



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.08.2018

CORAM:

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

CrI.O.P.[MD]No.529 of 2018

and

CrI.M.P.[MD]Nos.209 & 210 of 2018

S.Kalpana

: Petitioner

Vs.

1.Selvakumar

2.Mahaesh

3.Vijayalakshmi

4.Anuradha

: Respondents

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C., praying to set aside the order of dismissal passed in CrI.M.P.No.7236 of 2017 in C.C.No.124 of 2017 dated 27.12.2017 on the file of the Judicial Magistrate Court No.I at Thanjavur by allowing the present Criminal Original Petition.

For Petitioner : Mr.D.Selvanayagam

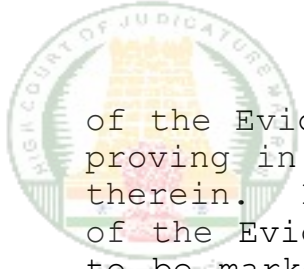
For Respondents : Mr.D.Sivaraman

O R D E R

This Criminal Original Petition has been filed challenging the order passed by the learned Judicial Magistrate No.I, Thanjavur in C.C.No.124 of 2017 dated 27.12.2017, wherein the learned Judicial Magistrate was pleased to dismiss the petition filed under Section 311 of Cr.P.C., to re-call the petitioner herself and to mark the deposition made by the first respondent husband in H.M.O.P.No.58 of 2013.

2.The learned Counsel for the petitioner would submit that the present complaint has been filed by the petitioner's wife for the offences under Sections 470, 498(A) IPC r/w. Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, against the first respondent husband and three others. In the said complaint, the petitioner examined herself as P.W.1. The matter was at the stage of examining further witnesses on the side of the petitioner. At this stage, a petition under Section 311 Cr.P.C., came to be filed by the petitioner to re-call her (P.W.1) and to mark the deposition given by the first respondent in H.M.O.P.No.58 of 2013. The learned Counsel would further submit that the deposition made by the first respondent is very relevant for the purpose of proving the case of the petitioner.

3.The learned Counsel for the respondents would submit that the <https://hcservices.ecourts.gov.in/hcservices/> petition filed by the petitioner to recall herself is not maintainable. Learned Counsel would further submit that Section 33



of the Evidence Act speaks about relevancy of certain evidences for proving in a subsequent proceeding about the truth of facts stated therein. For the purpose of invoking the provisions of Section 33 of the Evidence Act, the deposition of the witness which is sought to be marked in the case, should have died or is not found or has become incapable of giving evidence or has been kept out of the way by an adverse party or his presence cannot be obtained without delay or expenses which the Court considers to be unreasonable.

4.The learned Counsel for the respondents would further submit that none of these ingredients are available in the present case and therefore, Section 33 of the Evidence Act cannot be invoked in this case. The learned Counsel therefore submits that the Court below was right in dismissing the application filed by the petitioner for recalling herself in order to mark the deposition of the first respondent given in H.M.O.P. No.58 of 2013.

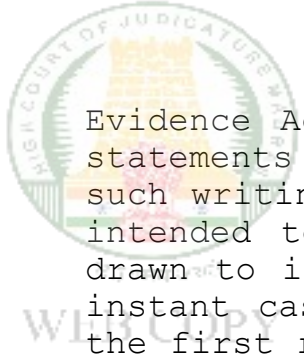
5.This Court has carefully considered the submissions made on either side.

6.The Court below, while considering the application filed by the petitioner, has found that the deposition that is sought to be marked by recalling P.W.1 cannot be done in the manner in which the petitioner wants it to. On the other hand, the Court below has found that the said deposition can be marked only in the course of cross examination of first respondent by virtue of the provisions of Section 145 of the Evidence Act.

7.As rightly pointed out by the learned Counsel for the respondents, the only provision which deals with the present situation is, Section 33 of the Evidence Act. For the purpose of invoking Section 33 wherein the evidence given by a witness in a judicial proceeding will become relevant for the purpose of proving in a subsequent judicial proceeding only when the conditions that are stipulated under Section 33 are fulfilled. In the instant case, none of the conditions under Section 33 is fulfilled.

8.That does not mean that the petitioner has lost her right to use the deposition of the first respondent in this case. Admittedly, H.M.O.P. No.58 of 2013 was a proceeding between the petitioner and the first respondent. Therefore, the statements and deposition that have been made in that case will have lot of relevance as between the same parties in the subsequent proceedings. However, it is only the manner in which this deposition is sought to be introduced before the Court that is in controversy.

9.The petitioner wants to rely upon the deposition made by the first respondent in the earlier proceedings that happened between the petitioner and the first respondent. The appropriate stage at which this should be done is at the time of cross examining the first respondent. Section 145 of the Evidence Act provides for dealing with a situation like this. Under Section 145 of the



Evidence Act, a witness can be cross examined as to the previous statements made by him which was reduced into writing without even such writing being shown to him or being proved. However, if it is intended to contradict him by the writing, his attention must be drawn to it before the writing can be proved against him. In the instant case, the petitioner wants to rely upon the deposition of the first respondent in order to prove her case and in order to use it against the first respondent. Therefore, the right of the petitioner is not taken away by the Court below but the stage at which it has to be done has only been pointed out by the Court below.

10.This Court does not find any illegality or infirmity in the order passed by the Court below. However, it is made clear that the petitioner is at liberty to mark the deposition of the first respondent made in H.M.O.P. No.58 of 2013, at an appropriate stage and the right of the petitioner to do so is not being taken away either by the order passed by the Court below or by the order passed in this Criminal Original Petition.

11.The C.C. is of the year 2017 and it is in the stage of evidence. Therefore, there will be a direction to the learned Judicial Magistrate No.I, Thanjavur, to dispose of C.C.No.124 of 2017 within a period of six [6] weeks from the date of receipt of the order of this Court.

12.This Criminal Original Petition is disposed of with the above observations. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar (CS-IV)

To

1.The Judicial Magistrate No.I,
Thanjavur. (to report compliance of this order after the
completion of the proceedings)

2.The Chief Judicial Magistrate,
Thanjavur at Kumbakonam.

+1CC to Mr.D.Sivaraman Advocate in sr.No.79071.

+1CC to Mr.D.Selvanayagam Advocate in Sr.No.79066.

MR

DS/SKN/RSK/SAR-4 ;31.08.2018; 3P/5C

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