



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 11.07.2018

CORAM:

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THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

CRL.OP.(MD) No.11614 of 2018

Mani

... Petitioner

Vs.

The Sub Inspector of Police,
Kottar Police Station,
Kottar, Kanyakumari District.

... Respondent

PRAYER: Criminal Original petition filed under Section 482 of Code of Criminal Procedure, to call for the records relating to the impugned order, dated 26.02.2018 in C.M.P.No.713 of 2018 in C.C.No.185 of 2014 passed by the learned Judicial Magistrate No.II, Nagercoil, Kanyakumari District and set aside the same and consequently allow the application filed by the petitioner herein in C.M.P.No.713 of 2018 in C.C.No.185 of 2014 on the file of the learned Judicial Magistrate No.II, Nagercoil (now re-numbered as C.C.No.34 of 2018 and pending on the file of Additional Mahila Court (Magistrate Level) Nagercoil, Kanyakumari District under Section 311 of Cr.P.C., for seeking permission to recall P.W.1 to P.W.4 for cross-examination.

For Petitioner	: Mr.E.V.N.Siva,
For Respondent	: Mr.K.Suyambulinga Bharathi, Government Advocate (Crl.side)

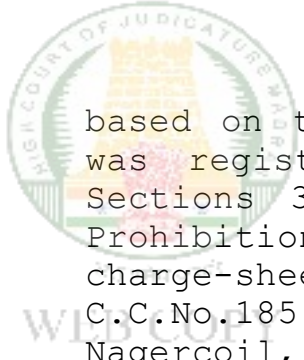
ORDER

This Criminal Original Petition has been filed to call for the records in C.M.P.No.713 of 2018 in C.C.No.185 of 2014 passed by the learned Judicial Magistrate No.II, Nagercoil, Kanyakumari District and set aside the order, dated 26.02.2018 passed therein.

2. According to the petitioner, he has filed an application under Section 311 of Cr.P.C., to recall P.W.1 to P.W.4 for cross-examination. However, the said application was dismissed by the Court below and challenging the same, this petition has been filed.

<https://hcservices.ecourts.gov.in/hcservices/>

3. The learned counsel appearing for the petitioner submitted



based on the complaint given by the defacto complainant, a case was registered against the petitioner for the offences under Sections 323, 294(b), 448 of IPC and Section 4 of Tamil Nadu Prohibition of Women Harassment Act, 1998, after investigation, charge-sheet has been filed and the same was taken on file in C.C.No.185 of 2014, before the learned Judicial Magistrate No.II, Nagercoil, Kanyakumari District. He would further submit that as per the provision under Section 311 Cr.P.C., the petitioner, at any stage, can file an application before the concerned Court to recall the witnesses.

4. The learned Counsel appearing for the petitioner would further submit that though P.W.1 to P.W.4 were examined on 06.11.2014, now, he came to know about some relevant facts and therefore, it is necessary to recall the said witnesses for cross examination and sufficient reasons have also been stated in the application to recall the witnesses. Despite the same, the Court below, without considering the said facts and also without giving any opportunity to the petitioner, has erroneously dismissed the application and therefore, he prays for interference at the hands of this Court.

5. Heard the learned Counsel appearing for the petitioner as well as the learned Government Advocate (Crl.side) appearing for the respondent and perused the documents placed on record carefully.

6. Perusal of records would show that P.W.1 to P.W.4 were examined in chief wayback in the year 2014. It is also seen that the petitioner has filed C.M.P.No.713 of 2018 to recall the P.W.1 to P.W.4 in the year 2018 and the same was dismissed by the Court below, which is impugned herein. It is seen that the Court below, while passing the impugned order, has held that P.W.1 to P.W.4 were examined in chief on 06.11.2014 and after a lapse of nearly 4 years, this petition to recall P.W.1 to P.W.4 has been filed and no reason has been stated for belated filing of this application and therefore, the Court below has rightly dismissed the petition.

7. The Hon'ble Supreme Court, in the decision reported in **(2016) 2 Supreme Court Cases 402 [State (NCT of Delhi) v. Shiv Kumar Yadav]**, has held as follows:-

"29.We may now sum up our reasons for disapproving the view of the High Court in the present case:

(i) *The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;*

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly



at the back of such counsel;

(iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall I.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted."

8. Further, in **Rajaram Prasad Yadav Vs. State of Bihar** reported in **(2013) 14 SCC 461**, the Hon'ble Supreme Court has culled out certain principles to be kept in mind, while exercising power under Section 311 Cr.P.C., and the said portion of the judgment is extracted as follows:-

"(i) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

(ii) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.



(iii) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

WEB COPY (iv) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

(v) The wide discretionary power should be exercised judiciously and not arbitrarily.

(vi) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

(vii) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

(viii) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

(ix) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

(x) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.



(xi) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

9. The said decision has also been followed in **Haryana Vs. Ram Mehar and others reported in (2016) 8 Supreme Court Cases 762**, where the Hon'ble Supreme Court has held that **"concept of fair trial cannot be limitlessly stretched to permit recall of witnesses endlessly on ground of magnanimity, etc."**

10. This Court has already dealt with the similar issue involved in this petition in CrI.O.P.(MD)No.94 of 2017, relying upon the judgment rendered by the Hon'ble Supreme Court in **(2016) 2 Supreme Court Cases 402** and dismissed the said petition, rejecting the contention on similar facts. In this case also, the petitioner has not adduced any satisfactory reason to make interference in the order passed by the Court below.

11. Therefore, the trial Court has rightly dismissed the petitioner's application, after considering all the materials available on record and the same does not warrant any interference of this Court.

12. In fine, this Criminal Original Petition is dismissed.

Sd/-

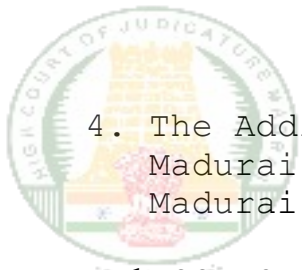
Assistant Registrar (RTI)

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Sub Assistant Registrar (CS-I)

To

1. The Judicial Magistrate No.II,
Nagercoil, Kanyakumari District.
2. The Additional Mahila Court, (Magistrate Level),
Nagercoil.
3. The Sub Inspector of Police,
Kottar Police Station,
Kottar, Kanyakumari District.



4. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC TO Mr.E.V.N.SIVA, ADVOCATE IN SR No. 72862

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TE/RP/SAR-1 : 01/08/2018 : 5P/6C

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