

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

CRM-M No.47488 of 2017 (O&M)

Date of decision: 08.04.2019

Malkiat Singh

....Petitioner

Versus

State of Punjab and others

....Respondents

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Aminder Singh, Advocate
for the petitioner.

Mr. Joginder Pal Ratra, DAG, Punjab.

Mr. S.S. Salar, Advocate
for respondents No.2 and 3.

Mr. K.S. Chahal, Advocate
for respondent No.4.

ARVIND SINGH SANGWAN J.

Prayer in this petition is for setting-aside the order dated 30.10.2017 vide which the application filed by the petitioner for leading secondary evidence to prove the Death Certificate of one Gurnam Kaur, in FIR No.98 dated 11.04.2013 registered under Sections 419, 420, 465, 467, 468, 471 and 120-B of the Indian Penal Code (in short 'IPC'), was dismissed.

Brief facts of the case are that the petitioner got the aforesaid FIR registered against the accused persons with the allegations that he is in possession of the disputed land and the accused persons in conspiracy and connivance with the revenue official forged a fake Death Certificate of one Gurnam Kaur and on the basis of the

same, got the mutation of land measuring 102 bigha in favour of Pritam Singh. The petitioner submitted a complaint before the Sub Divisional Magistrate, Sangrur and after conducting an enquiry, found that the Death Certificate was fake and on the basis of the report, the aforesaid FIR No.98 was registered.

After completing the investigation, challan was presented against 02 accused persons namely Buta Ram and Harbans Singh.

Thereafter, on an application moved by the prosecution under Section 319 Cr.P.C. Hardial Singh, Patwari was also summoned as an accused vide order dated 21.09.2016.

The petitioner has moved an application under Section 311 Cr.P.C. for allowing him to lead secondary evidence to prove the photocopy of the Death Certificate of Gurnam Kaur, on the basis of which the mutation was sanctioned.

The trial Court vide impugned order dated 30.10.2017, dismissed the application. The operative part of the order reads as follows:-

7. Having heard the submissions behalf of the rival sides a perusal of the record shows that in this case no attempt has been made by the prosecution to reveal as to in whose possession exactly the forged death certificate is in. The application does not ascribe directly as to which among the accused is in direct possession of the original forged death certificate. There is nothing on the record suggest that any attempt has been made by the prosecution to trace out the whereabouts of the original death certificate. After conclusion of the detailed investigation, which includes an inquiry conducted at his own level by the SDM is to, the prosecution had filed the challan in this

case along with copy of the death certificate which is reported to have been forged by the accused. However, no attempt had been made during the investigation by the prosecution to locate the whereabouts of the original death certificate. No application was made by the prosecution under section 91 Cr. PC during the investigation to direct the accused to produce the original death certificate. Without moving any such appropriate application, the prosecution is not within its right in arguing that one among the accused is in possession of the original forged death certificate.

8. As per the ordinary procedure carried out in routine by the revenue authorities, whenever the mutation is entered regarding the death of a person and succession to the property of such a person, the routine exercises that the original document of death is produced before the revenue officer i.e. Patwari. The original document is kept in the register roznamcha of the Patwari. During the investigation, no effort seems to have been made by the investigating team's to have taken into its possession the original forged death certificate from the Patwari from his roznamcha. It is also pertinent to be mentioned here that the Patwari was By name as a witness in this case but it was not mentioned that he would be required to produce the original death certificate. There is nothing in the record suggests that the investigating team at satisfied itself that the original death certificate was in the possession of the Patwari. Later on, the said Patwari has been Summoned as an additional accused in this case by the Ld. Predecessor of the Court exercising the power under section 319 Cr.P.C. however there is no material on the record to suggest that the Patwari might ever have been in possession of the original for death certificate or that he might have destroyed the same in order to avoid

detection of the crime and to tamper with the evidence. The story that the accused are in possession of the original death certificate has been propounded for the 1st time by the prosecution by the instant application and never before has it ever been suggested on behalf of the prosecution that the original death certificate could not be recovered during the investigation by the Police team because the same had been concealed by the accused. The prosecution is required to put forth its case in a cogent and convincing manner at the inception of the trial so that the accused is not kept in the dark about the defence which he is to take. That is why the provision under section 207 Cr.P.C. and enshrined which requires delivery of all the documents relied upon by the prosecution at the inception of the trial to the accused. The inquiry in the nature of a fishing inquiry is to be made by the prosecution during the stage of investigation. With criminal trial is not meant to be a fishing enquiry where the prosecution may take divergent stands at each step. A criminal trial is supposed to move in a country direction and does not meant to offer surprised to the accused at each and every step. The scheme of the Cr.P.C. suggests that the criminal trial has to take a concrete shape and move in schemed manner. The prosecution cannot be allowed to take a haphazard manner of reducing the evidence by moving one application after the other, without any basis in the same, as if the prosecution was trying to fish out the evidence. In this context it is pertinent to be noted here that in this case one after the other application has moved at each stage of the trial why the prosecution either to summon the additional accused or to summon the additional evidence. One application for producing the additional evidence has already been allowed in favour of the prosecution and even the said additional evidence has been led in this case.

At that time, it appears that the prosecution lost sight of that the original death certificate had not seen the light of the day in the trial and it appears that one application after the other is been filed by the prosecution without do application of mind to the facts of the case just with the purpose to linger on the matter and to avoid conclusion of the trial. It is also worth to be appreciated that even though the lady Gurnam Kaur whose estate is supposed to be involved in this case and who is forged death certificate is supposed to have been produced by the accused before the revenue authorities for sanctioning her mutation, is supposed to be still alive yet for the reasons best known to the prosecution, she has not yet been examining the prosecution evidence is and even no effort has made by the prosecution of the complainant said to someone said witness, despite the fact that the complainant side is being separately represented in this case by a private counsel. Under the circumstances it appears that even though the material evidence has been concealed by the prosecution for the reasons best known to it, it is moving one application after the other just to linger on the conclusion of the trial and it appears that every effort is made by the prosecution to bide the time. Hence this is another factor which goes against the prosecution and depicts its entire conduct in a bad light.

9. No doubt in this case it is necessary for the prosecution to prove for a successful trial, the original death certificate or instead its copy by way of secondary evidence. However, in this case the prosecution has failed to establish the background material which is necessary for his court to allow the prosecution to lead the secondary evidence within the purport of section 65 of the evidence Act. It is the requirement of section 65 evidence Act that must be cogently established that a document is in the

possession of a particular party and despite grant of the opportunity, the said party is intentionally not produce any document or that the said document has been destroyed or otherwise is incapable of production in the court. In this case the mandatory notice under section 66 evidence has not been served by the prosecution of the accused calng upon them to produce the original death certificate. Rather, the prosecution is straightforward move the application for allowing the secondary evidence which is against the prescribed procedure for moving the application for production of the secondary evidence. There is no material on record nor has it come force from the mouth of any material witness that the original death certificate might have been seen by any of the investigating officers or by any of the Private witnesses during the course of investigation or at any time prior to the same. It is also worth to be appreciated that it is not come force during the prosecution evidence that during the investigation or at any time after lodging of the FA, any attempt might have been made by any of the concerned persons to destroy the original forged death certificate so as to conceal the material evidence from the Court. Moreover, there has not come forth any evidence from the prosecution to show that the accused might have been given an opportunity to produce the original death certificate and that they might have failed to produce the same in the court. Under the circumstances, it is clear that there do not exist sufficient circumstances to show that the prosecution has complied with the mandatory provision of section 66 evidence Act. There do not exist option circumstances in this case to establish that the prosecution has succeeded in proving that the original death certificate either existed at any point of time or that it has been destroyed later on or even that the accused might be

in possession of the said original death certificate or that they might have destroyed the same this to conceal the material evidence from the Court. It appears that a hypothetical situation has been created by the prosecution just read the behest of the complainant who has merely given his own account without any substantive evidence to corroborate his version. The hypothesis of the prosecution that the accused are in possession of the original death certificate is a mere wishful thinking without any concrete basis with the same. Under the circumstances this court is handicapped, in the absence of sufficient material the record, to attract the provision under section 65 of the evidence Act and to allow the prosecution to lead the evidence on the said subject matter. Under the circumstances found that the application moved by the prosecution is devoid of any basis with the same and is devoid of merits and is therefore liable to be dismissed. Accordingly, the application moved by the prosecution is dismissed. Papers be filed.”

Counsel for the petitioner has argued that the original copy of the fake Death Certificate of Gurnam Kaur, is not available. Even the enquiry conducted by the Sub Divisional Magistrate, Sangrur was based on the photocopy of the Death Certificate of Gurnam Kaur and therefore, the petitioner be permitted to lead secondary evidence to prove the photocopy of the Death Certificate of Gurnam Kaur.

Counsel for the petitioner has further submitted that he has obtained the photocopy of the Death Certificate from the Sub Divisional Magistrate office, which was part of 173 Cr.P.C. report.

Reply on behalf of the respondents No.2 and 3 is on record.

Counsel for the respondents has heavily opposed the prayer of the petitioner and has submitted that as per the list of documents attached with the report under Section 173 Cr.P.C., it is clearly mentioned that the photocopy of the Death Certificate of Gurnam Kaur is attached and therefore, during the investigation, the police could not collect the alleged original fake Death Certificate of Gurnam Kaur and, therefore, the petitioner cannot be permitted to lead the secondary evidence qua a document, original of which is not proved and therefore, loss of the said document can also not be proved in respect of which the secondary evidence can be allowed.

Counsel for the respondents has further submitted that this is the 3rd application filed by the petitioner under Section 311 Cr.P.C. On an earlier occasion, the petitioner moved a similar application for summoning the enquiry report along with the revenue record and the bank account of Hardial Singh, Patwari and at that time, the petitioner never made any prayer for leading secondary evidence. It is further argued that this application was allowed and the enquiry report is already on record, which was also based on a photocopy of the Death Certificate.

Counsel for the respondents has further argued that when the 2nd application was moved, the petitioner was well aware of the alleged Death Certificate since the beginning of the case and while appearing as a witness on 24.08.2016, 03.04.2017 and 17.08.2017, he failed to prove the Death Certificate despite the fact that in his cross-examination, the enquiry conducted by the Sub Divisional Magistrate was put to him and therefore, the petitioner want to fill up the lacuna in the evidence. It is

also submitted that the petitioner has failed to produce the original document and no notice was given by the petitioner under Section 66 of the Indian Evidence Act. It is further submitted that the accused – Hardial Singh, Patwari was not named in the FIR and he has only been summoned under Section 319 Cr.P.C. and therefore, the application has been filed at a highly belated stage.

After hearing the counsel for the parties, I find no merit in the present petition. The trial Court has recorded a well-reasoned, cogent finding that the report under Section 173 Cr.P.C. was presented after the enquiry was concluded by the Sub Divisional Magistrate, Sangrur. The prosecution has not moved any application under Section 91 Cr.P.C., during the investigation to direct the accused persons to produce the original Death Certificate. Hardial Singh, Patwari, who entered the mutation was not named as an accused in the FIR and therefore, he was not joined in the investigation and was later on, summoned under Section 319 Cr.P.C. Even against this additional accused, there is nothing on record to suggest that he was ever in possession of the original Death Certificate or he may have destroyed the same. The petitioner while appearing as a witness has nowhere stated that the original Death Certificate was in possession of any of the accused persons, therefore, the petitioner has failed to prove that the original Death Certificate was ever part of the revenue record as it is own case of the petitioner that the Sub Divisional Magistrate, enquiry forming basis of the FIR is also based on the photocopy of the Death Certificate of Gurnam Kaur. The trial Court has further recorded a clear finding that no sufficient circumstances are made out to show that the

prosecution has complied with the mandatory provisions of Section 66 of the Indian Evidence Act as even the prosecution has failed to prove that the original Death Certificate ever existed at any point of time. Therefore, I find no ground to invoke the provisions of Section 65 of the Indian Evidence Act and to allow the prosecution to lead secondary evidence.

This petition is accordingly *dismissed*.

(ARVIND SINGH SANGWAN)
JUDGE

08.04.2019
yakub

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No