

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.03.2017

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

Crl.O.P.No.27636 of 2010

and

M.P.No.1 of 2010

Thasneem Anwar

.. Petitioner

vs

A.Moideen Sheik

.. Respondent

Criminal Original Petition filed under Section 482 of Code of Criminal Procedure, to set aside the order passed in Crl.R.P.No.42 of 2010 on the file of I Additional Sessions Judge, Coimbatore dated 03.11.2010 confirming the order passed in C.M.P.No.676 of 2010 in S.T.C.No.348 of 2008 on the file of the Judicial Magistrate No.I, Coimbatore, dated 11.3.2010.

For Petitioner : Mr.S.Gunalan

For Respondent : Mr.P.M.Duraiswamy

ORDER

This Criminal Original Petition has been filed by the petitioner, who has been arrayed as an accused in S.T.C.No.348 of 2008 has come forward with this petition challenging the orders passed by the learned Judicial Magistrate No.I, Coimbatore, dismissing the petition filed under Section 243(1) Cr.P.C. read with Section 45 of the Indian Evidence Act seeking to send Ex.P1 cheque and Ex.P6 promissory note to the handwriting expert for comparison of the signatures found in Ex.D1-account opening form and Ex.P4-acknowledgement card, which was confirmed in Crl.R.P.No.42 of 2010, dated 3.11.2010.

2. The petitioner/accused is facing trial in S.T.C.No.348 of 2008 on the basis of the complaint under Section 138 of the

Negotiable Instruments Act lodged by the respondent. In the said case, trial has begun. Disputing the signatures found in the cheque and the promissory note, which were marked as Ex.P1 and P6 respectively, the petitioner had filed petition under Section 243(1) Cr.P.C. read with Section 45 of the Indian Evidence Act to send for the disputed signatures for handwriting expert for comparison with the admitted signatures found in Ex.P4 and Ex.D1.

3. The respondent resisted the petition inter alia contending that the prayer sought for in the petition was unsustainable in law and the petition has been filed belatedly in order to drag on the proceedings. It is also stated that in the reply, the petitioner had admitted her signatures.

4. Finding that the plea for forgery can be established during the trial and seeking expert opinion at the belated stage cannot be entertained, the learned Judicial Magistrate dismissed the petition. Aggrieved by the same, the petitioner had filed revision before the learned I Additional District Judge. Observing that there was no infirmity in the order of the learned Judicial Magistrate and hence, the learned Additional District Judge, dismissed the revision. Assailing the orders of the Courts below, the petitioner has filed this petition.

5. I heard Mr.S.Gunalan, learned counsel for the petitioner and Mr.P.M.Duraiswamy, learned counsel for the respondent and perused the entire materials available on record.

6. The learned counsel for the petitioner submitted that the petitioner is facing trial for the alleged offence under Section 138 of Negotiable Instruments Act. He would submit that the trial had already commenced and the examination of witnesses are over. It is submitted that the petition was filed for seeking the relief of sending the cheque and promissory note for expert opinion by comparing the signatures of the petitioner found in Ex.P4 and Ex.D1.

7. The learned counsel further submitted that without assigning any valid reasons, the learned Judicial Magistrate dismissed the petition, which was confirmed by the learned Additional District Judge on the ground that as the forgery was not pleaded with respect to the signatures in the alleged documents, and as the signatures in the alleged documents were admitted throughout, there was no need to compare the signatures with the help of the expert.

8. Per contra, the learned counsel for the respondent submitted that there is no illegality in the impugned orders passed by the learned Judicial Magistrate and the Additional

District Judge. It is contended that the learned Judicial Magistrate and the Additional District Judge have assigned reasons to the effect that the petition was filed at the belated stage. He would submit that the petitioner has not made out any valid grounds to interfere with the orders of the Courts below.

9. I have given my careful consideration to the rival contentions put forward by either side and also perused the materials available on record.

10. It is seen that in this case, the examination of respondent's witnesses is over, including Section 313 Cr.P.C. questioning. At this stage the petitioner had filed petition seeking the relief of sending the disputed documents for comparison of the signatures found in Ex.P4 and Ex.D1.

11. A perusal of the impugned orders reveal that the Courts below dismissed the petition mainly stating that the petition was filed at the belated stage. Further, the Courts below pointed out that since in the reply, the petitioner admitted her signatures in the cheque and promissory note, there was no need to send those documents for expert opinion.

12. In *Kalyani Baskar v. M.S. Sampooranam*, reported in (2007) 1 SCC 577, the Hon'ble Supreme Court held as follows:

"11. To appreciate the reasoning recorded by the High Court in its impugned order, it is useful to refer to the provisions of Section 243 of Cr. P. C. which reads as follows:

243. Evidence for defence : (1) The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement the Magistrate shall file it with the record.

(2) If the accused, after he had entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing:

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not

be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice.

(3) The Magistrate may, before summoning any witness on an application under Sub-section (2) require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in Court.

13. Section 243(2) is clear that a Magistrate holding an inquiry under the Cr.P.C. in respect of an offence triable by him does not exceed his powers under Section 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a handwriting expert because even in adopting this course, the purpose is to enable the Magistrate to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz., the cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the handwriting expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. 'Fair trial' includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and Courts should be jealous in seeing that there is no breach of them. We have not been able to appreciate the view of the learned Judge of the High Court that the petitioner has filed application under Section 243, Cr.P.C. Without naming any person as witness or anything to be summoned, which are to be sent for handwriting expert for examination. As noticed above, Section 243(2), Cr.P.C. Refers to a stage when the prosecution closes its evidence after examining the witnesses and the accused has entered upon his defence. The appellant in this case

requests for sending the cheque, in question, for the opinion of the handwriting expert after the respondent has closed her evidence, the Magistrate should have granted such a request unless he thinks that the object of the appellant is vexation or delaying the criminal proceedings. In the circumstances, the order of the High Court impugned in this appeal upholding the order of the Magistrate is erroneous and not sustainable."

14. By relying upon the decision of the Hon'ble Apex Court in Kalyani Baskar v. M.S.Sampooranam, supra, in P.R.Ramakrishnan v. P.Govindarajan, reported in 2007 Cr1.L.J. 1897, the learned Single Judge of this Court held as under:

"8. I am of the considered view that the above principle laid down by the Apex Court in the decision cited supra is squarely applicable to the facts of the present case and the question involved in this matter and as such I am inclined to allow the revision petition and the order passed by the learned Magistrate dated 3-1-2006 is set aside. It is also made clear that the learned Magistrate shall send the disputed cheque dated 15-6-2004 for comparing the same with the admitted signature of the petitioner/accused, in the event of the petitioner producing the relevant documents either by way of an affidavit or other form of document containing the signature of the petitioner as of now."

15. In Sivanandha Steel Ltd. and others v. Upasana Finance Ltd., reported in 2010 (2) MWN (Cr.) DCC 78, the learned Single Judge of this Court held:

"15. The principle laid down by the Hon'ble Apex Court in the decisions cited supra is squarely applicable to the facts of the instant cases as in these cases also the petitioners rightly filed the petitions to send the cheques for expert opinion to compare the signatures of A2 after closing of the prosecution evidence and after examining the witnesses for defence as per the provision under Section 243(2) Cr.P.C. Therefore, there is absolutely no illegality in preferring such Applications at that stage, viz., at the defence stage."

16. Thus, I am of the view that the principle laid down by the Hon'ble Apex Court and the learned Single Judge of this Court in the cases referred to supra is squarely applicable to the facts of the present case. In cheque dishonour complaint,

when the accused challenged genuineness of writings and signatures found in the cheque, the accused is entitled to seek assistant of handwriting expert. The accused cannot be deprived of his right to get cheque analysed by expert merely on the ground that the application was filed belatedly and in the reply, the accused admitted the signatures. Nothing has been produced to show that the petitioner with a view to delay the proceedings, had filed the petition for sending the disputed documents to the handwriting expert for comparison with the admitted signatures.

17. For the foregoing reasons, I am inclined to allow the Criminal Original Petition by setting aside the impugned orders of the Courts below. It is made clear that the learned Judicial Magistrate shall send the disputed Exs.P1 and P6 for comparing the same with the admitted signatures found in Ex.P4 and Ex.D1 as sought for within a period of two weeks from the date of receipt of a copy of this order, for getting expert opinion. It is also made clear that the petitioner shall give her full co-operation for speedy disposal of the trial. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

To

1.The Judicial Magistrate No.I, Coimbatore.

2.The Additional District Judge, Coimbatore.

+1cc to M/S.S.Gunalan, Advocate, sr.18617

+1cc to M/S.P.M.Duraiswamy, Advocate, sr.18134

Cr1.O.P.No.27636 of 2010 and
M.P.No.1 of 2010

RGN (CO)
GSP (23/10/2018)