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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 28th February, 2019

\+ CRL.M.C. 3838/2016 and Crl. M.A. 16071/2016

AIR MARSHAL HARISH MASAND ..... Petitioner

Through: Mr. Samrat Nigam, Mr. Abhimanyu Walia and Mr. Shaurya Kathiala, Advocates

versus

M/S OUTLOOK PUBLISHING (INDIA) PVT LTD & ORS ..... Respondents

Through: Mr. Siddharth Yadav, Advocate

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The petitioner is the complainant in criminal complaint case (CC No.1168/1/2005) which is pending in the court of the Chief Metropolitan Magistrate (CMM) of South District at Saket, the first to third respondents (collectively referred to hereinafter as "the accused") having been summoned as accused therein by order dated 23.01.2006, on the basis of preliminary inquiry, on the accusations of offences punishable under Sections 500, 501 and 502 of Indian Penal code, 1860 (IPC).

2. The trial in the aforesaid case had reached the stage of defence evidence when, at the instance of the accused, the fourth respondent herein appeared as witness in defence (DW-1), his chief-examination having been recorded on 14.12.2007, his cross-examination having continued over certain subsequent dates, it being concluded on 22.12.2007.

3. On 24.12.2007, the petitioner (complainant) moved two applications, one invoking the provision contained in Section 311 of the Code of Criminal Procedure (Cr.PC) and the other under Section 319 Cr. PC. Both the said applications were decided by the trial court by a common order passed on 26.02.2008. While the second application (under Section 319 Cr. PC) was allowed, it resulting in the fourth respondent (DW-1) being impleaded as an additional accused, the other application of the complainant under Section 311 Cr. PC was dismissed on the ground that the said witness (DW-1), who stood summoned as additional accused, could not be compelled to answer the questions, refusal to do so being the root cause for the request made therein.

4. The petitioner challenged the dismissal of his application under Section 311 Cr. PC, the fourth respondent (DW-1) challenging the order summoning him as additional accused, by separate petitions - Crl. MC 840/2008 and Crl. M.C. 1584/2008 in this court. Both the said petitions were decided by a common judgment passed on 29.06.2015. The learned single judge deciding the said matters was of the view that the Metropolitan Magistrate had fallen in error by

considering the two applications together, the proper course commended to be for decision first to be taken on the prayer under Section 311 Cr. PC. The matter arising out of the said applications was remanded to the trial court for fresh decision.

5. After the remit, the complainant moved another application under Section 311 Cr. PC on 09.10.2015. His two applications under Section 311 Cr. PC, the one moved on 24.12.2007 followed by the one moved on 09.10.2015, were considered together by the CMM, and dismissed by order dated 06.09.2016.

6. Feeling aggrieved by the said order dated 06.09.2016, the complainant has come with the present petition invoking the inherent power and jurisdiction of this court under Section 482 Cr. PC read with Article 227 of the Constitution of India, his contention being that the trial court has failed to bear in mind and apply the statutory provisions contained in Sections 132 and 165 of the Indian Evidence Act, 1872 (Evidence Ac) read with Section 311 Cr. PC, its approach to the issues arising out of the requests in the said two applications being mis-directed.

7. *Per contra,* the first to third respondents (accused) through their joint reply, the fourth respondent (DW-1), having adopted the said reply, have resisted the prayer in the petition, the prime contention raised being that the provision contained in Section 311 Cr. PC cannot be used by a party to a litigation, it being a jurisdiction conferred on the criminal court which cannot be "*compelled*" to exercise it against its judicial discretion. It is argued that the prayer for recall of DW-1

for further cross-examination or for he to be compelled to answer the questions is unjust and unfair, since it exposes him to possibility of self-incrimination, also requiring him to breach the confidentiality of the source of his information as a journalist and consequently being violative of Article 19(1)(a) and Article 20(3) of the Constitution of India.

8. The background facts of the criminal complaint in which the present controversy arises were succinctly noted in the judgment dated 29.06.2015 in Crl. M.C Nos.840/2008 and 1584/2008, the relevant portion whereof may be extracted as under :-

> *"6. The case of the petitioner is that the petitioner is a retired Air Marshal of the Indian Air Force. In January 2004, the petitioner was serving in the rank of Air Vice Marshal in the Indian Air Force when he was denied promotion to the rank of Air Marshal. Being aggrieved by this denial of promotion, on 21st January, 2004, the petitioner filed a Writ Petition (Civil) No.1035/2004, titled as 'Air Vice Marshal Harish Masand Vs. Union of India & Ors.'. before this Court challenging the decision of the Indian Air Force and the Union of India and this Court allowed the Writ Petition by final judgment dated 8th November, 2004. Thereafter, Union of India filed Special Leave Petitions (Civil) No.24880/2004 and 24886/2004 in the Supreme Court challenging the judgment of this Court and the matter was listed before the Supreme Court on 7th December, 2004 and for admission on 13th December, 2004.*
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> *6.1 In the meanwhile, OUTLOOK Weekly News Magazine published on "exclusive", "only in Outlook" article entitled "Air of Uncertainty", claiming to arise out of the orders of this Court, with*

number of defamatory allegations against the petitioner, as well as Air Vise Marshal Chhatwal, in the 13th December, 2004 issue of the magazine which hit the new stands in the country on 5th December, 2004, i.e. just before the date already fixed of mention of the SLPs in the Supreme Court.

6.2 The above article, which claims that the orders of this Court had racked (sic) up "an old issue: how personal should the professional get" and tossed up the question "where to draw the line between the bedroom and the war room" etc. along with the above quoted orders dated 8th November, 2004 of this court, would immediately show that the article completely distorts the issues raised and adjudicated upon in the promotion cases by this Court while making totally false and defamatory allegations of fact and imputations against the petitioner as alleged by him. It is the case of the petitioner that none of these allegations and imputations were pleaded or argued in before the Court in the promotion cases because these were totally false and could not be sustained by any official record.

7. Aggrieved by the alleged act of the respondents No.2 to 5, the petitioner sent them a legal notice by registered post on 13th December, 2004 stating that these allegations and imputations were totally false and defamatory, and these had been printed without even contacting and ascertaining the true fats from the petitioner and demanding that the sources of information and material for the article be disclosed.

8. There was no response from the respondents to the above notice and to further aggravate the issue, the respondents published yet another article in the 7th March, 2005 issue of the said magazine entitled "Taking Off : On a Wing and a Plea" wherein the previous article "Air of Uncertainty" was again

referred, with the caption "The Masand Story : Blowing the lid Off".

9. In view of publication, the petitioner filed a Criminal Complaint under Section 500, 501 and 502 IPC on 12th July, 2005, Complaint Case No.1168/1/2005 in the court of the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi against the respondent Nos.2 to 5.

10. The trial court on 23rd January, 2006 prima facie found that an offence is disclosed under Section 500, 501 and 502 IPC against all the respondents / accused and issued summons."

9. The copy of the impugned publication on which the aforementioned criminal case is founded has been placed before the court, it having been referred to in the complaint case as Ex. CW1/2. A bare perusal of the contents of the article, the publication showing the third respondent to be its author, reveals that it *prima facie* contains insinuations which had the effect of lowering the reputation of the complainant in the estimation of people at large. There is no dispute at this stage about the conclusion to this effect in as much as the trial is underway on such accusations. The impugned publication also reveals that the fourth respondent (DW-1) was the senior editor of the magazine in question, particularly for the issue dated 13.12.2004 in which the said article was published. It is also clear that the accused persons (i.e. first to third respondents) had chosen, of their own volition, to bring in the fourth respondent as a defence witness, he having made the statement in that capacity voluntarily, his deposition having commenced on 14.12.2007. It is noted that during his examination-in-chief, the fourth respondent testified that the contents

of the articles pertain to a matter which was within his "*personal knowledge*", such personal knowledge extending to the fact that there was a reference to certain aerobatics having been performed to impress a particular lady. The fourth respondent also volunteered in his chief-examination that he had "*met some of the Air Force officers*" and also "*had a close look at the notes taken down about the court of inquiry*" as had been shown to the author of the article (third respondent), the reference about a "*girl friend*" made in the impugned publication also having "*come from the Air Force officers*", the third respondent (author of the article) having "*confirmed from the Air Force officers that the lady in question was the reason behind Air Marshal Masand being denied promotion*".

10. From the drift of the chief-examination of DW-1 during evidence tendered by the accused at the trial, it is clear that the defence raised is as to the *bonafide* of the publication, as indeed, possibly of the truth of the matter. The complainant, by cross-examination, sought information, *inter alia*, to ascertain the identity of the source of above information. DW-1 though reiterating at that stage that he had met the concerned senior Air Force officers in the presence of the author of the article, even after the draft of the "*story*" had been submitted, and having witnessed such exchange, declined to disclose the identity of the concerned individuals. The refusal to answer the questions in this regard was reiterated on the subsequent date when the cross-examination had continued.

11. The application dated 24.12.2007 under Section 311 Cr. PC made the following prayer :-

> *"(a). Direct the accused to reveal their sources of information and summon these as witnesses.*
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> *(b). In the alternative, summon the three members of the relevant Promotion Board, named above, as witnesses U/s. 311 of Cr. PC…"*

12. It may be mentioned here that in the above-said application, the complainant had mentioned (in para 18) names of certain senior officers as the three members of the promotion board in whose respect the prayer clause (b) had been included, his grievance, as pressed at that stage, essentially concerning the disinclination of DW-1 to disclose the identity of the persons from whom the facts were being projected as duly verified before the article was cleared for publication. By the application dated 09.10.2015, moved after the remit, however, the complainant also invoked Section 132 of the Evidence Act, it being pressed conjointly with the earlier application dated 24.12.2007 so as to compel DW-1 to respond to the remaining unanswered questions.

13. Section 132 of the Evidence Act reads as under :-

> *"132. Witness not excused from answering on ground that answer will criminate.—A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that*

it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso — Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

14. This court agrees with the respondents that the first prayer [clause (a)] in the application dated 24.12.2007 for the accused to be directed to reveal their source of information or for them to be summoned as witnesses cannot be allowed. An accused cannot be compelled to incriminate himself – Article 20(3) of the Constitution of India affords him protection in this regard. The accused cannot also be compelled to appear as a witness. It is his choice whether to do so or not. Section 315 Cr. PC only declares that an accused is also a competent witness; he not being permitted to appear in such capacity unless he makes a "*request in writing*" to the court. The second prayer [clause (b)] in the application dated 24.12.2007 for the three members of the promotion board to be summoned as witnesses also did not deserve to be allowed. The complainant's evidence was over. He had not chosen to examine them as his own witnesses. This court, thus, would not interfere with the discretion exercised by the trial court in refusing to summon the said three persons as witnesses under Section 311 Cr. PC. But, the prayer in the application dated 09.10.2015 to above effect could not have been short shrifted in the manner done.

15. A judge presiding over the trial is conferred by Section 165 of the Evidence Act, with the power to put questions or to order

production of additional evidence if it is so required "*to discover or to obtain proper proof of relevant facts*". The provision reads thus :-

> *"165. Judge's power to put questions or order production.—The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:*
>
> *Provided that the Judgment must be based upon facts declared by this Act to be relevant, and duly proved:*
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> *Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."*

16. It is clear that the two provisos appended to Section 165 of Evidence Act circumscribe the jurisdiction and authority of the judge presiding over the trial to invoke his power to put questions to a witness, such power apparently not being available to render a decision on facts which are not relevant, or on facts which are not duly proved, and it also not authorizing the judge to compel any witness to

answer any question, or to produce, any document which such witness is entitled to refuse to answer, or produce, under the specified statutory clauses. Noticeably, Section 132 of the Evidence Act, as quoted above, stands out from the said exclusion. Noticeably again, by virtue of Section 132 Evidence Act, a witness is not entitled to refuse to answer any question only because it might be self-incriminating (directly or indirectly) or that it might expose him (directly or indirectly) to a punitive action, he by virtue of the proviso appended to Section 132 Evidence Act being immune from arrest or prosecution on account of the answer which he has been compelled to give, unless the answers given are found to be false leading to a charge of perjury.

17. The respondents have relied on *Mohan Lal Shamji Soni vs. Union of India and Anr. 1991 Supp (1) SCC 271* and *Zahira Habibulla H. Sheikh and Anr. Vs. State of Gujarat and Ors. (2004) 4 SCC 158*, to argue that the power under Section 311 Cr. PC being discretionary, the court being expected to be neutral, the decision of the trial court not to exercise such jurisdiction to compel recall of DW-1 for answering the questions which he had refused to answer earlier should not be interfered with. This court finds the cases cited of no help to the respondents. The object of the criminal trial is to reach out to the truth. DW-1 was produced by the accused persons on their own volition. Given the background facts mentioned earlier, the complainant is within his legitimate rights to insist on clarity in as much as the defence taken, and the credibility of the word of the DW-1, have to be tested properly. The refusal to answer such questions

does give rise to the argument, and the possibility, that the facts narrated by the witness may have been invented. It is rather in the interest of the accused, as indeed of DW-1, that clarity as to the inquiry made to confirm the authenticity of the facts published be confirmed by disclosing the names of the individuals from whom such facts had been gathered or verified.

18. Noticeably, while refusing to answer, DW-1 had not given any reason. Undoubtedly, he has certain rights under the law which include the fundamental right under Article 20(3) of the Constitution of India. But then, at the time of his deposition (as DW-1), he was appearing in the criminal court – not as a person accused of an offence but – as a witness whose rights and obligations are spelt out clearly in Section 132 of the Evidence Act quoted above. The application under Section 319 Cr. PC has not been decided. Mere pendency of such prayer does not mean the fourth respondent acquires certain superior rights over and above Section 132 of the Evidence Act. As regards the freedom of speech and expression, as enshrined in Article 19(1)(a) of Constitution of India, all that needs to be said at this stage is that such freedom comes with the exceptions also prescribed by the *suprema lex*.

19. The power given to the judge presiding over a criminal trial by Section 165 of the Evidence Act is expected to be used to bring clarity, particularly when a smoke-screen is attempted to be created in as much as such smoke-screen hinders the search for the truth. This court agrees with the submissions of the complainant that given the

refusal on the part of the witness (DW-1) to answer the above mentioned queries in the cross-examination, it was the duty of the presiding judge to exercise his jurisdiction and power under Section 132 read with Section 165 Evidence Act to insist on answers to be given in as much as refusal to answer is also a penal offence (see Section 179 IPC).

20. As mentioned above, the fourth respondent (DW-1) has not indicated till date as to how the information sought from him by questioning in the above nature is privileged. It is not his choice to answer or refuse to answer. Once he has voluntarily entered the witness box, he is bound to answer unless he makes out a proper case justifying his refusal to answer under the law. That exercise was never done before the trial court. The trial judge seems to have abdicated his responsibility in terms of Section 132 and Section 165 of the Evidence Act.

21. In the considered view of this court, the impugned order dated 06.09.2016 of the CMM declining the prayer for recall of DW-1 for further cross-examination so as he to be compelled to answer the questions which he had earlier refused to answer cannot be upheld. The said order, thus, is set aside. The prayer to the said extent is hereby allowed. The trial court is directed to recall the fourth respondent (DW-1) and have him tendered for further cross-examination by the complainant which exercise, however, shall be restricted to reiteration of the questions about disclosure of the information which the said witness had earlier refused to give

statement on and further questions, if any, ancillary thereto. While presiding over such proceedings, the trial judge will be duty bound to bear in mind his responsibility, *inter alia*, under Section 165 of the Evidence Act and the obligation of the witness, *inter alia*, under Section 132 of the Evidence Act. If the witness claims any privilege against disclosure, he will be duty bound to state his reasons, on which claim of privilege the presiding judge will be duty bound to render a decision after hearing all concerned. It is trite that if the claim for privilege against disclosure of information sought to be ascertained by such cross-examination is found to be correct and proper under the law, the presiding judge will pass necessary orders disallowing such questioning. Conversely, if the claim of privilege is rejected, the presiding judge will be duty bound to issue necessary directions compelling the witness to answer and, in case of his persistence with the refusal, to initiate all such action as is envisaged under the law. Ordered accordingly.

22. For removal of doubts, however, it is clarified that nothing in this order shall be construed as reflective of opinion on the claim of privilege of the fourth respondent against disclosures.

23. The petition and the application filed therewith are disposed of in above terms.

R.K.GAUBA, J.

FEBRUARY 28, 2019
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