

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:09.01.2018

CORAM:

THE HON'BLE DR.JUSTICE S.VIMALA

Criminal Revision Case No.1574 of 2017
& Crl.M.P.Nos.15901 & 15902 of 2017

TTV Dhinakaran

... Petitioner / accused

-vs-

Assistant Director,
Enforcement Directorate,
Govt. of India, Shastri Bhavan,
No.26 Haddows Road,
Chennai 600 006

... Respondent / complainant

Prayer: Criminal Revision Petition filed under Section 397 read with 401 of the Criminal Procedure Code to set-aside the order, dated 05.12.2017 made in Crl.M.P.No.2756 of 2017 in EO.C.C.No.27 of 1996 on the file of the Additional Chief Metropolitan Magistrate (EO - II), Allikulam, Chennai - 3 and to allow the plea and order the petition for permission to examine the defence witnesses.

For Petitioner : Mr. B.Kumar, Sr.Counsel
For Mr. A.Jenasenan

For Respondent : Mr. G.Rajagopalan, ASGI, for,
M/s. G.Hema, Spl.P.P

O R D E R

When the right to adduce evidence is a statutory right and when the right to fair trial and the right to defend is a fundamental right as enshrined in Article 21 of the Constitution of India, whether the Lower Court is justified in dismissing the claim of the accused to examine certain witnesses as defence witnesses.

2. The dismissal of the application filed under Section 247 of the Criminal Procedure Code, in Crl.M.P.No.2756 of 2017 in E.O.C.C.No.27 of 1996 on the file of the learned Additional Chief Metropolitan Magistrate (E.O.-II), Allikulam, Chennai - 3, seeking to examine the list of witnesses 1 to 17, as defence witnesses, is under challenge in this Revision Petition.

3. The specific contention raised by the petitioner / accused is that the list of witnesses sought to be examined are the witnesses, which were relied upon by the complainant and as the complainant did not choose to examine them, the accused has a right to examine them as defence witnesses.

Brief Facts:

4. The respondent, as complainant, filed the case against the petitioner / accused under Section 56 of the FERA, 1973, for contravention of Section 8 (1), 9 (1) (a) and 14 of the FERA, 1973. During trial, the accused was discharged by the order, dated 18.05.2015 in Crl.M.P.No.379 of 2014. Challenging the discharge, a Revision Petition was filed before this Court, which was allowed on 01.02.2017. There was no appeal preferred before the Supreme Court, challenging the said order passed by this Court. Thereafter, charges were framed against the accused on 19.04.2017 and P.W.1 was cross-examined partly by the accused on 29.06.2017. Thereafter, a petition was filed for setting-aside the charges framed and this Court directed the learned Magistrate (Additional Chief Metropolitan Magistrate, E.O.-II, Egmore, Chennai) to complete the proceedings within a period of three months from the date of receipt of a copy of the order and that it may be on day-to-day basis. Thereafter the accused filed Crl.O.P.no.16261 of 2017 with regard to the examination of the witnesses and for full compliance of requirements under Section 246 (4) of the Criminal Procedure Code, for which, this Court passed an order, dated 10.08.2017, granting time till 31.08.2017 for cross-examination of P.W.1 and not to seek further time for cross-examination of P.W.1.

4.1 The petitioner, thereafter moved to the Supreme Court on 04.09.2017 and the Court dismissed the plea of the petitioner seeking extension of three month's time to contest the framing of charges against him. Later on, the Special Leave Petition (SLP) was dismissed as withdrawn.

4.2. Out of 17 witnesses, 12 were listed witnesses by the complainant and the remaining witnesses are the new witnesses cited by the accused. The respondent / complainant has explained as to why those witnesses were not examined by the prosecution.

5. The case of the prosecution is that, with the available evidence and the materials, the prosecution was able to establish the case against the accused and therefore, it is not necessary for them to produce those witnesses cited by the prosecution.

6. The question is not as to why the prosecution did not examine those witnesses and the question is, when the prosecution has not chosen to examine those witnesses, is it not open to the defence to examine those persons as defence witnesses?

7. Yet another contention of the prosecution is that the intention of the accused in seeking examination of witnesses is to cause delay and vexation and therefore, he cannot be permitted to examine defence witnesses and the Trial Court rightly dismissed the application.

8. The learned counsel for the respondent relying upon the following the Dates and events as detailed in the counter has contended that the accused is guilty of causing delay.

Dates and events:

Date	Event	Remarks
07.02.1996	Accused detained under COFEPOSA Act.	-
14.05.1996	Accused was produced before the trial court on Prisoner Transit Warrant.	-
25.06.1996	The complainant filed petition for cancellation of bail.	-
31.07.1996	Cancellation of bail was dismissed.	-
31.07.1996	Trial court ordered for posting the case, once in a week.	-
08.08.1996	Accused filed a petition with a prayer to direct the complainant to supply all statements, documents and memos of evidence of each witnesses.	-
09.08.1996	Petition dismissed.	-
12.08.1996	P.W.1 examined in Chief.	-
27.11.1996	High Court dismissed the revision petition which was filed by the accused challenging the dismissal order dated 09.08.1996.	-
20.12.1996	SLP by the accused was dismissed.	-

Date	Event	Remarks
12.10.1997	Accused filed application seeking direction to file supplementary report under Section 173 (2) and (8) of the Cr.P.C.,	-
20.10.1997	The said application was dismissed.	-
12.09.2008	Revision Petition filed by the accused was dismissed, with direction to expedite the trial within a period of six months.	-
04.02.2009 to 26.10.2010	P.Ws.1 to 12 examined in Chief. Summons issued to P.Ws.15, 16, 17, 19, 20, 22, 23, 24, 25 and 26 could not be served as the persons were not available in the addresses.	-
23.12.2010	Accused filed application to consolidated two complaints, in C.C.No.84 of 2001 and C.C.No.27/1996.	-
27.01.2011	Application was dismissed.	-
11.10.2011	Revision petition by the accused against the dismissal of the application was dismissed.	-
19.12.2013	Prosecution evidence closed.	-
18.02.2014	Discharge petition was filed by the accused in C.C.No.27 of 1996.	-
--	Discharge petition was filed by the accused in C.C.No.84 of 2001.	-
--	Both discharge petitions were allowed by the trial court.	-
01.02.2017	Both Revision Petitions filed challenging the order passed in the discharge petitions were allowed by the High Court.	-
22.02.2017	The accused was directed to appear on 10.03.2017.	-
22.03.2017	Accused filed application for adjournment for six weeks (to recall the order dated 01.02.2017, passed in CrI.M.P.No.957 of 2015).	-

Date	Event	Remarks
27.03.2017	The Application was dismissed.	-
	Accused did not appear for the four hearings during March and April 2017.	-
19.04.2017	The trial court framed charges against the accused.	-
24.07.2017	The High Court dismissed O.P., challenging framing of charges.	-
--	Criminal O.P.No.16261/2017 was filed by the accused regarding examination of P.Ws. and for complete compliance of requirement of Section 246 (4) of the Cr.P.C.,	-
10.08.2017	The High Court granted time till 31.08.2017 for cross-examination of P.W.1 and not to seek further time.	-
--	The accused moved SLP before the Supreme court challenging dismissal of the petition by the High Court challenging the dismissal of the discharge petition.	-
--	The SLP was dismissed as withdrawn.	-
05.12.2017	Revision Petition filed challenging the dismissal of the petition seeking examination of defence witnesses.	-

9. From the perusal of dates and events, it is clear that there is no delay caused after the closure of the evidence on the side of the prosecution. The right to examine the defence witnesses arises only after the closure of prosecution witnesses. The various proceedings taken to the Higher Forum at various level of proceedings cannot be considered as valid reasons for declining permission to examine defence witnesses. The challenge made by the accused by taking the matter to Higher Forum and the directions issued by the Courts to complete the proceedings within the limited time frame should be taken note of by the Trial Court at the appropriate stage and the directions issued by the Court would not amount to an authorization to the Trial Court to deny the right of the accused to examine the defence witnesses.

10. The trial court has given reasons for not permitting the accused to examine the listed witnesses as defence witnesses and the reasoning is extracted for easy reference:-

"109. On the basis of court records and arguments adduced by both sides, this Court has observed that,

i) considering the facts and circumstances of this case, and

ii) considering the long pendency for 21 years of this case, and

iii) considering the legal provisions laid down in Section 72 of the FERA Act, 1973, which enables the complainant / respondent to get authentication for the documents abroad, and

iv) considering the directions issued by the Hon'ble High Court, Madras

a) Order in Crl.R.C.No.937/2015 dated 01.02.17 and

b) Order in Crl.O.P.No.12983/2017 and Crl.M.P.Nos.8447 and 8877 of 2017, dated 24.7.17.

c) Order in Crl.O.P.No.16261/17 and M.P.No.10038/17 dated 10.08.2017 and

d) order in Crl.M.P.No.10856/17 in Crl.O.P.No.16261/17, dated 13.08.2017, and

v) considering the stand taken by the Hon'ble Supreme Court of India, Delhi, in order dated 16.08.2017 in SLP (Crl.) 005007/17 and 004936/17 Copy communicated from the Hon'ble High Court, Madras, in SLP (Crl.) Nos.4936 and 5007/17 dated 28.09.2017, and

vi) considering the reason that, the already died person the witness, Mr. K.M.Nair cannot be examined before any court of law, and

vii) considering the reason that the failure of the petitioner/accused to furnish the possibility of living and capability of adducing evidence at the age of 100 years by Mr.Rajoo of Malaysia, and

viii) considering the reason that, totally seven memos filed by the complainant / respondent about the cited witnesses, whose whereabouts are unknown and untraceable, that persons, Mr.Nistarr, Mr. S.Kubendran, Mr. R.Murali, Mr. D.Srinivasan, Mr.J.Natarajan, Mr.S.Alaguvel Pillai and Mr. A.Ganesan cannot be ordered to produced before this Court, and

ix) considering the reason that nearly 21 years passed after the enquiry of this case, and hence the failure of the petitioner/accused, to furnish the particulars about the present physical position, alive or not, mental and physical fitness to adduce evidence, present address, present occupation and the manner to secure the witness, and

x) considering the reason that the failure of the petitioner/accused to submit the reason and explanation about how the witnesses Mr.A.P.Kala and Mr. Rajiv Kumar, who did the Administrative work, but did not take part in investigation of this case, and

xi) considering the reason that the failure of the petitioner / accused to submit the reason and explanation about the witnesses Mr.Mahesh Chandra Reddy, Mr. S.V.Jogeswara Rao, Mr.R.C.Mohan, Mr. K.E.B.Rangarajan, Mr.G.Sankara Narayanan, who did not have direct participation in the investigation of this case, and

xii) considering the reason that the failure of the petitioner/accused to submit the reason and explanation for examining the witness, Mr.H.Ameer who did not adduce either any evidence or action against the accused, and

xiii) considering the reason that the failure of the petitioner/accused to disclose the necessity of or relevancy of, and how been relied upon, to examine the witnesses on the defence side, and

xiv) considering the reason that without submitting valid reasons and explanations, the petitioner/accused has filed this petition vexatiously and with the aim to delay the conclusion of the trial of this case, and

Hence, this petition is liable to be dismissed and the point is decided accordingly.

110. In the result, this petition is dismissed."

11. Whether those reasons can be considered as sufficient reasons or acceptable reasons to decline permission to the accused to examine those witnesses as defence witnesses, is the issue to be considered.

12. It would be appropriate to quote the relevant provisions regarding the right of the accused to examine the defence witness.

12.1. Section 247 Cr.P.C. reads as under:

"The accused shall then be called upon to enter upon his defence and produce his evidence; and the provisions of Section 243 shall apply to the case."

12.2. Section 243 Cr.P.C. also reads as under:

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 has 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. B.- Cases instituted otherwise than on police report."

13. The Code of Criminal Procedure, 1973 provides a comprehensive mechanism to conduct trials before the Courts by different methods. This mechanism achieves solemn object of fair trial to the accused as well as to the prosecution. In fact the object of the Code is to ensure that an accused person gets a full and fair trial along certain well established and well-understood lines that accord with our notion of natural justice. Throughout the web of Criminal Justice System of this country, golden thread is fair trial to accused, because cardinal Rule of Criminal Law, we follow is, each accused must be considered innocent till his guilt is established. Whatever be the merits of the case or whatever be the consequent result of the trial, the pious duty of the Court conducting the trial is to adhere strictly to the provisions of law ensuring fair trial.

14. The learned counsel appearing for the petitioner submitted that the learned Magistrate has passed an order by posing five questions, which are irrelevant under Section 243 (2) of the Cr.P.C., and the only question that is relevant is, whether the intention of the accused was to delay the proceedings. The main contention raised is that if the right of the petitioner to examine the defence witness is declined, it would amount to violation of Article 21 of the Constitution of India and a serious prejudice would be caused to the petitioner, thus there is a risk of entire proceedings being vitiated.

14.1. The following judgments are relied upon by the learned counsel appearing for the petitioner, in order to support the proposition that the statutory right of the accused to examine defence witnesses cannot be curtailed, except on the exceptions mentioned under Section 243(2) of Cr.P.C.:-

(i) 1954 CrL.L.J. 1161 [Ronald Wood Mathams and others vs. State of W.B]:

"10...It must be conceded that the evidence on record tends to establish a strong case against the appellants. But then, that is a case which they are entitled to rebut, and if, as was held by the Federal Court, Exhibit 27 series would furnish good material for rebutting that case, the Court, by declining to issue process for the examination of the witnesses connected with those documents, has deprived the appellants of an opportunity of rebutting it."

(ii) 2008 (5) SCC 633 [T.Nagappa vs. Y.R.Muralidhar]:

"9.What should be the nature of evidence is not a matter which should be left only to the discretion of the Court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses etc. If permitted to do so, steps therefor, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protracting the trial or summon witnesses whose evidence would not be at all relevant."

(iii) 2004 (1) SCC 414 [Banti @ Guddu vs. State of M.P.]:

"13.When the case reaches the stage envisaged in Section 231 of Code the Sessions Judge is obliged "to take all such evidence as may be produced in support of the prosecution". It is clear from the said section that the Public Prosecutor is expected to produce evidence "in support of the prosecution" and not in derogation of the prosecution case. At the said stage the Public Prosecutor would be in a position to take a decision as to which among the persons cited are to

be examined. If there are too many witnesses on the same point the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetition depositions on the same factual aspects. That principle applies when there are too many witnesses cited, if they all had sustained injuries at the occurrence. The Public Prosecutor in such cases is not obliged to examine all the injured witnesses. If he is satisfied by examining any two or three of them, it is open to him to inform the Court that he does not propose to examine the remaining persons in that category. This will help not only the prosecution in relieving itself of the strain of adducing repetitive evidence on the same point but also help the Court considerably in lessening the workload. Time has come to make every effort possible to lessen the workload, particularly those courts crammed with cases, but without impairing the cause of justice."

14.2. From this decision, it is clear that while the Public Prosecutor has the freedom to pick and choose witnesses, provided those witnesses are speaking about the same fact. But at the same time, the Public Prosecutor has a duty to be fair to the Court in bringing out the truth.

(iv) 2013 (14) SCC 434 [Rohtash Kumar vs. State of Haryana]

"16. In Masalti v. State of U.P., AIR 1965 SC 202, this Court held that it would be unsound to lay down as a general rule, that every witness must be examined, even though, the evidence provided by such witness may not be very material, or even if it is a known fact that the said witness has either been won over or terrorised. "In such cases, it is always open to the defence to examine such witnesses as their own witnesses, and the court itself may also call upon such a witness in the interests of justice under Section 540 Cr.P.C."

14.3. This decision is directly on the point canvassed by the learned counsel for the revision petitioner.

15. The learned counsel appearing for the petitioner pin-pointed that the adjudication order has no relevance in criminal proceedings because, in the adjudication proceedings strict rules of evidence will not apply, while the strict rules of evidence is fully applicable during trial proceedings before the Criminal Court. Therefore, reference to adjudication proceedings by the prosecution is not relevant.

16. It is also emphasised that the revision filed against the discharge of the accused and the SLP filed are all

proceedings pre-trial and they have nothing to do with the proceedings during trial or examination of defence witnesses.

17. The followings are the questions considered by the Hon'ble Supreme Court in 2013 (14) SCC 434 (referred to supra):-

(i) Whether the prosecution must examine all witnesses - multiplication of witnesses? As a general rule, all witnesses must be called upon to testify in the course of hearing of prosecution, but there is no obligation compelling Public Prosecutor to call upon all witnesses available who can depose regarding the facts that the prosecution has to prove. Ultimately, it is the matter left to the discretion of the Public Prosecutor. The Court cannot normally compel the prosecution to examine the witnesses, which the prosecution does not chose to examine.

18. It would be unsound to lay down as a general rule that every witness must be examined, even though the evidence provided by such witness may not be very material, or even if it is a known fact that the said witness has either been won over or terrorised. In such cases, it is always open to the defence to examine such witnesses as their own witnesses, and the court itself may also call upon such witness in the interests of justice under Section 540 Cr.P.C.

19. Therefore, the Trial Court is not justified in declining examination of defence witnesses. It is stated that witness K.M.Nair is dead and if it is proved so, his name must be deleted from the witness list. So far as witness Mr.Raju of Malaysia is concerned, it is stated that his age is 100 and therefore, he may not be in a position to give evidence and the learned counsel for the accused conceded that in that event, the defence would dispense with the examination of that witness. Therefore, the name of Mr.Raju is deleted from the list of witnesses.

20. In respect of some of the witnesses, it is stated that the whereabouts are not known. Procedures have already been prescribed to secure the witnesses and when the defence wants to examine those witnesses, it is for the defence to take out necessary steps to secure those witnesses.

21. The reason given by the Trial Court is that it is expected of the accused to state whether the witness is alive or not; whether the accused is physically and mentally fit to adduce evidence are all far-fetched and as and when, summons are issued, only during service of summons, the accused and the Court will be position to know the possibility of examining those witnesses. From the list of witnesses produced, it cannot be said that those witnesses are irrelevant for the purpose of

this case. When the prosecution alleges that some of the witnesses are not traceable, then it is for the accused to find out whether there are any other method available to trace the accused and to take further steps within a reasonable time. If during trial, if the Trial Court comes to the conclusion that inordinate time is taken to take steps, then it is open to the Trial Court to dispense with the examination of that witness. At various stages, if the Court feels that deliberately the accused is dragging on the matter, it is open to the Court to pass appropriate orders at appropriate stage. Instead of exercising at that point of time, the Court cannot shut the examination of witness itself at the threshold. It is made clear that the accused shall not cause any delay in examination of witnesses as well as in taking steps to get the examination of witnesses.

In the result, the Criminal Revision Petition is allowed, subject to the observations made hereinabove and the order dated 05.12.2017 passed by the learned Additional Chief Metropolitan Magistrate (EO - II), Allikulam, Chennai in CrI.M.P.No.2756 of 2017 in EO.C.C.No.27 of 1996 is set aside. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

srk/ar
To:

1. The Additional Chief Metropolitan Magistrate (EO - II), Allikulam, Chennai .
2. The Assistant Director, Enforcement Directorate, Government of India, Shastri Bhavan, No.26 Haddows Road, Chennai 600 006.

+ 1 cc to M/s. G. Hema, Special Public Prosecutor, 1634
+ 1 cc to Mr. A. Jeenaseenan, Advocate Sr.2075

CrI.R.C.No.1574 of 2017

RRCO)
EU(09/02/2018)