

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Criminal Misc. No. M-9501 of 2017 (O&M)

Date of decision : April 25, 2017

Kartar Singh Bhadana **Petitioner**

VERSUS

Central Bureau of Investigation & anr. **Respondents**

CORAM : HON'BLE MR. JUSTICE A.B. CHAUDHARI

PRESENT: Mr. R.S. Rai, Sr.Advocate, with
Mr. Gautam Dutt, Advocate, for the petitioner.
Mr. Sumeet Goel, Advocate, Retainer Counsel for CBI.
Mr. Sharad Aggarwal, Advocate, for respondent No.2.

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1. Whether Reporters of local newspapers may be allowed to see the judgment? YES/NO
2. To be referred to the Reporter or not? YES/NO
3. Whether the judgment should be reported in the digest? YES/NO

Per A.B. Chaudhari, J.

By the present petition, there is a challenge to the order dated 09.03.2017 (Annexure P-1), passed by the learned Special Judge, CBI, Haryana at Panchkula, in case RC-CHG2001A0035 dated 12.09.2001, by which the learned trial Court allowed the application under Section 311, Code of Criminal Procedure, filed by respondent No.2-Mahipal.

Learned senior counsel for the petitioner submitted that FIR under Sections 379/120-B, Indian Penal Code, and Section 13(2) read with Section 13(1)(d) of the Prevention of

Corruption Act, 1988, was registered against the petitioner on 12.09.2001. During investigation of the said FIR, statement of respondent No.2-Mahipal was recorded by the police under Section 161, Code of Criminal Procedure, on 26.02.2004. When the trial started, respondent No.2-Mahipal was examined as PW-22 on 06.09.2012 and he resiled from his statement under Section 161, Code of Criminal Procedure. Thereafter, the trial continued and, ultimately, on 12.02.2013, the prosecution closed its evidence. On 12.08.2015, an application under Section 311, Code of Criminal Procedure, was allowed and a witness was recalled for examination. Thereafter, on 29.10.2015, the prosecution evidence was again closed. The prosecution again wanted to examine two more witnesses, which prayer was allowed on 01.12.2015. Thereafter, the prosecution had filed one more application under Section 311, Code of Criminal Procedure, for examining Shri M.K. Puri, the then Deputy Superintendent of Police, CBI, Chandigarh, but the trial Court by order dated 27.01.2016, dismissed that application, inter alia, on the ground that it was belatedly filed. Said order was not challenged by the prosecution. Learned senior counsel for the petitioner contended that, thereafter, on 06.04.2016, statement of the accused under Section 313, Code of Criminal Procedure, was recorded and the accused examined two defence witnesses. On 10.10.2016, respondent No.2-Mahipal i.e. PW-22, filed an application of his own in his capacity as a witness who was already examined and cross-examined,

for recalling him for evidence on the ground that on 06.09.2012 when he had deposed as PW-22, he did not tell the truth because he was under the fear of the accused as the accused had threatened him at that time. The accused filed reply and disclosed the real reasons about private dispute and prayed for dismissal of the application. The trial Court, however, allowed the application by the impugned order.

Learned senior counsel for the petitioner contended that, in the first place, respondent No.2, who was only a witness i.e. PW-22, did not have the locus standi to file an application under Section 311, Code of Criminal Procedure, for recalling himself for recording his further evidence. He, then, contended that assuming respondent No.2 had a locus standi to file the application, the same could not have been allowed since the reasons given in the application are totally vague, false and baseless and could not have been accepted by the trial Court. He, then, contended that the said application was never filed by the prosecuting agency-CBI, which was taking care of the prosecution. It is contended that the trial Court ignored the reply filed by the petitioner to the said application about private dispute with respondent No.2. He, then, submitted that respondent No.2 had not supported the prosecution when he was examined on 06.09.2012 and as late as after a lapse of more than 4 years, he filed the application in question, which was clearly mala fide and was required to be rejected.

Per contra, learned counsel for respondent No.2 and

the CBI submitted that the application was bona fide since respondent No.2 himself wanted the truth before the court since he could not state the truth when his evidence was recorded on 06.09.2012 due to the threats imparted by the petitioner. Learned counsel for respondent No.2 relied upon the reasons given by the trial Court and submitted that the reasons given by the trial Court are legal, correct and proper. Learned counsel for respondent No.2 also relied on the decision of the Single Judge of the Bombay High Court in Fatehsinh Mohansinh Chauhan and others vs. Union Territory of Dadra and Nagar Haveli and others, 2004 Criminal Law Journal 150.

Learned counsel for the CBI supported the impugned order and submitted that clearly the aim is to find the truth and, therefore, this Court should not interfere with the impugned order.

I have heard rival counsel for the parties at length. I have also seen the impugned order and the reasons contained therein.

Section 311, Code of Criminal Procedure, reads, thus:-

“311. Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

Relying upon the above provision, learned counsel for respondent No.2 submitted that there is no prohibition anywhere in the above provision for the witness to apply for recalling himself for recording of evidence before the Court and, therefore, the witness also had the locus standi to make such an application.

I have carefully considered the said submission and I find it to be difficult to be accepted. Looking to the scheme of Code of Criminal Procedure, it is clear that the Prosecutor has to produce evidence before the Court for framing of charge and for proving the charge against the accused persons. A duty is cast upon the Prosecutor to do so. It is on the application made by the Prosecutor that the prosecution witnesses are examined before the Court. The Code of Criminal Procedure has assigned the duty to the Prosecutor for conduct of trial, recording of evidence of witnesses, for production of documents, additional evidence, withdrawal of prosecution and so on and so forth. The onerous responsibility to produce witnesses or drop the witnesses which the Prosecutor thinks unnecessary, is also cast on the Prosecutor. It is in that point of view that the locus standi of respondent No.2 is required to be examined. In my opinion, looking to the entire scheme of the Code and Section 311, a prosecution witness, in the instant case respondent No.2, would not be in a position to apply for recalling himself under Section 311, Code of Criminal Procedure, for recording of his evidence. It is made clear that power of the Court to recall a witness by

making a separate order giving reasons for recalling the witness is not at all curtailed. In the present case, it is significant to note that respondent No.2-Mahipal (PW-22) tendered his evidence on 06.09.2012 and did not support the prosecution or rather he turned hostile. It is after more than 4 years that he filed the application in question on the ground that at the time of recording of his evidence on 06.09.2012 he was threatened by the petitioner. A careful reading of para-3 of his application does not show on what date he was threatened and what he did after he was threatened; as to whether he lodged a report with the police station or with the Court, and why he kept quiet for all these years. Why he did not tell the truth when he was examined on 06.09.2012. The reasons given in the application are clearly false and bogus as stated in the reply filed by the petitioner to the said application. Respondent No.2 has an axe to grind against the petitioner. That is why he appears to have filed the present application. Thus, I hold that respondent No.2 had no locus standi to file the application under Section 311, Code of Criminal Procedure, for recalling himself as a witness.

Even on merits, I find that the application filed by respondent No.2 was clearly mala fide and with an ulterior motive. The decision of the Single Judge in Fatehsinh Mohansinh Chauhan's case (supra) has no application to the facts of the present case. The upshot of the above discussion is that the petition must be allowed.

Hence, I make the following order:-

ORDER:

- i) Criminal Misc. No.M-9501 of 2017 is allowed;
- ii) impugned order dated 09.03.2017 (Annexure P-1),
passed by the learned Special Judge, CBI, Haryana
at Panchkula, in case RC-CHG2001A0035 dated
12.09.2001, is quashed and set aside.

April 25, 2017
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(A.B. CHAUDHARI)
JUDGE