

(2022) 03 DEL CK 0128

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 1069 Of 2022, Criminal
Miscellaneous Application No. 4596 Of 2022

CBI

APPELLANT

Vs

Sachin Garg

RESPONDENT

Date of Decision : 09-03-2022

Acts Referred:

Prevention Of Corruption Act, 1988 — Section 5, 13(1)(e) 17, 17(A), 22
Prevention of Corruption Act, 1947 — Section 5A, 5A(1)
Indian Penal Code, 1860 — Section 161, 165, 165A
Code Of Criminal Procedure, 1973 — Section 321, 482

Citation : (2022) 03 DEL CK 0128

Hon'ble Judges : Anu Malhotra, J

Bench : Single Bench

Advocate : Nikhil Goel

Final Decision : Disposed Of

Judgement

Anu Malhotra, J

CRL.M.A.4597/2022 (Ex.)

1. Exemption allowed subject to all just exceptions.

The application stands disposed of.

CRL.M.C. 1069/2022

2. The petitioner, vide the present petition seeks the setting aside of the orders dated 13.01.2022 and 07.03.2022 of the Court of the learned Special Judge, PC Act (CBI-03), Rouse Avenue, District Court, New Delhi in Misc. DJ ASJ : 90/2021. The impugned orders dated 13.01.2022 and 07.03.2022 indicate that the respondent to the petition Mr.Sachin Garg has not been a party to the proceedings which have been impugned and it is submitted on behalf of the CBI that he is an accused in relation to RC No.219/2021 E0007 registered on

22.09.2021.

3. It is informed on behalf of the CBI in reply to a specific Court query that the investigation is still in progress and that the said Mr.Sachin Garg has so far not been arrested.

4. The petitioner is aggrieved by the order dated 13.01.2022 of the learned Special Judge, PC Act (CBI-03), Rouse Avenue, District Court, New Delhi which on a perusal thereof is indicated to be on an application under Section 17 of the Prevention of Corruption Act, 1988 (hereinafter referred to as the PC Act, 1988) filed on behalf of the CBI seeking permission to entrust the investigation of the case RC No.219/2021 E0007 to Sh. T.D. Tripathi, Sub Inspector of Police, CBI. EO-I, New Delhi, in as much as, vide the said order dated 13.01.2022 whilst there was no adjudication of the prayer made by the petitioner qua the application under Section 17 of the PC Act, 1988 seeking permission for entrustment of the investigation of the RC No.219/2021 E0007 to Sh. T.D. Tripathi, Sub Inspector of Police, CBI. EO-I, New Delhi, it had been observed vide paragraphs 8, 9, 10 & 11 to the effect:-

"8. In view of the above facts, instant application has been moved seeking permission to entrust the instant case to Sh. T.D. Tripathi, Sub Inspector of Police, CBI. EO-I, New Delhi for investigation.

9. Various opportunities have been given to the prosecution to explain the circumstances preceding the present application, however, no opportunity has been utilized and it is repeated merely due to occupation of IOs i.e. SSPs, DSPs and Inspectors of the Branch being pre-occupying with investigation of other cases entrusted to them and being busy with investigation of Coal Block Allocation case, no IO of appropriate rank for conducting investigation is available. The averment as it on its face sounds is devoid of reasonableness and substance. At the threshold, it be observed that no material by way of any document to suggest number of IOs, their names and their being assigned investigation of which matter is detailed. In a general manner, casually and carelessly as a matter of right and assertion it is being claimed. Any govt. official who is assigned to any department is expected to perform the work and it cannot be a ground for taking away the jurisdiction that he is busy. Furthermore, the responsibility of equivalent, fair and proper work assignment and distribution of work is the duty and part of responsibility of the Administrative Head of the Department. Nowhere any material by way of any noting/copy etc. to show any application of mind in discharge of above responsibility is pointed out or is substantiated to suggest peculiarity of circumstances having been arisen out of exhausting work load or being beyond control for which he has applied reasons and despite the same been left helpless. In this background, the possibilities of the submissions having arisen from an unscrupulous background cannot be completely dislodged. It also indicates towards the incompetence of the concerned partially involved in forming the contents of present application.

10. In the circumstance above, it is necessary that the Department Head/In-charge, who in this case is Director, CBI, must be forwarded a link to give him an opportunity of proper explanation and also show requisite material declining investigation/assignment to appropriate of officer rank holder competent to conduct the investigation and to propose the investigation being shouldered by an officer of lesser rank. He may also in the meanwhile submit the requisite material suggesting the name(s) of the officials/officers under disposal in the Branch, their assignment and the progress of investigation having been carried out to such extent necessitating directions prayed under this application.

11. In view of the aforesaid, let the matter be fixed for 07.03.2022.”

5. The application dated 21.10.2021 that the CBI had filed seeking grant of permission under Section 17 of the PC Act, 1988 to transfer the investigation of the case to Sh. T.D. Tripathi, Sub Inspector of Police, CBI. EO-I, New Delhi to investigate the matter in relation to RC No.219/2021 E0007 registered under sections of the Indian Penal Code, 1860 and the Prevention of Corruption Act, 1988 made mention inter alia to the effect:-

“4. That this case was initially entrusted to Sh. Bipin Kumar Mishra, Inspector, CBI, EO-I, New Delhi for investigation. Sh. Bipin Kr. Mishra, Inspector, CBI, EO-I, New Delhi is already occupied with investigation of another case i.e. RC 219 2019 E 0002 and pairvi of many other cases.

5. That all the other investigating officers viz. Addl. SSP, Dy. SSP, and Inspectors of this branch are preoccupied with investigation of other cases entrusted to them. Most of the IOs of this branch are also investigating Coal block allocation Cases which is being monitored by the Hon'ble Supreme Court of India.

6. That in view of this, it is proposed to entrust the investigation of the instant case RC 219 2021 E 0007 to Sh. T.D.Tripathi, Sub-Inspector of Police, CBI, EO-I, New Delhi for investigation after obtaining permission from this Hon'ble Court U/s 17 of PC Act, 1988.

7. That Sh. T.D.Tripathi, Sub-Inspector of Police, CBI, EO-I, New Delhi is an efficient officer of this branch. He has already been assisting other senior investigating officers in similar bank fraud cases, he has been working in CBI since 2016 and has experience to handle such bank fraud cases.”

6. It has thus been submitted on behalf of the CBI that all that the CBI sought vide the said application was that Sh. T.D. Tripathi, Sub Inspector of Police, CBI. EO-I, New Delhi be allowed to assist the Investigating Officer in the matter and it is submitted on behalf of the CBI that the import of Section 17 of the PC Act, 1988 which reads as under:-

“Section 17 in The Prevention of Corruption Act, 1988

17. Persons authorised to investigate.—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no police officer below the

rank,—

(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police;

(b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973 (2 of 1974), of an Assistant Commissioner of Police;

(c) elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank, shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant: Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefor without a warrant: Provided further that an offence referred to in clause (e) of sub-section (1) of section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.”,

in terms of the verdict of this Court in “CENTRAL BUREAU OF INVESTIGATION Versus M/S BHUSHAN POWER AND STEEL LIMITED (BPSL) AND ORS.” in CRL.M.C.1724/2020, a verdict dated 11.08.2021 with specific observations in paragraph 11 thereof, which reads to the effect:-

“11. The Trial Court by passing the impugned order not only failed to appreciate the mandate of Section 17 of the PC Act, 1988 but also failed in its duty to follow the import of above referred exposition of law. The Special Judge is empowered under Section 17 of the PC Act, 1988 to permit an officer below the requisite rank to assist the Investigating Officer in conducting investigation provided the steps taken by him are under direct supervision of the Investigation Officer who remains in control of the investigation and shall be responsible for all the steps that are taken by the subordinate officer.”,

with reference therein having been made to the verdict of the Hon’ble Supreme Court in “H.N. Rishbud and Inder Singh v. State of Delhi” AIR 1955 SC 196 with observations in paragraph 6 thereof which reads to the effect:-

“6. It is in the light of this scheme of the Code that the scope of a provision like Section 5(4) of the Act has to be judged. When such a statutory provision enjoins that the investigation shall be made by a police officer of not less than a certain rank, unless specifically empowered by a Magistrate in that behalf, notwithstanding anything to the contrary in the Criminal Procedure Code, it is clearly implicit therein that the investigation (in the absence of such permission) should be conducted by the officer of the appropriate rank. This is not to say that every one of the steps in the investigation has to be done by him in person or that he cannot take the assistance of deputies to the extent permitted by the

Code to an officer in charge of a police station conducting an investigation or that he is bound to go through each of these steps in every case. When the Legislature has enacted in emphatic terms such a provision it is clear that it had a definite policy behind it....”,

as well as a reference to the observations in the verdict of the Hon'ble Supreme Court in “Muni Lal v. Delhi Administration” AIR 1971 SC 1525 with observations in paragraph 16 thereof, which reads to the effect:-

“16. The High Court found irregularity in the investigation on the basis, as pointed out earlier, that some of the statements are in the hand writing of Ved Prakash. We are of the view that this was a wrong approach made by the High Court. It is clear from the evidence that PW 6 was in complete charge and control of the investigation and he has never withdrawn from the same at any stage. He was the officer who was controlling and giving necessary directions in the course of investigation. Though it is clearly implicit in Section 5-A that the investigation should be conducted by the officer of the appropriate rank, we do not think it is absolutely necessary that every one of the steps in the investigation has to be done by him in person or that he cannot take the assistance of his deputies or that he is bound to go through each and everyone of the steps in the investigation in every case. The above proposition also has been laid down by this Court in H.N. Rishbud and Inder Singh v. The State of Bihar 1955Cri LJ 526. We are referring to the above aspect to emphasise that the mere fact that some of the statements have been written by Ved Prakash to the dictation of PW 6 will not make the investigation as one not conducted by PW 6. Therefore, under the circumstances, we are not inclined to agree with the view of the High Court that there has been any irregularity or illegality in the conduct of the investigation.”,

to contend to the effect that all that the CBI thus sought through the application dated 21.10.2021 was that Sh. T.D. Tripathi, Sub Inspector of Police, CBI. EO-I, New Delhi assisted the Investigating Officer in the case and it is only to this extent the prayer ought to have been read.

7. It is submitted further on behalf of the CBI that the observations in paragraph 10 of the impugned order dated 13.01.2022 of the learned Special Judge, PC Act (CBI-03), Rouse Avenue, District Court, New Delhi calling upon the Director, CBI to give an explanation to show requisite material declining investigation/ assignment to an appropriate officer rankholder competent to conduct the investigation and to propose the investigation being shouldered by an officer of lesser rank and also to submit the requisite material suggesting the name(s) of the officials/officers under disposal in the Branch, their assignment and the progress of investigation having been carried out to such extent necessitating directions prayed under the application was not within the domain of the learned Special Judge, in as much as, the learned Special Judge, PC Act (CBI-03), Rouse Avenue, District Court, New Delhi does not hold administrative control over the Director, CBI, which contention is apparently correct.

8. It is essential to observe that the observations made in the impugned order dated 13.01.2022 in paragraph 9 to the effect that:-

"....

In this background, the possibilities of the submissions having arisen from an unscrupulous background cannot be completely dislodged. It also indicates towards the incompetence of the concerned partially involved in forming the contents of present application.",

are also apparently scathing made without material and there ought to have been exercise of due judicial restraint in making such observations.

9. It was undoubtedly, however, open to the learned Special Judge, PC Act (CBI-03), Rouse Avenue, District Court, New Delhi to decline the application under Section 17 of the PC Act, 1988 that had been filed by the petitioner/CBI.

10. The observations in the impugned order dated 13.01.2022 in paragraphs 9 & 10 which read to the effect:-

".....

In this background, the possibilities of the submissions having arisen from an unscrupulous background cannot be completely dislodged. It also indicates towards the incompetence of the concerned partially involved in forming the contents of present application.

10. In the circumstance above, it is necessary that the Department Head/In-charge, who in this case is Director, CBI, must be forwarded a link to give him an opportunity of proper explanation and also show requisite material declining investigation/assignment to appropriate officer rankholder competent to conduct the investigation and to propose the investigation being shouldered by an officer of lesser rank. He may also in the meanwhile submit the requisite material suggesting the name(s) of the officials/officers under disposal in the Branch, their assignment and the progress of investigation having been carried out to such extent necessitating directions prayed under this application.",

are thus, directed to be set aside.

11. As regards the prayer made vide the present petition seeking the setting aside of the consequential impugned order dated 07.03.2022, whereby, the prayer made by the applicant/petitioner seeking permission to withdraw the application dated 16.02.2022 for entrustment of the investigation to Sh. T.D. Tripathi, Sub Inspector of Police, CBI. EO-I, New Delhi was sought to be withdrawn, it has been submitted on behalf of the CBI that the proceedings of the date 07.03.2022 before the learned Special Judge, PC Act (CBI-03), Rouse Avenue, District Court, New Delhi itself indicate that a statement had been made by Mr.B.K.Mishra, Inspector which had been recorded separately and it is informed on behalf of the CBI that that statement that had been made was to the effect that the investigation of RC No.219/2021 E0007 has since been

assigned to Inspector Sudhir Kumar, EO-1 and that thus, in the circumstances, there was no prayer left qua invocation of Section 17(a) of the PC Act, 1988, in as much as, an Investigating Officer of the rank of an Inspector of the EO-1 CBI has already been entrusted with the investigation of RC No.219/2021 E0007. It has been submitted on behalf of the petitioner that apart from the factum that the prayer made by the petitioner seeking to withdraw thus the application dated 16.02.2022 having not been granted, and not disposed of, it was observed vide paragraph 11 to 35 of the impugned order dated 07.03.2022 thereof to the effect:-

"11. At the threshold, it be observed that from the aforementioned proceedings since inception of present application up till now, following legal questions arise necessitating answer:

(i) Whether the application u/s 17 P.C. Act can be withdrawn by the prosecution while on the application the prosecution has proceeded with the arguments and court has made its mind ~~ft1sqr1~~ by issuance of directions, as "withdrawal simpliciter?

(ii) While the proceedings are still alive and surviving and directions in operation, can by application of withdrawal simpliciter the proceedings be deemed to have been "wiped off" and rendered "non-est" without an attempt of compliance or explanation i.e. whether the proceedings can alter the clock

in motion to its inception in disregard of consequent events unfolded as acts of prosecution ?

(iii) Whether an irregularity can be allowed to remain uncured by allowing an application of simpliciter withdrawal ?

12. At this stage, it becomes necessary to note the relevant provision of Section 17 P.C. Act and are highlighted as below :

"17. Persons authorized to investigate-Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no police officer below the rank-

(a) in the case of the Delhi Special Police Establishment of an Inspector of Police

(b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973 (2 of 1974), of an Assistant Commissioner of Police;

(c) elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant:

Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he

may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefor without a warrant:

Provided further that an offence referred to in clause (e) of sub-section (1) of section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police."

13. The aforementioned provision is part of the "Special Act", which without dispute has an overriding effect on the general provisions to the extent of its applicability, which is time and again reiterated and upheld beyond which the application of general provisions under Code of Criminal Procedure is upheld by Hon'ble Supreme Court and is settled through judgments of A.R. Antuley vs. R.S. Nayak : AIR 1984 SC 718, Subramanian Swamy Vs. Manmohan Singh : 2012 (3) SCC 64 and Guruduth Prabha & Ors. vs. M.S. Krishna Bhat & Ors.: (1999) Cri LJ 3909.

14. Further, the relevant provision amplifying and extending the applicability and scope of general provision is highlighted in Section 22 of PC Act and again in Section 5 of P.C. Act. The relevant provisions of Section 22 are also observed as below, whereas the relevant provisions of Section 5 are also noted below:

"22. The Code of Criminal Procedure, 1973 to apply subject to certain modifications.-The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall in their application to any proceeding in relation to an offence punishable under this Act have effect as, if-

(a) in sub-section (I) of section 243, for the words "The accused shall then be called upon", the words "The accused shall then be required to give in writing at once or within such time as the court may allow, a list of the persons (if any) whom he proposes to examine as his witnesses and of the documents (if any) on which he proposes to rely and he shall then be called upon" had been substituted;

(b) in sub-section (2) of section 309, after the third proviso, the following proviso had been inserted, namely:-

"Provided also that the proceeding shall not be adjourned or postponed merely on the ground that an application under section 397 has been made by a party to the proceeding.

(c) after sub-section (2) of section 317, the following sub-section had been inserted, namely:-

"(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), the Judge may, if he thinks fit and for reasons to be recorded by him, proceed with enquiry or trial in the absence of the accused or his pleader and record the evidence of any witness subject to the right of the accused to recall the witness for cross-examination."

(d) in sub-section (1) of section 397, before the Explanation, the following

proviso had been inserted, namely:- "Provided that where the powers under this section are exercised by a court on an application made by a party to such proceedings, the court shall not ordinarily call for the record of the proceedings,-

(a) without giving the other party an opportunity of showing cause why the record should not be called for; or

(b) if it is satisfied that an examination of the record of the proceedings may be made from the certified copies.

Section - 5: Procedure and powers of special Judge.- (1) A special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 (2 of 1974), for the trial of warrant cases by Magistrates.

(2) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and any pardon so tendered shall, for the purposes of sub-sections (1) to (5) of section 308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered under section 307 of that Code.

(3) Save as provided in sub-section(1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for the purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor.

(4) In particular and without prejudice to the generality of the provisions contained in sub-section (3), the provisions of sections 326 and 475 of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as may be, apply to the proceedings before a special Judge and for the purposes of the said provisions, a special Judge shall be deemed to be a Magistrate.

(5) A special Judge may pass upon any person convicted by him any sentence authorised by law for the punishment of the offence of which such person is convicted.

(6) A special Judge, while trying an offence punishable under this Act, shall exercise all the powers and functions exercisable by a District Judge under the Criminal Law Amendment Ordinance, 1944 (Ord.38 of 1944).

15. The applicability of none of the aforementioned provisions is in dispute.

16. While referring to the first question that I have posted in the present order

as whether the present proceedings arising out of application under Section 17 P.C. Act can be allowed to be withdrawn 'simpliciter', vide no specific provision to show any such provision is stated from P.C. Act, (moreso, due to above noted avoidance/assistance appears), in which scenario the only provision which speaks of only withdrawal of proceedings appears to be available under the general Code, application of which is discussed above u/s 321 Cr.P.C. For the benefit, the said provision is also reproduced below:

"321. Withdrawal from prosecution. - The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and upon such withdrawal-

(a) If it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required he shall be acquitted in respect of such offence or offences;

Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the prosecutor in charge of the case has not been appointed by the Central Government he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution

17. However, the scope available under the aforementioned procedure (W/s 321 Cr.P.C.) is only for withdrawal of the "proceedings" and not an application specifically. Even, if the scope is stretched considerably and it is sought to be presumed for the advantage of investigating agency and prosecution that the present application and the orders thereupon may cumulatively form proceedings, still it falls short on many requisites, necessitating its consideration therein. Even, the gist, substance and intent of the provision u/s 321 does not find any "semblance" from the intended prayer in the application before hand. Hence, so to say, as of now, no material is specifically available to show that the present application after having been filed and proceedings having ensued before

the court can be permitted to be withdrawn simpliciter.

18. Whether the withdrawal proceedings will also make surviving judicial proceedings non-est, non-compliable or deemed to have been closed and are hence to be disregarded any response, is another question which needs to be responded by prosecution.

19. Again, I am unable to find any such proposition having been put forth. It is a settled proposition that when an application for withdrawal of any proceedings of any nature is made over, it shifts the position of an applicant to a place where he was i.e. before the proceedings ensued, started or commenced. However, it is also a settled law that if during course of proceedings by virtue of the proceedings on the applications any orders came to be made or any or an interest is created or any damage is caused the same needs to be first addressed and met before the proceedings are allowed to reverse to the earlier position. Moreover, any such plea made subsequent to the court's application of mind cannot reverse the stand initially taken by the party (in this case CBI), whereby the initial position is allowed to be voluntarily abandoned since the court is also navigated along to secure such distance or purpose disclosed in the application.

20. Further, the order of 13.01.2022, the necessary inference in favour of the public at large is created as the courts are custodian of their interest and rights to seek redressal of an accountability put in the investigation' by virtue of its engaging the status of public trust. Again at the cost of repetition, it is observed that in order dated 13.01.2022, it was specifically noted "It also indicates towards the incompetence of the concerned partially involved in forming the contents of present application" on which account the requisite directions were called for showing the application of mind in discharge of responsibility at the threshold.

21. Though another preposition warranting withdrawal may be based out of its incompetence to secure end for legal defects or lacuna in which case again the proceedings may not travel any far and must end at the commencement. However, none of above is suggested in this case.

22. In this background, needless to say, that finding, the observation inconvenient in nature a gap is being sought to be carved to "wriggle" out of same as a face saving exercise and avoid and explain the act of responsibility and trust and in this limb of observation it may be further added that court cannot be allowed to remain a silent spectator and keep its eyes closed to allow continuation of lackadaisical approach and irresponsible conduct leading to irregularities, likely to create advantage in favour of the opposite party at an appropriate stage and/or at the stage of trial

23. While Id. Sr.PP thrashed the observations of the court and sought to remind the mandate of the Hon'ble High Court in order of CBI vs. Bhushan Power and Steel Ltd. [CrI. M.C 1724/2020 (DoD 11.08.2021)] to which I am in humble submission, it was forgotten that the facts and circumstances of the aforesaid

judgment/order are distinct and disjunct and do not provide premise or stand for the contents of the present application u/s 17 P.C. Act or of withdrawal. It be observed that in the aforementioned decision (supra) no question of withdrawal of an application was pending consideration and/or any opinion expressed thereupon.

24. Furthermore, the observations of the Hon'ble High Court clearly show that in the aforementioned case, the advantage for assistance of an officer subordinate to the rank requisite was sought to be added.

25. At this stage, relevant law encapsulated in Sri Babu Rao Chinchanasur vs. The State [CrI. Petition 03/2013.: DoD 13.02.2013)] is reproduced to attain clarity and is referred below :

"Regarding Point No.3:

14) Section 17 of the P C Act deals with the officer who are authorized to investigate the offences punishable under the Act. Section 17 in its entirety reads as under:

17. Persons authorized to investigate.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no police officer below the rank-

(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police;

(b) In the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of Section 8 of the Code of Criminal Procedure, 1973 (2 of 1974), of an Assistant Commissioner of Police;

(c) Elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank, shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefore without a warrant:

Provided that if a police officer not below the rank of an Inspector of Police is authorized by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefore without a warrant:

Provided further that an offence referred to in clause (e) of sub-section (I) of Section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.

15) Clauses (a) to (c) of Section 17 directs that no police officer below the rank enumerated therein shall investigate any offence punishable under the Act without the order of a Metropolitan Magistrate or a Magistrate of the first class or make any arrest thereon without any warrant. In otherwards, the police officers enumerated in Causes (a) to (c) are authorized to investigate any offence

punishable under the Act without an order of the Metropolitan Magistrate or a Magistrate of the first class and a police officer below in rank than the one enumerated in Clauses (a) to (c) may investigate any offence punishable under the Act only with the order of the Metropolitan Magistrate or a Magistrate of the first class.

16) The first proviso to Section 17 of the P.C. Act empowers any police officer not below the rank of an Inspector of Police, if authorized by the State Government in that behalf by a general or a special order to investigate any such offence without the order of the Metropolitan Magistrate or a Magistrate of the first class. However, the 2nd proviso to Section 17 directs that the offence referred to under Clause (e) of sub-section (1) of Section 13 of the P.C. Act shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police. Thus, from the 2nd proviso, it is clear that an investigation into the offence referred to in Clause (e) of sub-section (1) of Section 13 of the P.C. Act even by any police officer enumerated in Clauses (a) to (c) or any Police Officer authorized in that behalf by the State Government as per the first proviso, can be undertaken only by an order of the police officer not below the rank of Superintendent of Police. Thus, the 2nd proviso is in the nature of additional safe guard for the public servant who are accused of the offence punishable under Section 13(1)(e) of the P.C. Act against an investigation by a police officer without the knowledge and consent of superior police officer not below the rank of Superintendent of Police. A Superior Police Officer of the rank of Superintendent of Police or any officer higher in rank is required to pass an order before an investigation, if any, for such offence is commenced. It is needless to point-out that, before directing such investigation, the Superintendent of Police or an officer superior to him is required to apply his mind to the information and come to an opinion that the investigation on such allegations is necessary.

17) In the case of State of Haryana and Others Vs. Ch. Bhajan Lal and Others [AIR 1992 SC 604], the Apex Court while considering the provisions of Section 5-A of P.C. Act, 1947 which corresponds to Section 17 of P.C. Act 1988, has held that the said proviso is mandatory. In the said decision, Their Lordships have observed thus in Paragraphs- 122 to 124:-

"122. According to Section -A, notwithstanding anything contained in the Code, no police officer below the rank specified in clauses (a) to (d) of Section 5-A(I), shall investigate any offences punishable under Sections 161, 165 or 165-A of the Indian Penal Code or under Section 5 of the Act without the order of a Presidency Magistrate or a Magistrate of the First Class as the case may be or make arrest therefor without a warrant. There are two provisos to that section. As per the first proviso, if a police officer nor below the rank of an Inspector of Police is authorized by the State Government, either by general or special order, he may investigate any such offence without the order of a Magistrate or make arrest therefore without a warrant. According to the second proviso, an offence

referred to in clause (e) of Sub-section (I) of Section 5 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police".

123. It means that a police officer not below the rank of an Inspector of Police authorised by the State Government in terms of the first proviso can take up the investigation of an offence referred to in clause (e) of Section 5(1) only on a separate and independent order of a police officer not below the rank of a Superintendent of Police. To say in other words, as strict compliance of the second proviso is an additional legal requirement to that of the first proviso for conferring a valid authority on a police officer not below the rank of an Inspector of Police to investigate an offence falling under clause (e) of Section 5(1) of the Act. This is clearly spelt out from the expression "further provided" occurring in the second proviso".

124. A conjoint reading of the main provision, Section 5-A(1) and the two provisos thereto, shows that the investigation by the designated police officers is the rule and the investigation by an officer of a lower rank is an exception".

18) In State of Madhya Pradesh-Vs-Ramsingh (2000) 5 SC 88, the Apex Court considering the purport of second proviso to Section 17 of P.C.Act, 1988 has held thus in Paragraph-12:

"Xxx xxx xxx Second proviso provides that where an offence referred to in clause (e) of sub-section (1) of Section 13 is sought to be investigated, such an investigation shall not be conducted without the order of a police officer not below the rank of superintendent of police xxx xxx xxx."

19) The Apex Court in the case of State Inspector of Police, Vishakapatnam Vs. Surya Sankaram Karri ((2006) 7 SCC 172] had an occasion to consider the provisions of Section 17 of the P.C. Act and it is observed thus in Paragraph-13:-

"13. Provisions of the 1988 Act, no doubt, like the 1947 Act seek to protect public servant from a vexatious prosecution. Section 17 provides for investigation by a person authorized in this behalf. The said provision contains a non- obstante clause. It makes investigation only by police officers of the ranks specified therein to be imperative in character. The second proviso appended to Section 17 of the Act provides that an offence referred to in clause (e) of sub-Section (1) of Section 13, shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police, Authorization by a Superintendent of Police in favour of an officer so as to enable him to carry out investigation in terms of section 17 of the Act is a statutory one. The power to grant such sanction has been conferred upon the authorities not below the rank of Superintendent of Police. The proviso uses a negative expression. It also uses the expression "shall". Ex facie it is mandatory in character xxx xxx xxx xxx." (Underlining is by me)

20) This Court in the case of State of Karnataka Vs. Narayana Reddy 2002 (2)

KLJ 80], after referring to the observations of the Apex Court in Bajanlal's case extracted above, has observed thus at Para-8:

"It was next observed in paragraph 125 that in several decisions of the Supreme Court, Section 5-A of the Act (Section 5-A(1) of the 1947 Act corresponds to Section 17 of the 1988 Act) is mandatory and not directory, and the investigation conducted in violation thereof bears the stamp of illegality, but that illegality committed in course of an investigation does not affect the competence and the jurisdiction of the Court for trial, and where the cognizance of the case has in fact been taken and the case is proceeded to termination, the validity of the proceedings with the preceding investigation does not vitiate the result unless miscarriage of justice has been caused thereby, but that, however, in H.N. Rishbud -Vs-State of Delhi and in Muni Lal -Vs- Delhi Administration, it is held that if any breach of the said mandatory provision relating to investigation is brought to the notice of the Court at an early stage of the trial, the Court will have to consider the nature and extent of the violation and pass appropriate orders as may be called for to rectify the illegality and to cure the defects in the investigation.

In the case concerned, the Supreme Court, while maintaining the first information report and the registration of the case, nevertheless, quashed the commencement as well as the entire investigation done till then on the ground that the investigating officer concerned had not been clothed with legal authority to take up investigation and proceed with the same within the meaning of Section 5-A(1) of the 1947 Act (corresponding to Section 17 of 1988 Act). The Supreme Court also gave liberty to the State Government to direct investigation afresh, through a competent police officer empowered with valid legal authority in strict compliance with Section 5-A(1) of 1947 Act (corresponding to Section 17 of the 1988 Act) xxx xxx xxx xxx xxx."

21) From the above it is clear that the provisions of the 2nd proviso to Section 17 is an additional safe-guard and protection in relation to the investigation of the offence referred to in Clause (e) of sub-section (1) of Section 13.

26. Hence, it must in all circumstances be shown that while making an application under provision of Section 17 due care and caution as part of expectation raised under the statute are fulfilled by the agency. It was not the circumstances where the earlier investigating officer of competent rank had been divested as is shown from the contents of the present application and to seek "transfer" of investigation to an officer junior in rank of Sub-Inspector level, whose credentials are also being sought to be established in para-7 of the application ignoring that the efficiency of an officer is not a premium to service but an underlying requisite for performing public duty and by claiming an officer efficient he cannot be equated to be holding the rank requisited under the statute itself as mandated, to override the provision, itself and creating a lee-way for making succumb the very intent of the act itself. Needless to say, even this question is not responded to by either prosecution or investigating agency.

27. The fact that the present proceedings are arising out of the alleged fraud of Rs.2,000/- crores of public money suggests the profundity of the scope of fraud and enormity of investigation cannot be by-passed casually by stating that no officer of suitable rank is available.

28. In view of the above discussion, when nothing is shown for withdrawal of the application, can by virtue of statement of withdrawal as a matter of right, it can be held that the provision giving rise to a proceeding can also be considered to generate a right, of its withdrawal or extinguishment.

29. While it is not uncommon for an executive act and/or notification to be generated and withdrawn by virtue of same provision, the similarity cannot be drawn or extended to a judicial provision. The statute makes available a specific provision wherefrom the withdrawal and/or any right to withdraw is created specifically. It is amplified by Cr.P.C. itself as apart from Section 321 no other recourse is available for withdrawal of prosecution lodged. Even in case of an FIR the same can only be allowed to be quashed under the specific provision where the courts have to invoke inherent powers W/s 482 Cr.P.C. Hence, in wake of the above, merely on claim, it is not possible to create a new right which is not intended to be created by the Legislation in favour of the prosecuting authority.

30. While it is definitely claimed that the proceedings of order dated 13.01.2022 may be deemed to have been wipe of, 1d. Prosecution again has not supported his submission that any legal provision or precedent.

31. Unlike Civil Procedure Code, the Code of Criminal Procedure provides no authority to the courts for any alternation, modification or review which authority only vests u/s 482 Cr.P.C. with Hon'ble High Court. By accepting the aforementioned statement of prosecution, the necessary import of entirely wiping of the order of 13.01.2022 shall tantamount to going back to the root of the reasoning of its passing which shall tantamount to exercising the non-available power of its review.

32. Lastly, with the show of defiance and adamant conduct of non-compliance, it appears that an effort is being made to create a conflict between the authorities and intentionally statements are being made on record qua noncompliance to derogate and undermine the authority of the court of law. Though, there is no request on behalf of the prosecution and/or IO suggesting non-availability of the Director due to exigency of work and/or in any other plausible reason for not joining the link through VC, in order to avoid a deliberate attempt to carve out a ground of conflict since none of the institutions, be it investigating agency/prosecution or courts, are created for self-serving purpose but to protect public interest, I hereby dispense the non-appearance of Director, CBI for today, he remains obligated qua compliance which shall be tendered within two days from today.

33. While sufficient observations have been made on the conduct and intent of the investigating agency and the prosecution in shielding each other, which has

sufficiently led to acts of undermining the interest of public involved for which they in fact are in place, I may also find it necessary to mention that in this attempt the precious time of the court has also been wasted for a considerable length from 22nd October onwards. The effort of the investigating agency clubbed with the prosecution is nothing short of "hide and seek" in pulling out of scope of courts order which has led them to hurriedly move the application for withdrawal and hide under its garb. No reason for hesitation for not granting the requisite details to show application of mind by the present In-charge and in realm of affairs is made available on record. Even, today Insp. B.K. Mishra who has made the statement has callously sought to wriggle out by claiming that certain IOs were busy in conducting investigation in Post-Election Violence Case in Kolkata.

34. It is again at the cost of repetition mentioned that such approach of an institution regarded so high can in fact create advantage in favour of those likely to face trial and against the common citizenry and must be curbed in the bud itself.

35. Having made aforementioned observation, I hereby impose cost of Rs.25,000/- on CBI. Direction is also issued for completing the proceedings within two days.”,

with it having been submitted on behalf of the petitioner that the observations in the impugned order dated 07.03.2022 were wholly uncalled for and not within the scope of ambit of the proceedings under Section 17 of the PC Act, 1988 before the learned Special Judge, PC Act (CBI-03), Rouse Avenue, District Court, New Delhi.

12. Inter alia it is submitted on behalf of the petitioner that there is a typographical error in paragraph 27 of the impugned order dated 07.03.2022 of the learned Special Judge observing to the effect that there was a fraud of Rs.2,000/- crores of public money submitting to the effect that the amount involved is Rs.19.50 Crores as mentioned in paragraph 13 of the complaint of the banking fraud dated 05.05.2021 made by the Asset Recovery Branch, New Delhi of the Central Bank of India to the Head of Zone, BSNF Zone i.e. the Bank Security and Fraud Zone of the CGO Complex, Lodhi Road, New Delhi.

13. Taking into account the factum that it has already been informed by the CBI and it is submitted that it was informed at the time of the impugned order dated 07.03.2022 vide a statement made by Mr.B.K.Mishra before the learned Special Judge to the effect that the investigation of RC No.219/2021 E0007 had already since been assigned to Inspector Sudhir Kumar, EO-1, New Delhi, it is apparent that the questions raised vide para 11 of the impugned order which read to the effect:-

“....

(i) Whether the application u/s 17 P.C. Act can be withdrawn by the prosecution

while on the application the prosecution has proceeded with the arguments and court has made its mind ~~ft1sqr1~~ by issuance of directions, as "withdrawal simpliciter?

(ii) While the proceedings are still alive and surviving and directions in operation, can by application of withdrawal simpliciter the proceedings be deemed to have been "wiped off" and rendered "non-est" without an attempt of compliance or explanation i.e. whether the proceedings can alter the clock in motion to its inception in disregard of consequent events unfolded as acts of prosecution ?

(iii) Whether an irregularity can be allowed to remain uncured by allowing an application of simpliciter withdrawal?",

were not requisite to be determined and thus, it is made expressly clear that the application dated 16.02.2022 filed by the CBI seeking permission to entrust the investigation to Sh. T.D. Tripathi, Sub Inspector of Police, CBI. EO-I, New Delhi stands dismissed as withdrawn.

14. In the circumstances, the impugned order dated 07.03.2022 of the learned Special Judge, PC Act (CBI-03), Rouse Avenue, District Court, New Delhi in relation to RC No.219/2021 E0007 is set aside.

15. However, on a perusal of the order dated 07.03.2022 and observations in paragraph 32 thereof to the effect that "Lastly, with the show of defiance and adamant conduct of noncompliance ..." and observations in paragraph 23 of the impugned order dated 07.03.2022 to the effect that "While Id. Sr.PP thrashed the observations of the court and sought to remind the mandate of the Hon'ble High Court", it is expected that due decorum is maintained by the CBI before the learned Special Judge, PC Act (CBI-03), Rouse Avenue, District Court, New Delhi in the matter.

16. Copy of this order be sent to the learned Trial Court.

17. The petition is disposed of.