

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.03.2015

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

CRL.R.C.No.238 of 2015

and M.P.No.1 of 2015

1.Nagarajan

2.Durai @ Duraisamy

... Petitioners/Petitioners

vs.

The Deputy Superintendent of Police,
Crime Branch CID,
Coimbatore-18.

... Respondent/Respondent

PRAYER: Criminal Revision Case filed under Sections 397 and 401 of Criminal Procedure Code to set aside the order dated 23.10.2013 in SC.No.77 of 1992 on the file of the learned I Additional Subordinate Judge, Coimbatore.

For Petitioner : Mr.C.Deivasigamani

For Respondent : Mr.P.Govindarajan, APP

JUDGMENT

Revision case is filed against the order dated 23.10.2013 in SC.No.77 of 1992 on the file of the learned I Additional Subordinate Judge, Coimbatore.

2. Material on record discloses that in SC No.77 of 1992, on the file of the learned I Additional Subordinate Judge, Coimbatore, prosecution has not examined some witnesses. Hence, the petitioner/A3 and others have filed a petition in CMP No.270 of 2013, under Section 233 CrPC, to examine 31 witnesses on the side of defence.

3.Prosecution has objected to the relief sought for in CMP No.270 of 2013. However, by observing that when the witnesses cited by the prosecution were dispensed with and that there is no bar for calling the said persons, as defence witnesses, vide order dated 10.04.2013 in CMP.No.270 of 2013, the learned I Additional Subordinate Judge, Coimbatore, allowed the petition, permitting the accused to examine the witnesses in the list furnished by the accused 3 and 6, except the persons, who were already examined by the prosecution. Head Clerk of the said Court, has been directed to

encircle the names of the persons in the list, who had already been examined as prosecution witnesses and place it before the Lower Court. Subsequently, on 23.10.2013, when SC.No.77 of 1992 came up for hearing, the learned I Additional Subordinate Judge, Coimbatore, has recorded as follows:

"A2-died. A1, A3, A4, A5, A6, A7- Bail. Issue second summons to all witnesses. A1, 4, 3, A3, 1, 7 allowed. Others present. DW summons not served. Cover returned as some other reasons. On perusal of cases, the witnesses address is not proper. The accused did not take effective steps. STG. The case is pending from 1992, keeping this bundle does not yield fruitful result. Hence, D.E. Closed by Court. Arguments by 13.11.2013."

4. Being aggrieved by the closure of defence evidence, the petitioners/accused 3 and 6, have filed CrIOP No.16467 of 2014 to quash the order passed in CMP No.270 of 2013 in SC.No.77 of 1992 on the file of the learned I Additional Subordinate Judge, Coimbatore. After hearing both parties, by order dated 05.08.2014, in CrIOP No.16467 of 2014, this Court has passed the following orders:

"Heard both sides.

2. Few facts, which led to filing of this petition, are as follows:

The petitioners are the accused in SC No.77/1992 on the file of the I Additional Sub Judge, Coimbatore. After examination of the prosecution side witnesses, the petitioners have come forward with CMP.No.270/2013 for issuing summons to some of the prosecution side witnesses, who were, according to the prosecution, either dispensed with or examined by the prosecution. The petition was after due contest, allowed by order dated 10.4.2013. Thereafter, summons were sent to the witnesses and the summons sent were returned unserved for want of proper address. In view of the same, the trial court has chosen to close the defence side evidence. While doing so, it is stated in the order dated 23.10.2013, which is impugned herein that as the accused did not take effective steps to send summons to the correct address and as the case was pending from 1992, keeping the bundle did not yield fruitful result. Aggrieved against the same, the petitioners/accused filed the present petition before this court for setting aside the order made in CMP.270/2013 in SC.No.77/1992.

3. The learned counsel for the petitioners has questioned the correctness of the order on the sole ground that the addresses to which summons were sent, were given by the prosecution, as such, the accused cannot be held responsible for the summons not being served on the witnesses. This Court is not inclined to accept the contention so raised on the petitioners' side.

4.It may be true that the addresses to which summons were sent to the witnesses, are given by the prosecution. The addresses were given, while filing the charge sheet in Cr.No.1627/88 which was taken up on file as SC.No.77/1992 in the year 1992 itself, as such, the witnesses may be now at various places within and outside of State of Tamil Nadu. In that event, it is the duty of the accused to ascertain the correct address of the witnesses and place it before the trial court for issuing summons to the witnesses. The accused ought to have, after obtaining due orders from the trial court for summoning the witnesses, furnished correct address of the witnesses and on the failure of the accused to do so, the trial court has rightly chosen to close the defence side evidence, for want of proper address of the witnesses. This court finds no error or infirmity in the order so passed by the trial court, warranting interference.

5.In the result, this criminal original petition is dismissed. Consequently, connected miscellaneous petition is closed."

5.Material on record further discloses that after the dismissal of the quash petition, CrIOP.No.16467 of 2014, a Writ petition in W.P.SR.No.90918 of 2014 has been filed for a Writ of Certiorarified Mandamus, calling for the records to quash the order dated 23.10.2013 in SC.No.77 of 1992 on the file of the learned I Additional Subordinate Judge, Coimbatore, and consequently, to direct the Deputy Superintendent of Police, Crime Branch (CID), Coimbatore-18, respondent therein, to call the witnesses cited by the petitioners, for examination in SC.No.77 of 1992.

6.From the reading of the order, it could be deduced that the Registry seemed to have raised objections regarding maintainability of the Writ Petition. Thus, the Writ Petition has been disposed of at the WP.SR.Stage itself in WP.SR.No.90918 of 2014, on 09.09.2014. While sustaining the Office Note, a learned Single Judge, at Paras 3 and 4 of the order in WP.SR.No.90918 of 2014, dated 09.09.2014, ordered as follows:

"3.The petitioner shall invoke the jurisdiction of the Revisional Court under Section 397 and 401 of the Code of Criminal Procedure or at least invoke the powers of the Court under Section 482 of the Code of Criminal Procedure. This is not a fit case for invoking jurisdiction under Article 226 of the Constitution.

4.Therefore, leaving it open to the petitioner to work out his remedy in terms of the Code of Criminal Procedure, the Office Note is sustained. No costs."

7.Being aggrieved by the same, the petitioner has filed a Writ Appeal in W.A.No.1420 of 2014 and on 05.11.2014, the Hon'ble Division Bench, has passed the following orders:

"The instant intra court appeal arises from the order dated 9.9.2014 passed by the Writ Court in W.P.No.90918 of 2014 holding that the Writ Petition against the order dated 23.10.2013 passed in SC No.77 of 1992 on the file of the First Additional Subordinate Judge, Coimbatore, is not maintainable and that the petitioner very well can invoke the jurisdiction of revisional Court under Sections 397 and 401 of the Code of Criminal Procedure.

2.The contention of the learned counsel for the appellants before this Court is that the learned single Judge has failed to appreciate that examination of witnesses on the side of defence is not only a statutory right but also a fundamental right. It also involves breach of fundamental right. Thus, the petitioner is entitled to maintain the Writ Petition under Article 226 of the Constitution of India.

3.We have examined all aspects of the matter.

4.The order, which was impugned in the writ court, can be challenged by invoking the statutory remedy, under section 397 and 401 of Cr.P.C which is more effective and efficacious. We do not find any infirmity or irregularity in the order passed by the learned single Judge in W.P.No.90918 of 2014.

5.This writ appeal is accordingly dismissed. No costs."

8.Now, after the dismissal of the quash petition in CrIOP.No.16467 of 2014, and having failed to overcome the objections of the Registry as regards the maintainability of the Writ Petition filed, to quash the order dated 23.10.2013 in SC.No.77 of 1992, by which, the learned I Additional Subordinate Judge, Coimbatore, has closed the defence evidence in SC.No.77 of 1992, a fresh revision petition is filed by taking note of the observations made in the Writ proceedings.

9.Assailing the correctness of the order dated 23.10.2013, in SC.No.77 of 1992, Mr.C.Deivasigamani, learned counsel for the petitioner submitted that the Court below has shut down the defence evidence and therefore, there is no fair trial. He also submitted that what was sought to be quashed in CrI.O.P No.16467 of 2014, was the order dated 10.04.2013, made in CMP.No.270 of 2013, by which the Court below has directed the petitioners to deposit a sum of Rs.25,000/- to summon the witnesses and not the order made on 23.10.2013 in SC.No.77 of 1992 on the file of the learned I Additional Subordinate Judge, Coimbatore, and therefore, the order made in the quash petition is beyond the scope of the prayer sought for in the quash petition.

10.Perusal of the order made in CrIOP No.16467 of 2014 dated 05.08.2014, shows that closure of the witnesses on the side of the

defence was due to the fact that the accused/petitioner therein did not take any effective steps to send the summons to the correct address and that the case was pending from 1992 onwards. From the reading of the order in CrIOP No.16467 of 2014, dated 05.08.2014, nothing could be deduced that the petitioner was aggrieved over the deposit of Rs.25,000/-, directed by the Court below. When the abovesaid submission, goes to the very root of prayer sought for in CMP.No.270 of 2013 filed under Section 233 of CrPC, this Court, posed a question to the learned counsel for the petitioner, as to whether the abovesaid submission can be placed on record. Attention of the Learned counsel for the petitioner was also invited that if the submission, as advanced in this revision petition is accepted, then the very order dated 10.04.2013 made in CMP.No.270 of 2013 in SC.No.77 of 2013 on the file of the learned I additional Subordinate Judge, Coimbatore, permitting the petitioners/A3 and A6 to examine the witnesses cited in the list, as defence witnesses, would be erased. Despite this Court making an effort to clarify the position as above, learned counsel for the petitioner submitted that he would stand by the submission that the order of High Court in CrI.OP.No.16467 of 2014, is beyond the prayer sought for in CMP No.270 of 2013. In the light of the stand taken by the learned counsel for the petitioner, this Court, deems it fit to extract the order made in CMP.No.270 of 2013 in SC.No.77 of 1992 on the file of the learned I Additional Subordinate Judge, Coimbatore.

"The petition is filed to examine the witnesses, who have not been examined, as prosecution witnesses. About 32 persons have been named. The petition has been filed on 1st April 2013. Prosecution has made oral objections. On 05.04.2013, counter objections have been filed and for enquiry, it was posted on 08.04.2013. On 10.04.2013, the learned Judge has allowed the petition, permitting the accused to examine the witnesses in the list except those persons, who had already examined by the prosecution. Head Clerk is directed to encircle the name of the persons, who are already examined as prosecution witnesses and place it before the Court. Thus, the petition has been allowed on 10.04.2013."

11.As stated supra, the order made in CMP.No.270 of 2013 in SC.No.77 of 1992, on the file of the learned I Additional Subordinate Judge, Coimbatore, sought to be quashed in CrIOP.No.16467 of 2014, is the order dated 23.10.2013, by which the Court below has closed the defence evidence. That is why, repeatedly, contentions have been raised that the accused should be allowed to have an opportunity of the defence.

12.Perusal of the order made in CrIOP No.16467 of 2014, dated 05.08.2014, extracted in the foregoing paragraphs, makes it clear that on the challenge to the order dated 23.10.2010, made in SC.No.77 of 1992, this Court, finding no error or infirmity in the order of the

trial Court, warranting interference, has dismissed the quash petition.

13. Thereafter, contending inter alia that the petitioners have no other alternative remedy, W.P.SR.No.90918 of 2014 has been filed to quash the order dated 23.10.2013 in SC.No.77 of 1992. At para 5 of the supporting affidavit, to the Writ Petition in W.P.SR.No.90918 of 2014, the petitioners have extracted the order dated 23.10.2013 in SC.No.77 of 1992. In the supporting affidavit, the petitioners have also contended that the order made in CMP.No.270 of 2013, in SC.No.77 of 1992 has not been furnished and therefore, they have also sought for a prayer to dispense with the production of the certified copy of the order dated 23.10.2013 in SC.No.77 of 1992 on the file of the learned I Additional Subordinate Judge, Coimbatore.

14. As stated supra, Registry has made an objection to the maintainability of the Writ Petition and vide order dated 09.09.2014, in W.P.No.SR.90918 of 2014, objections of the Registry as to the maintainability, has been sustained. However, the Writ Court has observed that the petitioner shall invoke the jurisdiction of the Revisional Court under Sections 396 and 401 of the Code of Criminal Procedure or at least invoke the powers of the Court under Section 482 of the Code of Criminal Procedure.

15. CrI.O.P.No.16467 of 2014 to quash the order of the Lower Court, has been dismissed on 05.08.2014. W.P.SR., has been disposed of on 09.09.2014. From the observations of the Writ Court made on 09.09.2014, it could be deduced that the Writ Court had no opportunity to peruse the order dated 05.08.2014, made in the quash petition. On 09.09.2014, if the Writ Court had an opportunity to peruse the order made in CrIOP.No.16467 of 2014 dated 05.08.2014, in the humble opinion of this Court, certainly, the Writ Court would not have made an observation, stating that the petitioners could invoke the powers of the Court under Section 482 of the Code of Criminal Procedure. When the petitioner has failed to quash the order dated 23.10.2013 in SC.No.77 of 1992, that is, to quash the order of closure of evidence, it is evident that he has made an attempt to quash the said order, by issuance of a Writ of Certiorarified Mandamus. As stated supra, attention of the Writ Court, probably, was not invited to the details of the order made in the quash petition and thus, the Writ Courts have observed that the petitioner may take recourse to the provisions under Sections 397 and 401 CrPC. At this juncture, Mr.C.Deivasigamani, learned counsel for the petitioner submitted that the copy of the order in CrI.OP.No.16467 of 2014, dated 05.08.2014, was not made ready, when the Writ Court heard the maintainability.

For the reasons stated, this Court is of the view that there are no merits in this Revision Petition and hence, it is dismissed. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

To

1.The I Additional Subordinate Judge,
Coimbatore.

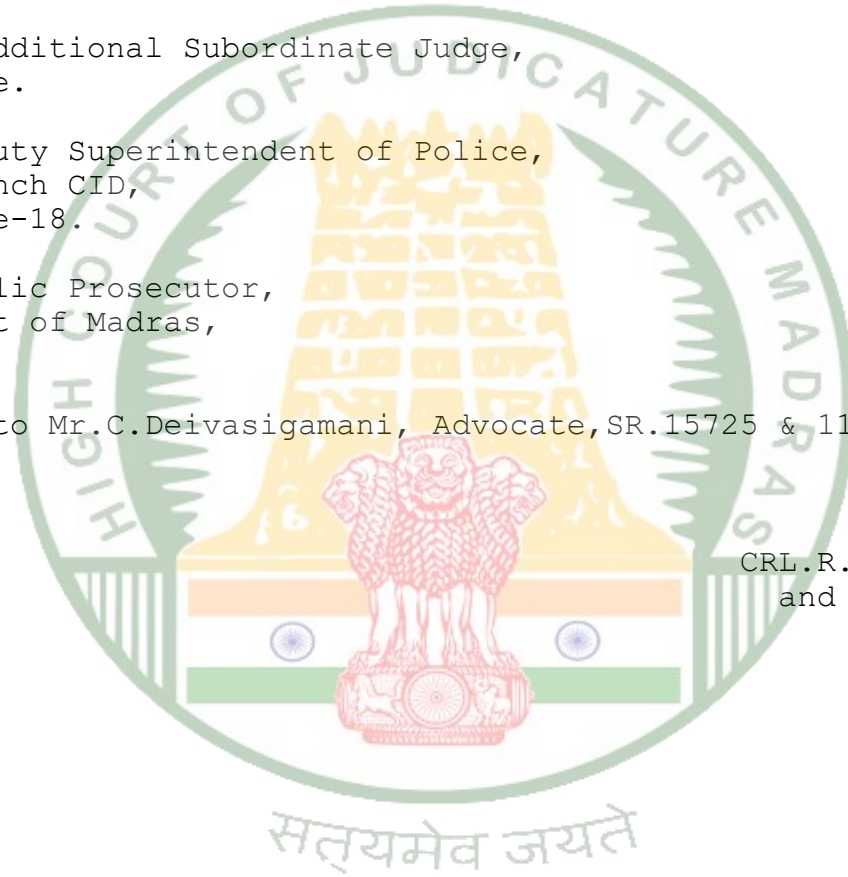
2.The Deputy Superintendent of Police,
Crime Branch CID,
Coimbatore-18.

3.The Public Prosecutor,
High Court of Madras,
Chennai.

+2 cc's to Mr.C.Deivasigamani, Advocate, SR.15725 & 11518.

sr(co)
krd 13/4

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