

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :08.12.2016

CORAM

THE HON'BLE MR. JUSTICE T.MATHIVANAN

CrI.O.P. No.25602 of 2009

Devichand

... Petitioner

Vs.

Sathyanarayan Rathi

... Respondent

Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure to call for the records of the learned VIII Metropolitan Magistrate, George Town, Chennai and set aside the order passed by the learned Magistrate in C.M.P.No.596 of 2009 dated 02.09.2009.

For Petitioner : Mr.R.Priyakumar

For Respondent : M/s.L.Prabakaran

ORDER

Invoking the provisions of Section 482 of the Code of Criminal Procedure, this petition is filed by the petitioner, who is the accused in the case in C.C.No.8136 of 2005 on the file of the VIII Metropolitan Magistrate, George Town, Chennai to set aside the impugned order dated 02.09.2009 and made in the petition in C.M.P.No.596 of 2009.

2. It is revealed from the records that the respondent had filed a private complaint as against the petitioner to punish him under Section 142 of the said Act for having committed an offence under Section 138 of the Negotiable Instruments Act.

3. Insofar this case is concerned, the trial was commenced on 17.03.2008 by examining PW1. He was also cross-examined on 27.06.2008. After the completion of the petitioner's/accused side evidence, the case stood posted for hearing both sides on 17.07.2009. It is also to be noted that the proceedings under Section 313 Cr.P.C was also completed. Only under this circumstance, the respondent herein, who is the complainant had come forward with a petition under Section 311 Cr.P.C to permit

him to produce and mark the income tax assessment and trial Balance Sheet for the period 2003-2010 on his side so as to substantiate his claim.

4. This petition was resisted by the petitioner by filing his counter statement. After hearing both sides, the learned VIII Metropolitan Magistrate, George Town, Chennai had proceeded to allow the petition on 02.09.2009 granting permission to the respondent/complainant to produce and mark the documents as aforestated. Having been aggrieved by the impugned order, the petitioner, being the accused in the above said case, stands before this Court with this petition.

5. Heard Mr.R.Priyakumar, learned counsel for the petitioner/accused and Mr.L.Prabakaran, learned counsel for the respondent. The main contention of the petitioner/accused is that the respondent, being the complainant, ought not to have been allowed to fill up the lacuna which was left out by him at the time of his examination as PW1. The learned counsel for the petitioner has also submitted that the case in C.C.No.8136 of 2005 was filed in the year 2005 and the trial was commenced on 17.03.2008 i.e., after passing of three years. The cross-examination of PW1 was completed on 27.06.2008. He would further submit that even after the completion of his cross-examination, it was prolonged for one reason or other and ultimately, brought to an end on 26.03.2009. Thereafter, the petitioner side evidence was also closed. As aforestated, when the case stood posted for hearing both sides on 17.06.2009, this petition under Section 311 Cr.P.C came to be filed by the respondent.

6. Mr.R.Priyakumar has submitted that the respondent had not given any satisfactory explanation for not producing or filing the documents which are sought to be produced. When the respondent/complainant was standing in the box, no satisfactory reason was assigned by the respondent / complainant for not having produced and marked the document at the earliest point of time if the allegations in the complaint were true. He has continued further that it was also not the case of the complainant that the documents which were sought to be produced were not available with him or could not be produced when he was examined as PW1. Even he had not chosen to produce those documents along with complaint when the cognizance of offence was taken by the trial Court. Therefore, he has urged to set aside the impugned order of the trial Court which seems to have been perverse in nature.

7. On the other hand, Mr.L.Prabakaran, learned counsel for the respondent during the course of argument has invited the attention of this Court to the cross-examination of PW1 wherein, to a particular question PW1 has answered that he had not

produced and marked the documents relating to income tax return and auditors report at the time of filing the complaint and if necessary, he would produce and mark those documents. However, he would submit that since the petitioner/accused had abruptly denied the money transaction, it is for the respondent/complainant to prove his case as the burden of proof lies on him and only for that purpose the respondent/complainant was under necessity to produce those documents which were sought to be received. He has also added that the impugned order as well within the bounds of the provisions of Section 311 Cr.P.C and therefore, it need not be disturbed or modified.

8. In support of his contention, Mrs.Priya Kumar, learned counsel for the petitioner has made reference to the following three unreported judgments of this Court:

i). M/s.Chamba Fabrics by its Sole Proprietor Narendra Kumar Vs.Mistry Apparels Pvt. Ltd., and Ors dated 27.08.2003 and made in Cr.O.P.No.14942 of 2001 wherein a learned single Judge of this Court (M.Chockalingam.J.,) has observed as under:

"The purpose for which P.W.1 was to be recalled according to the complainant was to file certain accounts in order to prove his case. The complainant allowed his side evidence to be over and the accused were also questioned under Section 313 of Cr.P.C. and the defence side evidence was also over, and thus, the matter was ripe for argument. At that stage, filing an application under Section 311 of Cr.P.C. to recall P.W.1 for the production of certain accounts was nothing but only with a view to fill up the lacuna that has already arisen in the evidence, and hence, it should not be permitted. It is needless to say that Section 311 of Cr.P.C. is not intended to recall or summon the witnesses to fill up the lacuna that has already arisen in the evidence recorded."

ii). In another case in P.R.Chandran Vs. Rajendra Paper Stores decided on 27.07.2007 in CrI.R.C.No.772 of 2005, another learned Judge of this Court has held as under:

As rightly pointed out by the learned counsel for the respondent Mr.A.M.Rahamath Ali under Section 139 of the Negotiable Instruments Act the accused has got a right to rebut the evidence let in by the complainant. But after examination of the accused and his witnesses and after the submissions of his evidence before the trial court through his witnesses, in my view, it is not open to the complainant to reopen the case only for the purpose of filling up the lacuna.

iii) In another case i.e., in Chettinad Cement Corporation Ltd., Vs. Alacrity Housing Limited and Ors. decided on 23.09.2015 in CrI.O.P.No.23858 of 2015, another learned Judge of this Court has pointed out that in the considered opinion of this Court, just because arguments were advanced on behalf of the accused, that cannot lead to an inference that, the learned Trial Judge will accept the arguments. Further the complainant cannot be permitted to fill the lacuna, if there is any, at such a distant point of time, for that will cause undue prejudice to the case of the accused. Therefore, this court, does not find any infirmity in the orders passed by the court below.

9. But, Mr.Prabakaran, learned counsel for the respondent dissenting all the above cited decisions has made reference to the decision of the Apex Court in P.Chhaganlal Daga Vs.M.Sanjay Shaw reported in 2004 Supreme Court Cases (Cri) 183 wherein a Division Bench of Apex Court has observed that in a complaint under Section 138 of the Negotiable Instruments Act, the complainant completing the evidence including his own examination, cross-examination and re-examination, and during such cross-examination, the accused denying the service of statutory notice and disowning the signature contained in the acknowledgement produced by the complainant after completion of evidence in the said manner, case posted for judgment. At this stage, the complainant seeking the court to permit him to produce additional material (a postal receipt in this case). Under this circumstance, the Apex Court has observed that granting of such permission by trial Court even at this stage held within the powers of the Court. The High Court has erred in interfering therewith on the assumption that production of the said document at the belated stage was only to fill up a lacuna.

10. This Court has given its careful consideration to the above said decisions and found that the observations made by the Apex Court in the above cited decision is not made applicable to the facts and circumstances of the case. But, on the other hand, this Court finds that at the belated stage, the respondent/complainant cannot be permitted to fill up the lacuna. As argued by Ms.Priya Kumar, learned counsel for the petitioner, the respondent/complainant had not given any satisfactory explanation for his inability to produce the document which were sought to be produced at the earliest point of time. He has also not stated whether those documents were in existence even at the time of filing of the complaint or at the time of his examination as PW1. Keeping in view of the above, this Court finds that the impugned order is not sustainable either in law or on facts as it is not well within the bounds of Section 311 Cr.P.C.

Hence, this petition is allowed and the impugned order is liable to be set aside. The learned trial Judge is directed to dispose the case in C.C.No.8136 of 2005 within a period of one month from the date of receipt of a copy of this order.

Sd/-
Assitant Registrar

//True copy//

Sub Assistant Registrar

gpa

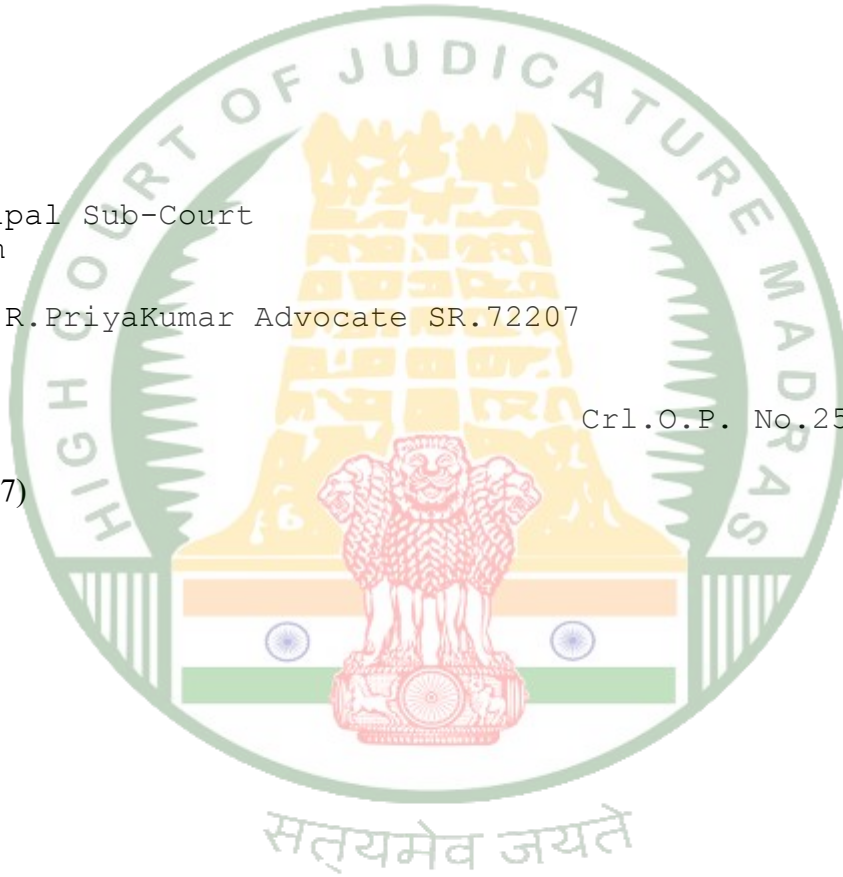
To

The Principal Sub-Court
Villupuram

+CC to Mr.R.PriyaKumar Advocate SR.72207

PA (CO)
GN (18/01/2017)

Cr1.O.P. No.25602 of 2009



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