

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C. 781/2009 & Crl.M.A.2868/2009 (stay)**

% Date of reserve: 11.08.2009
Date of decision: 28.08.2009

MURAIF QAMAR ...PETITIONER
Through: Mr. D.C. Mathur, Sr. Adv.,
Mr. E. Ahmad, Mr. Rakesh Bhugra,
adv.

Versus

THE STATE & ANR. ...RESPONDENTS
Through: Mr. G.E. Vahanvati, Attorney
General of India.
Ms. Mukta Gupta, Sr. Standing
Counsel for State
Mr. Harish Gulati, Adv. for CBI

With

+ **Crl.Rev.P. 107/2009 & Crl.M.A.2539/2009**

IRSHAD ALI @ DEEPAK ...PETITIONER
Through: Mr. M. Sufian Siddiqui, adv.

Versus

THE STATE ...RESPONDENT
Through: Mr. G.E. Vahanvati, Attorney
General of India.
Ms. Mukta Gupta, Sr. Standing
Counsel for State
Mr. Harish Gulati, Adv. for CBI

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

: **MOOL CHAND GARG, J.**

1. These petitions raise the following substantial questions of law

i.e.:-

- i. Whether this Court is empowered to direct Central Bureau of Investigation (CBI) to take over investigation of any criminal case registered by the local Police while exercising powers under Article 226 of the Constitution of India.
- ii. What is the effect of filing of closure report by the CBI after transfer of such investigation.
- iii. Does it supersede the investigation report submitted by the local Police (Special Cell of Delhi Police in this case) who filed the charge-sheet.
- iv. Whether the Special Cell of Delhi Police was competent to have questioned the authenticity of the closure report filed by the CBI before the Ld. ASJ.
- v. What are the powers of the Addl. Sessions Judge in this case after the closure report is filed by CBI.

2. Briefly stating the facts giving rise to the filing of the aforesaid two petitions are as under:

- i. *An FIR was registered by the Special Cell of Delhi Police on 09.02.2006 being FIR No. 10/2006 under Section 121, 121-A, 122, 123, 120-B IPC r/w Section 4/5 of the Explosives Substance Act & Section 25 of the Arms Act against the petitioners who were apprehended on the same day after*

receipt of an alleged secret information that the petitioners were likely to arrive near Mukarba Chowk after travelling in a SRTC bus of J&K No. JK020299 in the evening hours with huge quantity of arms, ammunitions and explosives. It is the case of the Special Cell that on that basis they recorded D.D. No. 14 and constituted a raiding party and then apprehended the petitioners. It is also their case that at about 7.30 PM the aforesaid bus arrived at Mukarba Chowk near Karnal Bypass. The informer pointed towards 2 boys, who were apprehended and their names were revealed to be Maurif Qamar & Irshad Ali & while from Muraif Qamar one Chinese pistol with 8 live cartridges, three non electric detonators, two timers were recovered, from Irshad Ali @ Deepak one Chinese pistol along with 8 live cartridges, 2 kg explosive material were recovered.

ii. On that basis SI Vinay Tyagi of Special Cell Delhi Police is stated to have sent a rukka for registration of an FIR for the commission of offences under Sections 121, 121-A, 122, 123, 120-B IPC, Section 4&5 Explosive Substances Act, & Section 25 of the Arms Act. Thereafter, a case was registered vide FIR No. 10/2006 at P.S. Special Cell, Lodhi Road, New Delhi. The petitioners were then arrested and from their personal search even the tickets of the aforesaid Bus was recovered. After investigating the case the Special Cell also filed a challan against the petitioners.

iii. On 25.02.2006 the petitioners filed a writ petition bearing

No. 501/2006 before this Court making allegations against the officials of Delhi Police, that the petitioner had been lifted from their houses for falsely implicating them in false cases. This fact was very much in the knowledge of the police as on the same day i.e on 9.2.06 a newspaper insertion was made by the police about the whereabouts of one of the petitioners. It was stated that they had been lifted from their houses much before the time when the arrest has been shown and in this regard complaints were filed even with the local Police and other authorities but as no action was taken, they filed the writ petition before this Court to transfer the investigation of case to either CBI or any other investigating agency and further to take action against the erring Police officials.

- iv. Directions were given to the Special Cell on 28.02.2006 to file status report/ reply regarding the allegations made against them.*
- v. The challan in this case was filed by the Special Cell before the Chief Metropolitan Magistrate on 06.05.2006 on the basis of which CMM took the cognizance and committed the case to the Sessions Judge.*
- vi. As per the report submitted by the CBI, on 04.07.2007 further directions were given to carry out investigations against the officials of Special Cell as it was reported, that allegations were made by the petitioners against the officials of Special Cell about having lifted them from their*

houses much before the date of their arrest in this case were correct.

- vii. *This Court also passed further orders directing the CBI to carry out an in-depth investigation in the whole matter.*

The order dated 24.10.2007 is reproduced hereunder:

24.10.2007
WP(Crl.) No.501/2006

Further investigation of this case was asked to be done by CBI since accused in this case had made certain allegations against the officials of Special Cell and IB officials. The accused gave names of three police officials as well as gave telephone numbers of the police officials and his own telephone number etc. In view of the allegations made by the accused against the investigating agency, this Court had thought it proper that let an independent agency investigate the matter in respect of the allegations made by the accused. It is surprising that despite about last 18 months period, the call details of different mobile phones involved in this case have not been collected by the CBI and no conclusion has been arrived at by CBI. The CBI has yet to identify the place where accused alleged that he was kept for 2 months. The trial of the case is not proceeding further hoping that CBI shall file supplementary report or supplementary material before the Trial Court and the accused gets an opportunity of case being fairly investigated. However, the pace at which the investigation is being done by CBI shows that CBI may take years together for just getting the call records, which can be collected within no time from the concerned telephone service providers and analysis of call records also takes no time. CBI seems to have done nothing so far. The interim report filed by CBI also shows that CBI either obtained certified copies from the Trial Court or recorded few statements. The manner in which investigation is being done by CBI is totally unsatisfactory. I consider that since accused is in jail and the trial is getting delayed, the investigation of this case must come to an end at an early stage. The CBI must file its final report in the case within a period of about 4 weeks.

The investigation was handed over to CBI on 9th May, 2006. CBI further sought extension of 6 weeks time on 17th July, 2006. Today we are in October end 2007. More than one and a half year has passed since CBI is ceased with the matter and the result so far is zero. Let the CBI give its findings in respect of the allegations made by the accused in its complaint, within 4 weeks from today and file a report before this Court. List this matter on 28th November, 2007.

SHIV NARAYAN DHINGRA, J
October 24, 2007

- viii. *On 11.11.2008 CBI filed its closure report before the Additional Sessions Judge making a request for discharge of both the petitioners and initiation of actions against Shri Vinay Tyagi, Subhash Vats and Ravinder Tyagi, officials of Special Cell for having acted illegally in having arrested the petitioners.*
- ix. *However, the Ld. Trial Court ignored the cancellation report filed by the CBI and relying upon the report of the Special Cell filed under Section 173 Cr.P.C. dismissed the applications moved by the petitioners for discharging them on the basis of CBI report vide order dated 13.02.2009.*
- x. *It is against the said order, the petitioners came before this Court with the following prayers:-*
- (a) Set aside the order dated 13.02.2009 passed by Sh.S.K.Gautam, ASJ, Delhi in FIR No.10/2006 P.S. Special Cell.*
- (b) To discharge the petitioners in case FIR No.10/2006 P.S. Special Cell.*
- (c) To quash the proceedings pending before Id. Sh. S.K.Gautam, ASJ, Delhi pertaining to FIR No. 10/2006, P.S. Special Cell.*
- (d) Pass such other, further order(s) in the facts and circumstances of the case as this Hon'ble Court may deem just and equitable.*

3. In view of the aforesaid, a very anomalous situation arose inasmuch as, despite various orders passed by this Court dated 09.05.2006, 04.07.07 & 24.10.07, transferring investigation of this case to the C.B.I, in the light of the complaint made by the petitioners against the officials of the Delhi Police posted in Special Cell, who filed

a closure report and also recommended action against the police officials of the Special Cell; the Special Cell despite pendency of the matter before this court, filed a report under section 173 Cr.P.C., against the petitioners alleging commission of the various offences by them, and on that basis, charges have been framed against them by the Special judge in complete ignorance of report of the CBI.

4. Thus, in view of the aforesaid conflict of interest by the two different investigating agencies i.e. the Special Cell of Delhi Police and Central Bureau of Investigation both working under the administrative control of the Central Government, vide order dated 01.07.2009 the Attorney General was requested to address this Court. The Ld. Attorney General appeared in this Court on 17.07.2009 and has made the following submissions:

1. There is no provision in the Cr.P.C. under which a case can be transferred from the State Police to the CBI except with the consent of the State Government under notification 6 of the Delhi Special Police Establishment Act (DSPE Act). The question whether the High Court can, in exercise of its powers under Article 226, transfer cases to the CBI for investigation is the subject matter of a case heard by the Constitution Bench of the Supreme Court. A decision is awaited.

2. Notwithstanding this, various High Courts, from time to time, have been requesting/directing the CBI to take over investigation of cases. There is no provision of law that sheds light on what happens when cases are transferred to the CBI.

3. The question to be considered, therefore, is as follows:

What is the effect of such a transfer?

4. After such transfer of investigation, the CBI takes responsibility for the conduct of the case and filing of the report under Section 173 of the Cr.P.C.

5. Therefore, when the Court is considering the report of the CBI under Section 173, the CBI prosecutor is the only person (apart from the Counsel appearing for the accused) who can be heard by the Court. (See, Vinay Katiyar V. State of Uttar Pradesh and Anr., a decision of the Allahabad High Court in Crl.Rev.P. 16/2007 dt. 12.5.2008)

6. Thus, the Court could not hear the State Public Prosecutor when the case was no longer with the State Police. The State Public Prosecutor did not have any role to play in the matter after the case was transferred to the CBI. He was not entitled to address the Court. It was not open to the Court to hear him.

7. The Learned Trial Court has proceeded on a misunderstanding of what the CBI was supposed to do and what the CBI in fact did. Its judgment leaves much to be desired.

8. It is wrong in several respects, which are as follows:

- i. It assumes that the CBI could not conduct a further investigation. (See, page 127 read with p.121)
- ii. It seems to accept the submission of the Counsel appearing on behalf of the Special Cell (Delhi Police) that the CBI could not register its own case (p.121)
- iii. It is entirely in error in its approach towards what the CBI did. The CBI did not conduct an investigation to undo what the Special Cell had already done (p.126). This submission is noted at p.116 independently and repeated at p.126.
- iv. The Trial Court gives a wrong date with respect to the filing of the Charge sheet. The charge sheet was filed on 6th May 2006 and not 6th May 2008. If the charge-sheet was filed on 6th May 2008, this would show that the Special Cell was conducting the investigation even after the Order of High Court, which it obviously could not do.
- v. The Trial Court has completely misunderstood the orders of the High Court and has failed to appreciate the effect of an order passed by the High Court transferring cases to the CBI for further investigation. (See, K. Chandrasekhar V. State of Kerala (1998) 5 SCC 223 at 237 para 24, Ramchandran V. R. Udhayakumar and Ors. (2008) 5 SCC 413 at 415 para 7 (relying on Chandrasekhar) and Kazi Lhendup Dorji V. Central Bureau of Investigation (1994) Supp 2 SCC 116)
- vi. The Trial Court also fails to appreciate that the CBI report was not an investigation into the Special Cell, but an investigation into the case.
- vii. It notices the contentions with respect to the locus of the Special Cell at p.117 but does not deal with this any further. This, in my opinion, is the most crucial aspect of the case and the core issue which the High Court ought to decide.

5. As far as the Special Cell is concerned, Ms. Mukta Gupta, Ld. Standing Counsel appearing for the Special Cell, Delhi Police submitted

that in this case there was no transfer of investigation to the CBI and only thing said was to carry out further investigation which submission is not correct in view of the order of this Court dated 04.08.2008 which reads as under:

W.P.(CRL) 501/2006
04.08.2008

CBI report filed in a sealed envelope has been perused by the Court. The status report is ordered to be resealed.

Vide order dated 9.5.2006, the investigation of this case was transferred to CBI with the direction to undertake an inquiry into the matter and submit a report to this Court within four weeks. Since thereafter the matter was kept on various dates awaiting for the report of CBI; the first status report filed was dated 3.4.2006, the second status report was filed along with covering letter on 31.8.2006, third status report was filed on 28.11.2007 and the fourth status report i.e. last status report was filed in this court on 24.3.2008.

In view of the fact that the investigation of this case has already been transferred to CBI which is conducting the inquiry/investigation in this case and also the fact that respondents have already filed the chargesheet after completion of their investigation which is pending adjudication in the court of Mr. K.S. Mohi, ASJ, Tis Hazari Courts, no further orders are required as sought in the petition for transfer of the investigation of this case from Delhi Police to any other independent agency, as investigation has already been transferred to CBI who after investigation is complete shall have recourse to law if so required.

Second relief claimed in the writ petition is for directions for taking action against the erring police officials who registered the FIR, arrested the brother of the petitioner and after investigation have filed the chargesheet. However, this relief cannot be claimed at this stage as if there was any error or misconduct or false implication of the accused on the part of any police official or the Investigating Officer while registering the case and while arresting the brother of the petitioner or while holding the investigation of the case, is yet to be ascertained by the trial court during the trial of the case. Therefore, this relief being premature cannot be granted.

However, petitioner shall be at liberty to move before the appropriate court of law, if so required, to claim action against the erring police officers if any in accordance with law at the appropriate stage.

In view of the observations as above, this writ petition stands disposed of.

An undertaking was given by the petitioner on 4.7.2007 in the following terms:

“Learned counsel for the petitioner assures this court that till the investigation is completed by the CBI,

the petitioners shall not move any application for bail either before the learned trial court or this court.”

This undertaking given by the petitioner shall not remain in force in view of disposal of the present petition and the accused persons are at liberty to apply for bail, if so advised.

ARUNA SURESH, J.
AUGUST 04, 2008

6. This order does not support the views of Ms. Mukta Gupta. Her further submission that Vinay Tyagi is the complainant is also not correct. Shri Harish Gulati, Id. Counsel appearing on behalf of the CBI also intervened and supported the report of CBI which it was stated was based upon the registration of RC bearing No. 3(S) 2007/SCU-V/SCR-11/CBI/New Delhi dated 27.07.2007 pursuant to the directions given by this Court and therefore in this case the complainant was the High Court and not Mr. Vinay Tyagi as pleaded by Ms. Mukta Gupta.

7. In view of the aforesaid, once the investigation was transferred by this Court to the CBI and on that basis CBI not only took over the investigation but also filed a closure report, it is that report only which will have to be taken into consideration by the Additional Sessions Judge to proceed further in the matter.

8. It is no doubt true that the jurisdiction to accept or reject even the report submitted by the CBI vests with the Additional Sessions Judge, who is also exercising powers of the Magistrate but the consideration of the report or its rejection has to be on the basis of the facts disclosed in the said report and while doing so the Trial Judge cannot be influenced by the report filed by the Special Cell.

9. However, the perusal of the impugned order goes to show that the Additional Sessions Judge has extensively relied upon the report of

the Special Cell which in view of the directions of this Court and a closure report filed by the CBI which mandates discharge of the petitioners from this case and further mandates taking action against the guilty officials of the Special Cell is not correct.

10. In these circumstances, the questions raised above are answered as follows:

- i. Despite their being no provision in the Cr.P.C. permitting this Court to direct transfer of investigation to CBI this Court while exercising powers vested in it under Article 226 of the Constitution of India has ample jurisdiction to direct transfer of investigation in appropriate cases. This power will certainly be controlled once any order is passed by Constitution Bench seized of the matter as submitted by the Attorney General but till then the orders passed by this Court shall remain in operation and shall be binding on the investigating agency. Reference in this regard can also be made to para 36 of the judgment delivered by Apex Court in Nirmal Singh Kahlon Vs. State of Punjab and Ors., AIR 2009 SC 984. The relevant portion is reproduced hereunder:

36. The question as to whether the Court can order C.B.I. to investigate a cognizable offence in a State without the consent of the State Government stands referred to a larger Bench in State of W.B. v. Committee for Protection of Democratic Rights W.B. and Ors. (2006) 12 SCC 534, but then concededly the law as it stands recognizes such a power in the High Court.

- ii. In view of the law laid down by the Apex Court in the case of K. Chandershekar Vs. Kerala and Ors. Reported in 1998

(5) SCC 223 once investigation stands transferred to the CBI it is that agency only which has to proceed with the investigation and not the Special Cell of Delhi Police. In this regard, the arguments that it was an order to carry out further investigation or additional or supplemental investigation are of no consequence. Further report of further investigation means investigation within the meaning of sub-Section (8) of Section 173 of Cr.P.C. The relevant observations made in K. Chandershekar's case (*supra*) are reproduced hereunder:

24. From a plain reading of the above Section it is evident that even after submission of police report under Sub-section (2) on completion of investigation, the police has a right of 'further' investigation under Sub-section (8) but not 'fresh investigation' or 're-investigation'. That the Government of Kerala was also conscious of this position is evident from the fact that though initially it stated in the Explanatory Note of their notification dated June 27, 1996 (quoted earlier) that the consent was being withdrawn in public interest to order a 're-investigation' of the case by a special team of State police officers, in the amendatory notification (quoted earlier) it made it clear that they wanted a 'further investigation of the case' instead of 're-investigation of the case'. The dictionary meaning of 'further' (when used as an adjective) is 'additional'; more; supplemental. 'Further' investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab-initio wiping out the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that Sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a 'further' report or reports - and not fresh report or reports-regarding the 'further' evidence obtained during such investigation. Once it is accepted - and it has got to be accepted in view of the judgment in Kazi Lhendup Dorji, (*supra*) - that an Investigation undertaken by CBI pursuant to a consent granted under Section 6 of the Act is to be completed, notwithstanding withdrawal of the consent, and that 'further investigation' is a continuation of such investigation which culminates in a further police report under Sub-section (8) of Section 173, it necessarily means that withdrawal of consent in the instant case would not entitle the State Police, to further investigate into the case. To put it differently, if any further investigation is to be made it is the C.B.I, alone which can do so, for it was entrusted to investigate into the case by the State Government. Therefore, the notification issued withdrawing the consent to enable the State Police to further investigate into the case is patently invalid and unsustainable in law. In view of this finding of

ours we need not go into the questions, whether Section [21](#) of the General Clauses Act applies to the consent given under Section [6](#) of the Act and whether consent given for investigating into Crime No. 246/94 was redundant in view of the general consent earlier given by the State of Kerala.

11. In view of the aforesaid, once a report was filed by the CBI the said agency has to be treated as investigating agency in this case.

12. In these circumstances, the impugned order dated 13.02.2009 dismissing the applications moved by the petitioners for discharging them is set aside. The case is remanded back to the Additional Sessions Judge to proceed further in the matter after hearing the parties on the basis of the closure report filed by the CBI dated 11.11.2008 and in accordance with the provisions contained under Section 173 and Section 190 of Code of Criminal Procedure. In case he accepts the report, then the matter may come to an end, subject to his orders, if any, against the erring officers. However, if he feels that despite the closure report filed by the CBI, it is a case fit for proceeding further against the petitioners, he may pass appropriate orders uninfluenced by what this Court has stated while disposing of this case. The only rider would be that while passing the orders the Additional Sessions Judge would not be influenced by the report of the Special Cell in this matter. Parties to appear before the Trial Judge on 14th September, 2009.

13. Pending applications, if any, shall also stand disposed of. Interim orders, if any, stands vacated.

MOOL CHAND GARG, J.

AUGUST 28, 2009
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