



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 730 OF 2024

Shashikant s/o Vitthal Kothawade,
Age : 64 years, Occu. : Retired,
R/o. : Flat No. 303, Tulshiratna Apartment,
Rajbihari Link Road, RTO Corner,
Nasik.

.. Petitioner

Versus

1. The State of Maharashtra
2. Union of India
Through Central Bureau of Investigation .. Respondent

Mr. Nilesh S. Ghanekar, Advocate for the Petitioner.
Smt. Chaitali Choudhari-Kutti, APP for Respondent No. 1/State.
Mr. Sachin S. Panale, Special P.P. for C.B.I./Respondent No. 2.

CORAM : KISHORE C. SANT, J.

Date on which reserved for order : 14th July, 2025.

Date on which order pronounced : 07th August, 2025.

FINAL ORDER :-

. The accused facing trial for an offence under the Prevention of Corruption Act has approached this Court for quashing of the impugned order whereby the application of the accused for setting aside no cross order and for recalling PW- 2 for further cross-examination came to be rejected by the learned Special Judge

(A.C.B.), Aurangabad in Special (ACB) Case No. 21/2018 by order dated 08.01.2024.

2. The facts in short are that, the present petitioner is charged with the offence punishable under sections 7 and 13(2) r/w 13(1) (d) of the Prevention of Corruption Act. In the trial, PW-2 de facto complainant was examined in the year 2018. His cross-examination started on 16.11.2018. The learned advocate for the respondent prayed for an adjournment on 16.11.2018 and he did not further cross-examined. The matter proceeded further. The evidence of other witnesses was recorded. At this stage, the petitioner filed an application Exh. 90 for setting aside no cross order dated 21.12.2023. The respondent/State filed say. It is stated that, the cross-examination started on 16.11.2018. Time was granted at the request of learned advocate for the accused and the matter was posted on 17.12.2018 and since then the cross of the witness is pending. On 22.04.2019 no cross order came to be passed for the first time. The prosecution thereafter examined five witnesses. On 24.11.2022 Exh. 71 application came to be filed for setting aside no cross order. The said application came to be allowed on 30.01.2023. The witness was present on

17.04.2023, however, even on that day the defence could not cross-examine the witness. The witness was therefore discharged. On 04.05.2023 the defence again filed an application Exh. 80 for recalling the witness. That application was allowed on 09.10.2023. However, even thereafter the defence failed to cross-examine the witness till 21.12.2023. The Court, therefore, again passed no cross order for third time. By mentioning these dates, the application came to be opposed.

3. The learned Trial Judge considered application Exh. 90. The learned Court categorically recorded the dates and the events. It is considered that, on previous date at around 01.45 p.m., learned counsel for the accused left to attend rites prior to marriage of his niece. At 2.30 p.m. he had a matter before the High Court. In view of that, the matter was taken up at 3.30 p.m. The matter was kept back. However, till 4.30 p.m. the cross-examination could not be done. The learned Court, therefore, passed no cross order. The learned Court further recorded in the order that, the evidence of PW-2 was recorded on 16.11.2018 and again time was sought for cross-examination. The witness was also not feeling well and therefore, the case was adjourned and since thereafter

the said witness is not cross-examined in spite of many chances and adjournments. When Exh. 71 application was allowed for recalling of the said witness along with one other witness, the said application was allowed on a condition of payment of cost of Rs. 1,500/- (Rs. One Thousand Five Hundred Only) per day to the witness. On that condition the witness was called. The accused again sought time vide Exh. 76. That application was rejected and the witness was discharged. Since thereafter no endeavour was made to call the witness till filing application under Exh. 80 on 04.07.2023. Though the application was filed on 04.07.2023 it was argued only in October 2023. The said application was allowed subject to cost of Rs. 10,000/- (Rs. Ten Thousand only) with further direction to pay cost of Rs. 1,500/- (Rs. One Thousand Five Hundred only) per day to the witness. Though the order was directed to be complied within one week, the accused did not comply with the said order. Thereafter, application was filed seeking permission to comply the order. The same was allowed.

4. The learned Court further recorded that, on 21.12.2023 the witness appeared at 11.00 a.m. in the morning since the said date

was given as per the convenience of the learned advocate for the accused. However, another learned advocate appeared for the accused and made different submissions. He informed that, the learned advocate for the accused would appear at 11.30 a.m., however, the learned advocate did not appear. Later on, another junior advocate informed the Court that, the learned advocate would appear at 12.30 p.m. Even then the learned advocate did not appear. The accused was specifically told to keep the learned advocate present by 1.00 p.m. The learned advocate did not appear. At 1.30 p.m. the learned advocate appeared, however, he told that he would start the cross-examination after recess. Then, third junior advocate informed that, the learned advocate would appear at 3.30 p.m. The learned Court recorded that, at 3.30 p.m. the witness made a request to the Court to discharge him as he was present since morning. The learned advocate for the accused was thereafter called, however, none appeared. The learned Court considering that, even after five years the witness is not being cross-examined, the learned Court again passed no cross order for third time at 3.30 p.m. On that day, even application for adjournment was not filed, neither an application was filed for

setting aside no cross order.

5. An application below Exh. 90 came to be filed on 04.01.2024. It is stated in the application that, learned advocate had to attend one religious ceremony and the same was informed to the Court. The Court considered Section 309 of the Code of Criminal Procedure (for short "Cr.P.C."). It is considered that the witness was present for cross-examination. He was waiting for his cross-examination for five years. On 21.12.2023 the witness was in the Court for almost five hours. The Court could not even manage the board since different junior advocates made different submissions throughout the day. The Court by recording all these events held that, five years time is certainly not a reasonable time. The Court also recorded that, earlier the dates were granted liberally and only after that passed an order rejecting the application.

6. The learned advocate Mr. Ghanekar for the petitioner submits that, in fact, there is no strong justifiable case to allow the application. The conduct also cannot be justified. His main submission is that, the petitioner being an accused needs a fair

opportunity. When learned advocate was not present, the Court could have offered an opportunity to the accused asking as to whether the accused is willing to conduct cross-examination personally. No such opportunity was given. Considering the serious case, he submits that, if the evidence of the witness goes unchallenged, petitioner would suffer grave prejudice. He further undertakes to the Court that the cross-examination would be conducted in a day if the application is allowed. He relies upon the following judgments :

(i) State of Uttarakhand Vs. Tilak Seth and Ors. in Criminal Revision No. 161/2010.

(ii) P. Sanjeeva Rao Vs. The State of A.P. reported in AIR 2012 SC 2242.

(iii) Varsha Garg Vs. The State of Madhya Pradesh and ors. reported in AIR 2022 SC 3707.

(iv) M/s Shrushti Developers, Nagpur and others Vs. Ramesh Rambhau Bidkar and ors. in Writ Petition No. 4825/2016.

7. The learned Special Prosecutor Mr. Panale for C.B.I. submits that, this is a case where no leniency can be shown to a litigant.

The accused facing the trial under the Prevention of Corruption Act must know the sanctity of the trial and the seriousness of the Court proceedings. Twice no cross orders were set aside. The learned Court has recorded the circumstances in which the witness was required to be discharged. He thus submits that, merely under the name of fair opportunity, no such application can be allowed. He submits that, now all the witnesses are examined except I.O. who is now being cross-examined. He relies upon the judgment in the case of Swaran Singh Vs. State of Punjab with Jagjit Singh Vs. State of Punjab reported in (2005) 5 SCC 668 and prays for rejection of the petition.

8. The learned A.P.P. adopts the argument of Mr. Panale, learned Special Prosecutor for C.B.I.

9. From looking to the order passed by the learned Court and looking to the manner in which the learned advocate did not conduct the cross-examination, it is clear that, the petitioner does not deserve any sympathy merely on the ground that he is an accused facing a criminal trial.

10. In the case of the **State of Uttarakhand** (*supra*), the Court considered the purport of Section 311 of the Cr.P.C. It is considered that, the Court shall exercise the powers for just decision of the case. The Court can exercise the powers at any stage of any enquiry, trial and any proceeding.

11. In the case of **P. Sanjeeva Rao** (*supra*), the Hon'ble Apex Court considered the scope of Section 311 of the Cr.P.C. In the said case two prosecution witnesses were not cross-examined by the counsel for the accused as the counsel for the accused intended to cross-examine them after Trap Laying Officer had been examined. No formal application to that effect was made. Even no oral prayer was made. The Court held that, because of the mistake of the advocate, the accused should not suffer a penalty totally disproportionate to the gravity of error committed by his lawyer. Denial of an opportunity to recall the witnesses for cross-examination would amount to condemning the appellant without giving him opportunity to challenge the correctness of version and the credibility of the witnesses. To test the credibility of the witness in a civil or criminal case can be done only when the testimony is put through fire of cross-examination. If such

opportunity is denied, the same would result in serious miscarriage of justice. The Hon'ble Apex Court considered the case of **Swaran Singh** (*supra*) in the judgment.

12. In the case of **Varsha Garg** (*supra*), the Hon'ble Apex Court considered right of the accused to a fair trial. It is observed that the accused is constitutionally protected under Article 21. In that case, application for recall of witness was allowed to meet the ends of justice. The observations in the case of **Swapan Kumar Chatterjee Vs. Central Bureau of Investigation** reported in **(2019) 14 SCC 328** are considered wherein the Court also held that, the Court should not encourage filing of successive applications for recall of a witness under this provision.

13. In the case of **M/s Shrushti Developers** (*supra*), an order of no cross was recalled and set aside. The petitioners were directed to cross-examine the respondent/witness on the next date before the Trial Court. It was made clear that, if the petitioners therein fail to comply with the condition on cross-examining the witness, no further opportunity would be granted to the petitioners to conduct cross-examination.

14. So far as the case of **Swaran Singh** (*supra*) is concerned, paragraph No. 36 is material which is reproduced hereunder :

“36. A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that, witnesses are required whether it is direct evidence or circumstantial evidence. Here are the witnesses who are harassed a lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened, he is abducted, he is maimed, he is done away with, or even bribed. There is no protection for him. In adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter is adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a helpless situation. For all these reasons and other, a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witness is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all. High Courts have to be vigilant in these matters. Proper diet money must be paid immediately to the witness (not only when he is examined but for every adjourned hearing) and even sent to him and he should not be left to be harassed by the subordinate staff. If the criminal justice system is to be put on a proper pedestal, the system cannot be left in the hands of unscrupulous lawyers and the sluggish State machinery. Each trial should be properly

monitored. Time has come that all the Courts, district courts, subordinate courts are linked to the High Court with a computer and a proper check is made on the adjournments and recording of evidence. The Bar Council of India and the State Bar Councils must play their part and lend their support to put the criminal system back on its trial. Perjury has also become a way of life in the law Courts. A trial Judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself which deters him from filing the complaint. Perhaps law needs amendment to clause (b) of Section 340 (3) of the Code of Criminal Procedure in this respect as the High Court can direct any officer to file a complaint. To get rid of the evil of perjury, the Court should resort to the use of the provisions of law as contained in Chapter XXVI of the Code of Criminal Procedure.”

15. This Court has considered the above cited judgments. The present case is a gross case where twice no cross orders were set aside and still the witness was not cross-examined. The circumstances recorded by the Court which made it to pass no cross order for third time show the total reckless attitude of the accused towards the Court proceedings. The Court is required to record in the order that on the day when no cross order was passed the Court even had find it difficult to manage the board as time to time requests were made to keep back the matter. In spite of repeated requests for keeping the matter back the learned advocate did not turn up to cross-examine the witness. The Court

was practically compelled to pass such an order.

16. The proceeding before the Court has the sanctity. No proceeding before the Court can be taken so lightly. Looking to the observations in paragraph No. 36 in the case of Swaran Singh (*supra*), this Court finds that, the observations are totally applicable to the present case. There is absolutely no justification for not examining the witness. In spite of passing no cross order twice even on third occasion the accused did not bother to cross-examine the witness. Merely saying that if opportunity is not given the accused would suffer irreparable loss cannot be considered in such cases. If this Court shows sympathy, it would be misplaced sympathy. In this case the accused has literally played with the Court. The act of accused in the present case shows utter disregard to the Court proceedings. The precious time of the Court is wasted because of the conduct of the litigant. In such circumstances still showing sympathy would practically encouraging such practices. It would be a mockery of the Court by the Court itself. The Court cannot allow the litigant to take the proceedings lightly and still to show sympathy towards such persons. The act of the accused in the present case is totally

condemnable beyond words.

17. Considering all above, this Court is not at all impressed by the submission that, to avoid miscarriage of justice, no cross order needs to be set aside. This Court finds that, such petitions are liable to be dismissed with heavy cost.

18. The present petition is, therefore, dismissed with cost of Rs. 50,000/- (Rs. Fifty Thousand only). The cost of Rs. 50,000/- (Rs. Fifty Thousand only) to be paid to the District Legal Aid Centre, District Aurangabad within four (04) weeks from today.

19. This Court appreciates the efforts taken by Mr. Panale, learned Special Prosecutor for C.B.I. in assisting this Court.

20. As the trial is pending since 2018, the learned Trial Court is requested to conclude the trial within three (03) months from today.

(KISHORE C. SANT, J.)

PS.B.