

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **W.P.(CRL) 92/2011 & CrI.MA Nos.831-32/2011**

Decided on 27.01.2011

IN THE MATTER OF :

G.S.RAJU

..... Petitioner

Through Mr. S.K.Sharma, Mr.Harsh Dev Shastra
& Mr.Avinash Sahrma, Advocates

versus

CBI

..... Respondent

Through Mr.Vikas Pahwa, Standing Counsel

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*** HON'BLE MS.JUSTICE HIMA KOHLI**

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

HIMA KOHLI, J. (Oral)

1. The present petition is filed by the petitioner under Article 226 & 227 of the Constitution of India read with Section 482 Cr.PC assailing an order dated 4.1.2011 passed by the Special Judge, CBI in case FIR No.RC-DAI-2008-A-0004-DLI dated 4.1.2008, whereunder an application under Section 311 Cr.PC filed by the respondent praying *inter alia* for recalling PW-9, Inspector Prem Nath, CBI ACB, New Delhi and PW-12, SI Manish Kumar Upadhaya, CBI, ACB, New Delhi, was allowed.

2. Counsel for the petitioner submits that the Special Judge, CBI erred in allowing the aforesaid application filed by the respondent as such a permission would amount to permitting the respondent to fill up the lacunae in its case, which had arisen after evidence had been led by the petitioner in his defense, and hence, would amount to nullifying such evidence. He further states that the procedure prescribed for visitors at the office of the CBI is clear, and no clarification is required on the same, especially in light of the depositions of PW-9 as recorded on 5.9.2009 and PW-12 as recorded on 28.8.2010. He therefore submits that the aforesaid order is liable to be quashed.

3. *Per contra*, counsel for the respondent submits that the aforesaid application had to be moved for re-examination of PW-9 and PW-12 in view of some confusion with regard to the entry of the names of PW-7, Sh.N.K.Awasthi and PW-10, Sh.Jagdish Singh on 3.1.2008 and 4.1.2008 respectively, in the visiting register kept at the reception of the CBI office. It is submitted that the application was filed with a view to remove ambiguity about the system in place at the CBI office, for making an entry in the visiting register, whenever an independent witness would visit the CBI office for the purpose of assisting the Department in laying a trap. He further states that since the defence has already produced relevant information received from the CBI under the Right to Information Act, pertaining to the copy of the visitors register maintained at the office of the CBI on the relevant dates and the aforesaid documents have become part of the record, no injustice shall be caused to the petitioner by recalling the aforesaid witnesses for re-examination. In support of the aforesaid submission, he

relies on a judgment of the Supreme Court in the case of U.T.of Dadra & Nagar Haveli and another Vs. Fatehsinh Mohansinh Chauhan reported as **(2006) 7 SCC 529**.

4. This Court has heard the learned counsels for the parties and carefully considered their respective submissions in the light of the documents placed on record.

5. A perusal of Section 311 Cr.PC makes it abundantly clear that the said provision empowers the court to summon or examine or recall any such person if his evidence appears to be essential to the just decision of the case. In other words, while exercising such a power, what is required to be seen is that all that which may assist the court to ultimately arrive at the truth and to reach a just and fair decision, after obtaining proper proof of facts, should be placed before the court. The aforesaid power vested in the Court is unfettered.

6. In the case of Fatehsinh Mohansinh Chauhan(supra), the Supreme Court has made a detailed examination of the law related to Section 311 of the CrPC or the similarly worded Section 540 of the Old Code and noted the decisions in Ram Jeet v. State reported as **AIR 1958 All 439**; State of W.B. v. Tulsidas Mundhra reported as **(1964)1 CriLJ 443**; Jamatraj Kewalji Govani v. State of Maharashtra reported as **AIR 1968 SC 178**; Mohanlal Shamji Soni v. Union of India reported as **(1991) Supp (1) SCC 271**; Rajendra Prasad v. Narcotic Cell reported as **(1999) 6 SCC 110**; and P. Chhaganlal Daga v. M. Sanjay Shaw reported as **(2003) 11 SCC 486** to hold as under : -

"15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice."

7. It is therefore, the discretion of the concerned court to summon any person as a witness or recall or re-examine any such person already examined at any stage of the trial proceedings, as long as such a witness is considered essential for the purpose of conducting a proper and fair trial. The submission of the counsel for the respondent that in the present case such circumstances did exist, is to be seen in the specific context of the case.

8. It is an undisputed position that the petitioner has already placed on record extracts of the visitors register maintained by the CBI at its reception for the relevant dates. It is also not disputed by the counsel for the petitioner that the defence has already led its evidence which is on record. The question of filling up any lacunae by the CBI does not arise, as the plea of the petitioner that the aforesaid witnesses did not visit the office of the CBI on the relevant dates, has been set up only in his defence, and the same was not the case of the CBI while leading its prosecution evidence. When confronted with such a situation after the defence has led its evidence,

the respondent cannot be faulted in seeking to demolish the said plea by approaching the trial court for permission to recall the relevant witnesses for clarifying the correct position in that regard. This request cannot be termed as an attempt on the part of the prosecution to fill up any lacunae, as alleged by the learned counsel for the petitioner. Nor will it cause any prejudice to the petitioner, as he has already placed the relevant evidence on the record.

9. Counsel for the respondent has rightly relied on the judgment of the Supreme Court in the case of Fatehsinh Mohansinh Chauhan(supra) to state that ultimately the object should be to delve at the root of the matter and elicit the truth by obtaining proper proof of facts for arriving at a just and correct decision that should matter with the criminal court. In the facts and circumstances of the present case, this Court is not inclined to exercise its extraordinary power under Article 226 of the Constitution of India read with Section 482 Cr.PC to interfere in the impugned order, as it does not suffer from any illegality, arbitrariness or perversity, nor would the said order result in miscarriage of justice.

10. The petition is dismissed, along with the pending applications.

JANUARY 27, 2011
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(HIMA KOHLI)
JUDGE