

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.03.2018

DELIVERED ON : 19.12.2018

CORAM

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

Crl.R.C.Nos.43 and 44 of 2018

N.Saminathan ...Petitioner/ Appellant
in both the Crl.R.Cs

Vs

M.P.Thangavelu ...Respondent/ Respondent
in both the Crl.R.Cs

COMMON PRAYER : Criminal Revision Cases are filed under Sections 397 and 401 of Cr.P.C. against the order dated 14.11.2017 passed in Crl.M.P.Nos.108 and 109 of 2017 in C.A.No.10 of 2017 on the file of the I Additional District and Sessions Judge, Erode.

For Petitioner : Mr.M.Guruprasad
in both cases

For Respondent : Mr.N.Ponraj
in both cases

COMMON ORDER

These Criminal Revision Cases are directed against the order dated 14.11.2017 of the learned I Additional District and Sessions Judge, Erode passed in C.M.P.Nos.108 and 109 of 2017 in C.A.No.10 of 2017, dismissing the petitions under filed by the petitioner under Section 315 and 391 of Cr.P.C. respectively.

2. The petitioner is the appellant/accused and the respondent is the respondent/complainant in C.A.No.10 of 2017. C.A.No.10 of 2017 has been filed by the petitioner challenging the conviction and sentence imposed in C.C.No.220 of 2010 dated 17.11.2016 on the file of the learned Judicial Magistrate III, Erode.

3. Pending appeal, the petitioner has filed C.M.P.No.108 of 2017 under Section 315 of Cr.P.C. praying to permit him to adduce evidence on his behalf in the appeal. The petitioner has also filed C.M.P.No.109 of 2017 under Section 391 of Cr.P.C. praying to permit him to examine additional witness, namely Palaniammal, and to mark the certified copy of Form-A issued to Shri Nalinam Finance.

4. Upon consideration of the rival submissions, the appellate Court dismissed both the petitions. Aggrieved by the same, the petitioner has preferred these Criminal Revision Cases.

5. I heard Mr.M.Guruprasad, learned counsel for the petitioner and Mr.N.Ponraj, learned counsel for the respondent in both the Criminal Revision Cases and perused the entire materials available on record.

6. Challenging the order impugned in these cases, the learned counsel for the petitioner submitted that the appellate Court without considering the material submissions made by the petitioner, dismissed the petitions for unsubstantial reasons. The appellate Court was carried away with objections and dismissed the petitions without any valid reasons. He would submit that the reasons adduced by the appellate Court for dismissing the petitions are not in consonance with the law and facts. The findings of the appellate Court are far fetched when it is considered with the legal frame work.

7. The learned counsel further submitted that the petitioner has come forward to examine himself as one of the witnesses in order to dislodge the presumption casted upon. There is no wilful intention on the part of the petitioner in delaying the proceedings. The appellate Court dismissed the petitions for the sole reason that the petitioner/accused has not denied the signature in the cheque.

8. As far as dismissal of the petition filed under Section 391 Cr.P.C. by the appellate Court is concerned, the learned counsel specifically contended that the appellate Court has failed to consider its unfettered powers under Section 391 Cr.P.C. in a proper perspective. The learned counsel submitted that the reception of additional evidence can be entertained when there is likelihood of failure of justice. He would submit that the findings of the appellate Court that the petitioner has failed to avail opportunity has no significance in criminal cases, as the petitioner/accused is facing criminal prosecution and his right to life and personal liberty enshrined in Article 21 of the Constitution of India is at stake.

9. Reiterating the findings of the appellate Court, the learned counsel for the respondent contended that the petitioner was given ample opportunity before the trial Court to disprove the case of the respondent, but curiously he had not taken any steps to prove his case and in order to drag on the appeal proceedings only, the petitioner has filed the petitions. Therefore, the appellate Court was right in dismissing both the petitions.

10. I have considered the submissions made by the learned counsel appearing on either side and also perused the materials available on record.

11. In C.M.P.No.108 of 2017, the petitioner sought permission of the Court to adduce evidence on his behalf in the appeal filed in C.A.No.10 of 2017. C.M.P.No.108 of 2017 was objected by the respondent contending that despite sufficient opportunity granted by the trial Court, the petitioner has not availed of the same and in order to drag on the appeal proceedings, he has filed the petition under Section 315 of Cr.P.C. and the appellate Court has rightly dismissed the petition.

12. Despite having been given opportunities, the petitioner has not chosen to take any defence side witness and, therefore, on the face of it, it cannot be said that the petitioner had not been given enough opportunity or his liberty available under the Code of Criminal Procedure had been denied by the Court.

13. On a perusal of the judgment of the trial Court, it is seen that the learned Judicial Magistrate has stated that defence side witness viz., D.W.1, was examined. But in the list of witnesses, it has been stated that accused side evidence - Nil.

14. Section 315 of Cr.P.C. provides as under:

"315. Accused person to be competent witness. (1) Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:

Provided that-

(a) He shall not be called as a witness except on his own request in writing;

(b) His failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial.

(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, or section 107, or section 108, or section 109, or section 110, or under Chapter IX or under Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings:

Provided that in proceedings under section 108, section 109 or section 110, the failure of such person to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry.

15. At the same time, since Section 315 of Cr.P.C. has not prescribed any time limit, the petition filed invoking Section 315 of Cr.P.C., is not hit by any legal bar expressly, on the ground that it is belated. By reading the language used in the Section 315 of Cr.P.C., this Court is of the view that when the accused seeks for accommodation to let in evidence by himself, and such permission is also sought for by invoking Section 315 of Cr.P.C., such opportunity would not normally be denied.

16. The language used in Section 315 of Cr.P.C., more particularly that the accused of offence before a Criminal Court shall be a competent witness for the defence and also the words used in Section 315(1)(a) that except on his own request in writing, underline the importance of giving opportunity to the accused, whenever he/she seeks such a permission by filing petition in writing, invoking Section 315 of the Code.

17. Once such a petition is filed, unless convincing reason is available, normally, in the opinion of this Court, the trial Court and/or appellate Court, as the case may be, shall not reject such petition. In the case on hand, while dismissing the petition, the appellate Court recorded that though sufficient chances and opportunities were given to the petitioner in the trial Court, the petitioner/accused not examined himself as a witness.

18. The reason for seeking examination of the petitioner as witness is he had given cheque to Nalinam Finance as a security for the deposits collected by them. But the appellate Court while dismissing the petitions came to the conclusion that the story of the cheque given as a security for the deposits collected by Nalinam Finance was an afterthought and still the petitioner has not denied his signature found in the cheque.

19. On a perusal of the judgment of the trial Court, it is seen that while giving conviction judgment, the trial Court recorded that the accused had not taken steps to examine any of the witnesses who are all partners to Nalinam Finance. If the defence plea raised by the accused is true, he would have examined one of the partners to the effect that blank cheques were handed over to the complainant as security to repay the deposit amount collected from the general public.

20. The reason for dismissing C.M.P.No.108 of 2017 by the appellate Court was on two fold - (i) the petitioner has failed to deny his signature in the cheque and (ii) the statement of the petitioner that only as a security for the deposits collected by Nalinam Finance the cheque was given is an afterthought. Except this, the appellate Court has not assigned any reason for dismissing the petition.

21. In view of the legal position as well as the factual matrix, which involved in this case, this Court is of the considered view that in the interest of justice an opportunity of permitting the petitioner/accused to let in his evidence on the defence side, in view of the provision under Section 315 of Cr.P.C., is inevitable and also required. Therefore, in that view of the matter, this Court is of the view that the impugned order of the appellate Court passed in C.M.P.No.108 of 2017 is liable to be interfered with.

22. As far as C.M.P.No.109 of 2017 is concerned, the petitioner has filed the above petition under Section 391 of Cr.P.C. praying to permit him to examine additional witness namely Palaniammal and mark certified copy of Form-A issued to Nalinam Finance.

23. Section 391 of Cr.P.C. provides as under:

"391. Appellate Court may take further evidence or direct it to be taken. - (1) In dealing with any appeal under this Chapter, the Appellate Court, if

it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

24. Section 391 of Cr.P.C. empowers the appellate court dealing with an appeal to take further evidence or direct further evidence to be taken by a Court subordinate to it. But simply because an omission had taken place during the trial, the power contemplated under Section 391 of Cr.P.C. for taking additional evidence cannot be exercised by the appellate Court. In order to exercise such a power, the appellate Court must be satisfied that taking of additional evidence is necessary. While considering the question as to whether taking of additional evidence in the appellate stage is necessary, the Court should not forget the principle that the parties who could have adduced such evidence in the trial stage, should not be allowed to fill up the lacuna by adducing additional evidence in the appellate stage, as a result of afterthought. At the same time, when a request comes from the accused, the Court should also consider the question whether he had reasonable opportunity of defending himself by adducing the proposed additional evidence. The Court should also consider the question whether the additional evidence proposed to be adduced does have any relevancy or whether the prayer for permission to adduce evidence has been made only as an attempt at vexation to fish out of troubled waters. The main aspect to be considered by the appellate Court dealing with the prayer for permission to adduce additional evidence shall be, whether the person seeking such permission could have adduced the proposed additional evidence before the trial Court itself.

25. In the case on hand, the petitioner wants to examine the additional witness viz., Palaniammal and to permit him to mark the registration certificate of Nalinam Finance.

26. As stated supra, while convicting the petitioner, the trial Court observed that the accused had not taken steps to examine any of the witnesses who are all partners to Nalinam Finance. It was further observed that if the defence plea raised by the accused is true, he would have examined one of the partners to the effect that blank cheques were handed over the complainant as security to repay the deposit amount collected from the general public.

27. When the plea of the petitioner is that cheque was given to Nalinam Finance as a security for the deposit collected by Nalinam Finance, it is the bounden duty of the petitioner to prove the same by examining the partners of Nalinam Finance. The reception of additional evidence can be entrained when there is likelihood of failure of justice. It is obvious that the cardinal principle of the Indian Evidence Act is that the best evidence has to be brought in.

28. This court is satisfied that the petitioner has made out a case for taking additional evidence in the appellate stage under section 391 of Cr.P.C. The appellate Court has not properly adverted to the essential ingredient of Section 391 of Cr.P.C. "if it thinks additional evidence to be necessary". These words in the Section contemplates a wide power to the appellate Court to weed out the infirmities and irregularities. Considering the facts and circumstances of the case, this Court is of the view that in order to render complete justice, it is just and necessary to allow the petitioner to lead additional evidence and also marking of documents.

29. For the reasons stated above, this Court comes to the conclusion that the petitions filed by the petitioner before the appellate Court seeking to adduce evidence on his behalf and also permission to examine additional witness viz., Palaniammal and mark certified copy of Form-A deserve to be allowed. Instead of appellate Court itself taking evidence of the petitioner and additional evidence on his side, this Court deems it convenient and appropriate to direct the trial Court to record the evidence of the petitioner and the additional evidence and submit the same to appellate Court for reference in the appeal.

30. In the result, the Criminal Revision Cases are allowed thereby setting aside the order dated 14.11.2017 passed in C.M.P.Nos.108 and 109 of 2017 in C.A.No.10 of 2017 on the file of the learned I Additional District and Sessions Judge, Erode. The petitioner is permitted to give evidence and also adduce additional evidence as prayed in the petitions. It is made clear that the permission granted to the petitioner to lead documentary and oral evidence shall be confined to the document to be produced in these petitions. The trial Court is directed to record the proposed evidence of the petitioner as well as additional evidence viz., one Palaniammal, partner of Nalinam Finance and submit the same to the appellate Court. For the purpose of recording evidence and additional evidence, the appellate Court is directed to send the relevant records to the trial court. The trial court shall, on receipt of a copy of the order and the records, fix an early date for the purpose of recording evidence of the petitioner and the additional evidence, issue necessary summons to the witnesses sought to be examined, complete the recording of evidence of the petitioner and the additional evidence and submit the same to the appellate Court at the earliest. It is made clear that if the petitioner failed to appear before the trial Court on the date fixed by the trial Court or any subsequent date for completion of taking the evidence on his side, no further opportunity need to be given to him by the trial Court and report the same to the appellate Court. Thereafter, the appellate Court shall pass suitable orders and dispose of the appeal on merits and in accordance with law without influencing the order passed by this Court expeditiously.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

vs

To

1. The I Additional District and Sessions Judge,
Erode.

Cr1.R.C.Nos.43 & 44 of 2018

EV(CO)
SSM(04/01/2019)