

**HIGH COURT OF BOMBAY****Date of Decision-04.Dec.2023**

CRIMINAL WRIT PETITION(ST) NO.17507 OF 2023

**Dr.Sublendu Prakash Diwakar****] .. Petitioner****vs.****State of Maharashtra****..Respondent****Legislation and Rules:**

Section 91, 161, 164, 173, 207, 208, 311 of the Code of Criminal Procedure, Section 376, 376(2)(n), 506 of the Indian Penal Code, Section 66(E) of the Information Technology Act.

**Subject:**

Petition for quashing the order rejecting the application under Section 91 Cr.P.C. r/w 165 of the Indian Evidence Act, 1872, seeking production of documents seized during the investigation but not submitted with the charge-sheet.

**Headnotes:**

Quashing of Order – Petition for quashing the order of the Additional Sessions Judge rejecting the application for production of seized documents by the Investigating Officer – Application under Section 91 Cr.P.C. for production of documents crucial for establishing consensual relationship in a case involving allegations of forcible sexual intercourse. [Para 1, 5]

Investigation and Evidence – Accused's entitlement to documents withheld by Investigating Officer – Importance of fair investigation and trial – Right of the accused to ask for documents necessary for defense, including those not forwarded with the charge-sheet. [Para 6, 17, 22-24]

Section 91 Cr.P.C. Application – Justification of invoking Section 91 at the trial stage – Accused's right to seek production of documents withheld by the Investigator/Prosecutor at the stage of framing of charge, provided the material is of sterling quality. [Para 10, 18, 20]

Fair Trial – Guidelines for fair trial and investigation – Duty of prosecution to comply with Draft Criminal Rules and Practice 2021, ensuring disclosure of all relevant documents, including those not relied upon by the Investigating Officer. [Para 14, 16, 23]

Decision – High Court's direction for production of documents sought by the Petitioner – Remand to the Additional Sessions Judge to secure production of documents necessary and desirable for the purpose of trial – Suspension of proceedings in Sessions Case No.128/2022 until compliance. [Para 25-26]

Referred Cases:

- V.K. Sasikala vs. State (2012) 9 SCC 771
- State of Orissa vs. Debendra Nath Padhi. (2005) 1 SCC 568
- Rukmini Narvekar vs. Vijaya Satardekar & Ors., (2008) 14 SCC 1
- Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, in RE vs. State of Andhra Pradesh & Ors. (2021) 10 SCC 598

Representing Advocates:

Mr. Siddhesh Bhole a/w Yakshay Chheda and Gautam Khazanchi i/b SSB Legal and Advisory for the Petitioner.

Mr. S.R. Agarkar, APP for the State.

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JUDGMENT :

1The present petition is filed by the Petitioner, inter alia, praying for quashing and setting aside of the order dated 29/8/2023 passed by the Addl. Sessions Judge, City Civil and Sessions Court, Greater Mumbai, rejecting the application filed by the petitioner under Section 91 of the Code of Criminal Procedure (for short 'Cr.P.C') r/w 165 of the Indian Evidence Act, 1872, seeking production of documents which were seized by the Investigating Officer during the course of investigation of the C.R., in which he is arraigned as an accused, but having not been forwarded to the trial Court along with the charge-sheet.

Heard Advocate Siddhesh Bhole along with Yakshay Chheda and Gautam Khazanchi i/b SSB Legal & Advisory for the Petitioner, who is opposed by Shri S.R. Agarkar, learned APP for the State.

2The brief background facts would reveal that the present Petitioner is arraigned as an accused in C.R.No. 278/2020 registered on 14/10/2020, at Bandra Kurla Complex Police Station in Mumbai, which invoked Section 376, 376(2)(n), 506 Indian Penal Code and also Section 66(E) of the Information Technology Act.

The subject C.R came to be registered on a complaint filed by the complainant, aged 32 years, who allege that taking advantage of the friendly relationship shared by her with the accused, and also of the distorted relationship with her own husband, the accused established physical relationship with her on the pretext of marriage on 24.04.2019 and he clicked photographs of her in an objectionable position and she accused him of using this material to coerce her to accompany him at various hotels situated at various locations and established physical relationship, without her consent and against her will.

On completion of investigation, the charge-sheet is filed in the competent Court which is accompanied with documents which, according to the Petitioner, have been selectively presented before the competent Court.

The Petitioner availed transit bail from Patiala House Court, Delhi, and thereafter, filed an Anticipatory Bail Application under Section 438 of Cr.P.C, before the Sessions Judge, City Civil and Sessions Court, Mumbai, since the crime was registered in the police station which fell within its jurisdiction. Along with the application, the petitioner enclosed conversation between him and the complainant in form of Whatsapp chats and he also enclosed payment receipts, demonstrating that he had spend substantial amounts on the complainant and her husband.

While the Petitioner was admitted to interim protection, it was observed that, considering the WhatsApp chats, the possibility of consensual relationship cannot be ruled out.

3The petitioner joined the investigation and provided documents/material, so as to demonstrate that the prosecution case of forcible sexual intercourse as alleged by the complainant, is false and the extract of WhatsApp and I-messages exchanged between the Petitioner and Complainant, demonstrated the falsity of the allegations made in the complaint. He also provided the details of the fight and hotel reservations made by the Petitioner during the consensual relationship and several photographs, depicting that the complainant was happy in the company of the Petitioner at various places, were also tendered, so as to establish that they shared a relationship which was mutual.

Apart from this, various bank statements from the bank account of the Petitioner, reflecting the monetary transactions with the complainant and her husband were also tendered to the Investigating Officer. The WhatsApp chats between the complainant and the Petitioner from 6/4/2017 to 18/3/2020 was tendered specifically to demonstrate that there was no forcible relationship, but the physical relationship maintained with the complainant was with her consent.

4The interim protection granted in favour of the petitioner was confirmed on 6/7/2021 and what is important to note is, that the Court clearly observed as under :-

“7..... The documents placed before me including the chats between the applicant and prosecutrix prima facie shows that they had very smooth relationship for considerable period of time which included trips, outings and shopping. They have even shares their personal chats of their respective spouses with each other. The prosecutrix has not made any complaints against the applicant about forcible sexual relationship or any false promise of marriage in the

chats on record. Therefore, prima facie, possibility of consensual physical relationship cannot be ruled out. False promise of marriage is subject of trial.”

5The grievance of the petitioner is that on 7/1/2022, when the charge-sheet was filed before the trial Court, the Investigating Officer deliberately withheld the documents tendered by him during the course of investigation and what the petitioner expected was a fair investigation and production of these documents before the Court along with the charge-sheet. However, on realizing that these documents are relevant to absolve him of the accusations faced by him, and he moved an application u/s.91 of the Cr.P.C, seeking production of documents seized by the Investigating Agency, but not appended with the charge-sheet.

It is this application, which is rejected by the impugned order and its perusal would reveal that the sole ground for declining the application is, that the documents sought to be produced are already in possession of the petitioner and the reasoning recorded therein, is assailed in the present petition.

6The Code of Criminal Procedure has defined the term ‘inquiry’ and also ‘investigation’.

In Section 2, ‘investigation’ under clause (h) shall include all the proceedings under the Code for collection of evidence conducted by a police officer or by any person, (other than the Magistrate) who is authorized by a Magistrate in his behalf.

Chapter XII of the Code, has compiled the procedure pertaining to the information received by the police and their powers to investigate. The Investigating machinery is set rolling when an information is received of a cognizable offence and upon completion of investigation, in the manner stipulated in the said Chapter, the police officer shall submit a report under Section 173 to a Magistrate empowered to take a cognizance of the offence and the report shall be in the form prescribed by the State Government, stating that

- “(a) the name of the properties;
- (b) the nature of the information;
  - (c) the names of the persons who appear to be acquainted with the circumstances of the case;
  - (d) whether any offence appears to have been committed and, if so, by whom;
  - (e) whether the accused has been arrested;
  - (f) whether he has been released on his bond and, if so, whether with or without sureties;
  - (g) whether he has been forwarded in custody under section 170;”

Sub-section (5) of Section 173 further provides as under :-

“(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report -

- (a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;
- (b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.”

Section 7 further stipulate that when the police officer investigating the case finds it convenient to do so, he may furnish to the accused copies of all or any of the documents, referred to in sub-section (5).

7 Another relevant provision in form of Section 207 is contained in Chapter XV under the caption “Complaints to Magistrate”. It reads thus:-

“207. Supply to the accused of copy of police report and other documents – In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

- (i) the police report;
- (ii) the first information report recorded under section 154;
- (iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposed to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under subsection (6) of section 173;
- (iv) the confessions and statements, if any, recorded under Section 164;
- (v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173;

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused;

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.”

By the above provision, an accused is entitled to the copy of FIR, Police Report, Statements recorded under Sub Section (3) of Section 161 of the Cr.P.C. of all the persons whom the prosecution proposes to examine as witnesses, the confessions and statements recorded under Section 164 and also any other document or relevant extract thereof, forwarded to the Magistrate with the Police Report under Sub Section(5) of Section 173 of the Cr.P.C.

8The right of the accused to be entitled to the aforesaid documents has been recognized as a part of his right to have a fair trial and fair investigation, and the Court trying the accused must ensure fairness of the investigating process. It is the responsibility of the investigating agency as well as that of the Courts to ensure that every investigation is fair and it does not impinge upon the freedom of an individual except in accordance with law and the right of an accused to ask for such documents, that he may be entitled to under the scheme contemplated under the Code and it has been recognized as an established facet of just, fair and transparent investigation.

On completion of investigation and before submission of the report to the Court under Section 173, a fair amount of application of mind on part of investigating agency is contemplated and the Investigating Officer during the course of investigation may have collected several documents or seized them alongwith any record, which may support the conclusion of the Investigating Officer as regards the offence with which the accused is charged by him. Though sub section (5) of Section 173 expect, him to forward only such reports/documents which support the case of the prosecution, there may be some documents, which have been placed before the Investigating Officer, either through a witness or through the accused himself, when he has participated in the investigation process, which are exculpatory in nature and may throw light upon the innocence of the accused in contrast to the aim of the prosecution to establish his guilt. Such documents may come to the aid of the accused to prove his innocence by dispelling the case of the prosecution. In such a scenario it is quite possible for the Investigating Officer to ignore the documents that have come into his possession, either being seized during the course of investigation or normally produced by the accused to disprove the accusations levelled against him and the Investigating Officer would choose to only forward those documents which are inculpatory in nature.

9In V.K. Sasikala vs. State represented by Superintendent of Police<sup>1</sup>, dealt with a situation where the documents sought by the accused are in custody of the Court and the question whether the accused can demand copies/inspection of the documents not relied upon by the prosecution, but part of the police report and in custody of the Court at the stage of Section 313 Cr.P.C. came to be answered by holding that the accused has a right to ask for all documents that he may be entitled to and it would cover the documents whether relied on or not by the prosecution, but fled in the Court and which would help in determining the truth. It was held

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<sup>1</sup> (2012) 9 SCC 771

that denial of access to documents in custody of Court, though not relied upon by the prosecution even at the advance stage of the trial may cause prejudice to the accused in properly defending her case and resulting in denial of fair trial.

The appellant was permitted to inspect the documents in custody of the Court to avoid any prejudice and their Lordships of the Apex Court refrain from enlarging the scope of the right of the accused where such documents are not forwarded by the Investigating Officer to the Court and restricted their observations to the unmarked and unexhibited documents being demanded by the accused which were forwarded to the Court under Section 173(5) of Cr.P.C., but not relied upon by the prosecution.

10 The conundrum whether the material filed by the accused can be considered at the stage of framing of charge was put to rest by a 3 Judges Bench of the Apex Court in the case of State of Orissa vs. Debendra Nath Padhi. (2005) 1 SCC 568 and position of law was crystalized to the effect that at the stage of framing of charge, the trial Court can consider only the material produced by the prosecution and there is no provision in the Code which would confer a right upon the accused to file any material or document at that stage and this right was held to be available to the accused only at the stage of trial.

It was also categorically viewed that accused cannot at the stage of framing of charge invoke Section 91 to seek production of any document to prove his innocence. Propounding upon the production of documents under Section 91 of the Cr.P.C., the Apex Court held as under :-

“25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is "necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code". The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under a written order an officer in

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

It was thus held that the jurisdiction under Section 91 of the Code, when invoked by the accused, the necessity and desirability would have to be seen by the Court, in the context of the purpose-investigation, inquiry, trial or other proceedings under the Code with a word of caution being expressed that law does not permit a roving or fishing enquiry.

11 In case of *Rukmini Narvekar vs. Vijaya Satardekar & Ors.*, (2008) 14 SCC 1, the issue of all the material produced by the defence at the stage of cognizance or framing of charge, once again surfaced before a two Judge Bench and it was held that it cannot be said as an absolute proposition that under no circumstances can the Court look into the material produced by the defence at the time of framing of charge, though this should be done in very rare cases i.e. where defence produces some material which convincingly demonstrate that the whole prosecution case is totally absurd or concocted.

The Division Bench, however, pronounced upon the width of the powers of the High Court under Section 482 of the CrPC and Article 226 of the Constitution of India, which was held to be unlimited, whereunder in the interest of justice, the High Court can make such order as may be required to secure the ends of justice and to prevent abuse of the process of any Court and therefore in the proceedings taken under Section 482 Cr.P.C, the Court is free to consider the material that may be produced on behalf of the accused to arrive at a decision whether the charge as framed could be maintained.

12 Recently the three Judges Bench of the Apex Court in *Criminal Trials Guidelines Regarding Inadequacies and Deficiencies*, in *RE vs. State of Andhra Pradesh & Ors.* (2021) 10 SCC 598, in the suo motto proceedings initiated under Article 32 noticed deficiencies which occurred in course of criminal trials and certain practices adopted in criminal proceedings which included the documents i.e. list of witnesses, list of exhibits, list of material, referred to or presented and exhibited and the end result of the directives is the Draft Rules of Criminal Practice 2021. Directions were issued to all High Courts to take expeditious steps to incorporate the Draft Rules 2021 as part of the Rules governing criminal trials and ensure that the existing rules, notifications,



orders and practice directions are modified and promulgated within 6 months of passing of the order.

The State Government as well as Union of India were directed to carry out consequential amendments to their police and other Manuals within a period of 6 months.

13 Rule 4 of the Draft Criminal Rules and Practice 2021 related to supply of documents under Section 173, 207 and 208 of Cr.P.C. which reads thus :

“4. Supply of Documents Under Sections 173, 207 and 208 Cr.P.C. Every Accused shall be supplied with statements of witness recorded under Sections 161 and 164 Cr.PC and a list of documents, material objects and exhibits seized during investigation and relied upon by the Investigating Officer (I.O) in accordance with Sections 207 and 208, Cr. PC.

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

14 The reading of the above Rule alongwith the explanation appended thereto, has conferred a right upon the accused, to be supplied with the statement of witnesses recorded under Section 161 and 164 of the Cr.P.C. and a list of documents, material and objects and exhibits seized during the investigation and relied upon by the Investigating Officer, but the explanation appended to the Rule made it imperative, also to provide a list of statements, documents, material objects and exhibits, that are not relied upon by the Investigating Officer, which necessarily contemplate that the accused shall be entitled to know about the details of the material collected by the Investigating Officer during investigation though it is not relied upon by the Investigating Officer.

In case of P. Ponnusamy vs. State of Tamil Nadu<sup>2</sup> the directions issued in suo motu Writ Petition (cri) No.1/2017 was once again deliberated upon and the following observations would reveal that without the adoption of the Draft Rules, benefit of Rule 4 deserve to be extended to an accused and the specific observations need a reproduction :-

“16. That some High Courts or governments of the States/Union Territories have failed to comply with this court's order and are delayed in adopting the Draft Rules or amending the concerned police/practice manuals, cannot prejudice the right of an accused (to receive this list of the statements, documents, material, etc. in the possession of the prosecution), which has unequivocally been recognized by this court in its final orders of the suomoto proceedings (paragraph 11, extracted above), itself. Further, to say that the judgment in Manoj in relation to this, and the right of the accused to receive the said list of documents, material, etc. would only apply after the draft rules are adopted-would lead to an anomalous situation

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<sup>2</sup> 2022 SCC Online 1543

where the right of the accused in one state, prejudicially differs from that afforded to an accused, in another.

“17. As stated earlier, the requirement of disclosure elaborated on in Manoj, not only was premised on the formulation of draft rules, but normatively premised on the ratio of the three-judge bench decision in Manu Sharma (supra). In these circumstances, the proper and suitable interpretation of the disclosure requirement in Manoj (supra) would be that:

- (a) It applies at the trial stage, after the charges are framed.
- (b) The court is required to give one opportunity of disclosure, and the accused may choose to avail of the facility at that stage.
- (c) In case documents are sought, the trial court should exercise its discretion, having regard to the rule of relevance in the context of the accused's right of defence. If the document or material is relevant and does not merely have remote bearing to the defence, its production may be directed. This opportunity cannot be sought repeatedly-the trial court can decline to issue orders, if it feels that the attempt is to delay.
- (d) At the appellate stage, the rights of the accused are to be worked out within the parameters of Section 391 CrPC.”

The above observations are further emphasized by holding that the accused always has a right to fair trial, but what is reiterated is that this right is manifested in the fair disclosure as elaborated above.

15 A three Judge Bench of the Apex Court in case of Manoj & Ors. vs. State of Madhya Pradesh, (2023) 2 SCC 353, once again pronounced upon the scope of Section 207 and 208 Cr.P.C. as regards the duty of disclosure of Public Prosecutor and the observations made in case of Manu Sharma vs. State (NCT of Delhi), (2010) 6 SCC 1, were reproduced in Para 202 to the following effect :

“202. Relevant extracts that merit repetition are:  
(Manu Sharma case 3, SCC pp. 80-81, paras 199 & 201202)

"199. It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law dehors his position and influence in the society.

201. Historically but consistently the view of this Court has been that an investigation must be fair and effective, must proceed in proper direction in consonance with the ingredients of the offence and not in haphazard manner. In some cases besides investigation being effective the accused may have to prove miscarriage of justice but once it is shown the accused would be entitled to definite benefit in accordance with law. The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and 21 and expansive power of the police to make investigation. These well-established principles have been stated by this Court in Sasi Thomas v. State, State of T.N. v. Surya Sankaram Karri and T.T. Antony v. State of Kerala".

202. In *Nirmal Singh Kahlon v. State of Punjab* this Court specifically stated that a concept of fair investigation and fair trial are concomitant to preservation of the fundamental right of the accused under Article 21 of the Constitution of India. We have referred to this concept of judicious and fair investigation as the right of the accused to fair defence emerges from this concept itself. The accused is not subjected to harassment, his right to defence is not unduly hampered and what he is entitled to receive in accordance with law is not denied to him contrary to law.”

Referring to the material which was suppressed by the prosecution, specifically the call details record, the relevant paragraph in the context of Section 91 and 243 Cr.P.C. in *Manu*

Sharma was reproduced to the following effect :-

“217. Section 91 empowers the court to summon production of any document or thing which the court considers necessary or desirable for the purposes of any investigation, inquiry, trial or another proceeding under the provisions of the Code. Where Section 91 read with Section 243 says that if the accused is called upon to enter his defence and produce his evidence there he has also been given the right to apply to the court for issuance of process for compelling the attendance of any witness for the purpose of examination, cross-examination or the production of any document or other thing for which the court has to pass a reasoned order.”

16 In the wake of evolution of the above principle of law it is now imperative for the prosecution, as a matter of rule, in all criminal trials to comply with Rule 4 of the Draft Guidelines approved by the Apex court to be adopted by all States and furnish the list of statements, documents, material objects and exhibits, which are not relied upon by the Investigating Officer and the duty is cast upon the presiding officer of the court in criminal trials to ensure compliance with the Rules.

Needless to state that once a list is furnished, it is open for the accused to file an application under Section 91 of Cr.P.C. seeking production of such documents and in such a contingency the trial Court by exercising its discretion having regard to the rule of relevance in the context of the accused’s right of defence, shall consider the application. If the document or material is relevant and does not merely have remote bearing to the defence, its production may be directed, but if it is of the opinion that an application is preferred to delay the proceedings such request can be declined.

Prosecution shall as a matter of rule of fairness ensure the compliance of the above stipulations.

17 It is in the backdrop of the above exposition of law on the right of the Accused to fair trial as it surfaces through several provisions in the Code including Section 207, the impugned order will have to be tested.

Section 91 of the Cr.P.C. though having been held not

to be availed at the stage of framing of charge, the exercise of such power has been justified during the trial, even if such document is not part of charge sheet and the Apex Court in case of Nitya Dharmananda Alias K. Lenin and Anr vs. Gopal Sheelum Reddy also known as Nithya Bhaktananda and Anr, <sup>3</sup> (2018) 2 SCC 93, by relying upon the decision in the case of State of Orissa vs.

Debendra Nath Padhi, has ruled as under :

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

18 In the facts of the present case, the application was preferred under Section 91 read with 311 of the Cr.P.C. by the accused as the documents/materials furnished by the accused to the Investigating Officer was not filed alongwith the charge sheet and a specific accusation was levelled that these documents are deliberately withheld, which were provided by him during the course of investigation and they are crucial in demonstrating that the allegations made by the complainant are false, frivolous and an afterthought.

According to the learned counsel Mr. Siddhesh Bhole, the material produced is indispensable to the issue of framing of charge and it is of sterling quality, which has the potential of exonerating the accused.

The Application also prayed for a direction to the Investigating Officer to provide a list of unrelieved documents/ material seized during the course of investigation and reliance was placed on the decision in case of Nithya (supra). The informant relied upon the decision in case of Debendra Nath Padhi to support the submission that at the stage of framing of charge Section 91 cannot be invoked seeking production of documents to prove his innocence.

19 The Additional Sessions Judge by reproducing Section 91 has concluded as under :

"14. The said provision itself is very clear that, Court may issue a summons or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it. The further provision itself is clear that it can be invoked when the person who is in possession and having power of any particular document with him. In the present matter, admittedly Investigating Officer has not collected any documentary evidence but, the accused has come with the case that he has produced those documents before the Investigating Officer during investigation. So the custody of the

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<sup>3</sup> (2018) 2 SCC 93

said documents is with the accused himself. Accused is custodian of the documents, though he has produced the copies of those documents to the Investigating Officer. Not only this, but accused has also relied upon those documents alongwith present application which itself shows, the custody of those documents with this accused.

15 According to accused, said documents are necessary for the just decision of the case. If at all the documents are in the custody of accused himself, there is absolutely no hurdle to the accused to produce the said documents straight way in the Court in support of his defence. It is not the case that the Investigating Officer is in custody of the said documents, and therefore, he has directed or to be ordered to produce the documents. There is absolutely no substance in the contentions of the accused that the documents, which are already in his custody and produced by him before Investigating Officer, has to be ordered to be produced through Investigating Officer. Accused is not seeking the production of the documents which were collected by the Investigating Officer during investigation or the documents which are not in his possession. So application filed by the accused is not at all maintainable.”

20 In the wake of the decision of the Apex Court in the case of Rukmini (supra) and Nithya (supra), exercise of power under Section 91 would be justified at the stage of framing of charge provided the court is satisfied that the material available investigator which was not made part of the charge sheet has crucial and significant bearing at the stage of framing of charge. Ordinarily the court has to proceed on the basis of material produced with the charge sheet, at the stage of framing of charge, but if the Court is satisfied that there is material of sterling quality, which has been withheld by the Investigator/Prosecutor then the court is not debarred from summoning or relying upon the same even if the document is not part of the charge sheet. The word of caution, expressed is the right under Section 91 cannot be invoked sans the satisfaction of the Court at the stage of framing of charge.

21 It is the specific case of the Petitioner that he has furnished several documents to the Investigating Officer and the list of documents furnished included the relevant extract of WhatsApp and i messages exchanged between the Accused and the Complainant, relevant photographs, flight and hotel reservations, to demonstrate the consensual relationship between the couple. The bank statements reflecting the amount transferred to the complainant and by furnishing the documents the Petitioner attempted to dispel the case of the prosecution of forcible sexual intercourse and instead intended to plead a case of consensual relationship between two adults.

No doubt, these documents were furnished by the Petitioner to the Investigating Officer, but when he seek these documents under Section 91, he has to establish necessity or desirability of its production, which would have to be seen with reference to the stage, when a prayer is made for its production.

The impugned Judgment has recorded that it is the accused who had tendered the documents to the Investigating Officer and therefore he is already in possession of these documents and hence there is no justification for him seeking production of these documents.

The aforesaid reasoning has missed out an important aspect being the documents which the Petitioner is seeking are sourced from the Investigating Officer since during the course of investigation they have been submitted to him to rebut the case of the complainant of forcible sexual intercourse and since the documents are collected during the course of investigation, though tendered by the Petitioner himself, they are deemed to be in custody of the Investigating Officer.

22 Through an Application being made under Section 91 of the Code, the Petitioner sought production of those documents, which is desirable for the purpose of trial as the documents collected during the course of investigation by whatever source will have a different connotation if they are produced through the Investigating Officer, as being received by him during investigation instead of the accused producing the same before the Court in his defence.

In the case of Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, in RE (supra), the explanation appended to Rule 4 has made it imperative to furnish a list of documents/material which is collected by the Investigating officer through whatsoever source, but which do not form part of the charge sheet and this may include several exculpatory documents, statements, material etc. which has the potential to weaken the case of the prosecution and benefit the accused.

23 In order to ensure fair investigation and fair trial to the accused the Apex Court has formulated guideline No.4 in the draft rules of Criminal Procedure Code, which contemplate an indication to the accused about the documents collecting during the investigation by classifying them, into the documents which are annexed alongwith the charge sheet to which the accused is undisputedly entitled to, in the wake of Sub Section (5) of Section 173 of CrP.C. and in another category would fall those documents/evidence/material which though collected by the Investigating Officer has not been furnished to the Court alongwith the charge sheet/fnal report.

Once the accused is aware that any material/documents collecting during the investigation process, which has potential of absolving him of the guilt, which is made known to him through the list of documents, exhibits etc. furnished in terms of the explanation to Rule 4 of the Draft Rules, then the accused is entitled to seek those documents through

an application under Section 91 of the Code by establishing its necessity and desirability, for the purpose of trial and upon such an application being made the Court shall issue summons to the person in whose possession or power such document or material is believed to be and the Court shall require him to attend and produce it or to produce it as directed.

24 The documents though furnished by the Petitioner to the Investigating Officer, when directed to be produced through the orders passed by the court under Section 91 will change its context, as what is relevant is the source from which the documents are being produced before the court, i.e. through the Investigating Officer, which would assume significance. Moreover, there shall be a clarification at this stage about what documents are furnished by the accused as at the time of trial, the Investigating Officer may dispute the documents/material and its contents and therefore if the accused/Petitioner intends to have these documents produced at the time of framing of charge, provided the court is satisfied about its necessity and desirability for the purpose of trial, such application deserve to be granted.

25 Unfortunately, the impugned order failed to consider this aspect of the matter and the learned Judge has not even bothered to ensure compliance of Rule 4 of the Draft Criminal Amendment Rules, which contemplate that a list of statements/documents, material objects and exhibits that are not relied upon by the Investigating officer is furnished to the accused.

Since the inaction on part of the court to exercise the power under Section 91 of the Code would cause severe and grave prejudice to the Petitioner, who is entitled to summon production of documents, which he had tendered to the Investigating Officer, by setting aside the impugned order, the matter is remanded to the Additional Sessions Judge to secure production of documents sought by the Petitioner in the Application filed under Section 91, as the documents are necessary and desirable for the purpose of trial, which are exculpatory in nature and would enable the accuse to prove his innocence, though it is at the stage of framing of charge, as this will assure him, fairness in the trial.

26 The Sessions Court shall direct the concerned Investigating Officer/In-charge of the Police Station to produce the documents sought in the Application by issuing appropriate summons for its production within the stipulated period.

By quashing and setting aside the impugned order, the writ petition is allowed in terms of prayer clause (a).

Needless to state that till the aforesaid compliance is ensured the proceedings in Sessions Case No.128/2022, pending on the file of Additional Sessions Judge, City Civil and Sessions Court, shall not proceed.

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