

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.07.2015
DELIVERED ON : 29.07.2015

CORAM:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH

Crl.O.P.Nos.18029 to 18031 of 2015
and M.P.No.1 of 2015 in Crl.O.P.No.18029 of 2015

B.Rajasekar ... Petitioner in all Crl.OPs./
Petitioner

Vs

P.Senthilkumar ... Respondent in all Crl.O.Ps./
rep. by power Agent
P. Ebenezer Joseph Raj Respondent

Prayer:- Criminal Original Petitions filed under Section 482 Cr.P.C. to set aside the order dated 10.07.2015 made in Crl.M.P.Nos.5157, 5161 and 5160 of 2015 in C.C.No.284 of 2013 on the file of the Judicial Magistrate Court No.II, Tiruppur.

For Petitioner Mr.R.Prabakar

C O M M O N O R D E R

These petitions have been filed to set aside the order dated 10.07.2015 made in Crl.M.P.Nos.5157, 5161 and 5160 of 2015 in C.C.No.284 of 2013 on the file of the Judicial Magistrate Court No.II, Tiruppur.

2. For the sake of convenience, the parties will be referred to as the complainant and the accused.

3. It is the case of the complainant that, the accused party borrowed a sum of Rs.7.5 lakhs on 16.11.2011 on a promissory note and also issued a cheque dated 18.01.2012 for Rs.7,65,000/-. When the accused did not repay the borrowed amount, the complainant presented the cheque for collection and the same was returned as "Payment Stopped by Drawer", following which the complainant issued a statutory notice on 27.02.2012 and on the accused not paying the money, filed a complaint under Section 138 of the Negotiable Instruments Acts before the Judicial Magistrate [FTC], Tiruppur, which was taken on file as C.C.No.284 of 2013.

4. The accused appeared before the trial Court on receipt of summons and the complainant was examined as P.W.1. The accused cross examined the complainant extensively. After the closure of

the evidence on behalf of the complainant on 23.02.2015, the matter was adjourned for defence evidence. The accused filed an application to recall the complainant for further cross examination, which was allowed by the trial Court on 31.03.2015, despite which the accused did not cross examine the complainant and he did not pay the necessary process for summoning the complainant. Therefore, the evidence was closed on 15.04.2015. Again the accused filed an application for recalling the complainant, which was allowed on 19.05.2015 on condition that, he should pay batta for issuing process. The case was adjourned to 26.05.2015, 02.06.2015 and 06.06.2015 and the accused did not take any steps to cross examine the complainant. Therefore, the evidence was closed on 11.06.2015 and the matter was posted to 30.06.2015 for judgment. At that juncture, the accused filed an application before the trial Court in Crl.M.P.No.5157 of 2015 for producing a conversation allegedly recorded between the accused and the complainant in the mobile phone of the accused. The accused also filed Crl.M.P.No.5160 of 2015 under Section 311 Cr.P.C. for examining one Balunathan and Senthilkumar [complainant] for the purpose of marking the recorded conversation. The accused filed Crl.M.P.No.5161 of 2015 under Section 315 Cr.P.C. for permission to examine himself as a defence witness for the purpose of marking the conversation and for speaking about other aspects. The trial Court dismissed all the three applications, namely Crl.M.P.Nos.5157, 5160 and 5161 of 2015 by three separate orders dated 10.07.2015, challenging each of which the accused is before this Court in three applications.

5. Heard the learned counsel for the accused.

6. The learned counsel for the accused submitted that, the recorded conversation between the accused and the complainant is essential and is admissible under Section 65(B) of the Indian Evidence Act. The learned counsel relied upon the judgments of the Supreme Court in (i) Kalyani Baskar v. M.S.Samppornam [(2007) 2 SCC 258] and (ii) T.Nagappa v. Y.R.Muralidhar [(2008) 5 SCC 633] to drive home the point that, the accused should be given a fair opportunity to adduce sufficient evidence to dislodge the presumption under Section 139 of the Negotiable Instruments Act. He also relied upon the judgment of this Court in P.Mariya Selvaraj v. C.Ganesan [2014 (144) AIC 411 (Mad., H.C.-M.B.)]. This Court has no quarrel with the propositions of law laid down in the aforesaid judgments. In this case, the petitioner has not even stated in his application in Crl.M.P.No.5157 of 2015, when and how the alleged conversation was recorded; what is the transcript of the conversation and how the conversation is relevant for the adjudication of this case. It must be remembered that the complainant was cross examined by the accused once and his request for further cross examination was allowed. Despite several opportunities given by the trial Court, he did not choose to cross examine the complainant. In P.Mariya Selvaraj v. C.Ganesan's case [cited supra], this Court had permitted the marking of the conversation after recording as follows:

"11. The accused in the cross-examination of the complainant, has established that there is a financial dealing between the complainant and Sankar which was settled in the Lok Adalat. The Lok Adalat paper was marked as Ex.R-1 before the Trial Court. Though I am unable to agree with the reasons given by the learned Magistrate for dismissing the application, I also find that the application cannot be allowed without the CD being first marked through some witness."

Without any fundamental basis, the accused has filed an application for marking the alleged conversation, which has been rightly rejected by the trial Court.

7. Similarly in Crl.M.P.No.5161 of 2015, the accused has not given any reasons for summoning Senthilkumar, who is the complainant in this case and Balunathan to be examined as defence witness. The learned counsel for the petitioner submitted that the actual complainant in this case is Senthilkumar and that, he has given a Power of Attorney to one Ebenezer Joseph Raj, who alone was examined as P.W.1 in the trial Court and that Senthilkumar was not examined and therefore, the accused filed Crl.M.P.No.5160 of 2015 to examine Senthilkumar as defence witness. The accused has no right to summon Senthilkumar, who is the actual complainant, as defence witness. As stated above, the trial Court had given enough opportunities to the accused to recall Ebenezer Joseph Raj to be cross examined, which were not availed of by the accused. Therefore, the trial Court was right in dismissing Crl.M.P.No.5160 of 2015.

8. Coming to Crl.M.P.No.5161 of 2015, the accused has filed it under Section 315 Cr.P.C. for examining himself as a witness. In the considered opinion of this Court, the trial Court should not have dismissed this request of the accused and he should have been permitted to be examined as a witness. However, it should be remembered that, the accused cannot try to mark the alleged recorded conversation in the guise of examining himself as a witness, because an electronic record has to be proved in terms of Section 65(B) of the Evidence Act in the manner laid down by the Supreme Court in Anvar v. Basheer [2014 (10) SCC 473]. Therefore, this Court is of the view that it will be in the interest of justice, if the accused is permitted to be examined as a defence witness to speak about other facts, when he is ready to waive his right of silence.

In the result, Crl.O.P.Nos.18029 and 18030 of 2015 are dismissed. Crl.O.P.No.18031 of 2015 is allowed and the order dated 10.07.2015 in Crl.M.P.No.5161 of 2015 in C.C.No.284 of 2013 is set

aside, and on a date fixed by the trial Court, without adopting any dilatory tactics, the accused should examine himself in chief. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

gms

To

1.The Judicial Magistrate Court No.II,
Tiruppur.

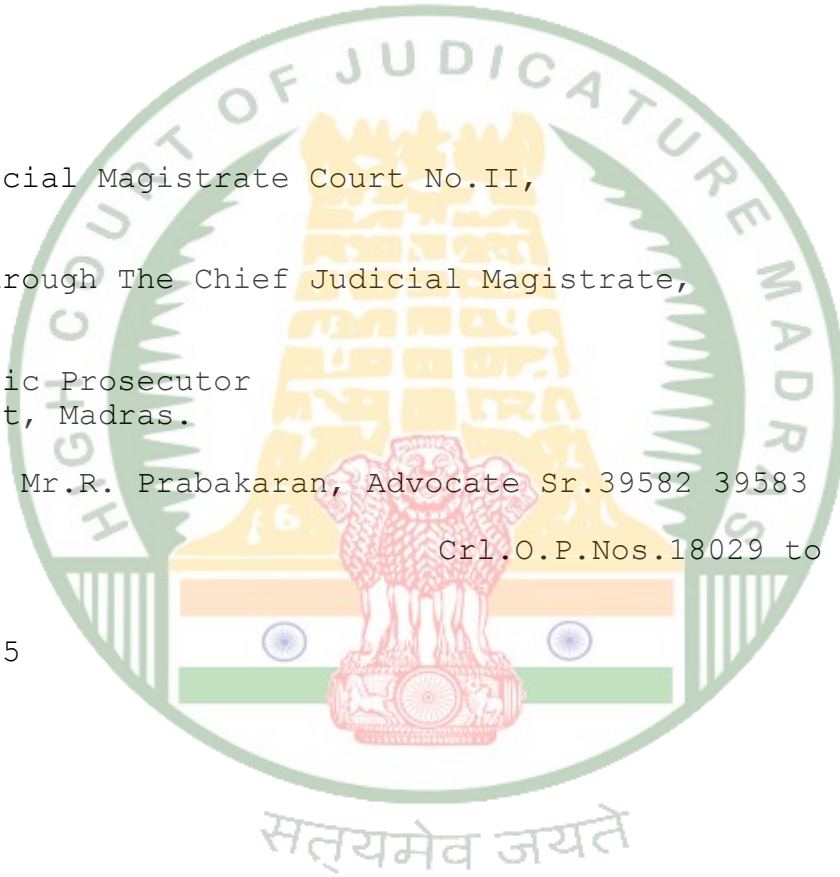
2. -do- Through The Chief Judicial Magistrate,
Tiruppur.

3.The Public Prosecutor
High Court, Madras.

+ 2 ccs to Mr.R. Prabakaran, Advocate Sr.39582 39583

CrI.O.P.Nos.18029 to 18031 of 2015

SR(CO)
Eu 13.08.15



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