

(2012) 08 DEL CK 0114
In the Delhi High Court
Case No : Criminal Rev. P. 328 of 2012

Sajjan Kumar

APPELLANT

Vs

Central Bureau of Investigation

RESPONDENT

Date of Decision : 03-08-2012

Acts Referred:

Commissions of Inquiry Act, 1952 — Section 6
Criminal Procedure Code, 1973 (CrPC) — Section 173, 207, 313, 397, 401
Evidence Act, 1872 — Section 137, 138, 139, 145, 155
Penal Code, 1860 (IPC) — Section 109, 147, 148, 149, 153 A

Citation : (2012) 08 DEL CK 0114

Hon'ble Judges : Pratibha Rani, J

Bench : Single Bench

Advocate : U.U. Lalit, instructed by Mr. Vineet Malhotra, Mr. R.D. Rana and Mr. Aman Khan, for the Appellant; Vikas Pahwa instructed by Mr. D.P. Singh and Ms. Tarranum Cheema, for the Respondent

Final Decision : Allowed

Judgement

Hon"ble Ms. Justice, Pratibha Rani

1. The petitioner Sajjan Kumar is facing trial for committing the offence punishable under Sections 109 r/w 147/148/149/153-A/295/302/396/427/486/449/505 IPC & 201 IPC in case RC No.24/2005 registered on the directions of Government of India vide D.O. No.U-13018/5/2005 dated 24.10.2005 to investigate/reinvestigate the case FIR No.416/84, PS Delhi Cantt, New Delhi. In the FIR and the chargesheet filed against the petitioner, apart from other material, the prosecution relied on the affidavits Ex.PW1/A and B filed by Smt. Jagdish Kaur (PW-1) before Justice Ranganathan Commission and Justice Nanavati Commission and the statement Ex.PW1/C made before Justice Nanavati Commission.

2. To prove the charge, the prosecution led evidence. During examination-in-chief of PW-1 Smt.Jagdish Kaur, she proved the two affidavits as Ex.PW1/A and B

as well as statement made before Justice Nanavati Commission as Ex.PW1/C. Cross examination of PW-1 Smt.Jagdish Kaur by accused Balwan Khokhar and Krishan through Mr.S.A.Hashmi, Adv. was in progress when on 12.07.2010 Mr.R.S.Cheema, Senior Advocate for the CBI raised an objection and recorded by the Trial Court as under :

12.07.2010

PW-1 Smt.Jagdish Kaur w/o Late Sardar Kehar Singh, recalled for further cross examination.

On SA

(At the very outset it is stated by Sh.R.S.Cheema, Senior Advocate for the CBI have argued that affidavits/statements filed by the witnesses before the Commissions under appointed under Commission of Inquiry Act 1952 cannot be used for the purpose of contradiction/impeaching the testimony of the witness. This is opposed by the defence counsel that the affidavits/statements filed before the Nanavati Commission and Ranganath Commission form the very the basis of registration of FIR and CBI got the same exhibited and is relying upon the same and therefore now it cannot be said that the defence cannot use those affidavits/statements for the purpose of impeaching the testimony of the witness. It is further stated that in case appropriate application is moved, they will file the suitable reply and contest the same.) Matter is left open.

3. No such application as mentioned in the above proceedings was moved by the CBI till the stage of final arguments. When the case was listed for final arguments, accused Sajjan Kumar filed an application on 15.05.2012 requesting the Court to consider the peculiar circumstances created by the prosecution and as per mandate of Hon''ble Supreme Court of India, he prayed to the Court to decide the objection dated 12.07.2010 which had been left open by the Court, before commencement of final arguments by defence side.

4. After hearing learned counsel for the petitioner Sajjan Kumar as well as CBI, the learned Trial Court sustained the objection by CBI observing that in view of the provision of Section 6 of Commissions of Inquiry Act, the decision of Apex Court in the case Kehar Singh and Others Vs. State (Delhi Administration), the petitioner cannot be permitted to confront the witness in respect of Ex.PW1/A to C. In the last para No.29 of the impugned order, the learned Trial Court arrived at the following conclusion :

29. Interpretation given to Section 6 of the Act as referred to above in Kehar Singh''s judgment leaves no doubt that in the present case bar u/s 6 of Commissions of Inquiry Act will be attracted and Section 6 is very much attracted and applicable in this case. Question framed in this order is accordingly answered to the effect that bar u/s 6 of the Commissions of Inquiry Act will be attracted so far as witness Smtjagdish Kaur has been confronted or sought to be contradicted with her affidavit Ex.PW1/A and Ex.PW1/B and her statement Ex.PW1/C, which

was given before Inquiry Commissions. Accordingly, objections recorded during cross examination of Smt Jagdish Kaur on 12.07.2010 is answered and decided to the effect that Section 6 of the Commissions of Inquiry Act stands attracted and applicable

5. The petitioner feeling aggrieved that in the garb of bar u/s 6 of the Commissions of Inquiry Act, learned Trial Court has curtailed his right to cross examine PW-1 Jagdish Kaur on the material documents which are also the foundation of the prosecution's case and claiming that he has been denied his right to have fair trial, invoked the jurisdiction of this Court u/s 397/401 read with Section 482 CrPC with the prayer that the impugned order dated 02.06.2012 passed by learned ASJ be quashed and the entire cross examination of PW-1 Smt. Jagdish Kaur be taken into account by learned Trial Court while deciding the matter.

6. At the outset, on being questioned by the Court whether petitioner/accused Sajjan Kumar would require PW-1 to be recalled for further cross examination with respect to her earlier affidavits and statement Ex.PW1/A to C, Mr.U.U.Lalit, Senior Advocate informed that cross examination of PW-1 Smt. Jagdish Kaur is complete in all respect and there will not be any necessity to resubmit her for further cross examination in respect of the documents Ex.PW1/A to C if this Court allows the prayer of the petitioner that he has a right to cross examine PW-1 Smt. Jagdish Kaur in respect of the evidence adduced before Inquiry Commission in the form of two affidavits Ex.PW1/A and B and statement Ex.PW1/C. Mr. Vikas Pahwa, Senior Advocate for CBI also submitted that the cross examination of PW-1 Smt. Jagdish Kaur by accused persons is complete and in view of the legal bar created u/s 6 of the Commissions of Inquiry Act, only the admissibility of the cross examination of PW-1 in respect of the documents Ex.PW1/A to C is in question.

7. Both the parties have filed written synopsis. I have also heard Mr.U.U.Lalit, Senior Advocate for the petitioner and Mr. Vikas Pahwa, Senior Advocate for CBI.

8. On behalf of petitioner, Mr.U.U.Lalit, Senior Advocate submitted that the case of the petitioner is clearly distinguishable from Kehar Singh's case as the facts are distinct. In Kehar Singh's case, the entire proceedings before Commission and its recommendation were confidential so much so that report was not even tabled before the House of People. In Kehar Singh's case, the accused persons requested the Court for supply of copies of the statements made before the Commission and at that time even they did not know what statement had been made by various witnesses before the Commission and in that circumstance, the Apex Court had held that use of previous statement at trial either for purpose of cross examination or to contradict the witness is not permissible.

9. It has been further submitted by learned counsel for the petitioner that in the present case, the prosecution has relied on the affidavits and statements of the witnesses made before Justice Ranganathan Commission and Justice Nanavati

Commission, supplied copies of these documents to the accused as required u/s 207 CrPC and examined those witnesses as prosecution witnesses and also proved the affidavits and the statement made before the Commissions in the trial. The accused has a right to cross examine such witnesses in respect of the statement made before the Court in the trial. Thus, the prosecution as well as the witnesses have come out of the umbrella/protection as envisaged u/s 6 of the Commissions of Inquiry Act. Prosecution has voluntarily chosen to produce earlier statements to prove the charge against accused who has a right to confront the witnesses on the affidavits and the statements earlier given which have now become substantive evidence.

10. While referring to Section 6 of the Commissions of Inquiry Act, it has been contended that it only prohibits using all statements made before the Commission against that person in any civil or criminal proceedings except in case of perjury. No proceedings have been initiated against PW-1 Smt.Jagdish Kaur in respect of the affidavits and statement made before Justice Ranganathan Commission and Justice Nanavati Commission. Thus there is prohibition about using of such statement against the witness but not by the witness against other persons. In the present case the statement is being used against the petitioner. It has been urged on behalf of petitioner that the accused cannot be denied his right to have a fair trial and Kehar Singh's case being clearly distinguishable, as the witness and the prosecution have themselves chosen to use such affidavits and statement against the accused, the Court cannot deny the petitioner his right to cross examine the witness on such affidavits/statement.

11. Mr.Vikas Pahwa, Senior Advocate for CBI submitted that in all fairness, learned Trial Judge recorded the legal objection of learned prosecutor and left it open. The very purpose of filing the application before learned Trial Judge for getting the objections disposed of was not in accordance with the dictum of the Apex Court in the case of Bipin Shantilal Panchal vs. State of Gujarat (2001) 3 SCC 1. The petitioner should have raised these arguments before learned Trial Court making it a part of final arguments instead of getting the objections disposed of by moving such an application. If such practice is encouraged, it would not only delay the trial but the accused persons would challenge every objection before every forum which is contrary to the observation of Apex Court in Bipin Shantilal Panchal's case i.e. the objections taken by both the sides should be recorded in evidence and decided at the final stage while passing final judgment in the matter.

12. Referring to the legal issue regarding the bar created by Section 6 of Commissions of Inquiry Act, Mr.Vikas Pahwa, Senior Advocate submitted that if the accused is permitted to contradict the witness with her previous statement, it would have the effect of using the statement "against" the witnesses which is not permissible in view of Section 6 of the Commissions of Inquiry Act. While supporting the impugned order, learned Senior Advocate for CBI submitted that it is extensively based on the interpretation given to Section 6 of the Commissions

of Inquiry Act by the three Judge Bench after analyzing all the legal precedents. Rebutting the contentions of learned counsel for the petitioner that the present case is clearly distinguishable from the case of Kehar Singh's case, it has been contended that the findings of Apex Court in Kehar Singh's case is not restricted on the issue of confidentiality of the proceedings and the report of Commission. Rather the Apex Court has not confined itself to the peculiar facts of that case and after interpreting Section 6 of the Commissions of Inquiry Act, arrived at the conclusion that the Court should avoid any such construction of Section 6 which may stultify the purpose of Act to protect the persons deposing before the Commission. Learned Senior Advocate further submitted that Kehar Singh's case puts an embargo on the use of any statement made before Commissions of Inquiry Act against the witness except in relation to perjury. Since the impugned order is based on the legal position about the scope of Section 6 of Commissions of Inquiry Act extensively examined by the Apex Court in Kehar Singh's case, the petition is liable to be dismissed.

13. During the course of arguments, learned Senior Advocate for CBI was questioned by this Court that as per decision of this Court in Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, affirmed in Kehar Singh's case, the statement made by any person before the Commission of Enquiry u/s 6 of the Act is wholly inadmissible in evidence in any future proceedings civil or criminal. But in this case those very affidavits filed and statement made before the Commission are forming part of the chargesheet against the petitioners and not against PW-1 Smt.Jagdish Kaur. These affidavits and statements have been produced and proved by the prosecution against the accused and in that circumstance, how the accused can be denied his right to cross examine the prosecution witnesses in respect of those incriminating documents. Learned counsel for CBI was also asked to explain the conduct of the prosecution that after completing the examination of PW-1 Smt.Jagdish Kaur, her cross examination on all material points including Ex.PW1/C continued for three dates i.e. 03.07.2010, 08.07.2010 and 09.07.2010 (from pages 101 to 105 & 131 to 138 as per the petition) when for the first time on 12.07.2010 learned prosecutor for CBI got his objection recorded. CBI was asked to explain the effect of the cross examination with respect to PW1/A to C recorded without objection prior to 12.07.2010 and thereafter subject to objection. Attention of learned Senior Advocate for CBI was also drawn to the statements of accused persons recorded u/s 313 CrPC wherein Ex.PW1/A to C have been put as incriminating evidence to the accused persons to enable them to explain the same.

14. Learned Senior Counsel for CBI was further requested to make submissions how the deposition of PW-1 Smt.Jagdish Kaur with reference to affidavits Ex.PW1/ A & B and statement Ex.PW1/C without being subjected to cross examination would be admissible in evidence against the accused/petitioner.

15. Mr.Vikas Pahwa, Senior Advocate for CBI submitted that when PW-1 Smt. Jagdish Kaur made statement in respect of Ex.PW1/A to C before the Court

during her examination-in-chief, the same being not against the witness, is admissible in evidence. However, when the accused sought to confront/contradict the witness with her earlier statements, a specific bar is created u/s 6 of the Commissions of Inquiry Act as discussed by the Apex Court in para 39 of the report *Kehar Singh & Ors. vs. The State (Delhi Admn.)* (Supra) prohibiting use of previous statements at the trial either for purpose of cross examination to contradict the witness or to impeach his credit. He submitted that the only permissible use of such statement as provided u/s 6 of the Commissions of Inquiry Act is in case of prosecution for giving false evidence by such statement.

16. Having heard learned counsel for the parties as well as on perusal of record, I am of the view that *Bipin Shantilal Panchal's* case relied upon by CBI has no application as here the question to be determined is not about the admissibility of the documents or any objection in that regard but right of the accused to cross examine the prosecution witness and to have a fair trial.

17. In *Mohd. Hussain @ Julfikar Ali Vs. The State (Govt. of NCT) Delhi*, the Apex Court, while dealing with a case where the trial concluded without providing legal assistance to the accused, has dealt with the aspect of right of the accused to cross examine the witnesses and to confront the witnesses against him and right to have a fair trial. The observation made in paras 9 to 11 of the report are :

9. It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case, to confront the witnesses against him not only on facts but also to discredit the witness by showing that his testimony-in-chief was untrue and biased. The purpose of cross-examination of a witness has been succinctly explained by the Constitution Bench of this Court in *Kartar Singh Vs. State of Punjab*,

278. Section 137 of the Evidence Act defines what cross-examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are:

- (i). to destroy or weaken the evidentiary value of the witness of his adversary;
- (ii). to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;
- (iii). to show that the witness is unworthy of belief by impeaching the credit of the said witness; and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character.

10. The aforesaid view is reiterated by this Court in *N. Kannadasan Vs. Ajoy Khose and Others*, wherein it is observed :

24. A right to cross-examine a witness, apart from being a natural right is a

statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence vis-à-vis opinion.

11. In my view, every person, therefore, has a right to a fair trial by a competent court in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of charge in a criminal case.

18. In Kehar Singh's case, the order impugned before the Apex Court was rejection of the prayer of the accused persons to have the copies of the previous statement of some of the prosecution witnesses recorded during inquiry before the Thakkar Commission to build their defence. The prayer was rejected by the High Court placing reliance upon the decision of the Apex Court in Dalmia's case (supra) wherein the scope of admissibility of the statement made before the Commission, in future proceedings was also considered as under :

The whole purpose of setting up a Commission of Inquiry consisting of experts will be frustrated and the elaborate process of inquiry will be deprived of its utility if the opinion and the advice of the expert body as to the measures the situation disclosed calls for cannot be placed before the Government for consideration notwithstanding that doing so cannot be to the prejudice of anybody because it has no force of its own. In our view the recommendations of a Commission of Inquiry are of great importance to the Government in order to enable it to make up its mind as to what legislative or administrative measures should be adopted to eradicate the evil found or to implement the beneficial objects it has in view. From this point of view, there can be no objection even to the Commission of Inquiry recommending the imposition of some form of punishment which will, in its opinion, be sufficiently deterrent to delinquents in future. But seeing that the Commission of Inquiry has no judicial powers and its report will purely be recommendatory and not effective proprio vigore and the statement made by any person before the Commission of Inquiry is, u/s 6 of the Act, wholly inadmissible in evidence in any future proceedings, civil or criminal.

19. In Kehar Singh's case, the contention before the Apex Court was that in Dalmia's case, scope of Section 6 was not before the Court, hence this case could not be accepted as an authority on interpretation of Section 6 of Commissions of Inquiry Act. It would be apposite to quote paras 35, 35A and 36 of the report as under :

35. According to learned Counsel, in that case it was not the scope of Section 6 but the validity of the provisions were in question and the observations were only incidental and it can not be regarded as a binding precedent. The High Court has accepted these observations of this Court in the judgment quoted above and in our opinion rightly. But apart from it, we shall try to examine Section 6 itself and other provisions relevant for the purpose as to whether the appellants i.e. the accused before the trial court were entitled to use the copies of the statement of those prosecution witnesses who were examined before the Thakkar Commission for purposes of cross examination or to use the report of the Commission or whether it could be handed over or given over to the accused for whatever purpose they intended to use. The learned Counsel for the parties on this aspect of the matter have referred to number of decisions of various High Courts and also some of the decisions of the English courts. They are being dealt with in the judgment elsewhere as in my opinion it is not necessary to go into all of them except examining the provisions of the Act itself.

35A. Section 6 of the Commission of Enquiries Act reads:-

No statement made by any person in the course of giving evidence before the Commission shall subject him to, or be used against him in any civil or criminal proceedings except a prosecution for giving false evidence of such statement.

36. On analysis of the provision, it will be found that there are restrictions on the use of a statement made by a witness before the Commission. First is "Shall subject him to...any civil or criminal proceedings except a prosecution for giving false evidence by such statement." The second restriction, according to me, is spelt out from the words "or be used against him in any civil or criminal proceedings." Thus if we examine the two restrictions stated above it appears that a statement given in a Commission can not be used to subject the witness to any civil or criminal proceedings nor it can be used against him in any civil or criminal proceedings and in my opinion it is in the context of these restrictions that we will have to examine the provisions of the Evidence Act which permit the use of a previous statement of a witness and for what purpose. Section 145 read with Section 155(3) and Section 157 are the relevant provisions of the Evidence Act. Section 145 reads:

Cross-examination as to previous statements in writing -A witness may be cross examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

This provision permits that a witness may be cross-examined as to the previous statement made by him in writing or reduced to writing relevant to the matters in question without such writing being shown to him or being proved. But if it is intended to contradict him by the writing his attention must be drawn to those

parts of the writing; and it can be proved. A witness could be cross examined on his previous statement but if a contradiction is sought to be proved then that portion of the previous statement must be shown to him and proved in due course.

20. In paras 37 and 38 of the report, after referring the Sections 155 and 157 of the Evidence Act, it was held in para 39 of the report as under :

39. To my mind, there could be no other purpose for which the appellants could use the previous statements of those witnesses. Contradiction could be used either to impeach his credit or discredit him or to pull down or bring down the reliability of the witness. These purposes for which the previous statements are required could not be said to be purposes which were not against the witness. The two aspects of the restrictions which Section 6 contemplates and have been discussed earlier are the only two aspects which could be the result of the use of these statements. I cannot find any other use of such previous statements in criminal proceedings. It is therefore clear that without going into the wider questions even a plain reading of Section 6 as discussed above will prohibit the use of the previous statements at the trial either for the purposes of the cross examination to contradict the witness or to impeach his credit. The only permissible use which has been provided u/s 6 is which has been discussed earlier and therefore the Courts below were right in not granting the relief to the accused.

21. The view taken in Dalmia's case was affirmed in Kehar Singh's case :

242. There is, therefore, much to be said for the observation made in Dalmia's case and indeed that is the proper construction to be attributed to the language of Section 6 of the Act. I respectfully affirm and re-emphasise that view.

22. In view of dictum of Apex Court in Dalmia's case affirmed in Kehar Singh's case, it cannot be disputed that the statement made by any person before the Commission of Enquiry u/s 6 of the Act is wholly inadmissible in evidence in any future proceedings civil or criminal except a prosecution for giving false evidence of such statement.

23. It would be advantageous to refer paras 11 and 12 of the decision of the Apex Court in Bharat Petroleum Corporation Ltd. and Another Vs. N.R. Vairamani and Another, on precedents :

11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the

entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

24. The objection of prosecution that accused cannot use the previous statements for purpose of contradiction is based on the observation made by Apex Court in Kehar Singh's case, has been sustained by learned Trial Court vide impugned order without appreciating the context in which it was so held.

25. At this stage, it would be appropriate to take note of the fact that in Kehar Singh's case, the prosecution did not rely upon any affidavit filed or statement made before the Commissions. It was the accused who requested for the copies of the statement of witnesses made before the Commission, to contradict the witness with reference to such statements as part of defence. Therefore, the facts of the case before this Court are altogether different.

26. The contention of learned Senior Advocate for CBI that the affidavits filed and statement made before the Commissions are admissible in examination-in-chief of PW-1 Smt. Jagdish Kaur but accused is precluded from contradicting the witness on Ex.PW1/A to C during cross examination in view of bar of Section 6 of Commissions of Inquiry Act, is devoid of any merit as no examination-in-chief which is not allowed to be subjected to cross examination can be read in evidence, since a person against whom a deposition is made/examination-in-chief is directed, has a legal right to cross examine the witness who has deposed against him.

27. Neither the part of examination-in-chief which referred to affidavits Ex.PW1/A & B and statement Ex.PW1/C, nor these documents can be read in evidence against the accused unless he is given an opportunity to cross examine PW-1 Smt. Jagdish Kaur with respect to affidavits filed and statement made before the Commissions.

28. The case before this Court has peculiar dimensions. The petitioner has placed on record the copy of the report u/s 173 CrPC in this case alongwith the list of witnesses and the list of documents. Not only in the chargesheet, reference to the statement of Smt. Jagdish Kaur and the affidavits filed by her before the Commissions is made, in the list of witnesses also, she is named as prosecution witness at serial No.1. In the list of documents, the prosecution has relied upon at :

"Sl. No.15 - "File No.W-136 DOH : 08.1.2002 of Justice Nanavati Commission of Inquiry containing original affidavits of Smt.Jagdish Kaur filed before Nanavati Commission, statement recorded before commission and copy of affidavit dated 17.07.1985 filed before Justice Rangnath Mishra Commission, M.No.292/08 (12 pages)

29. It is an admitted position that the affidavits filed and statement made before

the Commissions by PW-1 Smt. Jagdish Kaur are the foundation of the case of prosecution. The witness Smt. Jagdish Kaur (PW-1) has extensively referred to the affidavits as well as her statement before the Commissions with a view to corroborate her deposition during trial despite the provision contained in Section 6 of Commissions of Inquiry Act and the dictum of Apex Court in Dalmia's case reaffirmed in Kehar Singh's case that such statement is wholly inadmissible in evidence in any future proceedings civil or criminal.

30. However, in the present case, the prosecution has extensively relied upon the affidavits filed and statement made before the Commissions. These are the documents relied upon by the prosecution to prove the charges against the accused. Prosecution has led evidence against the accused and proved these documents in the examination-in-chief of PW-1 Smt. Jagdish Kaur who referred to these documents to corroborate her deposition. No objection was raised by any of the party regarding admissibility of Ex.PW1/A to C either during examination-in-chief or when she was cross examined on 03.07.2010, 08.07.2010 and 09.07.2010. Now therefore prosecution is estopped from raising objection regarding cross examination of PW-1 Smt. Jagdish Kaur with respect to Ex.PW1/A to C since this will amount to evidence, which has not been subjected to cross examination being read against the accused.

31. It is settled position of law that no evidence can be read against the accused if not subjected to cross examination. The implication would be that the affidavits Ex.PW1/A & B and statement Ex.PW1/C and the deposition to this effect will not be read in favour of prosecution and against the accused.

32. During the course of arguments before this court, learned counsel for the petitioner has specifically stated that PW-1 Smt. Jagdish Kaur is not required to be recalled for cross examination with respect to Ex.PW1/A to C. Thus, the only question to be determined is about the cross examination which has already taken place albeit partly without objection from the prosecution and partly subject to objection recorded on 12.07.2010. In fact, that part of evidence has already been put to the accused in his statement recorded u/s 313 CrPC as incriminating circumstance. The affidavits Ex.PW1/A & B and statement Ex.PW1/C of PW-1 Smt.Jagdish Kaur and her deposition in this regard will either be admissible as a whole i.e. examination-in chief and cross examination in respect of Ex.PW1/A and C or it will be wholly inadmissible. It cannot be admissible in examination-in chief and inadmissible in cross examination of same witness.

33. Accused has a right to get a fair trial. It is essential that the accused is given a reasonable opportunity to defend himself in the trial. He is also permitted to confront the witnesses and other evidence that the prosecution is relying upon. Since it is the duty of the Court to ensure that accused gets a fair trial, he has to be afforded a reasonable opportunity to defend himself by permitting him to confront the witnesses and other evidence relied upon by the prosecution. Learned Trial Court by curtailing this right of the accused had denied him his right to have a fair trial.

34. The impugned order dated 02.06.2010 is set aside. It is directed that whole of the examination-in-chief and cross examination of PW-1 Smt.Jagdish Kaur with respect to Ex.PW1/A to C will be read in evidence. The question put to the accused/petition in his statement u/s 313 CrPC and answers given by him with reference to said affidavits and statement shall also be taken into consideration. The petition is allowed. Interim order stands vacated. Copy of the order be sent to learned Trial Court for compliance. Parties are directed to appear before the learned Trial Court on 06.08.2012.