

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

(1)

CRR No.2251 of 2018 (O&M)

Inder Sain

.....Petitioner

Versus

C.B.I., Sector 30-A, Chandigarh

...Respondent

(2)

CRR No.2254 of 2018 (O&M)

Kuldip Singh and another

.....Petitioners

Versus

C.B.I., Sector 30-A, Chandigarh

...Respondent

Date of decision : 06.08.2018

CORAM : HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present : Mr. J. S. Bedi, Senior Advocate with
Mr. S. S. Brar, Advocate for the petitioners.

Mr. Sumeet Goel, Advocate with
Mr. Anubhav Tyagi, S.I., for respondent – C.B.I.

* * *

DAYA CHAUDHARY, J.

Both the afore mentioned criminal revision petitions *i.e.* CRR No.2251 of 2018 titled as Inder Sain Vs. C.B.I. and CRR No.2254 of 2018 titled as Kuldip Singh and another Vs. C.B.I. have been filed by the petitioners-accused to challenge impugned order dated 06.06.2018 in case

RC No.8(S)2003/CBI/SCB/Chandigarh and order dated 05.06.2018 in case RC No.10(S)2003/CBI/SCB/Chandigarh, respectively, passed by learned Special Judge (C.B.I.), Haryana at Panchkula, whereby the applications filed by the petitioners-accused under Section 311 of the Code of Criminal Procedure, 1973 (for short – “Cr.P.C.”) for recalling of the Investigating Officer namely M. Narayanan (PW-60 and PW-46, respectively), have been dismissed.

This order of mine shall dispose of both the afore mentioned criminal revisions. However, for the sake of convenience, the facts have been extracted from CRR No.2251 of 2018.

Briefly, the facts of the case as made out in the petition are that CBI Court at Panchkula is conducting the trial relating to alleged murder of one Ranjit Singh. Petitioner-accused Inder Sain is facing trial in said case which is likely to be concluded. One of the prosecution witness namely Khatta Singh (PW-31) had earlier resiled from his version while stepping into the witness box and he did not support the case of the prosecution. Said witness has stated that his initial deposition recorded under Section 161 Cr.P.C. on 21.06.2007 by the Investigating Officer was false by putting threat/pressure upon him. He was under pressure while making statement under Section 164 Cr.P.C. recorded by learned Duty Magistrate. Thereafter, the challan was presented against the petitioner and the co-accused. The Investigating Officer was examined as PW-60. Co-accused namely Baba Gurmeet Ram Rahim Singh was convicted in another case *i.e.* RC5(S)/2002 on 25.08.2017. Said PW-31 Khatta Singh moved an application under Section 311 Cr.P.C. on 14.09.2017 for recording his deposition again

stating that he became hostile on account of pressure/fear of Baba Gurmeet Ram Rahim Singh. Said application was dismissed by the Special Judge CBI on 25.09.2017. Thereafter, Khatta Singh approached this Court by filing CRR No.3592 of 2017. Said petition was allowed vide order dated 23.04.2018. In pursuance of the order passed by this Court, said witness Khatta Singh (PW-31) was re-examined before the CBI Court. During his re-examination, he proved his statement recorded under Section 161 Cr.P.C. by Investigating Officer namely M. Narayanan, the statement recorded under Section 164 Cr.P.C. by the then Duty Magistrate by discarding his earlier recorded statement, wherein it was stated that he was under the pressure and threat from the side of accused persons. His fresh statement was recorded on 08.05.2018. In the subsequent statement, he brought certain new facts with an improved version. Petitioner moved an application under Section 311 Cr.P.C. as he was aggrieved by the subsequent statement of PW-31 Khatta Singh with a prayer to recall Shri M. Narayanan (PW-60), the Investigating Officer to verify the confrontation/improvements made by PW-31 Khatta Singh. Said application was dismissed vide order dated 06.06.2018 (impugned order). Similar application under Section 311 Cr.P.C. was also moved in the other case *i.e.* RC No.10(S)2003/CBI/SCB/Chandigarh, which was also dismissed vide order dated 05.06.2018 (impugned order). Both said impugned orders are subject matter of challenge in the present petitions.

Learned senior counsel for the petitioners submits that initially the statement of Khatta Singh was recorded on 11.02.2012 and subsequently, application under Section 311 Cr.P.C. to re-examine him was

moved after a period of 5 years on 14.09.2017. Learned senior counsel further submits that now Khatta Singh has not only supported the case of the prosecution but improved his earlier version by way of some additions or omissions. The petitioners be allowed to cross-examine the Investigating Officer who got recorded his statement under Section 161 Cr.P.C. Learned senior counsel also submits that it would be in the interest of justice in case the clarification from the Investigating officer is made so that his statement may not remain unrebutted and in absence of such clarification by way of cross-examination of the Investigating Officer, great injustice would be caused to the petitioners. At the end, learned senior counsel submits that the delay would not cause any prejudice as only one opportunity is required to cross-examine PW-60 within a very short period. Learned senior counsel for the petitioners has relied upon judgments of Hon'ble the Apex Court in cases ***V.K. Mishra & Anr. Vs. State of Uttarakhand and another 2015(3) R.C.R. (Criminal) 899, Mannan Sk. and others Vs. State of West Bengal and another 2014(4) R.C.R. (Criminal) 617, Himanshu Singh Sabharwal Vs. State of M. P. and others 2008(2) R.C.R. (Criminal) 267, Rajaram Prasad Yadav Vs. State of Bihar and another 2013 (3) R.C.R. (Criminal) 726, P. Sanjeeva Rao Vs. State of A.P. 2012(3) R.C.R. (Criminal) 653 and Harnam Singh Vs. M/s Bhushan Metalics Ltd. 2007(1) R.C.R. (Criminal) 992***, in support of his arguments.

On the other hand, Mr. Sumeet Goel, learned counsel for the Central Bureau of Investigation has opposed the submissions made by learned senior counsel for the petitioners and submits that statement of PW-31 Khatta Singh recorded by the Investigating Officer was read-over to

him. It was admitted by him stating that he had gone through the statement and it was correctly recorded. Even as per the statement of the Investigating Officer it was specifically mentioned that he recorded the statement of Khatta Singh correctly without any addition and omission. It was also stated that said witness had read-over and made the statement after admitting it to be recorded correctly. Learned counsel for CBI also submits that once the statement has been duly recorded and the witness has also admitted to be duly recorded, there is no reason for recalling the Investigating Officer. Mr. Goel further submits that the Investigating Officer has already been cross-examined at length by the defence and the present application has been moved just to delay the proceedings. The order passed by the trial Court is well reasoned and no interference is required. At the end, learned counsel for CBI submits that the trial Court is the best judge to decide the relevancy of the questions put up by the defence counsel during cross-examination of a witness. The purpose to file application for recalling of Investigating Officer is to fill the lacuna in the prosecution case. It is the satisfaction of the trial Court to see as to whether it is essential to recall the witness for arriving at its just decision. There is no *bona fide* to file the application as it was filed after unexplained long delay. He has relied upon judgments of the Hon'ble Apex Court in case ***Rajaram Prasad Yadav Vs. State of Bihar and another*** (supra) and judgment of Delhi High Court in case ***R. K. Chandolia Vs.CBI and others 2014(9) R.C.R. (Criminal) 2073***, in support of his arguments.

Heard arguments of learned counsel for the parties and have also perused the impugned order and other documents on the file.

Facts of the case are not in dispute. The application moved by the petitioners for recalling of Investigating Officer Shri M. Narayanan PW-60 has been dismissed on the ground that the Investigating Officer has been cross-examined at length by the defence wherein it has been stated that said witness had read-over the statement recorded under Section 161 Cr.P.C. and had also stated in so many words that he had recorded correctly without any addition and omission. Said statement was read-over and explained to the witness. The trial Court has dismissed the application on the ground that the Investigating Officer has already been cross-examined at length by the defence. The application has been moved just to delay the trial without showing any *bona fide*. Chapter-X of the Indian Evidence Act, 1872 (for short – 'the Evidence Act') deals with the examination of the witnesses.

Different types of responsibilities are cast on the judge in different provisions of this Chapter while recording evidence. The Courts also have extensive powers for protecting the witnesses from the questions which are not lawful in cross-examination as provided under Sections 146 to 153 of the Evidence Act. Under Section 136, the Judge is not only to satisfy that the evidence which was to be led was relevant but, in what manner if proved, would be relevant. Section 137 of the Evidence Act gives a statutory right to the adverse party to cross- examine a witness. Similarly, Section 138 of the Evidence Act lays down the three processes of examination to which a witness may be subjected. It does not deal with the admissibility of the evidence. It provides that the examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his

examination-in-chief. Under this Section, the cross-examination can go beyond the facts narrated in examination-in-chief, but all such questions must relate to relevant facts. It does not mean that under the right of cross-examination, the party will have the right to ask irrelevant questions to oppress the witness. The "relevant facts" in cross examination has a wider meaning than the term when applied to examination-in-chief. For example, facts though otherwise irrelevant may involve questions affecting the credit of a witness but only such questions are permissible in the cross-examination as per provision of Sections 146 and 153 of the Evidence Act. The irrelevant question or not intended to contradict or qualify the statements in examination-in-chief, or, which do not impeach the credit of a witness, the same cannot be allowed in cross-examination.

Irrelevant cross-examination not only adds to the litigation, but wastes public time. The Court is not to act as a silent spectator when evidence is being recorded. The Court has full power to prevent continuing irrelevant questions and repetition in cross-examination and also to prevent any abuse of right of cross-examination. The Court is having power to control the cross-examination apart from the Evidence Act as also the Code of Criminal Procedure. Section 146 of the Evidence Act though relaxes the ambit of cross-examination and permits the putting of questions relating to the trustworthiness of the witness, but such questions must be relevant for the purpose of impeaching the credibility of the witness.

It has been held in various judgments of Hon'ble the Apex Court as well as of this Court that trial Judge is the best Judge to decide the relevancy of questions put by the defence counsel during cross-examination

of a witness.

This Court is having extraordinary powers under Article 226 or Article 227 of the Constitution of India but the same is to be exercised when there is illegality or perversity which has resulted in miscarriage of justice. Such exercise cannot be used for filling the lacuna in prosecution case unless the facts and circumstances of the case make it apparent that exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice. It is also relevant that the discretionary power is to be exercised judiciously and not arbitrarily. It is for the Court to satisfy itself that it is essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case. The purpose and object of Section 311 Cr.P.C. imposes a duty on the Court to determine the truth and to render a just decision. Accordingly, the power under Section 311 Cr.P.C. to be exercised in order to meet the ends of justice for valid reasons but with care and caution. Hon'ble the Apex Court in **Rajaram Prasad Yadav's** case (supra) has laid down the following principles which are to be borne in mind while dealing with an application under Section 311 Cr.P.C. :-

- a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?
- b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.
- c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to

summon and examine or recall and re-examine any such person.

- d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.
- e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.
- f) The wide discretionary power should be exercised judiciously and not arbitrarily.
- g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.
- h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.
- i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.
- j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.
- k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court

should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

- l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.
- m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.
- n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

The object of the Court is to discover truth. Section 311 of the Code is one of such provisions of the Code which strengthens the arms of a Court in making efforts to get the truth by procedure sanctioned by law. It empowers the Court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or to examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court is to form an opinion that for the just decision of the case recalling or re-examination of the witness is necessary.

The exercise of this power is to be guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. The purpose is not to fill up the lacuna. Whether recalling of a witness is for filling up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. It is for the Court to consider all the circumstances and decide as to whether the prayer for recall is genuine or not.

In the present cases, while moving applications under Section 311 Cr.P.C. by the petitioners, no such *bona fide* has been shown. Only on this ground that the witness is turned hostile because of pressure upon him, the applications have been moved at the fag end of the trial. The purpose appears only to delay the proceedings.

In absence of any plausible reason for recalling the Investigating Officer (PW-60 and PW-46, respectively in both the cases), the learned trial Court has rightly dismissed the applications in both the cases by passing a detailed reasoned orders and as such, no interference is required by this Court.

Accordingly, both the present petitions being devoid of any merit are hereby dismissed.

However, the trial court shall proceed with the cases and ensure that the trial be concluded at the earliest.

06.08.2018

sunil yadav

**(DAYA CHAUDHARY)
JUDGE**

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No