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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: February 08, 2010

Date of Order: February 22, 2011

+ Crl. MC No.3537 /2010

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Directorate General of Central Excise Intelligence

22.02.2011

...Petitioner

Versus

Brijesh Kanodia

...Respondent

Counsels:

Mr. Satish Aggarwala for petitioner.

Mr. Pradeep Jain and Mr. Yogesh Mittal for respondent.

JUSTICE SHIV NARAYAN DHINGRA

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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 judgment should be reported in Digest? | Yes. |

JUDGMENT

1. This petition under Section 482 Cr.P.C has been preferred by the petitioner for cancellation of bail of the respondent/accused granted by learned ACMM vide order dated 18th September 2010 on the ground that the learned ACMM in this case transgressed all limits of propriety and acted as a part of investigation and then heard the bail application himself. The other grounds for cancellation of bail are on merits which this Court is not considering.

2. While respondent was in judicial custody, an application was made by the petitioner department to make enquiries from the respondent /accused in Central Jail, Tihar, Delhi under Section 14 of the Central Excise Act so as to complete certain aspects of the investigation. The permission was sought so that Mr. Anil Chandeliya, Senior Intelligence Officer may visit Central Jail, Tihar and make enquiries from the respondent.

The learned ACMM directed that the respondent accused be not interrogated in Central Jail, Tihar but he be brought to the Court and any enquiry be made before the court on 17th September 2010 at 10 am. He issued production warrants of the accused/ respondent to be brought before the Court on 18th September 2010. Thereafter, the accused was produced and the learned ACMM kept recording order-sheets about the conduct of enquiries being done by SIO from the petitioner department on hourly basis. The first order-sheet of the day make it clear that the accused was produced on 18th September 2010 and the learned Judge kept on recording hourly order-sheets in respect of the enquiry. His orders are at 10.30 am, 11.30 am, 12.15 pm, 1.30 pm and after lunch. The learned ACMM heard arguments on the bail application made by the accused and granted bail on the same very day. Since it was already 5.35 pm by the time he passed order, he directed that the order be sent to Jail via special messenger along with release warrants.

3. As far back as 1945, Privy Council in *Emperor v Khwaja Nazir Ahmad AIR 1945 PC 18* had observed, *"It was the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry"*. The Privy Council further observed, *"It would be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate cases when moved under Section 491 Cr.P.C."*

4. The inherent powers under Section 482 Cr.P.C have been granted only to the High Courts and there are no inherent powers available to the courts subordinate to the High Court. The subordinate courts are supposed to act in accordance with the

provisions of Cr.P.C and cannot transgress the limits imposed upon the courts by Cr.P.C. There is no provision in Cr.P.C that a court can order that an enquiry be made from the accused in its presence nor the court can order that interrogation of accused by the investigating agency be done in presence of the court. This is to keep the judicial functions and executive functions separate. Once the investigation is done in presence of the court, the court becomes a witness to the investigation and this act of the court prejudices the court either in favour of accused or in favour of the prosecution. It is for this reason that the investigation and adjudication are done by two separate wings and the courts cannot become party to the investigation. In *State of Bihar v J.A.C Saldanha AIR 1980 SC 326 (Full Bench)*, the Supreme Court observed, *there was a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment and investigation of an offence was in the field exclusively reserved for the executive.* The superintendent over which vests a State Government, the role of the courts start only once the investigation is complete and investigating officer submits report to the court and requests court to take cognizance of the offence. In *Eastern Spinning Mills & Virendra Kumar Sharda v Rajiv Poddar AIR 1985 SC 1668 (Full Bench)*, the Supreme Court observed, *“save in exceptional case where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences. Investigation must proceed unhampered by Court orders”*. In *M/s Jayant Vitamins Ltd. v Chaitanyakumar AIR 1992 SC 1930*, the Supreme Court observed, *“The investigation into an offence is a statutory function of the police and the superintendence thereof is vested in the State Government and the Court is not justified without any compelling and justifiable reason to interfere with the investigation”*. In *Dukhishyam Benupani, Asst. Director, ED (FERA) v Arun Kumar Bajoria 1998 (1) SCC 52*, the Supreme Court observed, *“it is not the function of the court to monitor investigation processes so long as such investigation does not transgress any provision of law. It must be left to the investigating agency to decide the venue, the timings and the*

question and the manner of putting such questions to person involved in such offences. A blanket order fully insulating a person from arrest would make his interrogation a mere ritual”.

5. It is thus apparent that the learned ACMM who possessed no inherent powers to interfere into the investigation showed keen interest in the investigation in this case and wanted the accused to be brought to his court and investigation be done in his presence.

6. The keen interest of the ACMM in this case was not an isolated incident. The learned ACMM in all cases has shown poor understanding of criminal law. This Court had occasion to consider several other orders passed by learned ACMM and was compelled to find out about other cases before the learned ACMM and the results were startling. In all criminal cases decided by learned ACMM, either the accused were discharged or acquitted on technical grounds more specifically on technical ground of sanction granted being not a valid sanction or granted without application of mind. It is not that the relevant law in respect of sanction was not brought to the notice of the court. The Supreme Court categorically observed that the courts cannot acquit a person on the ground of sanction not being valid unless there was serious failure of justice and prejudice has been caused to the accused on the ground of invalid or defective sanction [*State of M.P. v Jiyalal 2009 (15) SCC 72*]. The Supreme Court laid down that it is not necessary for prosecution to examine the person, who was the sanctioning authority, to prove the sanctioning order. Despite clear ruling of the Supreme Court, the learned ACMM had been passing orders contrary to the judgment of the Supreme Court and despite every sanctioning order being in detail giving facts and reasons for granting sanction, the learned ACMM had been passing orders that the sanction was granted without application of mind, though law is that the court cannot draw any adverse conclusion that the sanction for prosecution was not properly granted or was defective without indicating any basis for such conclusion. Out of 78 cases decided by this ACMM

from April, 2010 to October 2010, he discharged/ acquitted accused persons in 73 cases only on this technical ground. The conviction in remaining five cases was under compulsion because accused persons pleaded guilty.

7. Without going into the merits of the case and looking into the conduct of learned ACMM that he transgressed all limits of judicial propriety, the order dated 18th September 2010 passed by learned ACMM granting bail to the respondent is hereby set aside and the matter is remanded back to the present ACMM for considering the application of the respondent/ accused afresh on merits without being influenced by the order of earlier ACMM. The application for bail of the accused/ respondent is already on record and the reply to the same is also on record of learned ACMM. The accused/ respondent shall surrender before the learned ACMM on 1st March, 2011 and the learned ACMM shall hear arguments either on the same day or on the following day and shall dispose of the bail application of the accused/ respondent on merits.

8. The petition stands disposed of with above order.

February 22, 2011
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SHIV NARAYAN DHINGRA, J