

*

THE HIGH COURT OF DELHI AT NEW DELHI

+

Crl. Revision No.496/2011

Date of Order: 14.11.2011

O.P. Dabas

.....Petitioner

Through: Mr. V.S. Yadav, Advocate

Versus

State through CBI

..... Respondent

Through: Ms. Sonia Mathur, Advocate for
CBI.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

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

M.L. MEHTA, J. (Oral)

Crl. MA 17737/2011 (exemption)

Exemption allowed subject to all just exceptions.

The application stands disposed of.

Crl. Revision No.498/2011 & Crl. MA 17738/2011 (stay)

1. Notice. Learned counsel for CBI accepts notice on behalf of the respondent/CBI. In view of the urgency explained by learned Senior Counsel for the petitioner, I have heard the matter finally with the consent of the parties.
2. This criminal revision petition under Section 482 397 & 401 of Cr.P.C challenges the impugned order dated 18.10.2011 passed under Section 311 Cr.P.C by learned Special Judge-CBI, Tis Hazari Court, Delhi.

3. The petitioner herein is one of the accused in CC No.71(A)/04 Police Station CBI, ACU(II) pending before the learned Special Judge, Tis Hazari Court, Delhi and fixed before him on 15.11.2011 i.e. tomorrow for cross examination of DW-2 and for final arguments on 16th and 17th of this month.

4. An application under Section 311 Cr.P.C was moved by the petitioner herein before the learned Special Judge for recalling PW4 Dr. O.P. Jain for further cross examination. The said application was dismissed by the learned Special Judge vide the impugned order. The learned counsel appearing for the petitioner has assailed the impugned order stating that recalling of Dr. O.P. Jain(PW4) for further cross examination was necessary and in the interest of justice inasmuch as in his cross examination earlier conducted, he could not be confronted with his statement under Section 161 Cr.P.C. In support of his contentions reliance was placed by him in the case of ***Inder Prasad v NCB AIR 1999 2292; Vijay Kumar v State of UP Criminal No.1345 of 2011*** decided on 3.8.2011 by the Supreme Court and ***UT of Dadra and Nagar Haveli v Fate Singh*** [2000(7) SCC 529].

5. At the outset, it was submitted by learned counsel for the respondent/CBI that the revision petition was not maintainable in view of Section 19(3)(c) of the Prevention of Corruption Act. Learned counsel for the petitioner fairly conceded that the revision petition was not maintainable against the impugned order but he, however, submitted

that the instant petition may be treated as a Writ Petition under Article 227 of the Constitution of India. There is no dispute about the fact that this Court could convert a revision petition as a writ petition under Article 227 of the Constitution. However, while exercising the writ jurisdiction under Article 227 of the Constitution, this Court has to proceed with caution and not to assume the role of an Appellate Court and re-appreciate the evidence. The limited scope and power to be exercised as a writ court in an interlocutory order, as the one which is impugned herein, can be noted from the judgment of this Court in **Anur Kumar Jain W.P.(Crl.) 80/2010** decided on 29.03.2011 wherein it was held as under:

“32. From the aforesaid pronouncement in the field, there can be no scintilla of doubt that the constitutional remedy under Article 227 of the Constitution of India would be available but the exercise has to be extremely limited. The power of supervisory jurisdiction by the High Court is to be exercised very sparingly and only in appropriate cases where judicial conscience of the writ court commands that it has to act lest there would be gross failure of justice or grave injustice would usher in. If we allow ourselves to say so, care, caution and circumspection have to be the pyramidal structure while exercising the inherent and the supervisory jurisdiction. The exercise of jurisdiction should not be one by which there would be an obstruction in carrying on of a criminal trial to its logical end. There may be cases where the writ court may feel inclined to interdict or intervene where it is felt that if the error is not corrected at the very inception the same would cause immense injustice and correction at a later stage may not be possible and further refusal to intervene would ensue in travesty of justice.

The writ court, under no circumstances can assume the role of appellate authority and re-appreciate the evidence.”

6. There was no dispute with regard to the proposition of law under Section 311 Cr.P.C that the power could be exercised by the Court to recall or re-examine any witness already examined at any stage of the trial. However, there also cannot be any dispute that though Section 311 Cr.P.C gives a vast discretion and power to the court to examine any witness at any stage, but at the same time, said power could only be exercised if it appears to the court that recalling of such a witness was essential to the just decision of the case. Wider power necessitated application of judicial mind. The dictum of the afore-cited cases is not in dispute that the power under Section 311 Cr.P.C. gives vast discretion to the court to recall any witness for just decision of the case. In fact, exercise of such powers largely depends upon the facts and circumstances of each case.

7. Before proceedings to see as to whether the recalling of Dr. O.P. Jain for the purpose of confronting him with his statement made by him under Section 161 Cr.P.C is germane to the controversy involved, it may be noted that this case pertains to the year 1991 and is pending before the learned trial court since December, 1992. The statement of Dr. O.P. Jain was recorded as PW4 on 10.4.2003. His cross examination was conducted on different dates by the learned counsel representing the different accused persons. The cross examination on behalf of the petitioner was conducted way back on 10.4.2003. The case before the

learned Special Judge was listed for the defence evidence as last opportunity on 15.11.2011 i.e. tomorrow and for final arguments on 16th and 17th November, 2011. The application under Section 311 Cr.P.C was moved by the petitioner before the learned Special Judge at this belated stage of the proceedings. The learned Special Judge has also noted that the copy of the statement under Section 161 Cr.P.C of this witness was supplied to all the accused persons including the petitioner and that nothing new has emerged in the statement of this witness made in the court to entitle the petitioner to recall this witness at this belated stage.

8. I have gone through the statement of Dr. O.P Jain recorded as PW4 and also the cross examination conducted by learned counsel for the petitioner as well as the counsel appeared on behalf of other accused persons. I have also gone through his statement recorded under Section 161 Cr.P.c. Learned counsel took me through the same on the basis of his statement under Section 161 Cr.P.C to contend that it was as per the order and directions of Dr. O.P. Jain that Gurbax Giyani was admitted in G.B. Pant Hospital on 5.8.1988 and that it was not the petitioner who himself admitted Gurbax Giyani in the hospital on this date. It is not desirable to appreciate or comment on the statement of Dr. O.P. Jain as made in the court as also the statement under Section 161 Cr.P.C, but reading the statement under Section 161 Cr.P.C and also his examination and cross examination as a witness in the court, it would be noted that though this witness was not specifically confronted

with his statement under Section 161 Cr.P.C but there was nothing left in his cross examination which could be said to be material or relevant for recalling this witness for further cross examination. Whether Gurbax Giyani was admitted on his orders or not, would be a matter of appreciation of the testimony and other material on record. I do not see any reason as to how the petitioner was prejudiced in any way by not allowing him to recall Dr. O.P. Jain for further cross examination.

9. In view of the foregoing facts, I do not see any infirmity, perversity or illegality in the impugned order dated 18.10.2011 passed by learned Special Judge. The petition is hereby dismissed. In view of the facts and circumstances of the case. There shall not be any orders as to costs.

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

November 14, 2011

rd