

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2018

CORAM:

THE HONOURABLE MR. JUSTICE M.S.RAMESH

Crl.O.P.No.1044 of 2018

Shakeer

... Petitioner

Vs.

State rep. by

The Inspector of Police,
Annur Police Station,
Coimbatore.

Crime No.339/2016

.... Respondent

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C. praying to set aside the order dated 08.12.2017 passed in C.M.P.No.144 of 2017 in S.C.No.169 of 2017 on the file of the learned I Additional District and Sessions Judge of Coimbatore and consequently dismiss the same.

For Petitioner : Mr.T.Sai Krishnan

For Respondent : Mrs.P.Kritika Kamal,
Government Advocate (Crl. side)

ORDER

The Criminal Original Petition has been filed by the petitioner to set aside the order dated 08.12.2017 passed in C.M.P.No.144 of 2017 in S.C.No.169 of 2017, on the file of the learned I Additional District and Sessions Judge, Coimbatore.

2. The order under challenge is passed under Section 173 Cr.P.C., directing the prosecution to produce the document which is alleged to be a dying declaration. It is submitted by the learned counsel for the petitioner that the alleged dying declaration cannot be treated as an evidence under Section 32 of the Evidence Act, since the person, who had given the declaration did not die subsequently. He also relied upon the Judgement of the Supreme Court in batch of cases reported in 1999(5) SCC 30 in (Ramprasad vs. State of Maharashtra and Others).

3. The learned Government Advocate (Crl. side) on the other hand submitted that since the person, who had given the declaration did not die subsequently, the declaration cannot be treated as a report under Section 161 Cr.P.C. Likewise, if at all, the petitioner is aggrieved, he can raise his objection at the time of marking the documents. In support of her submission, the learned Government Advocate (Crl. side) relied upon the Judgements of the Supreme Court, in the case

of Bipin Shantilal Panchal vs. State of Gujarat and Another reported in 2001 (3) SCC 6 and in case of Shrawan Bhadaji Bhirad and others vs. State of Maharashtra reported in 2002 (10) SCC 56.

4. I have given careful consideration to the submissions of both the counsels.

5. The objection raised by the petitioner that the dying declaration cannot be treated to be an evidence under Section 32 of the Indian Evidence Act since the person did not die subsequently, cannot be a sufficient ground to have the impugned order set aside. If at all such an objection is raised before the trial court, it is always open to the trial Judge to record such objections and give it a due consideration at the time of trial. This proposition has been laid down by the Hon'ble Supreme Court in the Judgment in the case of Bipin Shantilal Panchal vs. State of Gujarat and Another reported in 2001 (3) SCC 1, the relevant portion is as follows:

"14. When so recast, the practice which can be a better substitute in this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item or oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed)."

6. Likewise, insofar as the objection of the petitioner that the dying declaration cannot be treated to be a piece of evidence under Section 32 of the Evidence Act is concerned, the counsel relied upon the Judgment of the Supreme Court in batch of cases reported in 1999(5) SCC 30 in (Ramprasad vs. State of Maharashtra and Others) in which emphasis was laid on the following:

"13.Ext.52 is the dying declaration made by PW1 Ramu Somani, which was recorded by a Judicial Magistrate (PW16). Both the trial court and the High Court counted Ext. 52 as a piece of evidence. Shri. R.S.Lambat, learned

counsel contended that both the courts have gone wrong in treating Ext.52 as evidence because the person who gave the statement is not dead and hence it could not fall under Section 32 of the Evidence Act, 1872. Counsel further contended that even otherwise Ext.52 could only have been used to contradict PW1 as provided in Section 162 of the Code of Criminal Procedure (for short "the Code") as it was a statement recorded during investigation.

14. We are in full agreement with the contention of the learned counsel that Ext. 52 cannot be used as evidence under Section 32 of the Evidence Act though it was recorded as a dying declaration. At the time when PW1 gave the statement he would have been under expectation of death but that is not sufficient to wiggle it into the cassette of Section 32. As long as the maker of the statement is alive it would remain only in the realm of a statement recorded during investigation."

7. It would be appropriate to mention here that whenever the trial court is of the opinion that certain documents have to be looked into it can do so before coming to a logical conclusion and there cannot be any embargo to prevent such court from looking into the same. As a matter of fact, if at all there is any objection with regard to the marking of such an evidence, it is always open to the trial court to record the objection and at the time of pronouncing the judgement, if the trial court is of the view that the objection are sustainable it can always mark the evidence. In this regard the judgment of the Hon'ble Supreme Court, in the case of Shrawan Bhadaji Bhirad and others vs. State of Maharashtra reported in 2002 (10) SCC 56 had observed as follows:

"8. As a matter of fact, identification of the accused persons and the prosecutor's utter failure on that score has been the principal attack against the judgment. We however do not feel it inclined to accept such a submission. The High Court has dealt with the matter in a manner proper and the last few lines of the quote above cannot but have out concurrence as well. In any event, disclosure of names in the dying declaration on 29.06.1985 seems to be of a definite significance. But before anything further be it noted that though such a declaration was taken down, but by reason of the efforts of the doctor attending, the victim survived and as such the statement made need not stand the strictest scrutiny of dying declaration but at best a statement under Section 164 of the Code"

8. In view of the categorical pronouncement of the Hon'ble Apex Court to treat such an evidence as a statement under Section 164 of Cr.P.C and also record the objection of the petitioner over marking of the evidence, I do not find any infirmity in the order of the trial court. As such the criminal original petition stands dismissed. The trial court shall supply a copy of the document said to be marked to the accused.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

1.The I Additional District and Sessions Judge,
Coimbatore

2.The Inspector of Police,
Annur Police Station,
Coimbatore.

3.The Public Prosecutor,
High Court, Madras.

+ 1 cc to Mr.T. Sai Krishnan, Advocate Sr.11883

PA(CO)
EU(09/03/2018)

Cr1.O.P.No.1044 of 2018

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