

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

% **Decided on: 4th August, 2016**

+ **CRL.M.C. 1858/2016**

D K GARG & ORS

..... Petitioners

Represented by: Mr. S.B. Singh, Mr. Sailendra Kumar, Ms. Mamata Pal, Ms. Meenakshi Gautam, Mr. Rakesh Kumar and Mr.R.K. Kohli, Advocates.

versus

CENTRAL BUREAU OF INVESTIGATION

..... Respondent

Represented by: Mr. Sanjeev Bhandari, Spl. P.P.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Aggrieved by the order dated 11th April, 2016 dismissing the application under Section 311 Cr.P.C. for cross-examination of PW-36 Shri N.V.N. Krishnan and PW-35 Shri A.K.Seth filed by the petitioners herein the petitioners prefer the present petition. The reasoned impugned order of the learned Trial Court is as under:

“By this order, this Court shall dispose of an application moved on behalf of Accused 4, 7, 8, 9, 10 and 11 for recalling of witnesses U/S 311 Cr.P.C. for cross-examination of PW 36 Sh. N.V.N. Krishnan and PW 35 Shri A.K. Seth.

Ld. counsel Sh. R.K. Kohli has moved this application without affidavit of either of the parties or the counsel. Admittedly, there are two counsels moved this application in this case and definitely, if there are two counsels one could go to Hon'ble Supreme Court and other definitely could attend this court proceedings. Moreover, nothing has been explained what was the reasons for leaving the Court on 06.04.2016. Therefore, it is an admitted fact that on 06.04.2016 Ld. Defence counsel did not intentionally preferred to cross-examine PW-35. It is not explained in the application for non appearance of the counsel on 07.04.2016. It is nothing explained on 08.04.2016 at what time the case came up before the Hon'ble Supreme Court and for what reason he did not appear even after post lunch session.

Ld. PP for CBI submits that he does not want to file any reply to the application filed U/S 311 Cr.P.C. However, he strongly opposed the application as Ld. Defence counsel in moving this application just to delay the proceedings of the case as ample opportunities have been given to the accused persons to cross-examine the witnesses. It is further submitted that when the PWs were being examined Ld. Defence Counsel Shri R.K. Kohli and Ms. Meenakshi Gautam were present before the Court and they preferred not to examine the witnesses as they left the court even without taking the formal permission of the court and even court asked them to wait for cross-examination of the witnesses, which fact is writ large from the order-sheet dated 06.04.2016. It is further submitted that the case is pending before the Court of Law for the last seventeen years and if such vexatious applications are allowed there will be no end to proceedings and it will frustrate the very purpose of ends of justice.

It is further submitted that even after lunch, the Court kept the matter and adjourned only after lunch. I have heard both the parties and have gone through the court record. The order-sheet dated 06.04.2016 read as under: -

“... In the morning when the application seeking adjournment by the accused persons was disposed of then without permission the Ld. Counsel Ms. Meenakshi Gautam & R.K. Kohli left the court though evidence was going on and the court again and again requested to stay and assist the court but they left the court despite repeated requests and without permission of the court.

It is apparent that upon application seeking adjournment, it is not the prerogative of the counsel that the court has to certainly grant the adjournment. PW-35 has been examined and this Court has asked each of the accused person to call their respective counsels.

However, accused persons submits that their counsel are not available and they do not want to cross-examine the witnesses. The court again asked the accused persons that it can wait for their counsels and they can cross examine the witnesses after lunch. However, accused persons submitted that their respective counsels are not available after lunch. However, now when the witnesses has signed the statement and left the court now Ms. Meenakshi Gautam appeared and has moved an application for supplying copy of evidence. This court has no hesitation to supply the copy of the evidence to the counsel but when a counsel comes for the relief the court then it is his/her duty that he/she should show respect to the Court. Let copy of the evidence recorded today be supplied to the Ld. Counsel for accused persons as per rules.”

Apparently the matter is pending before the Court for the last 17 years. It is also apparent that Ld. Defence counsel as well as all the accused present were given ample opportunities to cross examine the witnesses present on 06.04.2016 and intentionally gone out of the Court without the leave of the court. Therefore, application seeking for cross examination of PW-35 Shri A.K. Seth who was examined on 06.04.2016 stands dismissed.

However, the application seeking permission to cross examine the PW-36 namely Shri N.V.N. Krishnan who was examined on 08.04.2016 cannot be allowed in the conduct of the applicants as the contents of the application themselves show that no relief can be more opportunity to the applicant to cross-examine PW-36 allows the present application to the limited extent i.e. to cross-examine PW-36 only on behalf of the applicants subject to deposit the cost of Rs.10,000/- to be deposited by each applicant with DLSA, East, Karkardooma Court, Delhi with the following condition:-

- i. only one opportunity shall be given;*
- ii. Steps shall be taken within a day;*
- iii. Diet money be deposited with taking steps of the evidence as per rules and procedures.*

It is made clear that no further adjournment or passover shall be given at any cost. In case cost is not deposited the consequences in accordance with law have to be followed including dismissal of the application.

Application stands disposed off.”

2. Contention of learned counsel for the petitioners before this Court is that since the application filed by CBI wherein it sought to place additional documents was allowed by the learned Trial Court vide order dated 12th October, 2015 and the petitioners challenged the said order first before this

Court and thereafter before the Hon'ble Supreme Court the two officers could not be cross-examined hence further opportunity was required to be granted.

3. A perusal of the order sheet of the learned Trial Court would reveal that vide order dated 12th October, 2015 while allowing the application of the CBI for filing additional documents, learned Trial Court noted that the documents related to the two witnesses, that is, A.K. Seth and A.K. Tiwari, Vigilance Officers, who were yet to be examined. Thus no prejudice would be caused to the defence. Learned Trial Court also noted that almost the entire evidence is over as out of 40 witnesses 34 witnesses have been examined and CBI has already dropped three witnesses. Thus only three witnesses remained to be examined of which the Investigating Officer was partly examined in chief. The documents were to be exhibited by the two witnesses, that is, A.K. Seth and A.K. Tiwari whose examination in chief and cross-examination had not been conducted as yet. Thus imposing cost on the CBI, the application was allowed. The learned Trial Court simultaneously fixed the dates of 26th October, 2015, 28th October, 2015 and 29th October, 2015 for the entire prosecution evidence. On 26th October, 2015 learned counsel for the accused No.1, that is, R.K. Kapoor, filed a copy of the affidavit along with the copy of the order dated 20th October, 2015 passed by this Court directing the Court to adjourn the matter in compliance whereof the trial court listed the matter for 7th January, 2016. Dates of 28th October, 2015 and 29th October, 2015 were cancelled. On 7th January, 2016 since this Court had adjourned the matter for 4th March, 2016 extending the interim order and the learned PO was on leave, the next date in the Trial Court was fixed for 5th March, 2016. On 5th March, 2016 the matter was

posted for 8th March, 2016 as A-1 had died and the learned PO had gone to Judicial Academy. On 8th March, 2016 the learned counsel for the accused admitted that there were no directions of the High Court and that the case should be proceeded further, thus the learned Trial Court fixed the dates of 6th April, 2016, 7th April, 2016 and 8th April, 2016 for remaining prosecution evidence. On 6th April, 2016 PW-35 A.K. Sethi was present however, an application was moved for adjournment of the proceedings till 8th April, 2016 on the ground that the matter was listed before the Supreme Court for hearing on 8th April, 2016 challenging the order dated 12th October, 2015 passed by the learned Trial Court and the order dated 4th March, 2016 dismissing the petition of the accused by this Court.

4. The learned Trial Court noting that the matter was pending for the last 17 years and there was no ground for seeking an adjournment unless the proceedings were stayed recorded the examination –in-chief of the witness. A request was made to the learned counsel for the accused to cross-examine the witnesses however, the learned counsels left the Court despite requests made by the Court and thus A.K. Seth was discharged. At 1.24 PM again Ms. Meenakshi, Advocate appeared on behalf of the four accused however, she did not cross-examine the witness and the Court noted that Ms. Meenakshi and R.K. Kohli, counsels left the Court despite repeated requests of the learned Trial Court and without permission of the Court. On 7th April, 2016 PW-36 N.V.N. Krishnan was examined in chief however, his examination-in-chief was deferred for 8th April, 2016 when he was cross-examined and discharged. On 8th April, 2016 the matter was again kept at 3.00 PM. Since no other witness could be produced by the CBI, the prosecution evidence was closed and the matter was listed for the statements

of the accused under Section 313 Cr.P.C. for 11th April, 2016. When an application under Section 311 Cr.P.C. was filed on 11th April, 2016 which was partially disposed of permitting cross-examination of N.V.N. Krishnan under Section 311 Cr.P.C.

5. From a perusal of the order sheets of the learned Trial Court, it is evident that ample opportunities were granted and once there was no stay from the higher court, the learned counsels could not have insisted and left the Court room that they would not cross-examine the witnesses. Section 311 Cr.P.C. enjoins the duty on the Court to recall the witness if the same is required for just decision. However, in a case where the witness was available for cross-examination and the counsel for the accused deliberately does not cross-examine him, the accused cannot turn around and say that the witnesses be recalled for cross-examination.

6. I find no reason to interfere with the impugned order.

7. Petition is dismissed. Trial court record be sent back forthwith.

(MUKTA GUPTA)
JUDGE

AUGUST 04, 2016
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