(2010) 06 DEL CK 0034

In the Delhi High Court

Case No : Criminal Revision Petition No. 126 of 2005

Mr. Tuncay Alankus APPELLANT

Vs

The Central Bureau of Investigation RESPONDENT

Date of Decision : 04-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 238, 239, 240, 241, 242
Delhi High Court Rules and Orders — Rule 3
Evidence Act, 1872 — Section 165
Penal Code, 1860 (IPC) — Section 120B, 409, 415, 418, 420
Prevention of Corruption Act, 1988 — Section 5

Citation : (2010) 06 DEL CK 0034

Hon'ble Judges : Aruna Suresh, J

Bench : Single Bench

Advocate : Amit Sibbal, Mr. Mahmood Alam and Mr. Vinay P. Tripathi, for the Appellant; Sanjay Jain with Mr. V.N. Ojha and Ms. Ruchi Jain, for the Respondent

Final Decision : Dismissed

Judgement

Aruna Suresh, J.—This revision petition has been filed by Tuncay Alankus, accused No.4 in case "CBI Vs. C. K. Ramakrishnan & Others", challenging the order of the Special Judge dated 11th October 2004, whereby the Learned Judge has restricted number of witnesses to be examined by the petitioner in his defence. Petitioner has also challenged the order dated 17th November 2004, whereby the Learned Judge, while allowing witnesses to be examined by video conferencing, directed the petitioner to bear the cost thereof. Impugned is also an order dated 6th December 2004, whereby the Court had fixed the time schedule for examination of the witnesses, failing which the defence evidence was to stand closed. Another order dated 8th February, 2005 has also been impugned by the petitioner.

2. It is noted that before filing the revision petition, petitioner had challenged the impugned orders of the Trial Court in a writ. The said writ petition was disposed of with observations that petitioner should have challenged the impugned orders

in revision and not in a writ petition.

3. Revision petition was allowed by this Court vide its order dated 14th July, 2005. The said order was challenged by the Central Bureau of Investigation (for short "CBI") by way of a criminal appeal being Appeal No.9250 of 2006 in the Supreme Court. Appeal was allowed by the Supreme Court vide its order dated 14th December, 2006 and the order of this Court dated 14th July 2005 was set aside. As regards question of examination of witnesses by video conferencing at the cost of the petitioner, it was left open to be decided by this Court.

4. In brief, case of the prosecution is that Karsan Danismanalik Turzim Sanayi Ticaret Ltd. STI. (for short "Karsan"), a company incorporated under the laws of Turkey had entered into a contract with National Fertilizers Limited (for short "NFL") on 9th November, 1995 for supply of 2,00,000/- metric tons of urea. An amount of US$ 38 lacs was remitted to Pamuk Bank TAS, Ankara as per Karsan''s instructions for payment of insurance premium. The said amount was not accepted by the Bank. An amount of US$ 37.62 million towards the balance consideration was remitted to Karsan''s account by State Bank of India on the instructions of NFL on 29th November, 1995. The said amount was credited to the account of Karsan in Piceet Bank, Geneva on 29th November, 1995. Petitioner is the chairman of Karsan. Allegations are that Karsan dishonestly induced NFL to pay the amount and thus committed offences under Sections 120-B/409 and 420 of the Indian Penal Code (hereinafter referred to as "IPC"). Petitioner was extradited to India from Switzerland on 3rd October, 1997 to face trial in the proceedings. A charge sheet was filed. The Special Judge framed charges on 1st December, 1998. Petitioner was enlarged on bail by an order dated 7th June, 2003.

5. After prosecution evidence was concluded, petitioner along with other co-accused persons was examined u/s 313 of the Criminal Procedure Code (hereinafter referred to as "Cr.P.C."). Petitioner filed a list of sixty three proposed defence witnesses. Vide order dated 11th December 2004, Special Judge permitted examination of seven defence witnesses within the said list. Since some of the witnesses were foreigners and beyond the reach of the Court, the Special Judge also recorded that witnesses permitted to be examined, be produced by the petitioner on his own expense or alternatively examine them through video conferencing.

6. By order dated 17th November 2004, the Special Judge disposed of an application filed by the petitioner seeking permission to examine the said seven witnesses on commission. While doing so, the Trial Court referred to Section 243(3) Cr.P.C., which permitted the Court to require the accused to deposit reasonable expenses incurred by defence witnesses for attending the proceedings. Vide order dated 6th December 2004, request of the petitioner seeking extension of time for examination of witnesses beyond the time granted, was declined.

7. In this revision petition, petitioner has sought examination of twenty one additional witnesses, besides seven witnesses already permitted by the Trial Court. Out of the said seven witnesses, one witness has already been examined by the Trial Court and the other six witnesses have been dropped. Out of twenty one additional witnesses, DW-1, Representative of M/s GEO Chem, Laboratories (P) Ltd. has already been examined by the Trial Court on 9th September, 2005 as DW-5. Similarly additional DW-7, Mr. Sirzat Yahyayef, Inter Invest Bank, Republic of Kazakhstan was examined by the Trial Court on 30th/31st August, 2005 as DW-4. Additional DW-16, Mr.Valadimir S.V. Stepushikin expired on 3rd October, 2005. Name of additional DW-11, Mr.Alexander Miailov Republic of Russia Gor, Mosvewy, UL, Chernishivskog also finds mention at serial number 15. Therefore, name of the witness appearing at serial numbers 11 and 15 is the same. Hence, this list is now confined to remaining seventeen DWs, whom the Trial Court did not find relevant for just and proper decision of the case.

8. Foremost question to be decided by the Trial Court is whether Karsan dishonestly made a promise which they never intended to fulfill. In other words, whether they entered into an agreement with NFL with a dishonest intention not to perform the contract and at the same time, cheated NFL of the money. Such an intention can be gathered from attending circumstances. Therefore, only such witnesses can be considered as relevant and permitted to be examined, who can throw some light on the intention of the petitioner at the time of execution of the contract keeping in mind that petitioner cannot be allowed to prolong the trial without any meaningful purpose.

9. Mr. Amit Sibbal, learned counsel for the petitioner has submitted that for an offence of cheating and criminal breach of trust, fraudulent and dishonest intention must be shown to be existing from the very beginning of the transaction. Mere failure to keep the promise at a subsequent stage by the defaulting party does not make out an offence of cheating. Substance of the complaint has to be seen. He further submitted that breach of contract for supply of urea allegedly by the petitioner is a civil breach of contract and the only defence available to the petitioner is to prove that he had no fraudulent or dishonest intention to cheat the Government at the time of execution of the contract and for that purpose he is entitled to examine witnesses to prove that mensrea was missing in the case when the contract was executed between Karsan and NFL. Petitioner is entitled to examine witnesses to demolish the case of the prosecution that petitioner had a dishonest intention in not supplying urea in time and for that purpose subsequent events which took place become relevant and petitioner is within his rights to examine the witnesses to prove his bona fides. It is emphasized that the Trial Court under the circumstances went wrong in declining the petitioner to examine other witnesses named in the list of witnesses filed by the petitioner, except seven.

10. He has made it clear that by way of this revision petition, he seeks permission to examine only twenty one additional witnesses. He has referred to

''Anil Mahajan Vs. Bhor Industries Ltd. & Anr.'' (2005) 10 SCC 228. In the said case, a complaint was filed by the respondent invoking Sections 420, 415 and 418 IPC. Magistrate issued process against the appellant which was challenged by him. While allowing the appeal, Supreme Court considered the allegations made by the complainant in the complaint to reach to a conclusion, if any offence under Sections 420, 415 and 418 IPC was made out justifying summoning of the appellant. This judgment, therefore, is not of any help to the petitioner as charges in the case have already been framed and prosecution has closed its evidence. The case is at the stage of recording of defence evidence. It is for the Trial Court to assess the evidence of the parties after trial is complete and decide if or not petitioner is guilty of having committed any of the offences charged for.

11. Section 311 Cr.P.C. confers power on the Court to elicit all necessary materials by playing an active role in the evidence collecting process. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also justice from the point of view of orderly society. Court is required to monitor the proceedings in aid of justice in a manner that, something, which is not relevant, is not unnecessarily brought on record.

12. Powers of the Court u/s 165 of the Indian Evidence Act, to some extent are complimentary to its powers u/s 311 Cr.P.C. Section 311 Cr.P.C. consists of two parts. Firstly, it gives discretion to the Court to examine the witness at any stage of inquiry, trial or other proceedings under the Code by summoning the witness or, examine any person present in the court or, recall and re-examine any person whose evidence has already been recorded for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.

13. Second part is mandatory in nature and it compels the court to examine a witness if his evidence appears to be essential to the just decision of the case. Though the discretion given to the Court is very wide with no limitation either with regard to the stage at which the power should be exercised or with regard to the manner in which it should be exercised, that widest power requires a corresponding caution that discretionary powers should be invoked as and when the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. Second part of the Section does not permit any discretion but, binds the Court to take necessary steps if a fresh evidence to be obtained is essential for just decision of the case.

14. This Section, in no manner, confers any party a right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the instance of any one party but, the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Reference is made to Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, .

15. Thus, it is clear that before exercising the power u/s 311 Cr.P.C., Court must apply its judicial mind and consider the necessity to permit summoning of the witnesses. Court is also required to take due care of its powers under this Section so that the same are not used to fill up the lacunae left by the prosecution or, by the defence or, to the disadvantage of the accused or, to cause serious prejudice to the defence of the accused or, to give an unfair advantage to the rival side and further additional evidence should not be received as a disguise for retrial or to change the nature of the case against either of the parties. The only factor which should weigh in the mind of the Court while exercising its powers u/s 311 Cr.P.C. is whether such material is essential for the just decision of the case.

16. In this case, petitioner accused has sought examination of twenty one additional witnesses, two of which have already been examined by the Trial Court. Now it is to be seen if witnesses sought to be examined are relevant for the just decision of the case.

17. Mr. Sibbal, appearing on behalf of the petitioner has submitted that Bank Manager of Bank of Central Greece, Athens/Greece (Serial No.2) is a relevant witness to prove that the amount of US$ 3.42 lakhs was transferred to the Bank of Central Greece by way of TT as insurance premium for non-delivery and non-performance of the supply of urea under the contract in 1995. It is argued that present dispute is purely one of a possible breach of contract between the contracting parties, and in these circumstances the allegations of fraud and conspiracy against M/s Karsan made by NFL are totally unsupportable.

18. Mr.Sanjay Jain, Senior counsel appearing on behalf of CBI has submitted that it is an admitted fact by the prosecution that the said amount was transferred to Mediterranean Insurance Limited and therefore, the factum of transfer stands proved vide document D-177. Since Bank Manager sought to be examined cannot prove the performance of transfer, therefore, he is an irrelevant witness. Trial Court vide impugned order dated 11th October, 2004 declined the request of the petitioner to examine this witness with the observations:-

The accused also wants to examine witnesses from bank of Central Greece (S.NO. 3 and 4) and KZI Bank (S.NO 29) to show payments made by him to the Insurance Company. He wants to show that he made payment of USD 3.42 lakhs for the consolidated insurance and a further payment of USD 17,000 separately for shipment. The law of interpretation of document is well settled. If the language of document is clear, the terms and conditions of the document have to be construed from that document only. Therefore payments made by the accused to the Insurance Agent are totally irrelevant.

19. Document D-177 dated 23rd November, 1995 is written by Karsan and is an order of payment. It seems that this document has not been proved in evidence as it is marked P-95/23. Unless a document is proved in evidence, Trial Court cannot interpret and construe the terms and conditions of the document.

Document D-177 is silent regarding payment of US$ 176,72. Under these circumstances, though factum of payment of US $ 3.42 lakhs being transferred to Mediterranean Insurance Limited is not disputed but the document is required to be proved for its interpretation. Therefore, examination of the Bank Manager of the Bank of Central Greece becomes relevant. There is no serious objection by the respondent if this witness is allowed to be examined.

20. Petitioner has sought examination of Manager, Camboi Bank of Central Greece (Serial No.3) to prove payment of US $ 17000 of marine insurance premium related to the first shipment of 9000 MT of urea, sent to the said bank to the account of the Insurance Company. This shipment was sent to India in August 1996 and was subsequently rejected on account of non-meeting the specification of the contract. Trial Court refused to permit the petitioner to examine this witness. Respondent has objected to the examination of this witness being irrelevant. To my mind, this witness is also relevant as petitioner''s endeavour is to prove his bona fides from the testimony of this witness.

21. Another witness sought to be examined is Manager of Balasco Instanbul Shipping Trading SA Istanbul Turkey (Serial No.4). It is submitted by counsel for the petitioner that this witness is relevant to depose that he had arranged the shipping consignment of 9000 MT of urea to prove the intention of the petitioner to supply the shipment and the company had to pay damages as the shipment was delayed for three weeks at Bhavnagar Port and was returned back by NFL for the reason that the shipment was not up to the standard of the contract. He further submitted that examination of this witness is also relevant to reflect on the past conduct and business dealings of Karsan with other companies and customers. In short, this witness is sought to be examined to depose on the charter party contract with Karsan for transportation of urea to NFL.

22. To emphasize the relevancy of this witness, my attention has been brought to the submissions made by the petitioner while submitting arguments on charge. Perusal of internal page 76 of the order on charge indicate that petitioner had taken a plea that he was an honest, renowned businessman and had entered into the impugned business transaction with NFL with the sole object to further his business interest but, became victim of certain political developments in India which took place during the relevant time. Though respondent has objected to the examination of this witness on the plea that he is irrelevant but, there is no serious objection to his examination, he being a relevant witness in the facts and circumstances of the case.

23. Another witness sought to be examined is Mr.Rafacel Leoni, Financial Consultant, SBR, Trust Sielminger, Germany (Serial No.5) to prove that first contract dated 27th July, 1995 was a blocked fund method contract and his examination is relevant to prove bona fide intention of the petitioner and NFL was required to send funding instrument to SBR Trust for supply of urea. Trial Court rejected examination of this witness on the grounds that it was not necessary to examine any witness to prove trade practice and to define practice

fund method of payment in the Court and the Court can take notice of such practice suo moto.

24. Counsel for the petitioner has submitted that purpose of examination of this witness is not to explain blocked fund method. This witness is relevant as he has personal knowledge about the first contract and he is to depose on facts as well as documents and would also depose about the reasons for second contract. There were two contracts with Karsan dated 27th July, 1995 and 9th November, 1995 respectively. However, first contract was not acted upon and the present suit is based on non-fulfillment of the second contract. Under the circumstances, it has been argued by counsel for the respondent that examination of this witness relating to the first contract is inconsequential and hence is not required. However, there is no vehement objection to the examination of this witness. To my mind this witness is relevant to reflect on mensrea i.e. mental intention of the petitioner at the time of execution of the contract.

25. Mr.S.Vepuri Murty of Mylyn Newton, USA (Serial No.6) is sought to be examined to prove that the amount of US$ 37.62 was received by him from M/s Karsan as a controlling authority of Mylyn Holdings Ltd. which was for investment purposes and there was no dishonest transfer and the purpose for which the money was paid. It is pointed out by counsel for the petitioner that this witness also faced a criminal complaint filed against him by NFL to recover the funds transferred to him, which according to NFL were stolen funds, rightfully belonging to it and it had the right to recover the same. Under the circumstances, this witness is relevant to be examined by the petitioner to meet the allegations that this witness had held the money of NFL deposited by Karsan with Mylyn Holding. There is hardly a dispute to the examination of this witness.

26. Mr.Karpenko Alazander Efimovich (Serial No.8), Urea Ships Captain, Russia and Mr.Ahmed Murad (Serial No.9), Captain M/s Sibir, Russia are sought to be examined by the petitioner to prove that urea was to be shipped to India but, as first shipment was refused at Bhavnagar Port by NFL and in the meantime petitioner was arrested, no further shipment of urea could be made. Examination of these witnesses is opposed by the respondent alleging that as per the contract, each shipment of urea was to consist of minimum of 25000 MT of urea whereas first shipment was sent only of 9000 MT of urea and if Karsan had more than 9000 MT of urea, the same could have been transported vide first shipment itself, and also that since petitioner had purchased/procured only 9000 MT of urea, he sent only the said quantity and there was no occasion for any further dealing as case had been registered against the petitioner on 28th May, 1996 and petitioner had already been arrested. Trial Court refused to grant permission to examine this witness on the ground that in view of the admitted facts of the parties that only one shipment of 9000 MT of urea was sent and there was no other shipment, examination of this witness was unnecessary.

27. Counsel for the petitioner has argued that he was told not to deliver other shipment of urea due to refusal by the complainant to accept the shipment of

9000 MT of urea. He has referred to Bill of Lading mark D-3/9A, sought to be proved in evidence, to prove as to why the ships were diverted and at whose instance. The shipment which was diverted was of June 1996. He has submitted that Trial Court went wrong in refusing the petitioner to examine these witnesses. He has submitted that examination of these witnesses is relevant to prove bona fide intention of the petitioner.

28. Ex.PW-38/L41 is a letter written by Karsan to NFL indicating the shipment schedule and the quantity of urea which each shipment would carry and also the Port from where this shipment would be dispatched. In his statement u/s 313 Cr.P.C., in answer to question No. 283, petitioner has deposed about shipping schedule and the loading Ports of other shipments as contained in Bill of Lading. He also requested the Court to summon these witnesses to testify and explain the preparations made by Karsan for supply of urea as per the contract. Under the circumstance, a fair opportunity has to be given to the petitioner to prove his defence and examination of these witnesses is also relevant for just decision of the case.

29. To prove that Karsan had sufficient stock of urea to be shipped to India in CIS Countries as well as with Karsan itself in Russia as per the schedule of supply, which could not be shipped because of bad weather conditions and was lying for long, petitioner seeks to examine Mr. Michail Capuryan (Serial No.10), Russia and Mr. Alexander Miailov (Serial No.11, this witness is also cited at Serial No.15), Russia. It is argued by counsel for the petitioner that these two witnesses are required to be examined to negate the intention not to send urea to India and also to prove reasons why shipment was not in time. Mr. Michail Capuryan, who happened to be the Port Manager, was personally aware of the terms contained in Freight Forwarding Contract and his deposition is relevant in view of Article 13 of the contract. He has emphasized that examination of these witnesses is necessary to prove the photographs placed on record and also when the same were taken. He pointed out that the Trial Court did not deal with the relevancy of these witnesses in the impugned order.

30. It is argued by counsel for the respondent that these witnesses are false and fabricated witnesses as their evidence is doubtful because NFL had sent several letters to Karsan, to know the place of stock so that inspection team could be sent for inspecting the quality and quantity of urea as envisaged in the contract but, no such information was given by Karsan. He further deposed that PW-40 Mr.N.K.Gupta, Executive Director of NFL had visited Ankara, Turkey and questioned the petitioner about the stock of urea but no information was given. He has submitted that shipment of 9000 MT of urea was purchased by the petitioner in July 1996 from Salvet Company, which indicates that accused had no stock of urea at the relevant time. Testimony of PW-40 Mr.Gupta do suggest that he was not given information about availability of the stock. The fact remains, to controvert the case of the prosecution that Karsan had dishonest intention at the time of execution of the agreement not to supply urea in terms

of the contract and also to cheat NFL of money payable by it under the contract, petitioner has to produce reasonable and relevant evidence. Some of these witnesses become relevant to complete the chain of incidents as per defence of the petitioner. Whether the witnesses are fabricated or false is a question which cannot be determined at this stage. It is only during their examination and cross-examination that their genuineness and honesty would emerge.

31. As regards documents indicating availability of stock, petitioner was entitled to produce the documents at the relevant stage and not when the charge sheet was filed. Even if there is no documentary evidence regarding availability of stock of urea with the petitioner, he is within his rights to defend his case by producing oral evidence. Thus for the limited purpose of proving nature of intention of the petitioner, these two witnesses become relevant.

32. Mr.Bartrand Grillon, Manager of Nimaco, Switzerland (Serial No.12) is required to be examined by the petitioner on the plea that he would depose regarding urea production certificate issued by Karsan and given by him to various buyers in India. Trial Court has not considered the relevancy of this witness in the impugned order. It is submitted that this witness is required to be examined to prove past conduct and previous supplies. This witness becomes relevant in view of the letter dated 25th October, 1995 written by Mr.Vikram Srivastava, Director of J.P.Srivastava Associates Trading (Pvt.) Limited to NFL, as this letter finds mention the offer for 1,00,000 MT of urea from its principals M/s Nimaco Ltd. This witness happened to be the Manager of Nimaco. Only objection raised to the examination of this witness is that the purpose for which the witness is required to be examined, stands achieved by deposition of other witnesses such as witnesses No. 34, 65 and73. They are all prosecution witnesses. This objection is not sustainable as petitioner is within his rights to rebut the prosecution case. There is hardly any opposition to his examination as a defence witness.

33. Another witness sought to be examined by the petitioner is Manager, KZI Bank, Tolebi, Kazakhstan (Serial No.13) to prove transfer made to Insurance Company related with marine insurance premium. Trial Court refused examination of this witness holding that the law of interpretation of documents was well settled and if the language of the document was clear, the terms and conditions of the document would have to be construed from that document only and therefore, according to the Trial Court, payments made by the petitioner to the Insurance Agent were totally irrelevant.

34. Counsel for the petitioner has argued that insurance premium for all the ships including the one which arrived in India were paid by this Bank. According to him, examination of this witness is relevant to complete the circle. This witness would also prove the instructions given for payment of each shipment''s insurance premium, a disputed fact by the prosecution and also the payments of other shipments as per the Bill of Lading. To my mind, the Trial Court while disallowing the examination of this witness did not separately consider the

relevancy of this witness. Rather it dealt with this witness along with other witnesses, namely, Bank Manager of Bank of Central Greece and Manager, Camboi Bank of Central Greece (Serial Nos. 2 and 3 respectively). Those two witnesses are related to insurance premium payments pertaining to the first shipment. Unless a document is proved in evidence, the terms and conditions contained therein cannot be interpreted or construed by the Court from the document itself. Hence, examination of this witness also becomes relevant for just and proper decision of the case.

35. Mr.Ivanov Sheri Petrovich (Serial No.14), Urea Ships Captain, Malta is another witness to depose on urea shipment effected through his ship. It is submitted by counsel for the petitioner that examination of this witness is required to prove certain facts leading to rejection of the Cargo without any sample test and also to prove certain documents placed on record which are yet to be proved in evidence. Trial Court seems to have declined the permission to examine this witness while considering the relevancy of witnesses appearing at serial Nos. 8 and 9 and other witnesses appearing in the original list at serial Nos. 35 and 37 who were later on dropped by the petitioner. Since this witness is to depose about shipment of 9000 MT of urea, the only shipment which reached Bhavnagar Port, India and the reasons for rejection of urea being not up to the standards of the contract, his testimony becomes relevant for just and fair decision of the case on merits. His examination cannot be refused simply because witnesses appearing at serial Nos. 8 and 9 have also to speak, about the urea shipment effected through their respective ships as they have nothing to state about shipment of 9000 MT of urea arrived at Bhavnagar Port, India through M.V. Ismail LN Ship.

36. Mr.G.A.Batalin, Director of Operation, Morskoj Port, Sea Harbour, Petersburg Ltd., Port-I, Russia (Serial No. 17) seems to be a formal witness in nature as he is sought to be examined to prove Karsan Port Contract/Port Stock. It is submitted by Mr. Sibbal counsel for the petitioner that this witness is relevant to be examined as he is to depose regarding his relation to the supply of urea and to prove that payment was made and that Trial Court has not given any reason why it rejected the examination of this witness. Name of this witness also appears in the statement of the petitioner recorded u/s 313 Cr.P.C. There is a document, Ex. DW-3/E1 placed on record which indicates participation of Mr.G.A.Batalin in shipment of urea. All the documents placed on record relating to Karsan Port Contract and the role played or to be played by Director Port Operation are required to be proved in evidence as some of the documents could not be exhibited for want of evidence. Petitioner also wants to prove on examination of this witness that the goods sent were in conformity with the order placed. The Court had declined to examine this witness observing that status of Karsan had no relevance. However, since this witness dealt with the consignment at the Port, his testimony becomes relevant. Besides during the course of arguments, counsel for the respondent did not raise much objection to the examination of this witness. I find no reason to refuse examination of this

witness by the petitioner.

37. Petitioner sought permission to examine Dydk Georgly Michailovich, Russia (Serial No. 18) to throw light on the operation of the Karsan within first sector, St. Petersburg Port No.2. Trial Court has not given any reason for rejecting this witness. Examination of this witness becomes relevant for assessment of the conduct of the petitioner in his business transactions.

38. Counsel for the petitioner has submitted that Manager SGS Vostak Ltd., St. Petersburg, Russia (Serial No.19) is required to depose on the analysis of urea at St. Petersburg Port during loading and the related report. The report has already been proved in evidence as Ex. PW-40/DD5. It is submitted that he is the person who has direct knowledge of the urea which reached at Bhavnagar Port and was rejected as of sub-standard quality and what had caused confusion to the quality of the supply, as per specification in Article 1 of the contract. The court has not given any reason for not permitting examination of the witness. It is pertinent that prosecution itself has relied upon the report of SGS which has been proved in evidence as Ex.40/DD5. Therefore, under the circumstances, when a report is relied upon by both the parties, examination of this witness becomes irrelevant.

39. Another witness sought to be examined is Manager Estrans Services Ltd., Tallinn, Esdnia (Serial No.20) to depose regarding the contract of Karsan with Tallinn Port. The said contract is marked D-3/11 on the record. Admittedly, nothing was shipped from Tallinn Port by Karsan, nor any stock was presumably kept there because despite repeated requests, petitioner did not allow inspection of the stock and if any stock was lying at Tallinn Port, Mr. Gupta (PW-40) would have been allowed to examine the same. Besides, name of Tallinn Port does not find mention in any of the documents filed on record by the petitioner in support of his defence, except a copy of the contract executed between Karsan and Tallinn Port. May be that petitioner had contracted with Tallinn Port for shipment of its goods to other places and may be that copy of this contract was sent to NFL, the fact remains that services of Tallinn Port were never taken by Karsan to enforce the contract.

40. It is argued by counsel for the petitioner that this witness has direct knowledge of the reasons as to why the contract could not be executed further and therefore, he is relevant to depose on adverse conditions prevailing at the relevant time. As regards, bad weather conditions prevailing at the relevant time, witnesses appearing at serial Nos. 9 and 10 have been considered as relevant for examination. Therefore, examination of this witness, under the circumstance, becomes irrelevant as not many witnesses are required to be examined to state the weather conditions prevailing at the relevant time, which prevented further shipment of urea to India in terms of the contract. Hence, examination of this witness is declined being irrelevant.

41. Name of Mr. Child Obaid, Sponsor, Edible Food Stuff, Dubai (Serial No. 21) does not find mention in the initial list disclosing names of sixty three witnesses

to be examined by the petitioner. Name of this witness has been added subsequently by the petitioner. It is pertinent that other partner of M/s Edible Food Stuff Trading, namely, Mr. Vasudev Prayani, PW-46 has already been examined by the prosecution. Examination of Mr. Child Obaid can in no manner improve upon the statement of PW-46, who was the actual activator of M/s Edible Food Stuff. Hence, examination of this witness cannot be allowed, firstly, being irrelevant and secondly, in the revision petition, petitioner cannot be allowed to add to his list of witnesses a name, which was not placed before the Trial Court.

42. In view of my discussion as above, petitioner is allowed to examine the following witnesses:-

Bank Manager of Bank of Central Greece, Athens/Greece, Manager Camboi Bank of Central Greece, Manager of Balasco Instanbul Shipping Trading SA Istanbul Turket, Mr.Rafacel Leoni, Financial Consultant, SBA, Trust Sielminger, Germany, Mr. S. Vepuri Murty of Mylyn Newton, USA, Mr.Karpenko Alazander Efimovich, Mr.Ahmed Murad, Mr. Michail Capuryan, Russia and Mr. Alexander Miailov, Mr.Bartrand Grillon, Manager of Nimaco, Switzerland, Manager, KZI Bank, Tolebi, Kazakhstan, Mr.Ivanov Sheri Petrovich, Mr.G.A.Batalin, Director of Operation, Morskoj Port, Sea Harbour, Petersburg Ltd., Port-I, Russia and Dydk Georgly Michailovich, Russia (appearing at serial Nos. 2 to 6, 8 to 14, 17 and 18 respectively).

43. Other submission made by Mr.Sibbal is that State should be asked to bear the cost of examination of the witnesses on video conferencing. He has submitted that Trial Court went wrong, when it asked the petitioner to bear the expenses of the witnesses to be examined by him in support of his case.

44. Trial Court in the impugned order dated 11th October, 2004 observed:-

According to Section 5 of the Prevention of Corruption Act, Special judge is required to follow the procedure prescribed by Cr.P.C. for trial of warrant cases by Magistrate. The procedure for such trial is laid down in Section 238 to 243 of Cr.PC sub section 3 of section 243 empowers the court to require the accused to deposit reasonable expenses incurred by witnesses for attending the court. As I noted at the very outset the witnesses are foreigners and they are beyond the reach of this court. Therefore, the accused will produce seven witnesses mentioned above at his own expenses by his own efforts. In the alternative he may coordinate with the said witnesses and find out dates convenient to them in the first week of December 2004 for examination through video conference and the expenses of such video conference shall be borne by the accused.

45. Thereafter petitioner filed another application to recall the order dated 11th October, 2004 and prayed for examination of the defence witnesses on commission and not on video conferencing. This application was dismissed by the Trial Court vide its order dated 17th November, 2004 observing that examination of witnesses by video conferencing would cut short time and distance both and is

a way of expediting the proceedings, where foreign witnesses are involved. The Court also observed that video conferencing would not only save time but also enable the Court to observe the demeanor of the witnesses.

46. Prayer made before this Court is for examination of the witnesses by video conferencing in view of amended provisions contained in Section 275 Cr.P.C. and request for examination of the witnesses on commission u/s 284 Cr.P.C. has not been pressed. However, petitioner''s grouse is that he should not be made to pay the expenses of the witnesses sought to be examined by him on video conferencing. He has referred to The State of Maharashtra and P.C. Singh Vs. Dr. Praful B. Desai and Another, , to emphasize that cost of video conferencing should be borne by the State.

47. In Amitabh Bagchi Vs. Ena Bagchi, , while referring to State of Maharashtra Vs. Dr. Praful B. Desai''s case (supra), the Court laid down various safeguards to be taken by the Court for the purpose of recording evidence through audio-video link observing:-

10.... Technology is definitely a tool. But the following safe guards are to be taken for purpose of recording evidence through Audio-Video Link : (1) Before action of the witness under Audio-Video Link starts the witness will have to file an affidavit or an undertaking duly verified before a Judge or a Magistrate or a Notary that the person who is shown as the witness is the same person as who is going to depose on the screen with a copy of such identification affidavit to the other side. (2) The person who wishes to examine the witness on the screen will also file an affidavit or an undertaking in the similar manner before examining the witness with a copy of the other side with regard to identification before hand. (3) As soon as identification part is complete, oath will be administered through the media as per the Oaths Act, 1969 of India. (4) The witness will be examined during working hours of Indian Courts. Plea of any inconvenience on account of time difference between India and other country will not be allowed. (5) The witness action, as far as practicable, be proceeded without any interruption without granting unnecessary adjournments. However, discretion of the Court or the Commissioner will be respected. (6) Witness includes parties to the proceedings. (7) In case of non-party witness, a set of plaint, written statement and/or other papers relating to proceeding and disclosed documents should be sent to the witness for his acquaintance and an acknowledgement in this regard will be filed before the Court. (8) Court or Commissioner must record any remark as is material regarding the demur of the witness while on the screen and shall note the objections raised during recording of witness either manually or mechanically. (9) Depositions of the witness either in the question answer form or in the narrative form will have to sign as early as possible before a Magistrate or Notary Public and thereafter it will form part of the record of the proceedings. (10) Mode of digital signature, if can be adopted in this process, such signature will be obtained immediately after day''s deposition. (11) The visual is to be recorded at both the ends. The witness alone can be present at the time of video conference, Magistrate and Notary is to certify to this effect. (12) In case of perjury Court will be able to take cognizance not only about the witness gave evidence but who induced to give such evidence. (13) The expenses and the arrangements are to be borne by the applicant who wants to this facility. (14) Court is empowered to put condition/s necessary for the purpose.

48. By virtue of Section 243 sub-section (2) Cr.P.C., a Magistrate is required to issue the process on an application of the accused for compelling the attendance of any witness for the purpose of examination or cross-examination or the production of any document or other thing unless it is of the view that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. I need not consider the provisions of Section 243 sub-section (2) Cr.P.C. for the simple reason that petitioner has been permitted to examine fourteen additional witnesses, whereas examination of three additional witnesses, namely, Manager SGS Vostak Ltd., St. Petersburg, Russia, Manager Estrans Services Ltd., Tallinn, Esdnia and Mr. Child Obaid, Sponsor, Edible Food Stuff, Dubai appearing at serial Nos. 19 to 21 respectively has been rejected.

49. Section 243 sub-section (3) Cr.P.C. empowers the Magistrate to ask the accused to deposit reasonable expenses incurred by the witnesses in attending the court for the purposes of the trial.

50. Counsel for the petitioner has brought my attention to Chapter 9 Witnesses - Criminal Courts, Part-A Expenses of the Delhi High Court Rules, Practice & Procedure, Fifth Edition. Expenses of the witnesses in session trials are to be paid by the Sessions Courts at the rate per diem scheduled in Rule 3. This Rule is absolutely silent if the Court has to bear the expenses of the witnesses to be examined on behalf of the accused as defence witnesses. of course, the term ''witnesses'' used is to be interpreted in the wider sense so as to include the defence witnesses to be examined by the accused. An accused person in custody is not expected to bear the expenses of the witnesses as per the schedule, for the reason that he has no earning capacity and is not financially independent to bear their expenses.

51. Note 2 sub-rule (iii) to the Rule leaves a discretion with the Court as to the payment of witnesses. The circumstances of cases differ and there are many criminal proceedings in which the prosecution is not called for on public grounds. It is not in every case that the State has undertaken, and is bound to provide the cost of the prosecution. Doubtful cases should be interpreted liberally by the Court. Scheme of the Chapter indicates that generally the witnesses appearing for the prosecution whether Expert, official or other public witnesses are being paid for their traveling expenses by the Court. There is no specific provision contained in the Chapter, which makes it mandatory on the Court to pay or bear the expenses of witnesses appearing for the accused.

52. Ordinarily, where the accused is financially capable of bearing the expenses of the witnesses, the Courts put a liability on him to bear their expenses. In this case, petitioner is the Chairman of M/s Karsan Limited, a company dealing in international contracts and is financially capable of meeting the expenses. Besides the witnesses sought to be examined on video conferencing are all foreigners based in different countries. They would be examined from the place where they are stationed. Their expenses cannot be paid by the State beyond the schedule prescribed in Delhi High Court Rules, which is silent about the expenses to be borne by the State for examination of the witnesses, who are foreigners and are stationed abroad.

53. Thus, it is clear that expenses for arrangements of audio-video facility have to be borne by the person who wants to avail the said facility. In the present case, petitioner has sought examination of his witnesses through video conferencing and therefore, he is required to bear the expenses to avail the said facility.

54. Hence, I find no reason to interfere in the order of the Trial Court directing the petitioner to bear expenses of the witnesses to be examined on video conferencing. Facility of video conferencing is available in almost every Court Complex. Therefore, Trial Court can examine the witnesses on video conferencing available at the place of his posting, which is notified Court Complex. It shall proceed in accordance with law for the examination of the witnesses as above. Trial Court shall ensure that once examination of the witnesses commences, it holds day-to-day trial and complete the examination of the petitioner''s witnesses within six months from the date of receipt of this order.

55. Under these circumstances and in view of my discussion as above, revision petition is partly allowed. Parties shall appear before the Trial Court on 2nd July, 2010. Registry is directed to send back the complete record of the Trial Court, forthwith along with certified copy of this order.

Criminal Misc. Petition No. 1347/2008

56. Since this criminal (MC) has not been pressed as prosecution has closed its evidence and the case is pending examination of the defence witnesses, assessment of any evidence by this Court for quashing the FIR would mean pre decision of the case on merits to the prejudice of interest of the parties. Therefore, it is dismissed.