



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 16.02.2021

CORAM :

THE HONOURABLE MRS. JUSTICE R. HEMALATHA

Crl.OP.(MD)No.267 of 2021
and
Crl.MP(MD)No.89 of 2021

Nallasivam ... Petitioner/Petitioner/Accused No.2

Vs.

State through
The Inspector of Police,
EOW-II,
Karur.
Crime No.1 of 2014. ... Respondent/Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to set aside the Order dated 23.12.2020 passed in Crl.M.P.No.2126 of 2020 in C.C.No.5 of 2015 by the Special Judge, Special Court under TANPID Act Cases, Madurai.

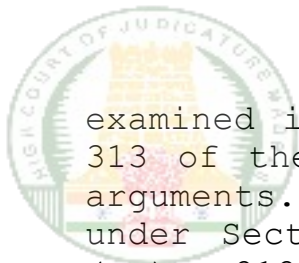
For Petitioner : Mr.D.S.Haroon Rasheed

For Respondent : Mr.A.Robinson
Government Advocate (Criminal side)

ORDER

The present petition has been filed to set aside the Order dated 23.12.2020 passed in Crl.M.P.No.2126 of 2020 in C.C.No.5 of 2015 on the file of the Special Judge, Special Court under TANPID Act Cases, Madurai.

2. The petitioner / second accused is facing trial in CC.No.5 of 2015 on the file of the Special Judge, Special Court under TANPID Act Cases, Madurai, for the alleged offences punishable under Sections 406, 420, 120(b) of Indian Penal Code and Section 5 of Tamil Nadu Protection of Interest Depositors (In Financial Establishments) Act, 1997. During the course of trial, the prosecution examined 27 witnesses on various dates from 16.02.2017 to 08.07.2017. Thereafter, the prosecution side evidence was closed on 08.08.2017 and the petitioner / accused did not cross examine the witnesses on the day when they were



examined in Chief. After questioning the accused under Section 313 of the Code of Criminal Procedure, the matter is posted for arguments. At this juncture, the petitioner has filed a petition under Section 311 of the Code of Criminal Procedure in Crl.M.P. (MD)No.2126 of 2020 in C.C.No.5 of 2015 to recall P.W.1 to P.W.27 for the purpose of cross examining the witnesses and the said petition was dismissed by the learned Special Judge, Special Court under TANPID Act Cases, Madurai, vide order dated 23.12.2020. Aggrieved over the same, the petitioner/accused has filed the present petition.

3.Mr.D.S.Haroon Rasheed, learned counsel appearing for the petitioner / accused contended that though the petitioner paid batta for recalling the witnesses, the prosecution did not produce the witnesses for the purpose of cross examination and thereafter, the District Revenue Officer was taking steps to settle the issue amicably between the accused and the depositors.

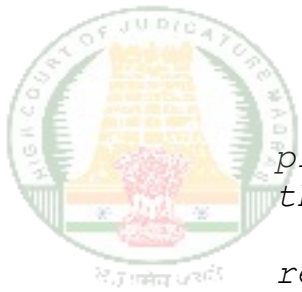
4. *Per contra*, Mr.A.Robinson, learned Government Advocate (Criminal Side) appearing for the respondent contended that the petition to recall P.W.1 to P.W.27 was filed by the petitioner / accused is without any valid reason and the learned Special Judge, Special Court under TANPID Act Cases, Madurai, has rightly dismissed the said petition. He also contended that the present petitioner did not appear before the Court and Non Bailable Warrant was also issued against him and thereafter, he was arrested and remanded to Judicial custody.

5.It is seen from the records that P.W.1 to P.W.27 were examined on various dates from 16.02.2017 to 08.07.2017 and after the evidence on the side of the prosecution was closed and the accused were also questioned under Section 313 of the Code of Criminal Procedure, the present petition came to be filed before the Trial Court.

6.The contention of the petitioner is that the prosecution did not produce the witnesses, even though he paid batta cannot be accepted for the simple reason that the petitioner/accused did not cross examine the witnesses, when they were examined in chief. Moreover, a Non Bailable Warrant was also issued against the present petitioner for his non-appearance and subsequently, he was arrested and remanded to Judicial custody.

7.The Trial court vide orders dated 23.12.2020 in Crl.M.P.No.2126 of 2020 in C.C.No.5 of 2015, in paragraph No.6, has observed as follows :

"6. It is also seen that thereafter for the last 3 years, the petitioner has not taken any steps to cross examine the witnesses, process fee



(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."

9. 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., which read 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.

(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."



10. The said decision has also been followed in **Haryana Vs. Ram Mehar and others** reported in **(2016) 8 Supreme Court Cases 762**, wherein 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.**"

11. In view of the law laid down by the Hon'ble Supreme Court and in view of the fact that the petitioner has not assigned any valid reason to recall P.W.1 to P.W.27, this Court finds no infirmity in the order passed by the trial Court.

12. Accordingly, this Criminal Original Petition is dismissed. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(P & A)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

Rm

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

- 1.The Special Judge,
Special Court under TANPID Act Cases, Madurai.
- 2.The Inspector of Police,
EOW-II, Karur.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

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