



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

CRL.O.P.(MD)No.15601 of 2017

and

Crl.M.P.(MD)No.10373 of 2017

R.Prem Anand

... Petitioner/Respondent/Respondent

-Vs-

M.Senthilkumar

...Respondent/Petitioner/Complainant

PRAYER: Petition is filed under Section 482 of the Criminal Procedure Code to call for the records of the order in Cr.M.P.No.4936 of 2017 in S.T.C.No.85 of 2015 on the file of the Judicial Magistrate No.II (Fast Track Court, Magistrate Level) Madurai dated 30.10.2017 and set aside the same.

For Petitioners

: Mr.M.Gururaj,

For Respondent

: Mr.R.Rangarajan,

O R D E R

This petition has been filed to set aside the order passed in Crl.M.P(MD)No.4936 of 2017 in S.T.C.No.85 of 2015 by the Judicial Magistrate No.II (Fast Track Court, Magistrate Level) Madurai, dated 30.10.2017.

2.According to the petitioner, the respondent has filed an application under Section 311 of Cr.P.C., to recall the P.W.1 and to mark the documents to substantiate the case. The petitioner has filed a counter statement by stating that the present application filed by the respondent is not maintainable by law and on facts.

3.The specific case of the petitioner is that after conclusion of the cross-examination of witnesses and arguments of both sides in the year 2016, the respondent has filed the present application to recall the P.W.1, is not maintainable, but the court below erroneously allowed the application. Challenging the said order, the petitioner has filed the present application.

4.The learned counsel appearing for the respondent would submit that the respondent being the complainant has stated the reason for marking of the documents. The court below has rightly allowed the application by providing an opportunity for marking of documents to substantiate his case. Therefore, there is no error in the order passed by the Court below.



5. The learned counsel for the respondent relying on the judgement in *State of Haryana v. Ra, Mehar* reported in (2016) 8 SCC 762 and the relevant paragraphs are extracted hereunder:-

"39. There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in-chief was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 11 CrPC should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown, we are inclined to think, are not acceptable in the obtaining factual matrix. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous.

42. At this juncture, we think it apt to state that the exercise of power under Section 311 CrPC can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words "magnanimous approach" and how it should be understood. Regard being



had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no boundaries, the orders like the present one may fall in the arena of sanctuary of errors. Hence, we reiterate the necessity of doctrine of balance."

6.Considering the rival submissions made by both parties and also perused the materials on record, it is an admitted fact that the P.W.1 was examined and after concluding the examinations, arguments was advanced by both parties and the written arguments was also submitted by the petitioner and at that stage, the present application has been filed by the respondent for the aforesaid prayer.

7.Therefore, in the light of the facts and in the light of the aforesaid decision of the Supreme Court of India, the impugned order passed by the learned Judicial Magistrate No.II (Fast Track Court, Magistrate Level) Madurai, dated 30.10.2017 is set aside and the Criminal original Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/

Assistant Registrar(CS-I)

/True copy/

Sub Assistant Registrar

To

- 1.The Judicial Magistrate No.II,
(Fast Track Court, Magistrate Level),
Madurai.
- 2.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1cc to Mr.M.VIVEK KUMAR, Advocate, SR.No. 60434

+1cc to Mr.C.SUNDARA VADIVEL, Advocate, SR.No. 60863

Order made in
CRL.O.P.(MD) No.15601 of 2017
10.04.2018

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