

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

+ **CRL.M.C. 4480/2015**

Date of decision: 23rd February, 2021

IN THE MATTER OF:

DR KESHAV KUMAR AGARWAL Petitioner

Through Mr. Nishi Kant Singh, Mr. Abdhesh Chaudhary, Mr. Amit Jaiswal and Ms. Manisha Suri, Advocates

versus

CENTRAL BUREAU OF INVESTIGATION (CBI) Respondent

Through Mr. Prasanta Varma, SPP with Ms. Hiteshi Kakkar and Mr. Amrit Singh Khalsa, Advocates for CBI
Mr. Mukul Gupta, Sr. Advocate with Mr. Tushar Gupta, and Mr. Sumit Mishra, Advocates for intervenor
Mr. Somiran Sharma, Advocate for respondent

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

CRL.M.A. 17559/2020

1. This is an application filed on behalf of the respondent/CBI under Section 482 Cr.P.C for modification of the order dated 29.07.2019 passed by this Court in CRL.M.C. 4480/2015.

2. This Court by order dated 29.07.2019 disposed of CRL.M.C.Nos. 4443/2015, 4480/2015 & 688/2017 and CRL. REV. P. No.25/2016. CRL.M.C.Nos. 4443/2015, 4480/2015 & 688/2017 have been filed by the accused challenging the order dated 07.10.2015 wherein the learned Additional Session Judge Special Judge CBI-01, Patiala House Courts, New Delhi has framed charges against the accused under Sections

120B/420/468/471 IPC read with Section 13(2) & 13(1)(d) of Prevention of Corruption Act, 1988. The CBI filed CRL. REV. P. No.25/2016 challenging the same order discharging two accused in the case. This case arises out of the orders granting permission to Rohilkhand Medical College and Hospital, Bareilly run by the Rohilkhand Educational Charitable Trust, Bareilly for extension of renewal of permission for admission of 3rd batch of MBBS students for the academic year 2008-09. This Court vide order dated 29.07.2019 found that both the parties i.e. the CBI and the accused were not satisfied with the order dated 07.10.2015 wherein charges have been framed and a few accused have been discharged. During the course of the arguments the counsels for both sides pointed out that an inspection which had been conducted by the MCI had been videographed and the CD of the videography has not been supplied to the petitioners. Paragraph No.37, 38, 39 of the judgment dated 29.07.2019 reads as under:

*“37. During the course of the arguments, Learned counsels has pointed out that the inspection team has carried out videography and the said set of videography is not supplied to the Petitioners/Accused persons and the factum of videography is not disputed in the statement of the witness. **The CBI also has not disputed carrying out the videography during the inspection. However, it is submitted that it has not been made part of the chargsheet. The said videography is a material evidence to reach to the conclusion, thus, the CD of the videography be supplied to the petitioners to show innocence on their part.***

38. The perusal of the record shows that the videography was asked to be carried out in Letter from

ASG Gopal Subramaniam to Anbumani Ramadoss dated 13.10.2008 which is at Page 235 (Annexure-P12) of the petition No. CRL. M.C 4443/2015. Relevant extract of the Letter is reproduced below:

“ ...I had pointed out that there is a serious concern of lack of transparency in the grant of recommendations by the Medical Council of India as well as the permissions granted by the Central Government in the setting up of medical colleges. I had expressed my very deep concern that standards in private medical colleges have to be firmly in order lest there be a serious threat to the lives of citizens who would require treatment at the hands of doctors. In my view, the public good and public health is the foremost and primary as well as overriding consideration. In my view, it is the Medical Council of India and the Central Government who are jointly responsible for the quality of medical education and consequent public health. However, I may make it clear that while there may be contest with reference to areas where one should have supremacy over the other, I am not persuaded to advise that the Central Government should reiterate the permission granted in favour of Ms Index Medical College, Indore as well as Rohilkhand Medical College, UP. As I said, the wide disparity between the MCI and the team deputed by the Central Government raise serious questions including the question which one is authentic for the purpose of according

admission. I confirm that in a meeting with officers of the Ministry of health Welfare at which meeting Health Secretary was present. I had advised in order to satisfy myself before advancing further submissions in respect of the said two colleges that a new team of senior and distinguished professors of medical/medical education in the all India Institute of Medical Science, PGI, Chandigarh and Christian Medical College, Vellore be constituted to conduct inspection and give a report for both the colleges. I also insisted that the said inspection should be clearly video graphed including the interaction between the members of the inspection team and the teachers/faculty...”

39. *The factum of carrying out of the videography is coming in the statement of Shri. Sudershan Kumar, Section Officer, Ministry of Health and Family Welfare, Government of India, New Delhi. His statement is at Page 183 of the petition No. CRL. M.C 4443/2015. Relevant extract from his statement is reproduced below: -*

*“..On dated 20.10.2008, the three members central team examined the Rohilkhand Medical College, Bareilly. They did not find of having any deficiency during inspection. This was mentioned on note sheet at S.No. 64(FR)p-7-74/cor. and submitted for approval. On this note sheet on dated 22.10.2008 Shri K.V.S. Rao (the then Dy. Secretary) has written a note that **“The inspection was videographed. The report is positive and we may accept the same. Hence the Ministry decision to grant renewal of***

permission to the said college may remain unchanged. On dated 22.10.2008 Shri Devasheesh Panda (Joint Secretary), on dated 23.10.2008 Shri Naresh Dayal (the then Secretary), on dated 23.10.2008 Shri Ambumani Ramdas (the then Minister of Health and Family Welfare, Government Of India) approved on which there are signatures of the above, which I am confirming.” (emphasis supplied)

3. In view of the abovesaid statements this Court by order dated 29.07.2019 set aside the order on charge dated 07.10.2015, passed by the Additional Session Judge (Special Judge) CBI-01, Patiala House Courts, New Delhi with the direction to the Trial Court to hear the parties on merit after duly supplying the copy of videography of the inspection carried out by the MCI on 20.10.2008 which was subsequently seized by the CBI, to all the accused persons. Paragraph 40 of the abovesaid judgment reads as under:

“40. In presence of the above statements and arguments the impugned Order on Charge dated 07.10.2015 is set aside with a direction to the Trial Court to hear the parties on merit afresh after duly supplying the copy of videography, of inspection carried out by MCI on 20.10.2008 which was subsequently seized by CBI, to all the accused persons.”

4. The said order has been challenged by the petitioner herein in the Supreme Court in SLP (CRL.) No.10342/2019. The CBI has filed this application for modification of order dated 29.07.2019 contending that when the order dated 29.07.2019 was passed by this Court the CBI was not exactly aware of the availability of the of the CD containing videography of the

MCI inspection dated 20.10.2008 for Rohilkhand Medical College, Bareilly, Uttar Pradesh. It is stated in the application that the case of the prosecution does not depend on the videography. It is also mentioned that after the order dated 29.07.2019 was passed, the CBI has not been able to trace the CD containing the videography of the inspection because it was neither seized by the CBI nor is it included in the list of relied upon documents/articles. It is stated in the application that the SP, CBI, ACB, Lucknow has stated that all the documents that have been transferred to the CBI, AC.I, New Delhi and no other documents/CD are available in Lucknow branch *Malkhana*. It is stated that no CD was recovered during the investigation of the case. The CBI has also produced the letters from the members of the investigating team wherein the members of the investigating team acknowledged the fact that the video of the inspection was prepared but they do not remember who prepared the video because the videographer was not a part of the inspection team. The members have also stated that they did not submit the cassette to any authority. It is stated that this fact was mentioned to the learned Trial Court and the learned Trial Court by its order dated 20.10.2020 has observed that the CBI is not taking steps to seek clarification from this Court regarding the order dated 29.07.2019. The CBI is therefore praying that the order giving directions to it to supply a copy of the CD to the accused be deleted as the same is not in its custody.

5. Mr. Prasanta Varma, learned counsel for the CBI reiterates the submissions made in the application. He states that the CBI does not have the CD since it is not a document which has been relied upon by the CBI. He contends that the case of the CBI does not rest only on the videography of the inspection. Learned counsel for the CBI has taken this Court through

various correspondences to demonstrate that despite making all efforts the CBI has not been able to get the cassette which contain the recording of the inspection done by the inspection team on 20.10.2008. He therefore contends that the direction to supply the CD to the accused cannot be complied with.

6. *Per contra* Mr. Mukul Gupta, learned Senior counsel appearing for the petitioner in the batch states that the entire judgment is based on the fact that the entire inspection was videographed, a fact which has not been disputed by the CBI during the hearing and a copy of the same had to be supplied to the accused. Mr. Mukul Gupta would submit that the CBI did not dispute carrying out the videography of the inspection and the videography was done in pursuance to a letter from learned ASG which has been quoted extensively in the judgment. He would state that since the entire judgment is based on the fact that there was a CD which contains the videography taken at the time of the inspection carried out by the MCI on 20.10.2008 and the same has not been supplied to the accused. He states that it is now not open to the CBI to go back on the statements made in the Court by its counsel.

7. Mr. Somiran Sharma, learned counsel appearing for the accused/respondent in CRL. REV. P. 25/2016 would state that he appears for those accused who were discharged by the order 07.10.2015 passed by the learned Additional Session Judge Special Judge CBI-01, Patiala House Courts, New Delhi. He would state that the respondents in CRL. REV. P. 25/2016 were discharged and their order of discharge has been set aside by the judgment dated 29.07.2019 on the ground that an inspection was conducted on 20.10.2018 and the same was videographed and that the Trial Court had to hear the matter afresh after a copy of the video was supplied to

the accused. He would therefore contend that this application is nothing but an abuse of the process of law and that if there is no videography the accused in CRL. REV. P. 25/2016 ought to be discharged automatically and the matter cannot be remanded *qua* them.

8. Heard Mr. Prasanta Varma, learned counsel appearing for CBI, Mr. Mukul Gupta, learned Senior Counsel appearing for Dr. Ambumani Ramadoss, Mr. Nishi Kant Singh, learned counsel appearing for the petitioner and Mr. Somiran Sharma, learned counsel appearing for the accused/respondent in CRL.REV.P.25/2016 and perused the material on record.

9. Section 362 Cr.P.C reads as under:

“The Code Of Criminal Procedure, 1973

362. Court not to alter judgment. Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”

10. Section 362 Cr.P.C. is an embargo on a Court prohibiting it from altering or reviewing its judgment or final order. The rigour of Section 362 Cr.P.C can be relaxed only in two conditions:

i. when it is provided by the Court itself;

or

ii. permitted by any other law for the time in force.

11. A perusal of paragraph 37 to 40 of the impugned judgment would show that the entire basis of the judgment dated 29.07.2019 is the fact that the entire inspection had been videographed and a copy of the same has not

been supplied to the accused. This fact had not been denied by the counsel for the CBI.

12. The Supreme Court in Simrikhia v. Dolley Mukherjee, (1990) 2 SCC 437, has observed as under:

“3. The learned counsel for the appellant contended before us that the second application under Section 482 CrPC was not entertainable, the exercise of power under Section 482, on a second application by the same party on the same ground virtually amounts to the review of the earlier order and is contrary to the spirit of Section 362 of the CrPC and the High Court was, therefore, clearly in error in having quashed the proceedings by adopting that course. We find considerable force in the contention of the learned counsel. The inherent power under Section 482 is intended to prevent the abuse of the process of the court and to secure ends of justice. Such power cannot be exercised to do something which is expressly barred under the Code. If any consideration of the facts by way of review is not permissible under the Code and is expressly barred, it is not for the court to exercise its inherent power to reconsider the matter and record a conflicting decision. If there had been change in the circumstances of the case, it would be in order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the court. Where there is no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review, which is expressly barred under Section 362.

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5. Section 362 of the Code expressly provides that no

court when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error save as otherwise provided by the Code. Section 482 enables the High Court to make such order as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. The inherent powers, however, as much are controlled by principle and precedent as are its express powers by statute. If a matter is covered by an express letter of law, the court cannot give a go-by to the statutory provisions and instead evolve a new provision in the garb of inherent jurisdiction.

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7. The inherent jurisdiction of the High Court cannot be invoked to override bar of review under Section 362. It is clearly stated in Sooraj Devi v. Pyare Lal [(1981) 1 SCC 500 : 1981 SCC (Cri) 188] , that the inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code. The law is therefore clear that the inherent power cannot be exercised for doing that which cannot be done on account of the bar under other provisions of the Code. The court is not empowered to review its own decision under the purported exercise of inherent power. We find that the impugned order in this case is in effect one reviewing the earlier order on a reconsideration of the same materials. The High Court has grievously erred in doing so. Even on merits, we do not find any compelling reasons to quash the proceedings at that stage.”

(emphasis supplied)

13. The purpose of Section 362 Cr.P.C is that once a Court delivers the judgment that Court becomes *functus officio* and thereafter it cannot reconsider or modify the judgment (refer Sunil Kumar v. State of Haryana,

(2012) 5 SCC 398).

14. It cannot be said that the ambit of the present application is to correct a clerical or arithmetical error. As stated earlier, the basis of the entire judgment dated 29.07.2019 is the fact that the inspection has been videographed and the video is an important piece of evidence which has not been supplied to the accused. The relief sought by the CBI would amount to altering the judgment which is specifically prohibited by Section 362 Cr.P.C.

15. Accordingly, the application is dismissed.

SUBRAMONIUM PRASAD, J

FEBRUARY 23, 2021
Rahul