

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

% *Judgment pronounced on: 29th June, 2015*

+ **CRL.M.C. No.840/2008**

AIR MARSHAL HARISH MASAND Petitioner
Through Mr.Arvind K. Nigam, Sr. Adv.
along with Mr.Samrat Nigam and
Mr.Manish Sangwan, Advs.

versus

STATE (GOVT OF NCT OF DELHI) & ANR Respondents
Through Mr.M.N.Dudeja, APP for the State
Mr.A.J. Bhambani, Sr. Adv. with
Mr.Siddharth Yadav and Mr.Arvind
Kumar, Advs. for R-2 to 6.

+ **CRL.M.C. No.1584/2008**

AJITH PILLAI Petitioner
Through Mr.A.J. Bhambani, Sr. Adv. with
Mr.Siddharth Yadav and Mr.Arvind
Kumar, Advs.

versus

STATE (GOVT OF NCT OF DELHI) & ANR Respondents
Through Mr.M.N.Dudeja, APP for the State
Mr.Arvind K. Nigam, Sr. Adv.
along with Mr.Samrat Nigam and
Mr.Manish Sangwan, Advs. for
R-2.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 482 of the Cr.P.C. read with Article 227 of the Constitution of India for setting aside the impugned portion of the order dated 26th February, 2008 passed by the Metropolitan Magistrate, Patiala House, New Delhi in Criminal Complaint Case No. 1168/1/2005 being Criminal Misc. No. 840/2008.

2. In the present petition, respondent No. 1 is the State, respondent No. 2 is the publisher, printer and owner of the weekly magazine OUTLOOK, respondent No. 3 is the Editor in Chief (dead now) of the said magazine, as well as Editor as per Sections 5 and 7 of the Press and Registration of Books Act 1867, respondent No. 4 was the Managing Editor of the said magazine during the relevant period from November 2004 to March 2005, respondent No. 5 is the author of the offending articles in question while respondent No. 6 is the Senior Editor of the said magazine who has now, as a defence witness, voluntarily admitted his role in the publication of the offending article.

3. Shri Ajith Pillai has also challenged the impugned order dated 20th February, 2008 by filing of petition under Section 482 Cr.P.C. read with Article 227 of the Constitution of India for setting-aside the order summoning the petitioner as accused in Complaint Case No. 1168/1/2005 titled as 'Air Marshal Harish Masand vs. M/s Outlook Publishing (India) Pvt. Ltd.' passed by the Metropolitan Magistrate, Patiala House, New Delhi.

4. In his petition Ajith Pillai is seeking quashing of order dated 26th February, 2008 to the extent of summoning him as co-accused in the said criminal complaint. It is stated by him that the impugned order is bad in law, as well on facts as he had appeared as a defence witness in the said Criminal Complaint and was subsequently made an accused on the basis of the statements made by him as defence witness in the matter. He was neither named as accused in the said Criminal Complaint, nor indeed was the petitioner's name mentioned in any manner or in any capacity whatsoever in the said Criminal Complaint. No allegation was made against him in the said Criminal Complaint or in the proceedings. He being the Senior Editor and immediate superior of Shri Saikat Datta - on the editorial side at Outlook Publishing (India) Pvt. Ltd., appeared as DW-1 in the said Criminal Complaint and was cross-examined. The accused No. 4 Saikat Datta was the author of the said Article. In his petition, by order dated 13th March, 2008 his personal appearance was exempted before the trial court.

5. In the petition filed by Air Marshal Harish Masand, trial court proceedings were stayed. (Air Marshal Harish Masand be read as petitioner and Ajith Pillai be read as respondent in both the petitions). In view of common facts, both the petitions are being disposed of by single order. Respondent No.3 Mr. Vinod Mehta in Crl.M.C.No.840/2008 died after reserving the orders. A clarification was sought from both the sides on 29th May, 2015 who have

confirmed that the complaint against the deceased has become infructuous and final order be passed accordingly.

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 of 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.

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 Vice 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 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 facts 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.

11. At the stage of issue of notice in December 2006, the respondents No. 2 to 5 filed a Criminal Miscellaneous (Main) Petition No. 7946/2006 under Section 482 Cr.P.C on 2nd December, 2006 in this Court, challenging the orders of the trial court who issued notice without a stay on the trial, returnable on 29th May, 2007.

12. On 15th February, 2008, this Court allowed the respondents to withdraw their petition under Section 482 based on an application for withdrawal by respondent Nos.2 to 5.

13. On 14th December, 2007 the respondents/accused produced the Senior Editor Sh. Ajith Pillai, as their witness, DW-1 who admitted that he had approved the story and confirmed the role of the Editor/Editor-in-Chief. He verified the information that was only supposed to be known to Promotion Board Members from 3 very senior officers but non-Promotion Board Members, that it was the author's job to meet the Promotion Board Members while claiming that he knew these officers also, thus implying at least 2 such

members, and thus confirming the involvement of at least 5 senior officers in this particular offence, and the conspiracy leading to the offence, and thus clearly making out such officers also as the offenders in this case. Further, that while questions were asked from DW-1 to disclose the identity of such officers, he merely stated that “I know the name of the officers but I do not wish to disclose their identity” without claiming any protection under law or even a claim of confidentiality, if any at all, which prevented him from doing so and without any intervention by the trial court.

14. DW-1 claims the confidentiality of such information. The petitioner submits that it amounts to contempt while claiming that even Top Secret documents related to Defence come out thus indicating not only the violation of the Official Secrets Act(OSA) in this case but also confirming the possibility of continued violation of the OSA jeopardizing national security with impunity.

15. The cross-examination of the only defence witness DW-1 was completed on 22nd December, 2007 and the statement was made on behalf of the accused to close the defence evidence.

16. The matter was kept for final hearing on 24th January, 2008. In the meanwhile, the petitioner filed an application on 24th December, 2007 requesting the trial court to direct the accused to disclose the sources of information within its powers or, in the alternate, summon the likely suspects from amongst the Promotion Board Members under Section 311 Cr.P.C. or pass such orders as it may deem fit in the facts and circumstances of the case.

The petitioner/complainant also moved another application on 24th December, 2007 itself under Section 319 Cr.P.C. praying that DW-1 be impleaded as a co-accused in the case. The trial court passed a combined order on 26th February, 2008, allowing the application of the petitioner/complainant under Section 319 Cr.P.C. but declining to direct the accused to disclose the sources or summon the suspects.

17. The trial Court after hearing dismissed the application of the petitioner under Section 311 Cr.P.C., however, the Court allowed the application under Section 319 Cr.P.C. in which the prayer was made to implead DW-1 as accused in the case. He was summoned as an accused person. The said order was passed in his absence.

18. The extracts of the order dated 26th February, 2008 has been reproduced here as under:-

“26.02.2008

Present: Complainant in person
Sh. A.J. Bhambani Id counsel for accused,
accused exempted through Id counsel

Matter is fixed today for order on the application of the complainant U/s 319 Cr.P.C. to summon DW 1 Sh. Ajith Pillai as an accused in this case and the application of the complainant for direction to the accused to disclose the source of information on the basis of which the articles in question have been published.

I have heard the submission of the complainant and submission made by Id counsel for the accused at length. I have also carefully perused the record. Submission of Id counsel for the accused has been heard only in respect of

the application of the complainant for direction to the accused to disclose the source of information. For the sake of brevity I am not mentioning the arguments and the averments in detail in the present order and I am also not discussing the authorities relied upon by the parties with reference to each authority individually.

Firstly I shall take up the application of the complainant U/s 319 Cr.P.C. DW 1 Sh. Ajith Pillai voluntarily appear as a DW and voluntarily deposed that he had read the article by Mr. Saikat Dutta. He has also stated that he permitted the impugned articles to go for printing. Sh. Ajith Pillai is a senior editor of the magazine in question. The complainant could not have known about the role of Sh. Ajith Pillai unless information was furnished by the accused about his specific role and responsibility. The complainant has rightly argued that DW 1 Sh. Ajith Pillai is not entitled to the protection provided U/s 132 Evidence Act. In my opinion there is sufficient ground to array him as an accused in this case the application of the complainant U/s 319 Cr. P.C is allowed. DW Sh. Ajith Pillai be summoned as accused in this case for the next date.

Now, I take up the application of the complainant for direction to the accused to disclose the source of information. In his application itself the complainant has mentioned the names of the officers whom he suspects to have disclosed the secret/ confidential information to the accused. The authorities relied upon by the complainant do not pertain to a criminal case and in all these authorities the non-applicant were not accused before a criminal Court. It is also not disputed that direction for disclosure of the source of information can be given only if it is required in the interest of justice. The present complaint is a personal case of the complainant. As far as his concerned about the violation of the Official Secrets Act and the security of the nation are concerned he can give information to the Government of India and the Government may get the allegations inquired if it considers

it to be expedient. In my opinion, in the present case no direction can be given to the accused to disclose their source of information. Application of the complainant for direction to the accused to disclose their source of information/ examined witnesses U/s 311 Cr. P.C is accordingly dismissed.

Summons be issued to the accused Sh. Ajith Pillai on filing of PF for 14.5.08.

Sd/-
MM/ND
26.2.08

At this stage joint application for dasti copy has been moved by the both the parties with requisite court fee. Allowed.

Sd/-
MM/ND
26.2.08”

19. The main argument of the petitioner is that DW-1's evidence is given voluntarily by him and without any compulsion. He deposed with regard to his personal knowledge and approval that all the allegations came from Air Force Officers. It rather confirms a criminal conspiracy to defame and hurt the case of the petitioner. He himself in his evidence has stated that there are other people involved in the offence as makers of the defamatory allegations and conspirators. The law cannot overlook their involvement and not expose them merely because the witness claims an immunity/ privilege that does not exist for such wrongdoers.

Even he admits that the author met senior Air Force Officers and he also met some officers. He cannot refuse to disclose the

names of these persons and answer other related and relevant questions by merely saying "I do not wish to reveal" while the trial court sits as a mute spectator.

Section 132 of the Indian Evidence Act and paragraph 12 of the judgment reported as ***Raghubir Singh Gill vs. G S Tohra & Ors***, AIR 1980 SC 1362 and paragraph 7 to 13 and 15 of the judgment in ***Renu Sharma vs Collector of Customs***, 1991 (45) DLT 642 are relied upon in this behalf.

20. It is argued on behalf of the respondents that if the witnesses are made accused solely on the basis of their own depositions made in Court, no one would ever appear as witness; and this would be a serious detriment to public justice. Even otherwise, the petitioner was aware of the persons who he suspects may have been the source/s of information for the journalists who are accused in the said criminal complaint. There is no averment of any nature in the complaint against DW-1. Hence, he should not have been impleaded as an accused. Even in the impugned order while deciding the petitioner's application under Section 311 Cr.P.C., the trial court has stated as under:-

"Now, I take up the application of the complainant for direction to the accused to disclose the source of information. In this application itself the complainant has mentioned the names of the officers whom he suspects to have disclosed the secret/confidential information to the accused....."

21. Both the parties have referred large numbers of decisions in support of their submissions and they have also raised very interesting proposition of law and this Court really appreciate their skill by raising such legal issue and make their submissions. However, after going through the impugned order, this Court is of the view that the detailed order on merit is not required to be passed in view of the peculiar circumstances, as the trial court has incorrectly followed the procedure in the impugned order.

22. From the impugned order, the trial Court has erred in first deciding the application under Section 319 Cr.P.C. and then the application for compelling the witness to answer. It appears to the court that the impugned order has been passed contrary to the procedure and circumstances in the matter. In the case in hand, it ought not have been passed without first deciding the application under Section 311 Cr.P.C. filed by the petitioner. This is only reflective of the complete non-application of mind. The application to compel the witness to answer ought to have been decided first as an accused has no obligation to enter into the witness box. The trial Court, in fact, has not assigned any valid reason in the impugned order as to why the witness was not compelled to answer the questions as contemplated under Section 132 / 165 of the Indian Evidence Act. Whether the witness has already incriminated himself or not, it was to be considered while deciding the application under Section 311 Cr.P.C. To the contrary Section 132 of the Indian Evidence Act is cited in the order of the trial court

relying on the portion under Section 319 Cr.P.C. agreeing that there is no protection for DW-1. As a matter of fact, it appears to the Court that the trial court lost sight of the fact that at the instant time, DW-1 was not an accused. The summoning order at this stage was uncalled for. Although, as per settled law, a witness is legally bound to answer the question which is relevant to the matter in issue, even if the answer to such question is likely to criminate him directly or indirectly. The proviso to Section 132 of the Indian Evidence Act, no doubt, protects witness from being answerable under exceptional circumstances. In the present case, the respondent is taking the shelter under the proviso. Whether he is entitled or not for such protection, the same aspect ought to have been considered by the trial court who failed to assign any reason, therefore, the impugned order is not sustainable. The said issue is to be considered first before passing the order on the prayer made in the application under Section 319 Cr.P.C. which procedure has not been followed.

23. From the impugned order, the trial court has erred in first deciding the application under Section 319 Cr.P.C., then the passing of the order in the application filed by the petitioner is pre-mature. The said application ought to have been kept pending till the prayer made in the application under Section 311 Cr.P.C. is decided wherein it was prayed that he be summoned again for compelling the witness to answer as the Court should not have played the role of an umpire in an adversarial system.

24. Considering the overall facts and circumstances, I am of the considered view that the impugned order is liable to be set-aside. Both the applications filed by the petitioner are restored to their original position. The trial court is directed to first decide the application under Section 311 Cr.P.C. filed by the petitioner on merits after hearing both the parties and without any influence of the present order as no opinion has been expressed on merit of the case. In case, the prayer in the first application is granted in favour of the petitioner and after opportunity being given if DW-1 refused to give an answer, the trial court under those circumstances shall proceed to decide the second application in accordance with law.

25. Both petitions and all pending applications are disposed of accordingly.

26. The parties to appear before the trial Court on 10th August, 2015.

27. No cost.

(MANMOHAN SINGH)
JUDGE

JUNE 29, 2015