



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved on : 05.09.2019
Judgment Pronounced on : 12.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

**CRL.O.P. (MD) .No.2796 of 2017
and
CRL.M.P. (MD) .No.2140 of 2017**

A.Koodalingam

.. Petitioner

Vs.

M.Sangilinathan

.. Respondent

PRAYER:- Petition filed under Section 482 of Criminal Procedure Code, to set aside the order of the learned Judicial Magistrate, Rajapalayam, in Crl.M.P.No.10890 of 2016 in C.C.No.341 of 2013, dated 20.01.2017.

For Petitioner : Mr.R.Anand
for A.Sivasubramanian

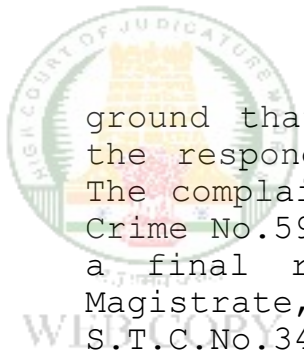
For Respondent : Mr.N.Dilipkumar

ORDER

This Criminal Original Petition has been filed against the order passed by the Court below allowing the application filed by the respondent under Section 311 of Cr.P.C., to issue summon to the Director and Chemical Examiner, Forensic Sciences Department, Chennai, and to mark the expert opinion given by the said authority.

2. The petitioner is the complainant in the complaint filed against the respondent for an offence under Section 138 of Negotiable Instruments Act. The case of the petitioner is that in the course of his business transaction, the respondent approached the petitioner and obtained a loan and issued cheque for a sum of Rs.32,00,000/- (Rupees thirty two lakhs only). When this cheque was deposited in the bank of the complainant, the same was dishonoured with an endorsement "funds insufficient". Therefore, the petitioner has proceeded to file a criminal complaint against the respondent for the offence under Section 138 of Negotiable Instruments Act.

3. In the meantime, the respondent had given a complaint before the South Police Station, Rajapalayam, against the petitioner on the



ground that the petitioner has extracted exorbitant interest from the respondent and has also abused and threatened the respondent. The complaint was taken on file and an FIR came to be registered in Crime No.598 of 2013. The concerned police investigated the case and a final report came to be filed before the learned Judicial Magistrate, Rajapalayam, and the same was taken on file in S.T.C.No.3467 of 2014.

4. The respondent had approached this Court seeking for a direction to the Court below to send certain electronic evidence for expert analysis and to get an expert report in order to substantiate the allegations made by the respondent against the petitioner.

5. It will be useful to extract the relevant portion of the order passed by this Court in Crl.O.P.(MD).No.2621 of 2015, dated 15.04.2015:

"1.The petitioner being the defacto complainant has come forward with this petition seeking a direction to learned Judicial Magistrate, Rajapalayam to receive the primary evidence of Cell phone and memory card from the petitioner under Section 91 of the Code of Criminal Procedure and forward the same through a court appointed advocate commissioner for expert analysis as provided under Section 45-A of the Evidence Act and transmit the same to the police for investigation and ensure safe custody of the Cell phone and memory card; to issue a direction to the respondent police to take all necessary steps under Section 65-B in respect of compact disc made available with them by the petitioner and after producing the same before the concerned Court under Section 91 of Criminal Procedure Code forward the same for expert analysis under and 2nd respondent police supervise the investigation of the criminal case by the 3rd respondent police and cause the filing of a final report within a reasonable time without any undue delay.

2.Heard learned counsel for the petitioner, learned Government Advocate (Criminal side) for the respondents and learned Advocate Commissioner.

3.On the earlier occasion this Court has appointed a learned Advocate Commissioner to carry out certain works including handing over the petitioner's cell phone and memory card to the Director and Chemical Examiner, Forensic Science Department, Chennai and obtain a detailed compliance with the order passed by this Court. The report contains three sealed covers along with transcription, articles and C.D. Thus the prayer

<https://hcservices.ecourtservicesfor> has been substantially complied with.



4. Considering the above, learned Government Advocate (Criminal side) is directed to hand over the evidence collected in pursuance to the order passed by this Court to the order passed by this Court to the first respondent viz., the Superintendent of Police, Virudhunagar District. The respondent No.1 is further directed to hand over the same to respondent No.3. The respondent No.1 is also directed to monitor the investigation and while doing so the evidence that the final report will have to be filed within three months from the date of receipt of a copy of this order."

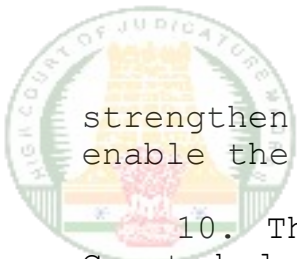
6. The petitioner again approached this Court to appoint an Advocate Commissioner for getting an expert opinion to compare the voice recorded in the mobile phone with the admitted voice sample of the petitioner. It will be relevant to extract paragraph No.10 of the order passed by this Court in Crl.O.P.(MD).No.23214 of 2015, dated 21.12.2015:

"10. Therefore, this Court appoints Mr.R.Gowri Sankar, No.97, Lawyers Chamber (Phone Nos.9442176789 and 9843028778) as an Advocate Commissioner for recording voices of petitioner (Sangilinathan), 1st accused (Koodalingam) and Sakthi in connection with Crime No.598 of 2013 with the aid of an expert and take the same to the Director and Chemical Examiner, Forensic Sciences Department (Forensic House), 30-A, Kamarajar Salai, Mylapore, Chennai-4 for comparison and obtain a report and transmit the same to the police for investigation. On completion of the work, the Advocate Commissioner shall ensure safe custody of the Cell Phone and memory card to the petitioner. After receipt of the report from the Advocate Commissioner, it is open to the Trial Court to arrive at a conclusion based on the contents in the electronic device, to be produced before it."

7. The expert opinion that was given pursuant to the orders passed by this Court have been filed before the Court below along with all the materials and the case is pending at the stage of framing of charges in S.T.C.No.3467 of 2014.

8. The trial commenced in the complaint filed by the petitioner against the respondent in C.C.No.341 of 2013. During the course of proceedings, the respondent filed an application under Section 311 of Cr.P.C., to issue summon to the Director and Chemical Examiner, Forensic Sciences Department, Chennai to mark the expert opinion.

9. The Court below by order, dated 20.01.2017 allowed the application on the ground that the same is required in order to



strengthen the defence of the respondent and the evidence will enable the Court to come to a just conclusion.

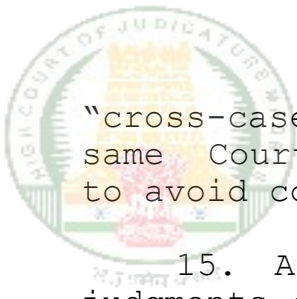
10. The learned counsel for the petitioner submitted that the Court below ought not to have allowed the application, since the expert opinion and the materials that have been placed before the trial Court in S.T.C.No.3467 of 2014, is yet to be marked in that case and it is yet to reach the status of an "evidence". The learned counsel further submitted that the defence raised by the respondent in the 138 proceedings is the main allegation that has been made by the respondent against the petitioner in the cross case that is pending in S.T.C.No.3467 of 2014. The learned counsel, therefore submitted that even if the expert opinion and the materials that were subjected to the expert opinion are taken to be evidence, that cannot be relied upon in the present case.

11. The learned counsel for the petitioner in order to substantiate his submissions, relied upon the judgments of the Hon'ble Supreme Court in ***Mitthulal and another vs. The State of Madhya Pradesh*** reported in **1975 (3) SCC 529** and in ***Sudhir and others vs. State of Madhya Pradesh*** reported in **2001 (2) SCC 688**.

12. Per contra, the learned counsel for the respondent submitted that there are absolutely no grounds to interfere with the order passed by the Court below. The learned counsel submitted that the respondent, who is facing the trial for an offence under Section 138 of the Negotiable Instruments Act, has to necessarily rebut the presumption under Section 139 of the Negotiable Instruments Act and therefore, he must be given sufficient opportunity to defend himself in the case. The learned counsel further submitted that the defence that has been taken by the respondent in the 138 proceedings is the main allegation that has been made against the petitioner in the complaint given by the respondent to the police and which is now pending in S.T.C.No.3467 of 2014. The learned counsel further submitted that the expert opinion is a very vital piece of evidence, which has to be placed before the trial Court in the 138 proceedings and the petitioner cannot prevent the respondent from placing such evidence before the trial Court.

13. This Court has carefully considered the submissions made on either side and the materials available on record.

14. It is clear from the submissions made on either side and the materials placed before this Court that both the criminal cases, viz., the 138 proceedings initiated by the petitioner against the respondent in C.C.No.341 of 2013 and the criminal complaint given by the respondent against the petitioner and which was investigated by the police and in which a final report has been filed and is pending in S.T.C.No.3467 of 2014, relate to the same transaction between the parties. Cases of this nature are commonly called in criminal law as



"cross-cases". Such cases should be tried and disposed of by the same Court. Such cases should be tried in quick succession in order to avoid conflicting judgments being delivered upon similar facts.

15. At this juncture, it will be useful to rely upon the judgments cited by the learned counsel for the petitioner. The first judgment that was cited by the learned counsel for the petitioner is **Mitthulal and another** referred supra. The relevant portions of the judgment is extracted hereunder.

" 4. It is apparent from a bare reading of the judgment of the High Court that it suffers from a serious infirmity and it is impossible to sustain it. The High Court has based its conclusion not only on the evidence recorded in the case against the appellants and the four other accused but also taken into account the evidence recorded in the cross case against Ganpat, Rajdhar and others. This is what the High Court has stated in so many terms in paragraph 7 of the judgment :

.....
This was clearly impermissible to the High Court. It is difficulty to comprehend as to how the High Court could decide the appeal before it by taking into accounts evidence recorded in another case, even though it might be what is loosely called a cross case. It is elementary that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision Even in civil cases this cannot be done unless the parties are agreed that the evidence in one case may be treated as evidence in the other. Much more so in criminal cases would this be impermissible it is doubtful whether the evidence in one criminal case can be treated as evidence in the other, even with the consent of the accused. But here there was clearly no consent of the appellants to treat the evidence recorded in the cross case against Ganpat and Rajdhar as evidence in the case against them The High Court was, therefore, clearly in error in taking into consideration the evidence recorded in the cross-case against Ganpat and Rajdhar. The High Court ought to have decided the appeal before it only on the basis of the evidence recorded in the present case and ought not to have allowed itself to be influenced by the evidence recorded in the cross-case against Ganpat and Rajdar. It is regrettable that the High Court should have fallen into such an obvious error. The judgment of the High Court must, therefore, be set aside and we



must proceed to consider whether, on the evidence recorded in the present case without locking into the evidence recorded in other cross-case the conviction and sentence recorded against the appellants can be sustained."

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16. The next judgment cited by the learned counsel for the petitioner is **Sudhir and others**, referred supra. The relevant portions of the judgment is extracted hereunder:

" 8. It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called "case and counter case" by some High Courts and "cross cases" by some other High Courts. Way back in nineteen hundred and twenties a Division Bench of the Madras High Court (Waller, and Cornish, JJ) made a suggestion (In Re Goriparthi Krishtamma - 1929 Madras Weekly Notes 881) that "a case and counter case arising out of the same affair should always, if practicable, be tried by the same court, and each party would represent themselves as having been the innocent victims of the aggression of the other."

9. Close to its heels Jackson, J, made an exhortation to the then legislature to provide a mechanism as a statutory provision for trial of both cases by the same court (vide Krishna Pannadi vs. Emperor AIR 1930 Madras 190). The learned judge said thus:

"There is no clear law as regards the procedure in counter cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished."

10. We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code. The practical reasons for adopting a procedure that such cross cases shall be tried by the same court, can be summarised thus: (1) It staves off the danger of an accused being convicted before his whole case is before the court. (2) It deters conflicting judgments, being delivered upon similar facts; and (3)



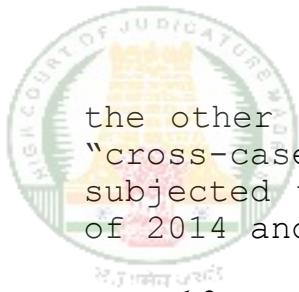
In reality the case and the counter case are, to all intents and purposes, different or conflicting versions of one incident.

11. In fact, many High Courts have reiterated the need to follow the said practice as a necessary legal requirement for preventing conflicting decisions regarding one incident. This court has given its approval to the said practice in *Nathi Lal & ors. vs. State of U.P. & anr.* [1990 (Supp) SCC 145]. The procedure to be followed in such a situation has been succinctly delineated in the said decision and it can be extracted here:

"We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other."

17. The above judgment clearly explains the manner in which such cross cases will have to be dealt with by the same Court. The Court must try both the cross cases one after another. After recording evidence in one case, final arguments must be heard and it must be reserved for judgment. Thereafter, the Court must proceed to record evidence in the cross case and must hear final arguments and reserved judgment in that case also. Both the cases must thereafter be disposed of by two separate judgments, one after another.

18. In the present case, both S.T.C.No.3467 of 2014 and C.C.No.341 of 2013 relate to the same transaction between the parties. The allegation made in one case is taken as a defence in



the other case. Therefore, it squarely falls within the criteria of "cross-cases". The expert opinion and the materials that were subjected to expert opinion has already been filed in S.T.C.No.3467 of 2014 and it is yet to reach the status of "evidence".

19. The simultaneous trial that has been referred in the judgments cited supra, relates to cases where the Court was dealing with cases where the aggressor in the case and counter cases had to be determined. Therefore, such a procedure was prescribed to ensure that the Court comes to an independent decision in both the cases and come to a final conclusion as to who is the aggressor and who is the victim in the case.

20. It is not necessary that this procedure should be followed blindly in all the cases. It will be relevant to extract the famous words of Justice Mahmood, J. in **Narsingh Das vs. Mangal Dubey**, reported in **ILR (1883) 5 All 163**, wherein the Hon'ble Judge has held as follows:

"Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed."

21. It will also be beneficial to take note of the judgment of the Hon'ble Supreme Court in **Lallu Prasad vs. State through CBI (A.H.D.), Ranchi, Jharkhand**, reported in **2003 (11) SCC 786**. The relevant portions of the judgment is extracted hereunder:

"7. It was submitted, on behalf of the appellants, that even though the appeals were dismissed by the Patna High Court, it has been held that there was a single conspiracy. It was submitted that the application for amalgamation was filed pursuant to the liberty granted by the Patna High Court while dismissing the appeals. It was submitted that, according to the prosecution, there was a large conspiracy involving the then Chief Ministers and other officers of the Animal Husbandry Department. It was submitted that according to the prosecution the object of the conspiracy was to earlier in the State of Bihar and now fall in the State of Jharkhand. It was submitted that the overt acts are alleged to have been committed in pursuance of this large conspiracy. It was submitted that in the overt acts there would be local people who are not part of the larger conspiracy. It was submitted that offences in pursuance of one conspiracy are offences



committed in the course of the same transaction. It was submitted that the main accused, namely, the appellants have been charged only on the basis of the large conspiracy. It was submitted that in all the cases, as against the appellants, there would be same witnesses and same documents. It was submitted that there are 58 witnesses who would be common in all the six cases. It was submitted that there are approximately 100 documents which are also common in all the six cases. It was submitted that the prosecution had admitted, in paragraphs 10 to 12 of the affidavit-in-reply filed before the Special Judge, that there was a single conspiracy and that the above mentioned witnesses and documents were common. It was submitted that if these witnesses have to dispose separately in all the six cases, there was a strong possibility of their evidence being different and of there being a conflict of decision. It was submitted that the appellants would have to hear the evidence of the same witnesses in six trials.

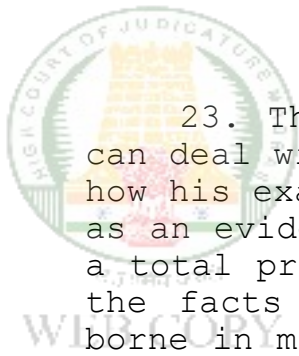
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14. Before we part, it must be mentioned that it had been complained that the appellants would be forced to hear the same evidence 5/6 times. If the appellants or any of them feel aggrieved by this and if they so desire, they may apply to the special Judges that evidence recorded in one case and documents marked as an exhibit in one case be used as evidence in other cases also. This would obviate their having to hear the same evidence in 5/6 different cases. We are sure that if such an application is made, the same will be considered by the Special Judge on its merit, after hearing all the other accused."

22. Even in **Harjinder Singh case (AIR 1985 SCC 404)** the Hon'ble Supreme Court did not permit the consolidation of the cases as the facts in the two cases were completely different. Even under such circumstances, the Hon'ble Supreme Court held as follows in paragraph No.8 of the judgment:

" 8. In the facts and circumstances of this particular case, we feel that the proper course to adopt is to direct that the two cases should be tried together by the learned Additional Sessions Judge but not consolidated, i.e., the evidence should be recorded separately in the extent that the witnesses for the prosecution examined in one case and their evidence be read as evidence in the other."



23. The above judgments give a fair idea as to how the Courts can deal with cases, where a witness is common in both the cases and how his examination and marking of documents in one case can be read as an evidence in the other. This Court does not find that there is a total prohibition to adopt this procedure and it all depends upon the facts and circumstances of a particular case. What is to be borne in mind is that the procedure is a handmaid of justice and it should not come in the way of effectively dealing with the cases more particularly, when the Code does not specifically prohibit adopting such a procedure. Borrowing the words of Justice, Mahmood, J. referred supra, a prohibition cannot be presumed.

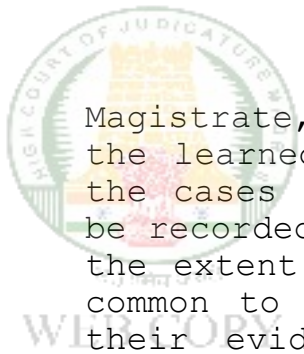
24. Section 138 of the Negotiable Instruments Act, 1881, cases are triable by way of summary procedure as per Section 143(1) of the Negotiable Instruments Act, 1881. However, it will be relevant to extract the second proviso to Section 143(1) of the Negotiable Instruments Act, 1881, which reads as follows:

"Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code."

25. If the above said proviso is invoked, the summary procedure contemplated under Section 143(1) of Negotiable Instruments Act can be dispensed with and in which case, it falls within the purview of a summons case. This is in view of the fact that the Code of Criminal Procedure will start applying to such cases. In such an event, Section 259 of Cr.P.C., can be resorted to and it is possible, on the facts of a given case, to justify such a course. In this manner, a complaint under Section 138 of NI Act can be tried under a warrant procedure also.

26. In the facts of the present case, the defence taken by the respondent and the evidence that is going to be relied upon by him to substantiate his defence is the same evidence, which is going to be relied upon by the prosecution to prosecute the petitioner in S.T.C.No.3467 of 2014. For this purpose, it is not necessary to record the evidence of the same witness and mark the same documents separately in both the cases. This view of mine is supported by the judgments referred supra.

27. The two cases in C.C.No.341 of 2013 and in S.T.C.No.3467 of 2014 are now pending before the same Court, viz., Judicial
<https://hcservices.ecourts.gov.in/hcservices/>



Magistrate, Rajapalayam. The proper course that can be adopted by the learned Judicial Magistrate, Rajapalayam, would be to try both the cases together, but not to consolidate it. The evidence should be recorded separately in both the cases, one after other, except to the extent that witnesses, who are common and documents, which are common to both the cases, can be examined/marked in one case and their evidence can be read as evidence in the other case. By adopting to this procedure, no prejudice will be caused to the petitioner and the Court below can avoid duplication of the same set of evidence.

28. In view of the above, the order passed by the learned Judicial Magistrate, Rajapalayam, in Crl.M.P.No.10890 of 2016, dated 20.01.2017, is hereby modified to the extent indicated herein above. The proceedings in S.T.C.No.3467 of 2014 and C.C.No.341 of 2013, shall be completed within a period of three months from the date of receipt of copy of this order.

29. This Criminal Original Petition is accordingly disposed of. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(AD-II)

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Sub Assistant Registrar

To

The Judicial Magistrate,
Rajapalayam.

+1 CC to M/s.A.SIVASUBRAMANIAN, Advocate (SR-86376[F] dated 12/09/2019)

+1 CC to M/s.N.DILIPKUMAR, Advocate (SR-86455[F] dated 13/09/2019)

**Order made in
CRL.O.P (MD) No.2796 of 2017
12.09.2019**

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