IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.07.2022

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Crl.O.P.No.15198 of 2022
and
Crl.M.P.No.8494 of 2022

Arumugam ...Petitioner

Vs.

Ponmuthu ...Respondent

Prayer: This Criminal Original Petition filed under Section 482 Cr.P.C praying to call for the records relating to the partly dismissal order dated 04.03.2022 made in Crl.M.P.No.1861 of 2021 in C.C.No.60 of 2017 on the file of the learned Judicial Magistrate No.II of Gobichettipalayam, Erode and set aside the same by allowing this Criminal Original Petition.

For Petitioner : Mr.J.Ranjithkumar

ORDER

This Criminal Original Petition has been filed to set aside the partly dismissal order of the learned Judicial Magistrate No.II, Gobichettipalayam, Erode made in Crl.M.P.No.1861 of 2021 in C.C.No.60 of 2017 rejecting the claim of the petitioner to examine the complainant as a Defence witness.

2.It is the grievance of the petitioner that the petitioner had borrowed a sum of Rs.10,00,000/-(Rupees Ten Lakhs Only) from the respondent and in order to discharge the debt, he had issued two cheques. When the cheque was presented for encashment, the same was dishonoured for the reason “Payment stopped by drawer”. After complying the statutory notice, the defacto complainant filed a complaint under Section 138 of Negotiable Instrument Act against the petitioner and the same was taken on file by the learned Judicial Magistrate No.II, Gobichettipalayam, Erode in C.C.No.60 of 2017.

3.It is the further grievance of the petitioner that the case was posted for defence witness on 14.06.2022. To prove his defence, he had filed Crl.M.P.No.1871 of 2021 under Section 243 (2) of Cr.P.C to examine four defence witnesses and to cross examine PW1. However,the learned Magistrate had partly dismissed the application. Hence, he prays to set aside the partly

dismissal order of the learned Magistrate and allow him to cross examine PW1 as defence witness.

4.Heard the learned counsel for the petitioner and perused the materials available on record.

5.At the outset, this Court is of the view that once the prosecution side witnesses were examined, such witnesses cannot be called as a defense witness by invoking the provision under Section 243(3) of Cr.P.C. In this regard, it is useful to refer the judgment of Hon'ble Apex Court in the case of "State of Madhya Pradesh Vs. Badri Yadav and ors" reported in MANU/SC/8087/2006 4 in paragraphs No. 11 & 13 and the relevant paragraphs are extracted here under:

> "11. Section 233 itself deals with entering upon defence by the accused. The application for recalling and re-examining persons already examined, as provided under Section 311 Cr.P.C., was already rejected. The power to summon any person as a witness or recall and re-examine any person already examined is the discretionary power of the Court in case such evidence appears to it to be essential for a just decision of the case. Under Section 233 Cr.P.C. the accused can enter upon defence and he can apply for the issue of any process for compelling the attendance of any witness in his defence. The provisions of Sub-section (3) of Section 233 cannot be understood as compelling the attendance of any prosecution witness examined, cross-examined and discharged to be juxtaposed as DWs. In the present case PW-8 and PW-9 were juxtaposed as DW-1 and DW-2. This situation is not one what was contemplated by Sub-section 3 of Section 233 Cr.P.C.
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> 12.....
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> 13. In the case of Yakub Ismail Bhai Patel v. State of Gujarat MANU/SC/0700/2004 : 2004CriL J4205 in which one of us Dr. AR. Lakshmanan, J. was the author of the judgment, in somewhat similar case to the facts of the present case it was held that once a witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from the testimony given in court on oath by filing affidavit stating that whatever he had deposed before court as PW was not true and was done so at the instance of the police. In that case the evidence of PW-1 was relied upon by the Trial Court and also by the High Court. He was

examined by the prosecution as an eyewitness. He also identified the appellants and the co-accused in the Court. After a long lapse of time he filed an affidavit stating that whatever he had stated before the Court was not true and had done so at the instance of the police. In those facts and circumstances this Court in paragraphs 38 and 39 at SCC pp.240-241 held as under: -

38. Significantly this witness, later on filed an affidavit, wherein he had sworn to the fact that whatever he had deposed before Court as PW1 was not true and it was so done at the instance of the police.

39.The averments in the affidavit are rightly rejected by the High Court and also the Sessions Court. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from the testimony given in Court on oath. It is pertinent to note that during the intervening period between giving of evidence as PW 1 and filing of affidavit in court later, he was in jail in a narcotic case and that the accused persons were also fellow inmates there."

6.In such view of the matter, this Criminal Original Petition is dismissed. However, it is well open to the petitioner to invoke provision for cross examination of P.W.1 as per law. Consequently, connected Criminal Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

nr/shk
To

1. The learned Judicial Magistrate No.II,
   Gobichettipalayam, Erode.

2. The Chief Judicial Magistrate,
   Erode.

+1cc to Mr.J.Ranjithkumar, Advocate, S.R.No.42792

Crl.O.P.No.15198 of 2022
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GSM(CO)
RGA(27/07/2022)