



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.08.2019

CORAM

THE HONOURABLE MR. JUSTICE G.R.SWAMINATHAN

Crl.O.P.(MD)No.9099 of 2019

P.Mariyammal

... Petitioner

Vs.

State rep. by
The Inspector of Police,
Vigilance and Anti Corruption,
Thanjavur,
Thanjavur District.

... Respondent

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to set aside the order dated 13.05.2019, passed in Cr.M.P.No.368 of 2019 in Spl.Case No.4 of 2017, on the file of the learned Special Judge Cum Chief Judicial Magistrate, Thanjavur at Kumbakonam.

For Petitioner

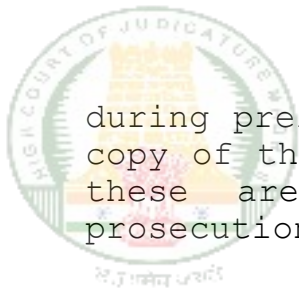
: Mr.A.Thiruvadi Kumar

For Respondent

: Mr.M.Chandrasekaran
Additional Public Prosecutor

ORDER

The petitioner is the sole accused in Spl.S.C.No.4 of 2017, on the file of the learned Special Judge Cum Chief Judicial Magistrate, Thanjavur at Kumbakonam. The petitioner is facing charges under Sections 7, 13(1)(d) r/w 13(2) of Prevention of Corruption Act, 1988. The petitioner was working as Assistant Geologist during the relevant time. A complaint was received that the petitioner demanded and collected illegal gratification. In this regard, Crime No.2 of 2015 was registered on the file the Inspector of Police, Vigilance and Anti Corruption, Thanjavur. Final report came to be filed on 16.06.2017. Cognizance of the offences was taken and charges have already been framed against the accused on 14.11.2017 and the trial is to commence. At this stage, the petitioner filed Crl.M.P.No.2236 of 2018 in Spl.S.C.No.4 of 2017, seeking copies of the statements of the witnesses. In his petition, the accused pointed out that the preliminary enquiry was conducted by Thiru.Venkatasen, the Inspector of Police and based on his report, the case to be registered and final report came to be laid. He therefore wanted copies of the statements of the witnesses examined



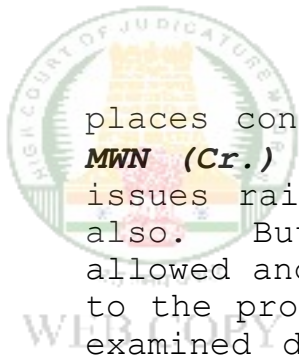
during preliminary enquiry to be furnished to him. He also wanted a copy of the preliminary enquiry report. The accused submitted that these are essential for effective cross examination of the prosecution witnesses.

2.The request made by the petitioner was opposed by the prosecution out by pointing that all the materials on which, the prosecution is going to place reliance have already been furnished to the petitioner/accused. It was further contended that the accused is not entitled to get a copy of the preliminary enquiry report and the statements of the witnesses recorded during the preliminary enquiry. According to the prosecution, they are highly confidential in nature. The learned Trial Magistrate by the impugned order dated 09.02.2019 observed that since the preliminary enquiry report is not forming the basis of the final report, the accused is not entitled to get a copy of the same. The petition filed by the accused suffered dismissal. Thereafter, the petitioner filed Crl.M.P.No.368 of 2019 in Spl.S.C.No.4 of 2017 under Section 91 of Cr.P.C. seeking the very same relief. It was also opposed by the prosecution. By order dated 13.05.2019, the learned Trial Magistrate dismissed the same. The learned Trial Magistrate apart from reiterating the reasons earlier given added that in view the dismissal of Crl.M.P.No.2236 of 2018, which had become final, a second petition seeking the same relief is not maintainable. Challenging the same, this criminal original petition had been filed.

3.Heard the learned counsel appearing for the petitioner and the learned Additional Public Prosecutor appearing for the respondent.

4.I must straightaway concur with the submissions of the petitioner's counsel that filing of Crl.M.P.No.368 of 2019 cannot said to be barred by the dismissal of the earlier petition in Crl.M.P.No.2236 of 2018. This is because the earlier petition was one filed under Section 207 of Cr.P.C. As rightly pointed out by the learned Trial Magistrate all the materials on which reliance is placed by the prosecution had already been made available. Admittedly, the materials now sought for are not being relied upon by the prosecution. Therefore, the dismissal of the earlier petition was certainly well founded. But then, the dismissal of petition under Section 207 of Cr.P.C. will not bar the right of the accused to renew his prayer under Section 91 of Cr.P.C. The scope of Section 91 of Cr.P.C. is certainly wider than that of Section 207 of Cr.P.C.

5.Now the question that arises for consideration is whether the petitioner is entitled to be furnished with copies of the statements recorded by the Inspector of Police during his preliminary enquiry and whether the accused should also be furnished with the copy of the preliminary enquiry report submitted by him. The petitioner's counsel



places considerable reliance on the decision reported in **[2015 (3) MWN (Cr.) 95 (I.Periasamy Vs. State of Tamilnadu)]**. No doubt the issues raised now were also substantially raised in the said case also. But then, the criminal original petition was only partly allowed and the order of the Trial Court declining to give direction to the prosecution to produce copies of the statements of witnesses examined during preliminary enquiry was confirmed. Of course, a direction was given for production of the preliminary enquiry report and the details enquiry report.

6.The learned counsel for the petitioner would place reliance on Section 145 of the Indian Evidence Act, 1872. The said provision reads as under:-

"145. 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.1145. 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."

7.His core contention is that he is entitled to contradict the prosecution witnesses with reference to their previous statements in writing. But then, it is not known as to whether, the witnesses, who were examined by the prosecution during preliminary enquiry are to be cited as witnesses in the trial or not. That apart ,Section 145 of the Indian Evidence Act will come into play only if the previous statements of the witnesses were made in writing or were reduced into writing.

8.The fact remains that notwithstanding the strong observation made in **[2015 (3) MWN (Cr.) 95 (I.Periasamy Vs. State of Tamilnadu)]**, the officer, who conducted the preliminary enquiry was certainly bound by Clause 18 of the Tamil Nadu Vigilance Manual. Clause 18 Manual reads as follows:-

"18. Scope and procedure:

Usually, the first enquiry into a complaint or information is Circularmemo. in the nature of a Preliminary Enquiry. This Preliminary Enquiry should be

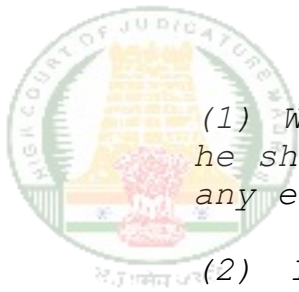


conducted with the utmost secrecy. Witnesses should normally be contacted only through sources or otherwise, indirectly. Where it becomes necessary to contact them directly, the purpose of enquiry must be suitably camouflaged. Willingness of witnesses to make statements may be ascertained, but actual statements should not be recorded. Departmental files and other records, including those that may be available with private sources like Hotels, Lodging houses, Shops, etc., may be looked into. Departmental records may also be taken into custody wherever considered desirable in the interest of preserving any available evidence. Where there is some difficulty in taking them into custody, the Investigating Officer may peruse the records in the Department itself and if a particular record were to be found important for purposes of further enquiry, a written requisition should be given to the local responsible officer of the Department to keep that particular record in safe custody, under his personal responsibility, so that the record could be taken over, at a later stage, when required. Records with private parties may also be taken into custody, if the parties do not raise any objection. If objections are raised, summons from a Magistrate may be got issued by filing a written report before the Magistrate, indicating that an enquiry is being made into the alleged commission of an offence connected with bribery, corruption, etc., and the need to secure the records concerned for the purpose of the enquiry."

9. There is a specific direction that the actual statements should not be recorded. Therefore, I am of the view that Section 145 of the Indian Evidence Act cannot be pressed into service.

10. The Honourable Supreme Court in the decision reported in **[2017 (6) CTC 888 (Nitya Dhamanda @ Lenin V. Gopal Sheelum Reddy)]** emphasized that the accused does not have the right to invoke Section 91 of Cr.P.C. at the stage of framing charge. Of course, that stage is now over and the accused now wants the copies of the statements as well as preliminary enquiry report for effective cross examination of the witnesses. But then, in the very same decision an earlier decision reported in **2005 (1) CTC 134 (SC) (State of Orissa Vs. Debendra Nath Padhi)** was referred to. In the said decision, it was observed that insofar as accused is concerned his entitlement to seek order under Section 91 of Cr.P.C. would ordinarily not come till the change of defence. Section 233 of Cr.P.C. reads as follows:-

"233. Entering upon defence -



(1) Where the accused is not acquitted under section 232 he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

11. In Section 91 of Cr.P.C., the expression "necessary or desirable" occurs. Section 91 of Cr.P.C. confers the power on the Court while Section 233 of Cr.P.C. enshrines the right of the accused. In my view, the two will have to be read together. The accused cannot claim any absolute right. In Section 91 of Cr.P.C. itself, it has been made clear that nothing in the said Section shall be deemed to affect Sections 123 and 124 of the Indian Evidence Act. In fact, the learned Additional Public Prosecutor would lay considerable stress on Section 124 of the Indian Evidence Act. The said provision states that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure. As already pointed, a preliminary enquiry is conducted in strict confidence and with utmost secrecy. That is why, the Honourable Supreme Court in the decision reported in **[(2013) 9 SCC 276, (Manjeet Singh Khare Vs. State of Maharashtra)]** held as follows:-

"8. The Court also noticed that seizure of large number of documents in the course of investigation of a criminal case is a common feature. After completion of the process of investigation and before submission of the report to the Court under Section 173 Cr.P.C, a fair amount of application of mind on the part of the investigating agency is inbuilt in the process. These documents would fall in two categories: one, which supports the prosecution case and other which supports the accused. At this stage, duty is cast on the investigating officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, many times it so happens that the investigating officer ignores the part of seized documents which favour the accused and forwards to the Court only those documents which supports the prosecution. If such a situation is pointed out by the accused and those documents which were supporting the



record of the Court, whether the prosecution would have to supply those documents when the accused person demands them? The Court did not answer this question specifically stating that the said question did not arise in the said case. In that case, the documents were forwarded to the Court under Section 173(5) Cr.P.C. but were not relied upon by the prosecution and the accused wanted copies/inspection of those documents. This Court held that it was incumbent upon the trial court to supply the copies of these documents to the accused as that entitlement was a facet of just, fair and transparent investigation/trial and constituted an inalienable attribute of the process of a fair trial which Article 21 of the Constitution guarantees to every accused. We would like to reproduce the following portion of the said judgment discussing this aspect:

21.The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court. The question arising would no longer be one of compliance or non-compliance with the provisions of Section 207 Cr.P.C. and would travel beyond the confines of the strict language of the provisions of Cr.P.C. and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if in a given situation the accused comes to the court contending that some papers forwarded to the court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to the accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to agree with the view taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belatedly. This is how the scales of justice in our criminal jurisprudence have to be



investigation and after getting the sanction to prosecute accused No.1, charge-sheet was filed. PW1 also did not depose anything about the receipt of complaint/application in his examination-in-chief but receipt of the complaint/application and its contents having been relied upon by the defence during cross-examination of PW1."

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12.I am therefore of the view that the right of the accused to seek a copy of the preliminary enquiry report will depend upon the satisfaction of the Court that it is desirable in the interest of justice and causing production of the same will not defeat the ends of justice. The public interest aspect of the matter will also have to be borne in mind. In this case, the learned Trial Magistrate has proceeded on the premise that the accused is not having any right at all. I am of the view that the learned Trial Magistrate had not correctly appreciated the scope of right of an accused to have a fair trial. The prosecution cannot claim any immunity from disclosure as far as the Court is concerned. The prosecution will have to place all the materials before the Court and if the Court is satisfied that serving a copy of the preliminary enquiry report on the accused will not defeat the ends of justice, it is bound to serve a copy of the same. Since the correct parameters of law while deciding the petition filed by the accused were not taken note of, the order impugned in this criminal original petition is set aside. The matter is remitted to the file of the learned Trial Magistrate. The prosecution shall place a copy of the preliminary enquiry report in a sealed cover to the Court. The prosecution will have to indicate in a covering note as to how serving a copy of the same will prejudice public interest or defeat the ends of justice. If such a case is not made out by the prosecution, the learned Trial Magistrate shall direct the prosecution to serve a copy of the same to the accused. It is however made clear that the petitioner will not be entitled to get the copies of the statements of witnesses recorded during preliminary enquiry. If certain details are to be suppressed and protected from disclosure, the learned Trial Magistrate can also direct the prosecution to suppress those aspects of preliminary enquiry report and serve the remaining part. The learned Trail Magistrate will take decision within a period of two weeks from the date of receipt of a copy of this order. This criminal original petition is allowed with the above directions.

Sd/-

Assistant Registrar (P&A)

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Sub Assistant Registrar(CS)

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



To

1.The Special Judge Cum
Chief Judicial Magistrate,
Thanjavur at Kumbakonam.

2.The Inspector of Police,
Vigilance and Anti Corruption,
Thanjavur,
Thanjavur District.

+1 CC to M/s.A.THIRUVADI KUMAR, Advocate (SR-82041[F] dated
16/08/2019)

Crl.O.P. (MD)No.9099 of 2019
16.08.2019

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