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

+ CRL.M.C. 5244/2015 & CrI.M.A. 18916/2015 (stay)

GOVIND & ORS

..... Petitioner

Represented by: Mr. Gaurav Chowdhary, Adv.

versus

STATE & ANR

..... Respondent

Represented by: Mr. Ashok Kumar Garg, APP.
Mr. Gulzari Lal, Adv. for R-2.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

19.07.2016

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1. The learned Trial Court closed the right of the petitioner to further cross-examine PW-5 and PW-6 vide order dated 16th July, 2015. An application for recalling PW-5 and PW-6 was filed by the petitioner under Section 311 Cr.P.C. which was dismissed vide the impugned order dated 3rd October, 2015. Hence the present petition.

2. The relevant portion of the finding of the learned Trial Court while dismissing the application under Section 311 Cr.P.C. is as under:

“It is submitted on behalf of the accused persons that PW-5 and PW-6 are the material witnesses, who could not be cross examined on behalf of the accused persons on 16.07.2015 for non-appearance of the Ld. Counsel as Ld. Counsel was ill at that time and the case was attended by Sh. Sadhu Ram, who apprised the Court about the said fact. It is further submitted by Ld. Defense counsel that on the earlier occasions also, PW-5 could not be cross examined for such circumstances beyond his control.

Ld. APP for the State has submitted that examination in chief of PW-5 was recorded on 04.03.2013 whereas PW-6 Ms. Neha was examined on 21.08.2013. Thereafter, PW-5 was cross-examined on various dates in detail but his cross-examination was not completed by Ld. Defense Counsel. It is also submitted by Ld. APP that the examination in chief of PW-5 runs just into three pages but counsel for accused has cross-examined him running into 13 pages and still not completed his cross-examination just to delay the trial. It is also submitted by Ld. APP that PW-6 is the victim and she had harassed on various dates by counsel for the accused by not even starting her cross-examination for two long years and now he had moved the present application. It is further submitted by Ld. APP that on 30.09.2014, last and final opportunity was granted to the accused for completing the cross-examination of PW-5 Sh. Manoj Kumar and PW-6 Ms. Neha @ Nibha with the condition that in case accused persons fail to cross examine those two witnesses, their right to cross examine the said witnesses shall be closed on the next date of hearing i.e. on 01.12.2014. However, on the subsequent dates also, at request of the accused persons, they were given opportunity to cross examine PW-5 and PW-6 but of no avail. Thereafter, vide order dated 16.07.2015, right of the accused persons to cross examine PW-5 and PW-6 was closed. It is further submitted that the accused persons are just harassing these public witnesses and especially the victim PW-6 and not conducting their cross-examination.

It is further submitted by Ld. APP for the State that already many effective opportunities have been given to the accused persons on 01.07.2013, 21.08.2013, 19.10.2013, 05.05.2014, 06.05.2014, 25.08.2014, 30.09.2014, 13.05.2015 and 16.07.2015 but of no avail.

Submissions heard. Relevant orders perused carefully.

Perusal of record especially order dated 30.09.2014 reveals that only one opportunity was granted to the accused persons to cross examine the PW-5 and PW-6. However, after a lapse of about one year, accused persons have not completed

the cross examination of the complainant on one pretext or the other and thus their right to cross examine the PW-5 and PW-6 was closed on 16.07.2015.

It is not out of place here to mention the landmark judgment of Hussnnaira Khatoon's case wherein Hon'ble Supreme Court has considered the right of speedy trial as one of the fundamental rights. Also, the observations of Hon'ble Supreme Court in State of UP vs. Shambu Nath Singh AIR 2001 SC 1403 and Rajdeo Sharma vs. State of Bihar MANU/SC/0640/1998 wherein directions have been passed with respect to the completion of the cross examination of the witnesses which cannot be ignored.

As already discussed, accused persons have been given ample effective opportunities on 01.07.2013, 21.08.2013, 19.10.2013, 05.05.2014, 06.05.2014, 25.08.2014, 30.09.2014, 13.05.2015 and 16.07.2015 also to complete the cross examination of the complainant and PW-6 but they have not availed to do the same. It is also to be mentioned that vide order dated 30.09.2014, one last and final opportunity was granted to the accused persons to complete the cross examination of the complainant and PW-6. Force can also be had from the Uber case wherein it has been held by the Hon'ble Supreme Court that there is absence of valid ground to recall the victim and other witnesses as the Ld. Counsel for the accused had already been given opportunity in accordance with the law to examine them. Here, also counsel for the accused had been granted more than required opportunities to examine the victim and other witnesses but of no avail.

In view of afore discussed circumstances, there is no merit in the application u/s 311 Cr.P.C. moved on behalf of the accused persons and the same is hereby dismissed."

3. I have perused the Trial Court Record which was summoned. The FIR is under Sections 341/354/506 IPC registered at PS DBG Road. The victim a minor girl was examined as PW-6. PW-5 is the father of the victim.

For the first time PW-5 Manoj Kumar appeared before the Court on 17th November, 2012 for his examination when he was not examined as the learned APP was on leave. The situation remained the same on 30th January, 2013. However his examination-in-chief was recorded on 4th March, 2013. On 4th March, 2013 the cross-examination had to be deferred at request of learned counsel for the defendant. Again on 27th April, 2013, 1st July, 2013, PW-5 the father of the victim was present, however he was discharged unexamined. On 21st August, 2013 PW-6 the victim was also summoned, she appeared and her examination-in-chief was recorded. However, her examination was deferred and PW-5 was partly cross-examined. On 19th October, 2013 PW-5 was further partly cross-examined, however PW-6 was discharged unexamined. On 10th February, 2014 again when PW-5 was present he was discharged unexamined. On 5th May, 2014 both PW-5 and PW-6 were present, however despite various calls neither the accused appeared nor the counsel. On 6th May, 2014 PW-5 was partly cross-examined, however after lunch learned counsel for accused sought deferment as he was not available. Thus he was recalled on 15th July, 2014 and 25th August, 2014 when he could not be examined as learned PO was on leave. On 30th September, 2014 adjournment was sought again by learned counsel for accused to cross-examine PW-5 and PW-6. Again on 1st December, 2014 and 11th February, 2015 both PW-5 and PW-6 were present and they were discharged unexamined. Finally the matter was listed for cross-examination of PW-5 and PW-6 on 16th July, 2015 when again learned counsel for the accused sought time for cross-examination. Thus the right of the petitioner to further cross-examine PW-5 and PW-6 was closed.

4. Considering the conduct of the petitioner in delaying the cross-

examination and despite the main witnesses being present on number of dates they have not been cross-examined, I find no error in the impugned order by the learned Magistrate dismissing the application of the petitioner for recalling of the witnesses under Section 311 Cr.P.C.

5. Section 311 Cr.P.C. provides that the Court can summon any witness for a just decision of the case. However, the same cannot be for misuse by an accused who does not cross-examine a witness when he is present and defers the same on one pretext or the other and thereafter files an application for recalling of the witness.

6. Petition and application are accordingly dismissed.

7. Trial Court record be sent back.

MUKTA GUPTA, J.

JULY 19, 2016
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