



Crl.O.P.(MD) No.13650 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 27.09.2022

CORAM

THE HON'BLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

CRL.O.P (MD) No.13650 of 2021

and

Crl.M.P(MD) No.7112 of 2021

Subash Chandra Kapoor

...Petitioner

-vs-

**The Inspector of Police
Economic Offences Wing -II(Idol Wing)
No.C-48, TNHB Building,
II Floor, II Avenue, Main Road,
Anna Nagar, Chennai 600 040.**

...Respondent

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C, praying to set aside the order dated 03.12.2020 passed in Crl.M.P.No.647 of 2020 in C.C.No.1 of 2016 pending on the file of the learned Additional Chief Judicial Magistrate/Special Judge for Idol Theft Cases, Kumbakonam and consequently allow the Petitioner to cross-examine P.W-1, P.W-2, P.W-3, P.W-12, P.W-15, P.W-21, P.W-22, P.W-23, P.W-24, P.W-25, P.W-26, P.W-27, P.W-28, P.W-33, P.W-34, P.W-35 and P.W-36 and enabling the Petitioner to cross-examine in full.



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For Petitioner : Mr.M.Shreeshar
For Respondent : Mr.T.Senthil Kumar
Additional Public Prosecutor

ORDER

This Criminal Original Petition has been filed to set aside the order dated 03.12.2020 passed in Crl.M.P.No.647 of 2020 in C.C.No.1 of 2016 pending on the file of learned Additional Chief Judicial Magistrate, Special Court for Idol Theft Cases, Kumbakonam and consequently allow the Petitioner to cross-examine P.W-1, P.W-2, P.W-3, P.W-12, P.W-15, P.W-21, P.W-22, P.W-23, P.W-24, P.W-25, P.W-26, P.W-27, PW28, P.W-33, P.W-34, P.W-35 and P.W-36 and enabling the Petitioner to cross-examine in full.

2. The learned Counsel for the Petitioner would submit that the Petitioner was originally arrayed as Accused No.7. Subsequently he was arrayed as Accused No.1. It is the contention of the learned Counsel for the Petitioner that the Petitioner was arrested in Germany and he is the citizen of United States of America. The Government of India had given an undertaking when he was in Cologne Prison, Germany that he will be



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prosecuted in India only for the case regarding idol theft. On that undertaking, he was extradited from Germany to India and he was arrayed as Accused in C.C.No.01 of 2016 on the file of the learned Additional Chief Judicial Magistrate, Special Court for Idol Theft Cases, Kumbakonam.

3. It is the contention of the learned Counsel for the Petitioner that while the Government of India had given an undertaking that the Petitioner will be confined only in Central Prison, Chennai whereas he is now confined in Central Prison, Trichy. It is the further submission of the learned Counsel for the Petitioner that after the Petitioner was extradited to India as per the undertaking given by the Government of India before the Cologne Court only one case pending against him is to be tried and he has to be sent back immediately after the case ends in conviction or acquittal as the case may be. In spite of that undertaking, after the Petitioner was brought to India and confined in Prison, all the idol theft cases, where the idols were recovered in Foreign Countries, were foisted against the Petitioner. Therefore, he is having many cases. Also, when the Petitioner was secured and brought back to India, he filed petition seeking bail and the bail application was allowed by the trial Court. The Prosecution went in



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appeal and cancelled the bail. Thereafter, he was continuously in Prison from the date of his arrival in India from 14.07.2022. There is nothing to show that the Petitioner is protracting the trial. Sooner the trial is completed, the Petitioner is interested to go back immediately. Further, he is suffering from cancer. Therefore, he has to get treatment in Germany or United States.

4. The learned Counsel for the Petitioner further submitted that the antique idols were properly purchased through proper channel under documents from the Institutions/Governments/Persons as per law. He further submitted that recall petition was filed only to recall the witnesses who were examined during Covid-19 lock down period. The valuable right of defence of the Petitioner will be affected by the order of refusal to cross examine the witnesses. The learned Additional Chief Judicial Magistrate, Special Court for Idol Theft Cases, Kumbakonam while dismissing the petition filed by the Petitioner has observed as follows:

“6. Records perused. In this case 12 witnesses including the official witnesses were not cross examined by the petitioners and they were examined in chief between 18.09.2015 to 15.10.2020 and the reason for not cross examining the above witnesses is that some



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important documents were not available at that time. But, the details of the said documents were not mentioned in the petition. Further, in what way the petitioners are in a handicapped situation due to the non availability of those documents is also not explained. Hence, the said reason stated by the counsel for the petitioners is not acceptable”.

5. It is the contention of the learned Counsel for the Petitioner that the Prosecution witnesses are all Government witnesses and how the Petitioner was included in this case is to be elicited in the cross examination by the Petitioner only. He is a dealer in antique idols and his name had been included for no fault of his. Further, he seeks cross-examination of witnesses examined by the Prosecution during the lock down period.

6. The learned Additional Public Prosecutor vehemently objected to the line of arguments of the learned Counsel for the Petitioner stating that other Accused viz., Accused Nos.2, 4 and 5 filed CrI.M.P.No.659 of 2020 and Accused Nos.3 and 6 filed CrI.M.P.No.658 of 2020 seeking similar prayer for recalling the witnesses and those petitions were also dismissed on 03.12.2020.



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7. At this stage, the learned Counsel for the Petitioner submitted that those petitions were filed by Accused Nos.2 to 6 and it does not have any bearing on this case. They are already on bail and the Petitioner herein is now confined in Prison. The learned Counsel for the Petitioner cannot get instructions by visiting the Petitioner in Prison and if the Petitioner is granted bail, he will be free to give instructions to his Counsel to proceed with the cross-examination.

8.The abovesaid submission was objected by the learned Additional Public Prosecutor stating that one of the accused namely A4 was also in judicial custody. The learned Additional Public Prosecutor further submitted that none of the witnesses were examined during Covid lockdown period. He has also submitted a counter filed by the Investigating Officer giving out details regarding the examination of witnesses.

9. It is the further submission of the learned Additional Public Prosecutor that P.W-1 to PW3 were examined on 18.09.2015, P.W-12 was examined on 18.08.2017, P.W-15 was examined on 21.02.2018, P.W-21 to P.W-23 were examined on 10.06.2019, P.W-24 and P.W-25 were examined



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on 24.06.2019, P.W-26 to P.W-28 were examined on 04.07.2019, P.W-33 & 34 were examined on 25.10.2019, P.W-35 was examined on 07.11.2019 and P.W-36 was examined on 19.03.2020. He would further submit that out of 40 witnesses, 23 witnesses have been examined in both chief and cross. Further 17 witnesses who were mentioned in the petition alone were not cross examined. Remaining witnesses already dispensed with by the Prosecution.

10. When the witnesses were available before the Court and they had deposed evidence as examination-in-chief, none of the defence Counsel appearing on behalf of the accused cross-examined the witnesses and therefore the trial Court recorded 'No Cross'. None of the defence lawyer had filed any petition to defer their right to cross-examine the witnesses. Therefore, the learned Additional Chief Judicial Magistrate, Special Court for Idol Theft Cases, Kumbakonam has rightly dismissed the petition.

11. Aggrieved by the same, the Petitioners Accused No.3 and Accused No.6 and Accused No.2, Accused No.4 and Accused No.5 had appeared before this Court and filed petitions in Crl.O.P(MD) Nos. 2554 and 2555 of



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2021 which were dismissed by this Court on 22.02.2021. This Court cannot give contradictory orders for the same relief sought by the Petitioner herein which would amount to judicial indiscipline. The same Bench of High Court cannot give different order as against the order passed by the learned Additional Chief Judicial Magistrate, Special Court for Idol Theft Cases, Kumbakonam. The learned Additional Public Prosecutor objected to consider this petition under Section 311 of Cr.P.C under Section 482 of Cr.P.C to set aside the order. He would further submit that the Petition under Section 311 Cr.P.C filed before the trial Court was dismissed on 03.12.2020 and the petition under Section 482 of Cr.P.C was filed before this Court on 13.09.2021 after a period of nine months. He would further submit that after completion of Prosecution evidence now the case stands posted for arguments on 30.09.2022 and also submitted that after completion of trial, the Petitioner is to be handed over to the authorities in Germany where he is facing similar cases. Therefore, the arguments of the learned Counsel for the Petitioner that the Petitioner is not interested in protracting the case is not true and it is to be rejected.



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12.By way of reply, the learned Counsel for the Petitioner submitted that at the relevant point of examination of witness, there is covid-19 lock down period.

13.On consideration of the rival submissions, the submission of the learned Counsel for the Petitioner cannot at all be accepted in the light of the order passed by the learned Single Judge of this Court. When the Accused No.3 and Accused No.6 had filed Crl.M.P.No. 658 of 2020 and Accused No.2, Accused No.4 and Accused No.5 filed Crl.M.P.No.659 of 2020 passed by the very same trial Judge.

14. Considering the stage of the case and the date of examination of witnesses, the arguments of the learned Counsel for the Petitioner cannot be accepted. It is observed by the trial Judge that when the witnesses are present, the Counsel who appeared for the accused take it for granted and they file 311 of Cr.P.C petition leisurely. When the trial Court dismissed the same, they claimed it as valuable defence to the Petitioner/accused as he lost. It is to be noted that fair trial and speedy trial is a guaranteed right to a citizen of Country by the Constitution of India. It does not mean that the



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accused alone is to be protected as per this provision of Constitution of India. It includes Prosecution witnesses also, who are also Indian citizens, who are harassed in the light of the recall after several months, days, years. Here in this case, as rightly pointed out by the learned Additional Public Prosecutor that the witnesses are official witnesses. Therefore, the Petitioner ought to have cross-examined them then and there. The Petitioner is responsible for loosing the right of defence when the trial Court had recorded as ' No Cross ' based on the instructions given to the Counsel. Therefore, by exercising the right under Section 311 of Cr.P.C and filing a Petition after several months, cannot at all be accepted. The argument of the learned Counsel for the Petitioner that witnesses were not examined during Covid lock down cannot at all be accepted for the reason that the Covid lock down commenced from the month of March 2020 till September 2020 as per the counter filed by the Investigating Officer. Not only that, the Hon'ble Supreme Court in the reported decision in **2015 (1) MLJ (CrI) 288 (SC) [Vinod Kumar -vs- State of Punjab]** had deprecated the practice of defence Counsels filing Petitions under Section 311 of Cr.P.C. to recall Prosecution witnesses as per the whims and fancies of the Accused person, thereby harassing the Prosecution witnesses and also resulting in the trial Court



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unable to dispose off criminal cases in a time bound manner, which in turn results in trial Courts unable to dispose off cases.

15. In the light of the above discussion, this Criminal Original Petition lacks merits and it has to be dismissed.

In the result, this **Criminal Original Petition is dismissed.**

The learned Additional Chief Judicial Magistrate/Special Judge for Idol Theft Cases, Kumbakonam is directed to dispose of C.C.No.1 of 2016 within a reasonable period of one month from the date of receipt of a copy of this order. Consequently, connected miscellaneous petition is closed.

27.09.2022

Internet: Yes./No
Index: Yes/no
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To

1. The Additional Chief Judicial Magistrate
Special Judge for Idol Theft cases, Kumbakonam
2. The Inspector of Police
Economic Offences Wing -II(Idol Wing)
No.C-48, TNHB Building,
II Floor, II Avenue, Main Road,
Anna Nagar, Chennai 600 040.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

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SATHI KUMAR SUKUMARA KURUP, J.

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