervene by an interference at the present stage of the proceedings."

27. Insofar as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were 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 fulfil the task or achieve the object. Before the trial court the stage was to find out whether there was sufficient ground for proceeding to the next stage against the accused. The application filed by the accused under Section 91 of the Code for summoning and production of document was dismissed and order was upheld by the High Court and this Court. But observations were made in para 6 to the effect that if the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to look into the material so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/public time, these observations are clearly obiter dicta and in any case of no consequence in view of conclusion reached by us hereinbefore. Further, the observations cannot be understood to mean that the accused has a right to produce any document at the stage of framing of charge having regard to the clear mandate of Sections 227 and 228 in Chapter 18 and Sections 239 and 240 in Chapter 19.

28. We are of the view that jurisdiction under Section 91 of the Code when invoked by the accused, the necessity and desirability would have to be seen by the court in the context of the purpose -- investigation, inquiry, trial or other proceedings under the Code. It would also have to be borne in mind that law does not permit a roving or fishing inquiry."

16. In another matter *Nitya Dharmanda & Anr vs. Gopal Sheelum Reddy & Anr*, (2018) 20 SCC 93, the Hon'ble Supreme Court held as under:

"5. It is settled law that at the stage of framing of charge, the accused cannot ordinarily invoke Section 91. However, the court being under the obligation to impart justice and to uphold the law, is not debarred from exercising its power, if the interest of justice in a given case so require, even if the accused may have no right to invoke Section 91. To exercise this power, the court is to be satisfied that the material available with the investigator, not made part of the charge-sheet, has crucial bearing on the issue of framing of charge.

6. In *Debendra Nath Padhi [State of Orissa v. Debendra Nath Padhi*, (2005) 1 SCC 568 : 2005 SCC (Cri) 415], it was observed: (SCC pp. 579-80, para 25) "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. Insofar 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 a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof."

7. In *Hardeep Singh v. State of Punjab* [*Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92: (2014) 2 SCC (Cri) 86] a Bench of five Judges observed: (SCC pp. 115- 16, para 19) "19. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

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 CrPC de hors the satisfaction of the court, at the stage of charge."

17. Be that as it may, now this Court proceeds to examine the impugned order dated 24th December, 2020, passed by Special Judge, NDPS Act, on merits.

18. The application under Section 91 of the Cr.P.C. was filed before the Court below, raised the defence that accused was lifted from Barabanki with Swift Car on 11th October, 2019 and taken to Delhi passing through various Toll Plazas, therefore, CDR and CCTV footage are required to be summoned to falsify the prosecution case, which as per the prosecution is that the accused was apprehended with car and contraband on the intervening night of 13th/ 14th October, 2019. It is also stated that the CDRs are also required to falsify the factum of presence of the Police officials at the spot, that is Barapulla, where the accused were apprehended.

19. While adjudicating the contentions of the petitioner, the learned Trial Court has passed the following orders:

"14. However, alongwith this application, two complaints dated 13.10.2019 and 16.10.2019 regarding the missing of accused Mohd. Shabir and Mohd. Hashim is filed at PS Kotwali, Barabanki. In the said complaint, one Nizamuddin alleging to be the cousin brother of Mohd. Shabir stated that both accused run the shop of repairing of Maruti car and went to the shop from their house on 11.10.2019 in the morning however not returned. Thereafter, on 12.10.2019 in the morning he went and found both were not present. However their mobile were found present in the shop and nearby public informed that In the evening of 11.10.2019 they were present at the shop and In the meanwhile some third person came and they went with him. In this complaint which is lodged on 13.10.2019 and 16.10.2019 there is no mention that Delhi Police has taken the accused from the shop. The accused was taken by some third person not alleged to be the police official. It is also mentioned that the mobiles of accused were found at the shop. There is nothing in these complaints that some person forced the accused to leave the mobiles at the shop. No mobile phone numbers of accused are mentioned in these complaints. The story in the present application which is made after filing of charge-sheet and conclusion of investigation on 18.11.2020 I.e. almost after one year is that SI Pawan Kumar, IO has unlawfully arrested accused from Barabanki and taken their Swift car also. This story is totally different with the story mentioned in complaint dated 13.10.2019 and 16.10.2019. In that complaint even there is no mention of taking away of Swift car.

15. It is settled law that at this stage, the court cannot look at the defence of accused and has to see the prosecution case. There is no doubt that accused has constitutional right of fair investigation however, this does not mean that prosecution has to investigate the offence in terms of defence of accused. Accused brought the defence by way of this application after more than one year of the incident. This court does not found any reason to direct the Police to make further investigation into the case over the defence of accused however, nothing in this order shall prejudice the defence of accused and accused is entitled for his defence to be proved in accordance to law. As far as the prayer of preservation of CDRs and CCTV footage is concerned, it is submitted that more than one year has already elapsed in raising such defence. Furthermore, Delhi High Court in Puneet Arora (supra) held as under:

9. I also agree to the fact the police officials as set out in para no.6 of the petition belong to a specialized investigating agency which operates in the matter of national interest, terrorism, arms dealing, drug peddling and organized criminal activities by dreaded gangsters etc and the team members being continuously in touch with the secret informers, so preservation of the CDR of mobile phones of the raiding party shall obviously jeopardized the personal safety/security of the police officials as also it would cause exposure and identity of the secret informers concerned with this case.

16. Ld. Addl. PP submits that the Special Cell Officials deal with secret informers and other serious matters having secret information regarding terrorists, gangsters, etc therefore privacy of police is to be preserved has been duly reinforced by the above judgment. Even otherwise, I do not deem fit to entertain at this stage the pleas raised. Accordingly, the application u/s 91 Cr.PC and application u/s 156(3) r/w section 173(8) Cr.PC for further fair and proper investigation stand dismissed."

20. After perusing the aforesaid order, the Court below has rightly taken the view that "there is no doubt the accused has constitutional right of fair investigation, however, this does not mean that prosecution has to investigate the offence in terms of defence of the accused." The said application under Section 91 of the Cr.P.C. was filed by the petitioner after more than one year of the incident before the Court below. As far as the preservation of the CDRs and CCTV footage is concerned, the Police authority has already filed the status report and as per the status report, it has been categorically stated as under:

"10. That it is submitted that in compliance with the order dated 30.12.2020 passed by this Hon'ble court, prompt measures and necessary steps were taken to intimate the service providers to preserve the call detail records and the relevant agencies to preserve the CCTV footages as ordered by the Hon ble Court. The reply received from Agra-Lucknow Expressway reveals that since their storage capacity is only for 30 days, they do not have records of CCTV footage pertaining to dates in Oct 2019. Likewise, First Plaza Bara Toll Bara, UP in their reply revealed that since the footage is stored for a maximum of 10 days, CCTV footage for Oct 2019 is not available with them. As such, on this count i.e. lapse of time and delay in the pleas too, the petition is liable to be dismissed."

21. Therefore, viewed from any angle, in considered opinion of this Court, learned Trial Court has not manifested any error of the law warranting interference by this Court. Apparently, there is no reason in the instant case, to exercise the powers under Article 226/227 of the Constitution of India. The order of the Court below is well reasoned and does not require any interference by this Court.

22. This Court does not find any merit in the instant petition and is accordingly, dismissed.

23. All pending applications, also, stand disposed of.

CHANDRA DHARI SINGH, J MARCH 14, 2022 Dy/ms