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THE HIGH COURT OF DELHI AT NEW DELHI

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Crl. MC No.457/2010 & Crl.MA 1623/2010

Date of Order: 31.10.2011

AJAY KUMAR GUPTA

..... PETITIONER

Through: Mr. Nitin Sehgal, Advocate

Versus

State

..... Respondent

Through: Ms.Fizani Husain, APP for State

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the Reporter or not ? | No |
| 3. | Whether the judgment should be reported in the Digest ? | No |

M.L. MEHTA, J. (Oral)

1. The challenge in this petition is to the order dated 4.9.2009 and 19.1.2010 passed by learned MM and learned ASJ respectively as passed in case FIR No.180/2005 under Section 354/509 IPC Police Station IP Estate. Relief is also sought for striking off the examination in chief of PW3 Smt. Krishna Chawla as recorded by learned MM on 2.1.2009 and 4.9.2009.

2. The learned MM recorded the statement of PW3 Krishna Chawla on 2.1.2009. During her examination in chief, the learned MM made the following observations:

“At this stage, the witness is feeling embarrassed to depose in presence of male persons and therefore I had requested all the persons including learned APP, counsel for the accused and the complainant to go out side from the court room and I am recording her examination in chief only in the presence of accused and my steno.

“While the evidence of witness being recorded the accused is smiling in a lustful manner. When he is asked to mend his way, he does not appear to feel any repentance.”

3. After recording the above observations, the learned MM proceeded to record the examination in chief of the witness PW3 in absence of APP as also the learned counsel for the accused. However, the accused remained present in the court during the remaining part of her examination in chief. The petitioner was aggrieved of this act of learned MM in proceeding to record the examination in chief of PW3 in absence of his counsel. Thereafter, the petitioner filed a review application dated 24.4.2009 before the learned MM for striking off the examination in chief of PW3 as recorded on 2.1.2009. The said application was dismissed by learned MM vide order dated 4.9.2009. The recording of evidence by learned MM in the manner as stated above and the observations made by her, were challenged by the petitioner by way of a revision petition before learned ASJ who vide her order dated 19.1.2010 dismissed the revision petition.

4. The petitioner challenged the order dated 4.9.2009 of learned MM before the learned ASJ which came to be dismissed by learned ASJ vide order dated 19.1.2010 holding that the said order did not suffer from any illegality or infirmity and the review application was not maintainable on account of limitation. Learned ASJ observed that the limitation for filing the revision petition to be 30 days from the date of the order and the same having been filed much after that without there being any justifiable reasons for delay, the petition was not maintainable.

5. I have heard learned counsel for the parties and perused the record.

6. Learned APP for the State fairly conceded to the fact that the limitation prescribed for filing of the revision petition was not 30 days, but 90 days from the date of the order and that being so, the finding of learned ASJ that the revision petition was not maintainable, being barred by limitation, is apparently untenable. However, it is seen that the learned ASJ did not dismiss the revision petition solely on the ground of limitation, but has also recorded that there was no illegality or impropriety in the impugned order dated 4.9.2009 of learned MM. It was also recorded by learned ASJ that the revision petition filed before her was for striking off the examination in chief of PW3 recorded on 2.1.2009 and for recording the same *de novo* and further that the review petition which was filed before learned MM was not maintainable

as learned MM was not empowered to review its own order. The observations of learned ASJ on both these aspects are factually correct inasmuch as it remained an undisputed fact that the learned MM has no power to review its own order and if that was so, the application dated 24.4.2009 filed by the petitioner for recalling the order dated 2.1.2009 was not maintainable. Though such an application was not maintainable, but since it had been filed, the learned MM vide order dated 4.9.2009 dismissed the same. It was rightly recorded by learned ASJ that in the revision petition filed before him, the petitioner was seeking striking off the examination in chief of PW3 as recorded on 2.1.2009 and for recording of the same *de novo*.

7. I do not see any illegality or impropriety in the impugned orders dated 19.1.2009 passed by learned ASJ with regard to the findings that the petitioner had failed to show any illegality or irregularity in the impugned order dated 4.9.2009 of learned MM. Thus, except for the finding recorded about limitation as noted above, which is untenable, there is no illegality or impropriety in the impugned order of learned ASJ.

8. Now coming to the proceedings of 2.1.2009 as conducted by learned MM, it would be seen that the learned MM's observations that PW3 was feeling embarrassed to depose in presence of male persons and consequently she requested that all the persons present including APP and the counsel for the accused and the complainant to remain

outside the court room and proceeded to record the statement of PW3 in the presence of accused. She also observed that while PW3 was being examined, the accused kept smiling in a lustful manner despite that he was asked to mend his way. The learned MM has also clarified the same thing in her order dated 4.9.2009 that whenever PW3 was feeling inconvenience, the proceedings be recorded *in camera* in absence of counsel for the accused as well as complainant. The learned MM had recorded examination in chief of PW3 in presence of the accused which was the procedure prescribed under Section 273 Cr.P.C. In case of **Sakshi v Union of India and others** [(2004) 5 SCC 518 the Apex Court observed as under:

“34. The writ petition is accordingly disposed of with the following directions:

- (1) The provisions of sub-section (2) of Section 327 Cr.P.C shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.*
- (2) In holding trial of child sex abuse or rape:*
 - (i) a screen or some such arrangements may be made where the victim or witness (who may be equally vulnerable like the victim) do not see the body or face of the accused;*
 - (ii) the question put in cross examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may*

put them to the victim or witnesses in a language which is clear and is not embarrassing;

- (iii) *the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.*

These directions are in addition to those given in *State of Punjab v. Gurmit Singh (1996) 2 SCC 384.*"

9. In view of above discussion, I do not find any illegality of perversity in the orders dated 2.1.2009 and the order dated 4.9.2009 and also the impugned order dated 19.1.2010 passed by learned ASJ to the extent as indicated above. I find no force in this petition. The petition is dismissed. No orders as to costs.

**M.L. MEHTA
(JUDGE)**

October 31, 2011
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