



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.06.2017

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THE HON'BLE MR.JUSTICE P.N.PRAKASH**Crl.O.P. (MD) Nos.7634 and 7635 of 2017**
and Crl.M.P. (MD) Nos.5211 & 5212 of 2017

Thinakar ... Petitioner in all Petitions
-vs-

Bhoothalingam ... Respondent in all petitions

Prayer in Crl.O.P. (MD) 7634/2017: Petition filed under Section 482 of Code of Criminal Procedure to allow this Criminal Original Petition and set aside the order passed in Crl.M.P.No.78 of 2013 in C.C.No.137 of 2012 on the file of Fast Track Court (Magistrate Level) No.1, Nagercoil dated 30/09/2016.

Prayer in Crl.O.P. (MD) 7635/2017: Petition filed under Section 482 of Code of Criminal Procedure to allow this Criminal Original Petition and set aside the order passed in Crl.M.P.No.75 of 2013 in C.C.No.136 of 2012 on the file of Fast Track Court (Magistrate Level) No.1, Nagercoil dated 30/09/2016.

For Petitioner : Mr.C.K.M.Appaji

Reserved on	Pronounced on
22.06.2017	30.06.2017

C O M M O N O R D E R

The petitioner/accused in both these petitions seeks to set aside the orders dated 30.09.2016 passed in Crl.M.P.No.78 of 2013 in C.C.No.137 of 2012 and Crl.M.P.No.75 of 2013 in C.C.No.136 of 2012 by the Fast Track Court (Magistrate Level) No.1, Nagercoil.

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

3. The accused is facing two prosecutions in C.C.Nos.137 and 136 of 2012 before the Fast Track Court (Magistrate Level) No.1, Nagercoil under Section 138 of Negotiable Instrument Act (in short "the N.I. Act") on the complaint lodged by the complainant. The trial in both the cases commenced with the complainant filing a proof affidavit in support of his case in terms of Section 45 of the Act.



4. While so, the accused filed petitions in CrI.M.P.No.78 of 2013 in C.C.No.137 of 2012 and CrI.M.P.No.75 of 2013 in C.C.No.136 of 2012 on 03.01.2013, alleging that the affidavit sworn to by the complainant has been attested by a counsel and that the said affidavit has not been attested in terms of Section 294 of Cr.P.C. and therefore, the accused prayed that the said affidavit should be struck off. Learned Magistrate heard both sides and by orders dated 30.09.2016, dismissed both the petitions in CrI.M.P.No.78 of 2013 and CrI.M.P.No.75 of 2013, challenging which, the accused is before this Court.

5. Heard the learned counsel for the accused.

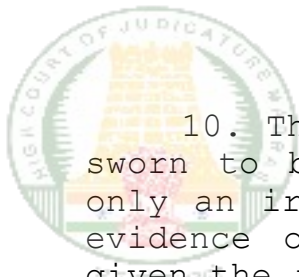
6. Learned counsel for the accused submitted that under Section 297 Cr.P.C., affidavits to be used before any Court under this Code may be sworn or affirmed before any Judge or Magistrate, or any Commission of Oaths appointed by a High Court or Court of Session, or any notary appointed under the Notaries Act, 1952 and therefore, he submitted that the said affidavit should be struck off. In support of his contention, learned counsel for the accused strongly relied upon an unreported judgment of this Court in the case of **M.Esakkimuthu vs. M.Manoharan [CrI.O.P. (MD) No.4039 of 2012] decided on 17.04.2012.**

7. This Court gave its anxious consideration to the submission made by the learned counsel for the accused.

8. It is true that in M.Esakkimuthu's case (cited supra), learned Single Judge of this Court has struck off the affidavit filed by the complainant therein on the ground that it was not attested in terms of Section 297 Cr.P.C., but in the operative portion of the order, learned Judge has stated as follows:

"6.....However, the respondent / petitioner/ complainant is at liberty to file fresh affidavit in accordance with provision of law. Consequently, connected Miscellaneous Petition is closed."

9. Under the provisions of Indian Evidence Act, an affidavit cannot be treated as a substantive evidence. However, certain special Statutes like Negotiable Instruments Act have incorporated the provisions like Section 145 of the Act, permitting reception of substantive evidence in the form of an affidavit. Similarly, amendments were made to the Code of Civil Procedure where proof affidavit can be filed before a Civil Court. Those amendments were made in order to reduce the delay in disposal of the case. If the main object of these amendments are kept in mind and the facts of this case is analyzed, it will be clear that there is no infirmity in the orders passed by the Trial Court. The attestation of the affidavit by a person other than a person mentioned in Section 297 Cr.P.C. will not in any way destroy the averments in the affidavit. The attestation is only for attesting the signature of the deponent and not for the truth of the facts contained therein.



10. Thus, in the considered opinion of this Court, an affidavit sworn to before a person not mentioned in Section 297 Cr.P.C. is only an irregular affidavit and that by itself, cannot vitiate the evidence or the trial. In this case, the learned Magistrate has given the following finding in C.M.P.No.78 of 2013:

"7. On perusing the case records, it is seen on 02.09.2010 P.W.1 was examined before this Court and Ext.P1 to P6 has been marked on his side. After that this case posted for P.W.1 cross examination. Accordingly, some witnesses examined on the side of respondent. On 27.09.2010, this petitioner was questioned under section 313 of Cr.P.C. and the case was posted for defence side evidence. It is seen from the records that at this stage of defence side evidence, this petitioner filed petition under Section 45 of Evidence Act to send the cheque for expert opinion. It was dismissed by this Court on 26.12.2012. After that the petitioner filed this petition....."

That apart, in Paragraph No.8, the Trial Court has given the following finding:

"8.....Hence, this Court considers that the petitioner filed this petition only at the belated stage to drag on the proceedings. This case is pending from 2013 to till this date by merely pending of this petition. Even today also the petitioner has not come forward to proceed with the petition. Hence, this petition is dismissed."

11. Thus, from the above, it is apparent that the petitioner has been filing one or the other petitions before the Trial Court for the purpose of prolonging the trial and defeat the very object of Section 145 of the Act. Under such circumstances, this Court does not find any infirmity in the orders passed by the Court below warranting interference by this Court.

12. In the result, these two petitions are dismissed as devoid of merits. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS-III)

/True Copy/

Sub Assistant Registrar

To:

The Fast Track Court (Magistrate Level) No.1,
Nagercoil.

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JS/JC/SAR.1/10.07.2017/3P-2C

ORDER IN

Crl.O.P. (MD) Nos.7634 and 7635 of 2017

3W30.06.2017