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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.01.2022

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CRL.O.P.NO.22652 OF 2021

M/s.Goa Oceanarium Private Limited,
Represented by its Authorized
Person Mr.Arul Officer at No.304 & 305,
Anna Salai, Teynampet,
Chennai - 600018. ...Petitioner/Defacto Complainant

Vs.

1. State Rep by,
Assistant Commissioner of Police,
Central Crime Branch-Team II,
Vepery, Chennai - 600 007. ...1st Respondent/Complainant
2. K.E.Dayalan
3. M.Srinivasulu
4. D.Krishnamoorthy ...Respondents 2 to 4 /
Accused 1 to 3

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to set aside the order passed by the Judicial Magistrate-I, Poonamallee in Crl.M.P.No.3083/2021 in C.C.No.102/2019, dated 23.08.2021 on the file of the Judicial Magistrate-I Poonamallee and consequently direct the Judicial Magistrate-I Poonamallee to receive the documents mentioned in Para 11 of this petition in C.C.No.102 of 2019.

For Petitioner : Mr.C.Iyyappa Raj for
Mr.T.S.Lavanesh

For R1 : Mr.E.Raj Thilak,
Additional Public Prosecutor

For R2 : Mr.J.Daniel

ORDER

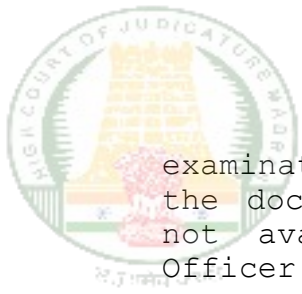
This Criminal Original Petition has been filed to set aside the order, dated 23.08.2021, made in Crl.M.P.No.3083 of 2021 in C.C.No.102 of 2019, passed by the learned Judicial Magistrate No.I, Poonamallee (trial Court).



2.The petitioner is the defacto complainant in C.C.No.102 of 2019. The Public Prosecutor before the trial Court filed a petition under Section 242(2) of Cr.P.C., before the learned Judicial Magistrate No.I, Poonamallee to receive the documents mentioned in paragraph No.11 of the petition in C.C.No.102 of 2019 and bring the same on record and mark as additional documents. The learned Judicial Magistrate No.I Poonamallee, dismissed the said petition, against which, the present petition has been filed.

3.The gist of the case is that the land measuring 8 acres 11 cents in Survey Nos.538/2, 535/1, 538/1 in Aynambakkam Village, Ambattur Taluk, Thiruvallur District belongs to one A.S.Samikannu and others. They entered into an agreement of sale on 25.10.2004 for selling the aforesaid lands in favour of A1. As per the agreement of sale, it was agreed by both the purchaser and seller that Rs.16,000/- will be the sale price for one cent of land. On the basis of such agreement of sale, A1 paid a sum of Rs.32,00,000/- as advance sale consideration. One of the condition is that sale will be effected after the Urban Land Ceiling proceedings initiated against the lands are resolved. Even after two years, apart from the initial amount Rs.32,00,000/- paid, A1 could not mobilize the balance sale consideration. Hence, he approached the petitioner to mobilize the said balance sale consideration with the consent of the land owners and requested to purchase the aforesaid lands along with other adjacent lands for Rs.1,69,00,000/-. As per the agreement both accepted such a proposal, paid the entire sale consideration to A1 and to the land owners by way of cheque as well as cash. Thereafter, A1 failed to complete the sale in favour of the petitioner, on the other hand executed sale deed in favour of A3 through A2 and thereby, cheated the petitioner. Hence, a complaint was lodged by the petitioner before the 1st respondent Police and the same was registered in Crime No.89 of 2015, after completion of investigation, charge sheet filed in C.C.No.102 of 2019 before the Judicial Magistrate No.1, Poonamallee, listing witnesses LWI to LW25 and annexing 62 documents.

4.The learned counsel for the petitioner submitted that during trial, PW1 to PW3 were examined in chief and the petitioner was examined as PW1. The petitioner filed a petition in C.M.P.No.677 of 2020 in C.C.No.102 of 2019 to mark the affidavit of the accused, which was filed before this Court in CrI.O.P.Nos.24558 & 24585 of 2015. Though these documents were produced to the Investigating Officer, it was not shown in the listed documents in the charge sheet. The trial Court, by order, dated 12.03.2015 in C.M.P.No.677 of 2020 in C.C.No.102 of 2019, dismissed the petition for the reason that after examination of PW1, again recalling of PW1 further chief



examination would not arise without any proper reason and that the document sought to produce is photo copy and original was not available and that the signature of the Investigating Officer in the sworn statement was missing. This being the case, the trial Court dismissed C.M.P.No.3083 of 2021 in C.C.No.102 of 2019, by order, dated 23.08.2021 for marking 1) certified copy of the order in Crl.O.P.No.8442 of 2015 by the High Court, Madras, 2) Quash petition filed by A1 and A3 in Crl.O.P.No.24558 of 2015 before the High Court, Madras, 3) Vacate Stay petition filed by the defacto complainant in Crl.O.P.No.24558 of 2015 before the High Court, Madras, 4) Counter affidavit filed by A1 and A3 to the vacate stay petition filed by the defacto complainant, 5) Additional affidavit of the accused to the vacate stay petition filed by the defacto complainant, 6) Certified Copy of the order in Crl.O.P.Nos.24558 & 24585 of 2015 by the High Court, Madras and 7) Signed Copy of the petition to District Registrar, Chennai, North District, sent by LW6 Mr.A.S.Chandramohan and LW7 Mr.Sandanakarishnan.

5.He further submitted that the trial Court dismissed the above petition for the reason that earlier, the trial Court had rejected the same prayer in Crl.M.P.No.677 of 2020 in C.C.No.102 of 2019 filed by PW1, in such circumstances, question of entertaining the above impugned petition would not arise, in view of Section 362 of Cr.P.C. The learned counsel further submitted that the petitioner lodged a complaint before the Assistant Commissioner of Police against the respondents 1 to 3 on 12.03.2015, which was kept pending and no FIR was registered. Thereafter, as per the direction of this Court in Crl.O.P.No.8442 of 2015, the 1st respondent registered the FIR, for offences under Sections 406, 420, 506(1), 120(B), 294(b) r/w 34 IPC. The trial Court had wrongly construed that the prayer sought for in the two petitions under Sections 311 Cr.P.C., and 242(2) Cr.P.C., in C.M.P.No.677 of 2020 in C.C.No.102 of 2019 and C.M.P.No.3083 of 2021 in C.C.No.102 of 2019 respectively are one and the same. Hence, the trial Court citing Section 362 Cr.P.C., held that entertaining the petition in Crl.M.P.No.3083 of 2021 in C.C.No.102 of 2019 would amount to review of its own order passed in C.M.P.No.677 of 2020 in C.C.No.102 of 2019. Hence, he prayed for setting aside the order of the trial Court in C.M.P.No.3083 of 2021 in C.C.No.102 of 2019, dated 23.08.2021.

6.The learned counsel for the respondents 2 to 4/accused Nos.1 to 3 submitted earlier, the prosecution filed C.M.P.No.677 of 2020 in C.C.No.102 of 2019, under Sections 311 and 242(2) of Cr.P.C., with a prayer to reopen and recall PW1 to mark the document viz., affidavit of the accused, which was filed before this Court in Crl.O.P.Nos.24558 & 24585 of 2015 and its order. The trial Court, by order, 12.03.2020, dismissed the petition and held that after chief examination of PW1 to PW3, with an



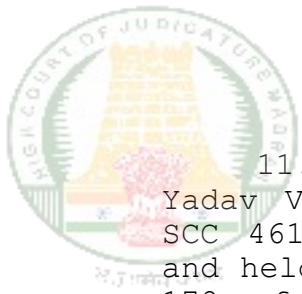
inordinate delay, the petition has been filed and further no reason given how the document proposed to be marked would be useful to arrive at a just decision of the case and that the affidavit filed by the Investigating Officer was not signed. Thereafter, another petition in C.M.P.No.3083 of 2021 in C.C.No.102 of 2019 was filed seeking similar prayer as in C.M.P.No.677 of 2020 in C.C.No.102 of 2019, wherein the trial Court finding that the petition cannot be entertained in view of Section 362 Cr.P.C., dismissed the same. He further submitted that the order of the trial Court is proper, which needs no interference and he strongly objected for entertaining this petition.

7.The learned Additional Public Prosecutor appearing for the 1st respondent Police submitted that it is the prosecution, who filed a petition in C.M.P.No.3083 of 2021 in C.C.No.102 of 2019. The trial Court on a wrong premise referring to Section 362 Cr.P.C., dismissed the petition, by order, dated 23.08.2021, which is not proper. The trial Court failed to consider the petition in C.M.P.No.3083 of 2021 in C.C.No.102 of 2019. Marking of above said seven documents would no way prejudice the defence in any manner and further, after recalling the witnesses, marking document would give an opportunity to the defence to question the documents and cross examine the witnesses and thereby, the trial Court would be benefited to arrive at a just decision of the case. Hence, he prayed for setting aside the order of the trial Court.

8.This Court considered the rival submissions and perused the materials available on record.

9.It is seen that except document No.7, all other documents are filed before this Court. This Court is of the view that certified copies of the aforesaid documents are permitted to be taken up in evidence. Further, filing a petition under Section 242(2) of Cr.P.C., will not restrict the petitioner from filing a petition under Section 311 Cr.P.C. Thus, the petitioner cannot be denied his right of such petition. The reason given by the trial Court that again filing of petition with same prayer, would amount to review of the earlier order, is not proper.

10.In this case, though PW1 to PW3 were examined earlier, they are yet to be cross examined by the accused. The defence of the accused not exposed. Hence, the question of filling up lacuna with fresh materials would not arise. The proposed documents to be marked are certified copies, which were filed before this Court and before the Public authority and it cannot be a generated document at later point of time to suit anybody's case.



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11. The Hon'ble Apex Court in the case of "Rajaram Prasad Yadav Versus State of Bihar and another reported in (2013) 14 SCC 461" had considered the provision of Section 311 Cr.P.C., and held that Section 311 Cr.P.C., to be read along with Section 178 of the Indian Evidence Act and laid down the following principles:-

"23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) 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.

c) 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.

d) 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.

e) 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.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination



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in order to arrive at a just decision of the case.

h)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.

i)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.

j)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.

k)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.

l)The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m)The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.



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n) 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."

12. In view of the same, this Court finds that marking of the seven documents would no way delay the trial and it would be beneficial for the trial Court to arrive at just decision of the case. In this case, the witnesses examined so far, are yet to be cross examined by the accused. The stand of the accused and the defence are unknown and not exposed. There is no question of review of order under Section 362 Cr.P.C., in order passed in C.M.P.No.3083 of 2021 in C.C.No.102 of 2019, dated 23.08.2021.

13. Hence, this Court set aside the order of the trial Court made in C.M.P.No.3083 of 2021 in C.C.No.102 of 2019, dated 23.08.2021 and permits the prosecution to recall the concerned witnesses again or examine fresh witnesses and mark the above said seven documents. This Criminal Original Petition is allowed, accordingly.

14. The trial Court is directed to conduct the trial in C.C.No.102 of 2019 on day to day basis and complete the same within a period of four months from the date of receipt of a copy of this order.

Sd/-
Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

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To

1. The Judicial Magistrate Court No.I,
Poonamallee.
2. Do Thro Chief Judicial Magistrate,
Thiruvallur.



3. The Assistant Commissioner of Police,
Central Crime Branch-Team II,
Vepery, Chennai - 600 007.

4. The Public Prosecutor,
High Court, Madras.

+1cc to Mr.T.S.Lavanesh, Advocate, S.R.No.5408

Crl.O.P.No.22652 of 2021

GPL (CO)
RGA (25/02/2022)