



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.07.2016

CORAM

THE HON'BLE DR.JUSTICE S.VIMALA

Crl.O.P.(MD) No.12941 of 2016

1. C.Senthilkumar
2. M.Senthilkumar

... Petitioners/A2 & A3

-vs-

State represented by
The Inspector of Police,
B-1, Vilakkuthoon Police Station
Madurai City.
(Crime No.761/2013)

... Respondent/Complainant

Prayer: Petition filed under Section 482 of Code of Criminal Procedure praying to set aside the orders made in S.C.No.118 of 2014 dated 12.07.2016 on the file of the Additional Chief Judicial Magistrate, Madurai.

For Petitioners : Mr.R.Murali

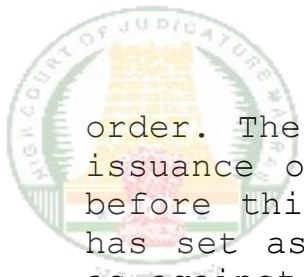
For Respondent : Mr.K.V.Rajarajan
Govt. Advocate (Crl.Side)

O R D E R

On the complaint of the Assistant Engineer, P.W.D., a case was registered in Crime No.761 of 2013 under Sections 147, 148, 427 and 109 IPC, Section 3(1) of TNPPDL Act and Section 30 (1) (i) (iv) of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 r/w Section 149 IPC. After investigation, a charge sheet was filed and it has been taken up for trial in SC No.118 of 2014 on the file of the learned Additional Chief Judicial Magistrate, Madurai.

2. Petition in Crl.O.P.(MD) No.7596 of 2014 has been filed to quash the proceedings and it is pending. Pending the original petition, this Court has dispensed with the personal appearance of the accused 2 & 3 / petitioners herein by the order dated 23.03.2014 in M.P.(MD) No.2 of 2014.

<https://hcservices.courts.gov.in/hcservices> Petitioners filed a memo before the Lower Court intimating the Court that the personal appearance of the petitioners has been dispensed with along with a copy of the



order. The Court recorded the memo and passed the order directing issuance of NBW as against A2 and A3. That order was challenged before this Court in CrI.O.P.(MD) No.8217 of 2016 and this Court has set aside the order dated 11.05.2016 by which NBW was issued as against the petitioners herein.

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4. Learned counsel for the petitioners submitted that the Presiding Officer has issued the NBW in the same case as against the same petitioners,

a) despite the existence of the order by this Court dispensing with the personal appearance of the petitioners before the learned Additional CJM, Madurai; and

b) despite the earlier order of the lower Court having been set aside.

4.1. The order dated 12.07.2016 is under challenge and the order reads as under:

".....A2,A3 absent. There is no representation for A2,A3. A2,A3 counsel absent. As per the Hon'ble High Court in ROC No.7652-A/2015/F2 dated 23.12.2015 Judgment in CrI.R.C.No.993 and 994/2015 dated 25.09.2015. Amul Gabarani vs. M/s.KEI Industries Ltd., Hon'ble High Court gave direction that in the case of accused personal Presence is dispensed. Accused counsel must Be present. But today A2,A3 counsel absent. In view of above said judgment, issued NBW to A2,A3....."

5. Whether the Court is right in relying upon the said decision cited supra in the order or whether the Court has relied upon the judgment as a ruse in order to pass order directing issuance of NBW (despite a similar order having been set aside by the High Court).

6. This Court has perused the order passed in CrI.R.C.Nos.993 and 994 of 2015 dated 25.09.2015. This judgment deals with the absence of the accused persons, when the absence is permitted under Sections 205, 317 and 273 Cr.P.C. Section 205 provides for dispensing with the personal appearance of the accused, when the Magistrate issues a summon. The indication in Section 273 is that evidence can be taken in the presence of the accused or in the presence of the Pleader, if his personal appearance is dispensed with. Under Section 317 Cr.P.C., a Magistrate has the power to allow the accused to appear by his Pleader at any stage and continue the trial, if he is satisfied that the personal attendance of the accused is not necessary in the interest of justice. The reported decision did not discuss anything about the dispensation order being passed by the High Court while exercising the jurisdiction under Section 482 of Cr.P.C.

<https://hcservices.ecourts.gov.in/hcservices/>

7. The discretion exercised in condoning the absence of the accused during trial is with the purpose to ensure that the



progress of the trial is not obstructed. During trial, if the accused is absent, the absence can be condoned provided the counsel is available to get along with the trial. But, when the very existence of the proceedings itself is challenged as invalid, void / liable to be quashed and considering those circumstances, when the higher forum dispenses with the personal appearance of the accused, the requirement that they should be represented by counsel does not stand to reason.

8. Judicial Officers are also likely to commit mistakes on account of misinterpretation of law or misunderstanding of law or misconception of facts or for any other related reasons, but the mistake can be condoned provided the Officers learn from the mistakes. Learning by mistakes can be tolerated as it is useful at least for the purpose of learning. But here is the case, despite the order issuing NBW having been under challenge before this Court and despite the order being set aside on earlier occasion, again passing the same order in the same proceedings is unjustified. This Court expresses the hope that the learned Judicial Officer will not repeat the mistake.

In the result, this Criminal Original Petition is allowed. The order dated 12.07.2016 passed by the learned Additional Chief Judicial Magistrate, Madurai in S.C.No.118 of 2014, issuing NBW against the petitioners is set aside. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (Writ)

/True Copy/

Sub Assistant Registrar (CS)

To:

1. The Additional Chief Judicial Magistrate, Madurai.
2. The Inspector of Police, B-1, Vilakkuthoon Police Station Madurai City.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

+1cc to Mr.R.Murali, Advocate, Sr.No.40486
ar
JM/GSV-PM/SAR-I/01.08.2016/3P-5C