

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.02.2018

CORAM

THE HONOURABLE MR. JUSTICE M.S.RAMESH

Crl.O.P.No.3089 of 2018
and M.P.No.1315 of 2018

L. Jaishankar

... Petitioner

Vs

Mohan Harinath

.... Respondent

Prayer: Criminal Original Petition filed under Section 482 Cr.P.C. to call for the records and set aside the dismissal order dated 22.12.2017 passed by the learned Judicial Magistrate, Tambaram, in CMP SR.No.10321 of 2017 in S.T.C. No.1497 of 2014 and consequently order for a de-nova trial.

For Petitioners : Mr.S.Ramsenthil Kumar
For Respondent : No appearance

O R D E R

This Criminal Original Petition has been filed to call for the records and set aside the dismissal order dated 22.12.2017 passed by the learned Judicial Magistrate, Tambaram in CMP.SR.No.10321 of 2017 in S.T.C.No.1497 of 2014.

2. This is a summary trial case. The order under challenge dated 22.12.2017 is passed in CMP SR 10321 of 2017 in STC 1497 of 2014 by which the learned Magistrate had rejected the petitioner's request to record the evidence by the succeeding Magistrate afresh under Section 326 of Cr.P.C. The reasoning given by the trial Court was that in view of Section 326 of Cr.P.C., the Magistrate who succeeds the earlier Magistrate who had partly recorded the evidence, is entitled to act on the evidence partly recorded by his predecessor.

3. In the instant case, the complainant was examined as PW1 in the year 2015 and Exs.P1 to Ex.P6 were marked through him. Subsequently, the then learned Judicial Magistrate was transferred and replaced by another learned Judicial Magistrate. Since the evidence was partly recorded, the petitioner has sought for a fresh trial, which came to be rejected through the impugned order.

4. The learned counsel for the petitioner submitted that in view of Section 323(3) of Cr.P.C., there is a bar for the succeeding learned Judicial Magistrate to act on the evidence recorded by the earlier learned Judicial Magistrate, since this is a case of a summary trial. I find some force in the submissions made by the learned counsel for the petitioner.

5. Section 326 of Cr.P.C reads as follows:-

"326. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.

(1) Whenever any Judge or Magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another Judge or Magistrate who has and who exercises such jurisdiction, the Judge or Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself:

Provided that if the succeeding Judge or Magistrate is of opinion that further examination of any of the witness whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

(2) When a case is transferred under the provisions of this Code from one Judge to another Judge or from one Magistrate to another Magistrate, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub-section (1).

(3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under Section 322 or in which proceedings have been submitted to a superior Magistrate under Section 325".

6. A careful reading of sub section 326 evidences that the powers vested on the Magistrate to act on the evidence recorded by an earlier Magistrate under Sub Section (3) of Section 326, does not apply to a case of summary trial. In other words, whenever a Magistrate records an evidence in the case of summary trial and leaves as such half way, the succeeding Magistrate is not entitled to act on the evidence already recorded by the erstwhile Magistrate. The intention of the Legislature as envisaged Under Section 326(3) of Cr.P.C is that the procedure prescribed under Sub Section (1) of 326 of Cr.P.C. cannot made

applicable to summary trial, since during summary trials, the substance of evidence alone is recorded unlike the regular trial.

7. The Hon'ble Supreme Court of India in judgment reported in 2011 (9) STC 638 in the case of Nitinbhai Saevatilal Shah and another Vs Manubhai Manjibhai Panchal and another had an occasion to deal with this proposition, which is extracted hereunder.

"13. In fact, Section 326 deals with part-heard cases, when one Magistrate who has partly heard the case is succeeded by another Magistrate either because the first Magistrate is transferred and is succeeded by another, or because the case is transferred from one Magistrate to another Magistrate. The rule mentioned in Section 326 is that the second Magistrate need not rehear the whole case and he can start from the stage the first Magistrate left it.

14. However, a bare perusal of sub-section (3) of Section 326 makes it more than evident that sub-section (1) which authorizes the Magistrate who succeeds the Magistrate who had recorded the whole or any part of the evidence in a trial to act on the evidence so recorded by his predecessor, does not apply to summary trials. The prohibition contained in sub-section (3) of Section 326 of the Code is absolute and admits of no exception. Where a Magistrate is transferred from one station to another his jurisdiction ceases in the former station when the transfer takes effect.

17. The mandatory language in which Section 326(3) is couched, leaves no manner of doubt that when a case is tried as a summary case a Magistrate, who succeeds the Magistrate who had recorded the part or whole of the evidence, cannot act on the evidence so recorded by his predecessor. In summary proceedings the successor Judge or Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it. The reason why the provisions of sub-sections (1) and (2) of Section 326 of the Code have not been made applicable to summary trials is that in summary trials only the substance of evidence has to be recorded. The Court does not record the entire statement of witnesses. Therefore, the Judge or the Magistrate who has recorded such substance of evidence is in a position to appreciate the evidence led before him and the successor Judge or Magistrate cannot appreciate the evidence only on the basis of

evidence recorded by his predecessor. Section 326(3) of the Code does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor, the obvious reason being that if the succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and indeed, it would be difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice.

20. From the language of Section 326(3) of the Code, it is plain that the provisions of Sections 326(1) and 326(2) of the new Code are not applicable to summary trials. Therefore, except in regard to those cases which fall within the ambit of Section 326 of the Code, the Magistrate cannot proceed with the trial placing reliance on the evidence recorded by his predecessor. He has got to try the case de novo. In this view of the matter, the High Court should have ordered de novo trial".

8. In view of the categorical and explicit terms under section 326 (3) of Cr.P.C, the benefit under Sub section (1) & (2) of 326 Cr.P.C. cannot be extended in the case falling under Sub Section (3) of 326 Cr.P.C. to a summary trial case. As such, impugned order passed by the trial Court requires to be set aside.

9. In the result, the order dated 22.12.2017 passed in CMP.SR.No.10321 of 2017 in STC No.1497 of 2014 on the file of the learned Judicial Magistrate, Tambaram is set aside. Consequently the learned Judicial Magistrate, Tambaram is directed to conduct a de-novo trial and endeavour to complete the same as expeditiously as possible. Accordingly this criminal original petition stands allowed with the above observations & direction. Consequently connected miscellaneous petition is also closed.

-s/d- सत्यमेव जयते

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

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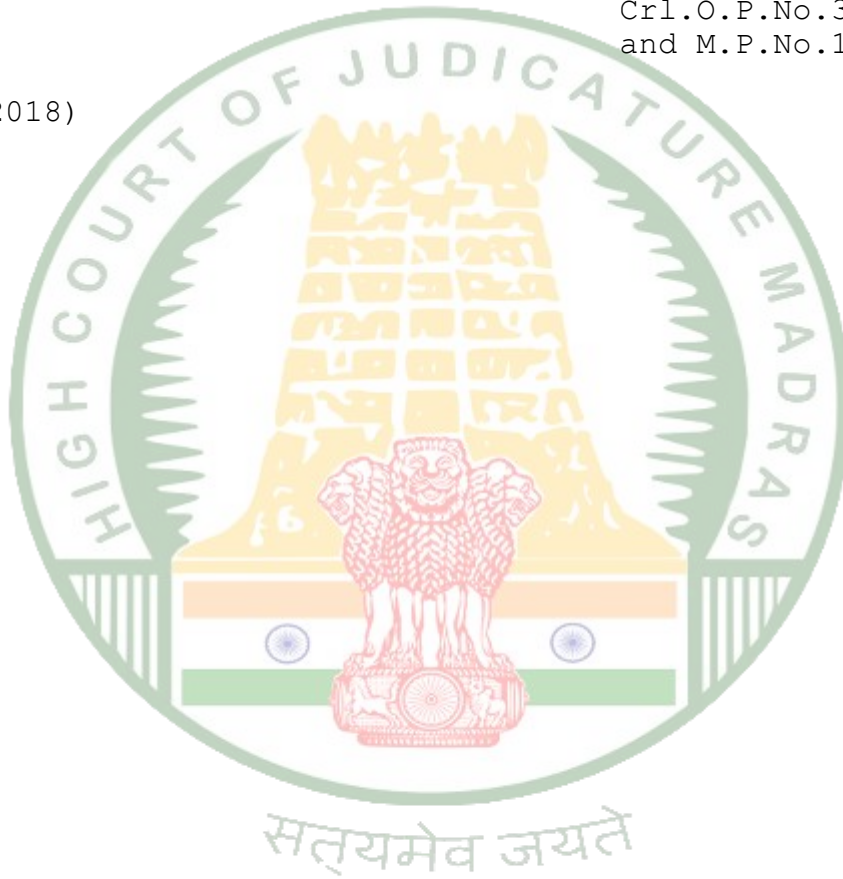
To

The Judicial Magistrate,
Tambaram,

+2 CC to Mr.S.Ramsenthil Kumar , advocate sr 8561.

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SP (28/02/2018)



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