

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Criminal Jurisdiction)

Wednesday, the Nineteenth day of December Two Thousand Eighteen

PRESENT

The Hon`ble Mr Justice V. PARTHIBAN

CRIMINAL MISCELLANEOUS PETITION Nos.16656 to 16660 of 2018

IN CRL RC.186 to 190 /2018

S.ARUL PRAKASAM

[PETITIONER
IN ALL THE PETITIONS]

Vs

V.JAYAPAL

[RESPONDENT]
IN ALL THE PETITIONS]

Petition praying that in the circumstances stated therein the High Court will be pleased to summon the following documents to secure the ends of justice

a. The Letter dated 08.10.2015 of the complainant to Inspector of Police, F-5, Choolaimedu Police Station for having acknowledged in receipt of 4 cheques at the choolaimedu police station,

b. FIR being crime no.317 of 2016 under sections 406 and 420 of IPC and

c. the concerned CD file in crime No.317 of 2016 on the file of the F-5,Choolaimedu police station and pass such further order or other order as may necessary in the cricumstances of the case and thus render jusice.[CRL.MP.NO.S 16656 TO 16660/2018]

Order : This petition coming on for orders upon perusing the petition and upon hearing the arguments of MR.R.SANKARASUBBU FOR M/S.C.V.KUMAR Advocate for the petitioner[IN ALL THE PETITIONS] and of MR.Y.KAJA NAVAS Advocate on behalf of the Respondent [IN ALL THE PETITIONS]the court made the following order:-

All these criminal miscellaneous petitions have been filed under Sections 391, 401 and 91 r/w 482 of Cr.P.C. The petitioner herein was convicted for an offence punishable under Section 138 of Negotiable Instruments Act, by the Fast Track Court II, Allikulam, Egmore, Chennai, in C.C.Nos.794, 796, 797, 2975 and 795 of 2016 dated 31.08.2017 to undergo simple imprisonment for a period of one year with payment of compensation of Rs.2.00 lakhs each, Rs.2,52,000/- in C.C.No.2975 of 2016, in default, to undergo simple imprisonment for a further period of three months, which convictions were confirmed by

the lower appellate Court vide its judgment dated 22.01.2018 in Criminal Appeal Nos.278, 280, 281, 282 and 279 of 2017. In the present revision cases, notices were ordered and the respondents have entered appearance. While so, the present miscellaneous petitions have been filed seeking to adduce additional evidence by summoning the following documents:

- a) "the letter dated 08.10.2015 of the complainant to Inspector of Police, F5-Choolaimedu Police Station for having acknowledged in receipt of 4 cheques at the Choolaimedu police station;
- b) FIR bearing crime no.317 of 2016 under sections 406 and 420 of IPC and
- c) the concerned CD file in crime No.317 of 2016 on the file of the F5-Choolaimedu Police Station."

2 Mr.R.Sankarasubbu, learned counsel appearing for the petitioner would submit that these documents are necessary to the defence of the petitioner/accused that there was no legally enforceable debt on behalf of the petitioner/accused to the respondent/ complainant. Unfortunately, these documents were not summoned by the trial Court or by the lower appellate Court and therefore he is constrained to move these petitions for adducing additional evidence.

3 These petitions were strongly resisted by the learned counsel for the respondent/complainant stating that although enough opportunities were given by both the trial Court as well as the lower appellate Court, the petitioner/accused had not utilised the same and at the belated stage, in the revision before this Court, these petitions are filed. The intention of the petitioner/accused is quite clear that these petitions are filed only to avoid payment to the respondent/complainant and to frustrate the respondent/complainant from realising the dues from the petitioner/accused. The learned counsel would submit that these petitions, at the revision stage, are not maintainable in law and the attempt by the petitioner seeking adducing additional evidence is abuse of process of law. He would in support of his contentions rely on the decisions of the High Court of Delhi reported in **2015 (220) LLT 629 (Sonu Dahiya vs. state the Govt. of NCD of Delhi)**. The relevant portion of the above judgment is extracted hereunder.

"9. Before dealing with the arguments of learned counsel for the Appellant, it would be useful to reproduce Section 391(2) of the Code of Criminal Procedure.

"(A) Section 391(2): This section contemplates a further inquiry by taking additional evidence when the conviction by the lower court has been based upon some evidence which might legally support it, but which in the opinion of the appellate court is not quite satisfactory.

(B) Section 391(3) : It is an exception to the general rule and the power conferred by this provision must be exercised with great care, so that the reception of additional evidence for the prosecution may not operate

in any manner prejudicial to the defence of the accused.

(C) The power to take additional evidence in appeal has been vested to ensure that the concept of justice does not suffer, and "to rectify the irregularities."

(D) Where the documents are already on record, the application of the accused for taking additional evidence obviously to delay the trial of the case and is rightly rejected as the set evidence could be filed before the trial court.

(E) Where the witnesses, nor any attempt was made to file them before the trial court, the same cannot be admitted in evidence in the appellate court. F) Affidavits of the prosecutrix or the witness which have the effect of demolishing the entire prosecution case cannot be received in evidence in appeal.

(G) The appellate court cannot permit the production of the new documents in exercise of its powers under Section 391 Cr.P.C.

(H) Section 391(8) : The object of this section is not to enable the prosecution to produce evidence at a later stage which could have been produced at the first Trial and fill up the lacuna left by its. Therefore an order allowing an application under this section must be set aside as it would tantamount to allowing the prosecution to reinvestigate the matter and adduce further evidence."

10. The law in this regard is well settled. The Court must exercise its jurisdiction with care and caution and only in cases where appellate court is satisfied that some evidence, which ought to have been brought on record, has been left out, the Court must satisfy itself that additional evidence is essential to prevent miscarriage of justice.

11. A reading of the above Section clearly stipulates that the power under Section 391 of the Code of Criminal Procedure needs to be exercised with great care. It is binding upon the Court that where the documents are already on record, the prayer for adducing additional evidence may be inferred as delaying the disposal of the case and in case of production of new documents, the Appellate Court cannot permit such ground as raised by the Appellant."

The learned counsel would further rely on the decisions of the **High Court of Bombay in Criminal Application No.4307 of 2002 (Yogendra Bhagatram Sachdev vs. State of Maharashtra and others)**, dated **07.02.2003**, wherein, the Court has held that the accused having not chosen to reply to the notice and not had any evidence at trial, he cannot be allowed to lead evidence at the stage of appeal. He would also rely yet another decisions of the **High Court of Bombay in Criminal Application No.1962 of 2007 (Mamtadevi w/o Prafullakumar**

Bhansali vs. Vijayakumar Mamraj Agarwal dated 25.10.2017, in which, the Court has held that additional evidence, at the appeal stage, belatedly, is just to fill up the lacuna, and the same was not permissible. The learned counsel for the respondent would also submit that the respondent has filed a detailed counter affidavit, in which, the entire transaction has been explained, which facts are relied upon by both the trial Court as well as the lower appellate Court and convicted the petitioner. According to him, it is true that the case was registered for cheating and for other offences, later on, at the instance of the petitioner/accused it was not pursued, but, instead the respondent accepted four cheques from the petitioner/accused and the letter dated 08.10.2015, which is one of the documents sought to be summoned was intimation to the police to not pressing the complaint. On the basis of the initial complaint, a case was registered under Section 406 and 420 of IPC. According to the learned counsel for the respondent, in fact, this aspect was pleaded by the petitioner and it was discountenanced by the lower appellate Court. The petitioner having not discharged the burden cast upon him, after having admitted his signature in the cheque, it is not open to him for summoning the documents at the revision stage. The learned counsel therefore would submit that the entire attempt to seek additional documents is only to delay the proceedings and it would inure to the petitioner/accused.

4 This Court considered the rival submissions made by the learned counsel on either side and perused the materials and the pleadings placed on record.

5 As rightly contended by the learned counsel appearing for the respondent/complainant, the petitioner/accused has not utilised the opportunity, at the time of trial for discharging his burden of his defence and having failed to discharge the burden cast on him and having failed to file any petition, even at the lower appellate stage, it is not open to the petitioner/accused to file the present miscellaneous petitions at the revision stage.

6 The conclusion by the trial Court in regard to the said aspect as found in paragraph nos.38 and 39 is useful for taking decision in the present cases, which are extracted hereunder.

"38) Since the accused is unable to extract useful answers from the cross examination of P.W-1 to support his case/defence and there is nothing on record in this case to support the accused's case/defence and the accused has not let in any evidence and the defence of accused appears to be false, improbable and after thought, it cannot be held that the accused has rebutted the statutory presumptions and discharged his burden of proof. Therefore, this Court concludes that the accused has failed to even set out a probable defence and to establish the same through any one of the mode which is absolutely and exclusively available to him and further that the accused has failed to discharge his burden of

39) As the accused is unable to discharge his burden of proof, the case of complainant becomes to be proved with and the aid of statutory presumptions, under these circumstances this court has no hesitation to hold that the complainant has proved the guilty of the accused beyond all reasonable doubts and the accused is liable to be punished. Therefore, to the above discussed extent, this court answers the first point positively that the complainant has proved the guilty of the accused beyond reasonable doubts and the second point negatively that the accused has not rebutted the statutory presumptions that favour the complainant by making probable defence and consequently he has not discharged his burden."

Further, the lower appellate Court, wherein this aspect was raised on behalf of the petitioner/accused has held as found in Paragraph nos.12 and 13, which are extracted hereunder:

"12. The contention raised on the side of the appellant is that the four cheques were obtained forcibly at the police station for a concocted amount with undue influence and coercion. But the appellant has not denied the issuance of cheque and his signature in it. If the above cheque has been obtained from him under threat, then the appellant has to prove the same.

13. At this juncture, this appellate Court has taken judicial note of The three Judge's bench of the Honourable Supreme Court of India in the case of Hiten P.Dalal-vs-Bratindranath Banerjee on 11 July, 2001 cited in 2001(3) CTC 243 wherein the Honourable Apex Court has held as follows:-

"The appellant's submissions that the cheques were not drawn for the 'discharge in whole or part of any debt or other liability' is answered by the third presumption available to the Bank under Section 139 of the Negotiable Instruments Act. This Section provides that "it shall be presumed, unless the contrary is proved; that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or part, of any debt or other liability" the effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability."

----"Presumption are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the presumption is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact."

In this case, the accused has not produced any oral or documentary evidence to disprove the borrowal of loan, execution of cheque on security purpose. Further he has

admitted to have issued the cheque under dispute and his signature in the disputed cheque. When the cheque as well as the signature has been accepted by the accused, the presumption under section 139 would operate. Thus the burden was on the accused to disprove the cheque or the existence of any legally recoverable debt or liability. He has totally failed to prove the same."

7 From the above it is very clear that the petitioner herein has not established his defence at all before the trial Court as well as the lower appellate Court and on the other hand the respondent/complainant has proved his case that there was a legally enforceable debt by the petitioner herein towards the respondent/complaint. Having suffered by concurrent findings of the two Courts below, the petitioner herein, in a despair, to wriggle out from the liability, has chosen to file these petitions, which are nothing but frivolous petitions which do not merit for consideration at all by this Court. As rightly contended by the learned counsel for the respondent/complainant, it is a brazen attempt on the part of the petitioner herein to drag the proceedings and to frustrate the respondent/complainant from realising the fruits of two judgments in his favour by the trial Court as well as the lower appellate Court. Summoning of documents as prayed for in the petitions will not materially alter the case of the defence and it is clear that the petitioner has attempted to make a vexatious plea in order to achieve a collateral purpose with oblique motives. Such calculated design cannot be allowed to succeed by this Court.

8 For the above said reasons, this Court finds that these petitions are absolutely without merit and substance and to say the least the petitions are more than frivolous in nature and are calculated to defeat the legitimate right of the respondent/complainant to enforce the debt against the petitioner as held by the both the Courts below. Therefore all these miscellaneous petitions are dismissed.

-sd/-

19/12/2018

This order, on being produced, be punctually observed and carried into execution by all concerned

TRUE COPY

Sub-Assistant Registrar (Statistics/C.S.)
High Court, Madras - 600 104.

TO

1 THE VI ADDITIONAL SESSIONS
JUDGE, CHENNAI

2 THE METROPOLITAN MAGISTRATE
FAST TRACK COURT-II,
ALLIKULAM, EGMORE, CHENNAI

+10 C.C. to M/S.C.V.KUMAR Advocate on payment of necessary
charges SR.NO.24445,24446,24447,24448,24449

+1 C.C. to M/S.Y.KAJANAVAS Advocate on payment of necessary
charges SR.NO.88088

Order

in

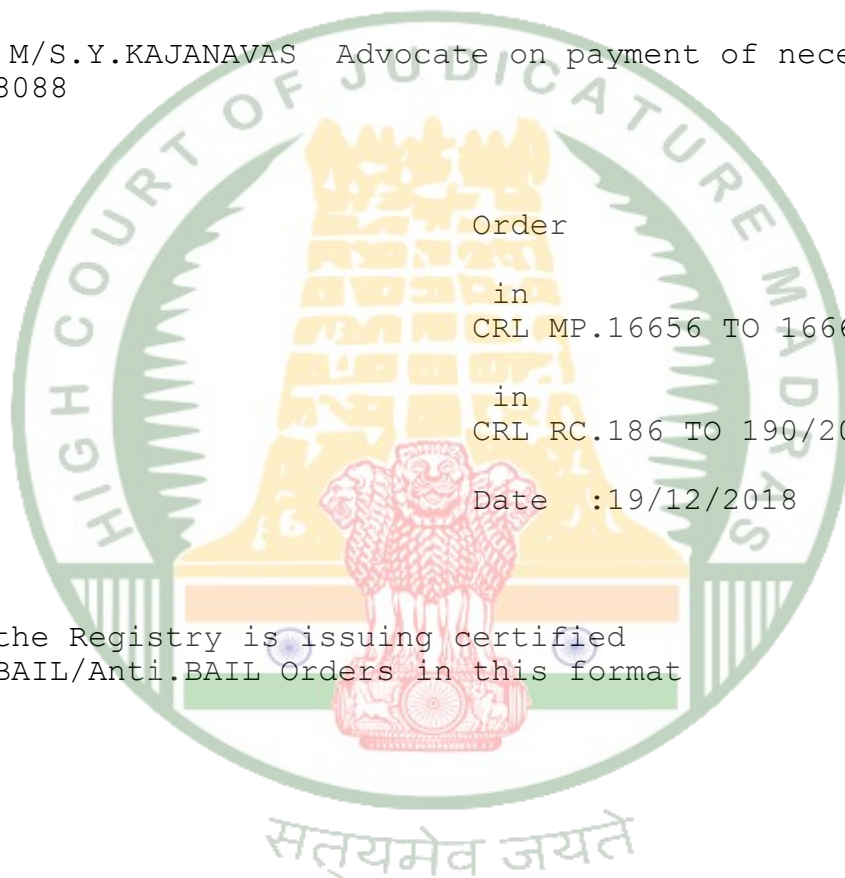
CRL MP.16656 TO 16660/2018

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CRL RC.186 TO 190/2018

Date :19/12/2018

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RD 21/12/2018



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