

**In the court of Shri Naresh Kumar Laka
Special Judge (PC Act) (CBI-20),
Rouse Avenue District Courts, New Delhi**

CBI-24/2021

RC No. DAI-2019-A-0015 dated 30.04.2019

CNR No. DLCT11-000169-2021

In the matter of:

Central Bureau of Investigation

vs.

Vikas Gupta And & Ors.

Dated: 19.12.2023

ORDER

Vide this order, I shall decide two applications moved by the CBI seeking placing on record DVD (**Q1_Data**) which has been received subsequently from CFSL and examination of witness, namely, PW Sh. Amitosh Kumar, Sr. Scientific Officer before further examination of PW-1 Sh. Basant Goel. Replies were filed on behalf of accused persons. I have heard arguments on the aforesaid applications from Sh. Pramod Singh, Ld. PP for CBI, Ms. Meenakshi Mohan, Ld. Counsel for Dr. Vikas Gupta (A-1) and Sh. Manikant Singhal, Ld. Counsel for Dr. Kajal Goldar (A2). File perused.

2. The case is fixed at the stage of prosecution evidence. In the first application, the prosecution seeks placing on record one DVD (**Q-1_Data**) by arguing that during the course of investigation, one mobile

phone (Q-1) along with specimen voices (S-1, S-2 and S-3) were sent to CFSL, New Delhi for forensic examination and to prepare six copies of data. After examination, Sh. Amitosh Kumar, Sr. Scientific Officer, CFSL, CBI had sent his report along with certificate under Section 65B of Indian Evidence Act, Six DVDs and Exhibits Q-1, S-1, S-2 & S-3 to the CBI.

3. Ld. PP for CBI stated that forensic voice examination report along with certificate under Section 65B of Indian Evidence Act and the said 6 DVDs having data of mobile phone of Sh. Basant Goel have already been filed on record before this court which have also been taken on record. Now, Ld. PP for CBI argued that the DVD (**Q1_Data**) is the extracted data of the exhibit i.e. Q-1 (mobile phone of Sh. Basant Goel) which was not provided by the CFSL, New Delhi earlier inadvertently and now the said DVD has been received and, therefore, same may be allowed to be taken on record as it contains a vital piece of evidence.

4. Ld. Counsel for the accused persons strongly opposed these applications on the ground that copies of the DVD which has been provided by the CBI during trial are not the true copy nor prepared by the authorized person because without any request, Mr. Amitosh Kumar has prepared said six DVDs and no where in his report he had mentioned that he supplied the same to the IO. Ld. Counsels further argued that during the examination of Sh. Basant Goel, it was found that mobile phone (case property) was not in working condition and thereafter, the IO filed an application stating therein that he has six DVDs as copy of material lying in the Malkhana. It is very suspicious

that if the IO was having DVDs, he could file the same with charge sheet/supplementary charge sheet. It is further submitted that the said DVDs were got prepared with manipulation and without any request and as such it casts serious doubt on the genuineness of the alleged original mobile phone, copies of the recordings in the absence of the genuineness of the original source and therefore, they cannot be permitted to be placed on record nor there is any need to examine Sh. Amitosh Kumar first before the examination of Sh Basant Goel.

5. The present case is based not only on oral testimony but on electronic evidence also and in order to prove its case, when PW-1 was being examined, a mobile phone was produced during his examination and it was revealed that same was not found to be in a working condition. A court observation was also made to the effect that “***Back side portion of the said mobile phone is in open condition probably because of swelling of his battery***”.

6. It is common knowledge that technology keeps on updated drastically from time to time and mobile phone & its parts are also subject to wear and tear due to environmental factors. On account of out dated condition of the mobile phone, it is not feasible to get it repaired by the prosecution to hear the voice recordings contained therein and the only option left with the prosecution was to place on record its data by other sources. Ld. PP for the CBI submitted that data of the said mobile phone was extracted at the CFSL in a DVD. Therefore, the first application has been filed by the prosecution seeking placing on record the said data which is claimed to be contained in the DVD (**Q1_Data**).

7. The main opposition of the accused persons is on the ground that the said DVD is a manufactured device and contains manipulated data, therefore, it was not filed earlier along with the charge sheet. In the opinion of this court, the admissibility and authenticity of the said data cannot be checked at this stage which is a matter of evidence and trial.

8. Ld. Counsel for accused persons raised objection that this is secondary evidence which cannot be taken on record without filing of appropriate application in this regard. It is a settled position of law that secondary evidence can be taken if the circumstances as contemplated under Section 65B of the Indian Evidence Act are present like when an original document is destroyed and not traceable even there is no need of filing of a separate application for said purpose. In the instant case, when the mobile phone which contained the primary evidence is found to be not working, its data in the form of DVD (**Q1_Data**) can very well be taken on record as secondary evidence and the present application can be treated for the said purpose only.

9. The law with regard to proving an electronic record is slightly different in the sense that the information contained in an electronic record can be proved as a primary evidence by filing a certificate under Section 65B of the Indian Evidence Act even without proving or producing the original (in the instant case the mobile phone). In this regard, Section 65B (1) of the Indian Evidence Act can be referred to. The Ld. PP for CBI has pointed out that a certificate under Section 65B of the Indian Evidence Act is already on record which was given by Sh. Amitosh Kumar with regard to 06 DVDs of the original

data and it is argued that same can be read towards the DVD (Q1_Data). This court takes into account that the data of mobile phone was extracted in DVD (Q1_Data) by Sh. Ajay Chaudhary, therefore, such certificate under Section 65B of Indian Evidence Act should be filed by him. It is a settled position of law that the said certificate can be filed at the subsequent stage of the trial in view of the judgment passed by Hon'ble High Court of Delhi in the case "*Eli Lilly and Company & Anr Vs. Maiden Pharmaceuticals Limited*' CS(COMM) 1472/2016'. The prosecution will take appropriate steps in this regard as per law.

10. As regards the confusion in not placing on record DVD (Q1_Data) at the first instance stage, Ld. PP for CBI stated that the same was not inadvertently sent by the CFSL to the CBI though in their report, they mentioned that same was submitted. To clarify the said fact, this court also called Sh. Amitosh Kumar and Sh. Ajay Chaudhary (the CFSL experts) and the facts already came on record that the said DVD was lying with the CFSL only. Now, when the said facts are clear with regard to custody of the said DVD, the same is allowed to be taken on record as a secondary evidence in the circumstances already enumerated above.

11. Ld. Counsel for the accused persons raised objection that the data of the DVD supplied earlier and the data of the DVD (Q1_Data) is different being 2.86 GB and 2.85 GB respectively. A direction has already been passed to supply data of all the DVD which are placed on record and during the course of evidence, the DVD which the prosecution seeks to rely will be played and the said aspect will be considered, if pressed upon as per law. This is not the stage to inquire

about the said aspect which can be got clarified from the relevant witness/CFSL Expert only.

12. In the light of aforesaid discussion, the first application is allowed subject to filing of certificate under Section 65B of the Indian Evidence Act of the concerned person and proving it on record as per law.

13. As regards the second application seeking examination of Sh. Amitosh Kumar first before further examination of PW-1 Sh. Basant Goel, this court observes that the intact seal of the envelope was already opened in the presence of the Ld. Counsel for the accused persons before this court and even copy of the data was also supplied on the pendrive of the Ld. Counsel for the accused. Even a direction was passed to seal the said envelope with the seal of the court. Therefore, there is no need to examine Sh. Amitosh Kumar first before further examination of PW-1 Sh. Basant Goel. Accordingly, the second application is dismissed.

14. Put up for PE on the date already fixed i.e. **09.02.2024**. Summons be issued to PW-1 Sh. Basant Goel.

Announced & dictated in
the open court on 19.12.2023

(Naresh Kumar Laka)
Special Judge (PC Act) (CBI-20),
RADC/New Delhi/19.12.2023