

IN THE HIGHCOURT OF JUDICATURE AT MADRAS

Reserved on : 21.01.2020

Pronounced on : 30.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

CRL.OP.No.26567 of 2019
and
CRL.MP.No.14213 of 2019

V. Nedumaran ...Petitioner/Defacto complainant

versus

1.State rep. By its
The Inspector of Police,
CCB, EDF-II, Team - III,
Vepery, Chennai,
Cr.No.484 of 2012.1st respondent/complainant

2.Jothimani

3.SelviRespondents 2 & 3/ Accused

Prayer: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure to set aside the order passed in Crl.MP.No.550 of 2019 in CC.No.229 of 2013 dated 12.02.2019, by the learned Judicial Magistrate-I, Poonamallee.

For Petitioner :Mr.S.Anantha Narayanan
(in both Crl.OPs) Senior Counsel
assisted by Mr.S.Angamuthu

For Respondents :Mr.M.Mohamed Riyaz,
(in both Crl.OPs) Additional Public Prosecutor for R1
Mr.P.Kumaresan for R2 and R3

ORDER

This Criminal Original Petition has been filed by the defacto complainant to set aside the order passed by the Judicial Magistrate - I, Poonamallee in Crl.M.P.No.550 of 2019 in C.C.No.229 of 2013 dated 12.02.2019.

2. The learned Senior Counsel Mr.S.Anantha Narayanan assisted by Mr.S.Angamuthu, the learned counsel for the petitioner/Defacto complainant has submitted that based on the complaint lodged by the petitioner, the first respondent has registered an FIR in Cr.No.484 of 2012 under Sections 406 and

506 (ii) and 420 IPC r/w. 34 of IPC against the respondents 2 and 3 and after investigation, the charge sheet was filed and based on the same, a case was taken on file in C.C.No.229 of 2013 on the file of the Judicial Magistrate - I, Poonamallee. He further submitted that during trial, the petitioner herein was examined as PW10. He further submitted that since there was a chatting, the second respondent was in chat with the petitioner through his mobile phone for the period between 26.08.2011 and 24.09.2011 and sent several SMS. He further submitted that the petitioner has produced the text conversation to the first respondent during investigation, but the first respondent failed to produce the said text conversation before the trial court and hence in order to produce the said text messages and mark the same, the first respondent has filed CrI.MP.No.550 of 2019 to recall P.W.10 (petitioner herein) and also mobile phone receipt and order passed by this court in CrI.O.P.No.23324 of 2012, but the learned Judicial Magistrate has dismissed the said petition on the ground that the petitioner has not stated anything in the statement which was recorded under Section 161(3) Cr.P.C. He further submitted that the learned Judicial Magistrate has also recorded the findings that the other documents are only xerox copies. He further submitted that the petitioner has stated in his statement recorded under Section 131(3) Cr.P.C., about the handing over of the text messages of SMS to Investigation Officer. He further submitted that the aforesaid documents are vital documents to prove the prosecution case and hence he requests to allow this petition and set aside the order passed by the learned Judicial Magistrate in CrI.MP.No.550 of 2019 and permit the petitioner to adduce further evidence and mark the aforesaid documents.

3. Per contra, the learned counsel Mr.P.Kumaresan, who is appearing for the respondents 2 and 3 has submitted that the petitioner herein himself has filed CrI.OP.No.3836 of 2018 to direct the trial court to dispose of the case at early and in the said petition, this Court by the order dated 05.04.2018 has directed the trial court to dispose of the case in C.C.No.1229 of 2013 within a period of six months and after getting such order, the petitioner herein has adopted dilatory tactics and did not cooperate for early disposal. He further submitted that he instigated the learned Additional Public Prosecutor to file petition after petition and when the case was posted for defence side evidence, the learned Assistant Public Prosecutor has filed three petitions vide CrI.MP.Nos.549, 550 and 551 of 2019. He further submitted that the learned Judicial Magistrate, after considering the submission of both sides has allowed the CrI.MP.No.549 of 2019, however she dismissed the other two applications on the ground that the petitioner has not stated either in his statement recorded under Section 161(3) Cr.P.C or in his evidence that he has produced the aforesaid documents to the Investigating officer and also on the ground that no certificate has been issued as contemplated under Section 65 -

B of the Indian Evidence Act. He further submitted that the first respondent has not challenged the order passed in Crl.MP.Nos.550 and 551 of 2019 and that being so, the petitioner has no locus standi to file the present petition challenging the order passed in Crl.MP.No.550 of 2019 and hence he prayed to dismiss the petition.

4. The learned Additional Public Prosecutor who is appearing for the first respondent has submitted that he is leaving it to the discretion of the court.

5. It is seen from the typed set of papers filed by the parties that the petitioner herein has filed Crl.O.P.No.3836 of 2018 before this court to direct the trial court to dispose of the case in C.C.No.229 of 2013 at early. This court by its order dated 05.04.2018 has allowed the said petition and directed the trial court to dispose of the case in C.C.No.229 of 2013 within a period of six months, but after getting such an order, it appears that the petitioner has adopted the dilatory tactics. The diary extract of the trial court shows that even though the petitioner had appeared in person before the trial court on several hearings, he did not enter into witness box. Even though the petitioner has been cited as LW1 in the charge sheet, since he did not come forward to examine himself as PW1, the trial court went on to examine the other witnesses and also issued final notice and only thereafter, the petitioner has come forward to examine himself as PW10. Further, the diary extract shows that the Assistant Public Prosecutor has not cooperated and examined the witnesses who appeared before the court, on the contrary, he took adjournments at the instance of the petitioner herein. Further, though the petitioner has filed one petition under Section 301 of Cr.P.C., seeking permission to assist the prosecution and subsequently, he filed another petition for the same relief by engaging some other counsel without getting consent from the previous counsel and hence the said petition was returned.

6. It is also to be pointed out that at the instance of the petitioner, the Assistant Public Prosecutor has filed petitions before the trial court on behalf of the first respondent. The Assistant Public Prosecutor has filed Crl.MP.Nos.549 to 551 of 2019. The learned Judicial Magistrate has allowed Crl.MP.No.549 of 2019, but she dismissed the Crl.MP.Nos.550 and 551 of 2019. Challenging the dismissal of Crl.MP.Nos.550 and 551 of 2019, the first respondent has not filed any petition before this court. On the contrary, the petitioner herein who is being the defacto complainant has filed the present petition to set aside the order passed by the Judicial Magistrate in Crl.MP.No.550 of 2019 dated 12.02.2019. The petitioner herein has also filed Crl.O.P.No.24570 of 2019 to transfer the case in C.C.No.229 of 2013 from the file of the Judicial Magistrate - I, Poonamallee to the Judicial Magistrate, Alandur, or to some other court. In support of the said petition, the petitioner

herein has filed an affidavit, in which, in paragraph No.10, he has stated that he himself has filed Crl.MP.No.550 of 2019 to recall himself so as to mark the text messages (SMS) chat between himself and the first accused and also for submission of mobile bills. The said statement is not true. He has not filed Crl.MP.No.550 of 2019. The said petition was filed by the Assistant Public Prosecutor on behalf of the first respondent herein.

7. In Amir Hamza Shaikh vs The State Of Maharashtra and Others in Crl.A.No.1217 of 2019 arising out of SLP (Crl.A.No.3202 of 2019), recently the Hon'ble Supreme Court has held that the victim has a right to assist the court in a trial before the Magistrate but he is not entitled to conduct the prosecution. In this case, admittedly Crl.MP.No.550 of 2019 was filed by the first respondent and the same was dismissed by the trial court. Challenging the said order, the first respondent has not filed any petition. In view of the aforesaid decisions of the Hon'ble Supreme Court, the petitioner who is being the defacto complainant is not entitled to file this petition. Challenging the order passed in the petition, filed by the first respondent.

8. On merits also, this petition has to be dismissed. The learned Senior Counsel for the petitioner has submitted that the petitioner has stated in his statement recorded under Section 161 (3) Cr.PC and also in his deposition that the first accused has sent SMS, but without considering the same, the learned Judicial Magistrate has dismissed the petition in Crl.MP.No.550 of 2019. Though the petitioner has stated in his statement recorded under Section 161 (3) of Cr.P.C., that the first accused has sent SMS and the same has been produced before the Investigating Officer, but in his evidence, he has simply stated that the first accused has sent SMS. In his evidence, the petitioner has not stated that he has produced the said SMS text messages before the Investigating Officer. Further, the learned Judicial Magistrate has dismissed the said petition on other grounds also i.e., the Investigating Officer has not produced any certificate as contemplated under Section 65-B of the Indian Evidence Act and that the cellphones also not produced. Apart from that, the first respondent has produced only xerox copies of the telephone bills and copy of the order passed by this court in Crl.OP.No.23324 of 2012. In so far as the copy of the order passed in Crl.O.P.No.23324 of 2012 is concerned, it appears that already P.W.11 (Investigating Officer) has adduced the evidence by referring to the said order. Further, if the said order is before the trial court, that can be considered even without marking the same because the said order forms part of the record.

9. The learned Senior Counsel for the petitioner relied upon the following decisions and submitted to grant one more opportunity to the petitioner to adduce further evidence with

regard to the aforesaid documents

1. Raj Deo Sharma (II) Vs. State of Bihar (1999) 7 SCC 604
2. Silambarasan and Others Vs. State MANU/TN/2851/2016= 2016-2 LW (CRL) 484
3. P. Sanjeeva Rao Vs. State of A.P (2012) 4 MLJ (Crl) 311 (SC)

10. In the aforesaid decisions, it was held that the power under Section 311 of Cr.P.C., can be invoked by prosecution even after closure of the trial. With regard to the aforesaid preposition of law, there is no quarrel, but in this case, the petitioner and the first respondent have adopted dilatory tactics without any co-operation for early disposal of the case as directed by this court in Crl.OP.No.3836 of 2018 dated 05.04.2018. The learned Assistant Public Prosecutor has filed petition after petition at the stage of defence side evidence. Further, on the same ground, the first respondent has filed two petitions in Crl.MP.Nos.1998 and 2297 of 2019 seeking permission of the trial court for further investigation and the said petitions were dismissed by the trial court by a common order dated 18.06.2019. The first respondent herein has filed Crl.RC.No.764 of 2019 challenging the order passed in Crl.MP.No.1998 of 2019 alone and when this court was about to dismiss the said case on merits with exemplary costs, the learned Government Advocate (Crl.Side) sought permission to withdraw the case and accordingly, the said case was dismissed as withdrawn.

11. Under the said circumstances, the first respondent cannot file another petition on the same grounds under the guise of recalling PW10. It is also to be pointed out that in Raj Deo Sharma (II) Vs. State of Bihar (cited supra), the Hon'ble Supreme Court has observed in paragraph No. 4 as follows:

“ The whole idea was to speed up the trial in criminal cases to prevent the prosecution from becoming a persecution of a person arrayed in a criminal trial. No trial can be allowed to prolong indefinitely due to the lethargy of the prosecuting agency or the State machinery and that is the raison d'etre in prescribing the time-frame within which prosecution evidence must be closed.”

12. Therefore, the petitioner being the defacto complainant, he should cooperate for early disposal of the case.

13. For the aforesaid reasons, this court is of the view that this petition is lacking bonafide and the same has to be dismissed. Accordingly, this Criminal Original Petition is dismissed. Consequently, connected miscellaneous petition is dismissed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

gv

To

1.The Inspector of Police,
CCB, EDF-II, Team - III,
Vepery, Chennai,
Cr.No.484 of 2012.

2. The Judicial Magistrate-I,
Poonamallee.

3. The Public Prosecutor,
High Court, Madras.

+lcc to Mr.S.Angamuthu , Advocate SR.No. 7131

+lcc to Mr.P.Kumaresan , Advocate SR.No. 7882

CRL.OP.No.26567 of 2019
and

CRL.MP.No.14213 of 2019

A.SK(05/03/2020)

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