



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 23.01.2019

CORAM:

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA
Crl.O.P.(MD).No.15977 of 2018
Crl.M.P.(MD).No.7091 of 2018

WEB COPY

Krishnan Kutty

... Petitioner

/Vs/

1. C.Jeyakumar
2. H.Selvan
3. K.Jeyaraj

... Respondents

PRAYER: This Criminal Original Petition is filed, under Section 482 of Cr.P.C, against the order dated, 17.07.2018, made in Crl.M.P.No.805 of 2018 in C.C.No.16 2018, by the Judicial Magistrate No.II, Padamanabapuram, Kanyakumari District.

For Petitioner : Mr.C.T.Perumal

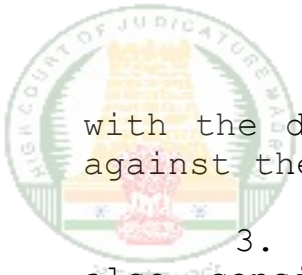
For Respondent : Mr.S.C.Herold Singh

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O R D E R

This Criminal Original Petition is filed, under Section 482 of Cr.P.C, against the order dated, 17.07.2018, made in Crl.M.P.No.805 of 2018 in C.C.No.16 of 2018, by the learned Judicial Magistrate No.II, Padamanabapuram, Kanyakumari District.

2. The facts, in a nutshell, for disposal of this Criminal Original Petition are that the petitioner has filed the complaint in C.C.No.16 of 2018, before the learned Judicial Magistrate No.II, Padamanabapuram, Kanyakumari District, alleging that on 05.06.2017 at 3.10 p.m., during the marriage function of his son Abith, the respondents herein trespassed into his house and committed theft of Rs.70,000/- and 8 sovereigns of jewels and that since the said complaint was not registered, and only a receipt dated 08.06.2017, in C.S.R.No.274 of 2017 was given, the petitioner has filed the above complaint. He would further submit that in C.C.No.16 of 2018, the 1st respondent herein has filed Cr.M.P.No.805 of 2018, to call for certain documents from the Kulasekharan Police Station and a counter was also filed by the petitioner herein, objecting to marking of such documents and that in pursuance of the order, the court below has allowed Cr.M.P.No.805 of 2018, directing the Sub Inspector of Police, Kulasekharan Police Station, to appear and give deposition on 31.07.2018, along

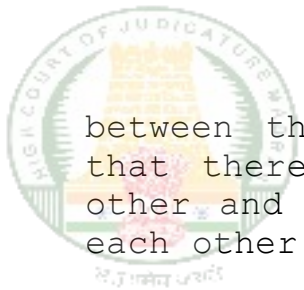


with the documents and regarding the action taken by them and as against the same, this Civil Original Petition has been filed.

3. This Court heard the learned counsel on either side and also considered their rival submissions and also perused the materials placed on record.

4. The learned counsel for the petitioner would submit that the Document No.1 was already marked as Ex.P1 and hence, it is not necessary to be marked and that the Document No.2, statement of Abith and Gloyry Saroja, recorded in C.S.R.No.274 of 2017, cannot be marked as it is hit by Section 162 of Cr.P.C. He would further submit that the Document Nos.3 and 4 and are also not necessary to be marked, as they have got no relation with the present case, as they are separate complaints and that if at all that complaints culminated in filing of the charge sheet, the accused therein have to be prosecuted separately and that for such reasons, the impugned order is liable to be set aside and placing reliance on the decision of the Hon'ble Supreme Court reported in **1990 4 SCC 692 (Baldev Singh Vs.State of Punjab)** for the proposition that the statement recorded under Section 161 of Cr.P.C shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso to Section 162(1) of Cr.P.C.

5. On the other hand, the learned counsel for the respondents, by filing a counter, would submit that the entire allegations made by the petitioner are false and since it is a marriage function, if the respondents were really involved in the crime, the petitioner along with others could have prevented them at the time of alleged occurrence. He would further submit that in the marriage function in the busy time, in the presence of the de-facto complainant, there was no possibility of the alleged incident having taken place and only in order to cause inconvenience to the respondents, a false complaint was given. He would further submit that the documents sought to be marked are very essential documents for fair disposal of the case and the trial court after being satisfied has rightly allowed the petition and summoned the Sub Inspector of Police .He would submit that even in the decision relied on by the counsel for the petitioner it has been held that the statement recorded under Section 161 Cr.P.C shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso to the Section 162 (1) and that it is not needed for any other purpose and that no prejudice would be caused to the petitioner if the documents are called for whereas grave prejudice would be caused to the respondent who is defending the false complaint.



between the parties regarding participation in the marriage and that there are allegations and counter allegations against each other and also there are complaint and counter complaint against each other.

7. However, now the only question, that has to be decided, is as to whether the order of the trial judge could be sustained and the documents sought to be called for from the Kulasekharan Police Station by the respondents, can be allowed to be marked as documents in CC.No.16 2018 or not?

8. The documents sought to be called for from the Kulasekharan Police Station and marked in C.C.No.16 of 2018, are as follows:-

1. Enquiry Findings in Kulasekharan Police Station in C.S.R.No.274 of 2017.

2. Statement of Abith, Glolry Saroja recorded by the Kulasekharan Police Station in C.S.R.No.274 of 2017.

3. Complaints of Abith and Abitha before the Kulasekharan Police Station against Krishnan Kutty and others.

4. Complaints forwarded by Superintendent of Police, Nagarcoil in Ref.P2/SP/1642/2017 to the Kulasekharan Police Station against Krishnankutty and others.

9. The objections raised by the learned counsel for the petitioner is that the statements given by Abith and Glolry Saroja recorded by the Kulasekharan Police Station in C.S.R.No.274 of 2017 is hit by Section 162 (1) of Cr.P.C., and that as per the decision referred above in **1990 4 SCC 692 (Baldev Singh Vs.State of Punjab)** the statement recorded under Section 161 of the code of Criminal Procedure shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso to Section 162 (1) of Cr.P.C.

10. The trial judge has passed the order on an application filed by the respondent/accused under section 91 Cr.P.C. For the sake of reference Section 91 of Cr.P.C is extracted hereunder.

"91. Summons to produce document or other thing (1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is



necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed.

(a) to affect sections 123, and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (18 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

11. The powers conferred under Section 91 are enabling in nature, aimed at arming the Court or any office-in-charge of a Police Station concerned, to enforce and to ensure the production of any document or other things, "necessary or desirable", for the purpose of any investigation, inquiry, trial or other proceeding under the code, by issuing a summons or a written order to those in possession of such material. The language of Section 91 would, no doubt indicate the width of the powers to be unlimited but the in-built limitation inherent therein takes its colour and shape from the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfil the task or achieve the object. Power of Court under Section 91 of Cr.P.C for summoning and production of documents is one of absolute discretion. The only condition for exercise of such discretion is that the Court must be of the opinion that the production of document is necessary or desirable for arriving at a just decision. In this case the objection raised by the learned counsel for the petitioner is that the statements of Abith and Gholry Saroja cannot at all be called under Section 91, in view of the bar under sec 162 Cr.P.C.



Hon'ble Apex Court has held as follows:-

"**16.**Section 162 CrPC bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police under Section 161(1) CrPC can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162(1) CrPC. The statements under Section 161 CrPC recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose: (i) of contradicting such witness by an accused under Section 145 of the Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and (iii) the re-examination of the witness if necessary.

17.The court cannot suo motu make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 CrPC "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. The statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of the Evidence Act that is by drawing attention to the parts intended for contradiction.

18.Section 145 of the Evidence Act reads as under:

"45. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

19.Under Section 145 of the Evidence Act when it is intended to contradict the witness by



his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradictio"

13. As per Section 91 of Cr.P.C what is to be seen is that the trial Court has to be satisfied whether the material sought for are "necessary or desirable", for the purpose of any investigation, inquiry, trial or other proceeding under the code necessary for arriving at a just decision of this case. In view of the above the sustainable objections of the petitioner can be only to the limited extent that the statements of Abith and Gloyry Saroja shall not be used for any purpose except to contradict their earlier statements in the manner prescribed in the proviso to Section 162 (1) of Cr.P.C. and the objection of the petitioner cannot be sustained and thereby this court is of the opinion that there is no error in the order passed by the trial judge calling for the



records.

14. I find no infirmity in the order passed by the learned Trial Judge in CrI.M.P.No.805 of 2018 in C.C.No.16 of 2018 dated 17.07.2018 summoning the Sub Inspector of Kulasekharan Police Station to be present along with the documents. However, it is made clear, the statements of Abith and Gjolry Saroja recorded during the enquiry in C.S.R. 274 of 2017 cannot be used for any other purpose other than contradicting their statements if they are examined by the Petitioner/Complainant.

15. With the above observations, the Criminal Original Petition stands disposed of. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar (CS)

To

The Judicial Magistrate No.II, Padamanabapuram, Kanyakumari District.

+1 cc to Mr.C.T.Perumal , Advocate SR.No.42617

+1 cc to Mr.S.C.Herold Singh , Advocate SR.No.42357

KV

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