



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 15.12.2021
PRONOUNCED ON: 09.02.2022
CORAM
THE HONOURABLE MR.JUSTICE **K.MURALI SHANKAR**

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Crl.O.P. (MD)No.16031 of 2018
and
Crl.M.P. (MD)No.7105 of 2018

N.Anantha Kumar : Petitioners/Complainant

Vs.

Antony Charles : Respondent/Accused

PRAYER : Criminal Original Petition has been filed under Section 482 Cr.P.C, to call for the records relating to the docket order with regard to the evidence of D.W.1 in C.C.No.133 of 2016, on the file of the Judicial Magistrate Court, Nanguneri and set aside the same.

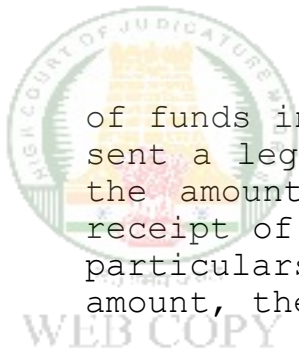
For Petitioner : Mr.P.Senthur Pandian
For Respondent : Mr.A.Balakrishnan

ORDER

This Criminal Original Petition is directed against the order dated 24.07.2018 passed by the learned Judicial Magistrate, Nanguneri, treating the witness D.W.1 as hostile witness while recording the evidence of D.W.1 in C.C.NO.133 of 2016.

2. The petitioner is the complainant and he filed a complaint under Section 200 Cr.P.C., against the respondent herein for the alleged offence under Section 138 r/w 142 of the Negotiable Instruments Act. It is not in dispute that the complainant has examined three witnesses on his side and closed his side evidence and that the respondent has commenced his side evidence by summoning and examining one Sharmila Rose as D.W.1.

3. The case of the complainant is that the respondent approached the complainant through one V.Maheshwaran and borrowed a sum of Rs.4,00,000/- on 07.06.2014 to meet out the family necessity promising to repay the same within one year along with interest, that the respondent has paid interest to the tune of 64,000/- on 18.10.2015 and agreed to repay the principal amount within one month, that the respondent has issued a post dated cheque of Indian Overseas Bank, Sathankulam Branch, dated 18.11.2015, that when the cheque was presented for collection, the same was returned for want



of funds in the Bank account of the accused, that the petitioner has sent a legal notice, dated 17.12.2015, demanding the accused to pay the amount covered by the cheque, that the respondent after the receipt of notice, has sent a belated reply on 05.01.2016 with false particulars and that since the accused has not chosen to pay any amount, the petitioner was constrained to lodge the above complaint.

4. It is evident from the records that the respondent has taken a defence that the accused is a distant relative of Sharmila Rose, that when the mother of the accused was working as an agent in MRDT concern, Sharmila Rose had deposited Rs.5,00,000/- accepting the words of the accused, that the said Sharmila Rose had taken the Indian Overseas Bank cheque for Rs.5,00,000/- as a security from the accused, that the said Sharmila Rose had returned that old cheque and received a cheque, now involved in this case and that the said Sharmila Rose had set up her husband's friend Anantha Kumar and filed the above complaint through him.

5. No doubt, the complainant has specifically disputed the above defence put forth by the accused. When the case was pending for the defence evidence, the accused has summoned the said Sharmila Rose as witness on his side and also examined in chief. After recording of evidence to some extent, the accused has requested the Court to treat the witness D.W.1 as hostile, as she was denying the receipt of the cheque involved in the case, after handing over the old cheque. Though the complainant side has raised objection, the learned Magistrate has passed the impugned order treating the witness D.W.1 as hostile and permitted the defence to cross-examine the said witness under Section 154 of the Indian Evidence Act. Aggrieved by the said order, the complainant has come forward with the present Criminal Original Petition.

6. Before entering into further discussion, it is necessary to consider the legal position.

7. No doubt, the learned Counsel for the complainant has cited a decision of this Court in ***S.Murugesan and two others Vs. S.Pethaperumal and two others*** reported in ***AIR 1999 Madras 76*** before the trial Court as well as before this Court. It is necessary to refer the decision of the Hon'ble Apex Court in ***Gura Singh vs The State Of Rajasthan (Crl.A.No.1184 of 1998), dated 06.12.2000***, wherein the Hon'ble Supreme Court, while considering the treating of witness as hostile under Section 154 of the Indian Evidence Act, has held as follows:

"The terms "hostile", "adverse" or "unfavourable" witnesses are alien to the Indian Evidence Act. The terms "hostile witness", "adverse witness", "unfavourable witness", "unwilling witness" are all terms of English Law. The rule of not permitting a party calling the witness to cross examine are relaxed under the common law



by evolving the terms "hostile witness and unfavourable witness". Under the common law a hostile witness is described as one who is not desirous of telling the truth at the instance of the party calling him and a unfavourable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves the opposite test. In India the right to cross-examine the witnesses by the party calling him is governed by the provisions of the Indian Evidence Act, 1872. Section 142 requires that leading questions cannot be put to the witness in examination-in-chief or in re-examination except with the permission of the court. The court can, however, permit leading question as to the matters which are introductory or undisputed or which have, in its opinion, already been sufficiently proved. Section 154 authorises the court in its discretion to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The courts are, therefore, under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Permission for cross-examination in terms of Section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness. Extensively dealing with the terms "hostile, adverse and unfavourable witnesses" and the object of the provisions of the Evidence Act this Court in *Sat Paul v. Delhi Administration* [AIR 1976 SC 294] held: "To steer clear of the controversy over the meaning of the terms 'hostile' witness, 'adverse' witness, 'unfavourable' witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that, in India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared 'adverse' or 'hostile'. Whether it be the grant of permission under Sec.142 to put leading questions, or the leave under Section 154 to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court (see the observations of Sir Lawrence Jenkins in *Baikuntha Nath v. Prasannamoyi*), AIR 1922 PC 409. The discretion conferred by Section 154 on the court is unqualified and untrammelled, and is apart from any question of 'hostility'. It is to be liberally exercised whenever the court from the witnesses's demeanour, temper, attitude, bearing, or the tenor and

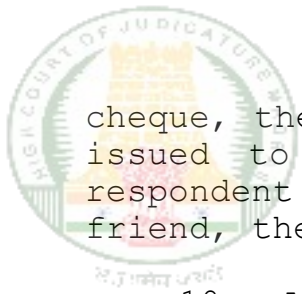


tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as 'declared hostile', 'declared unfavourable', the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts.

It is important to note that the English statute differs materially from the law contained in the Indian Evidence Act in regard to cross-examination and contradiction of his own witness by a party. Under the English Law, a party is not permitted to impeach the credit of his own witness by general evidence of his bad character, shady antecedents or previous conviction. In India, this can be done with the consent of the court under S.155. Under the English Act of 1865, a party calling the witness, can 'cross-examine' and contradict a witness in respect of his previous inconsistent statements with the leave of the court, only when the court considers the witness to be 'adverse'. As already noticed, no such condition has been laid down in Ss.154 and 155 of the Indian Act and the grant of such leave has been left completely to the discretion of the court, the exercise of which is not fettered by or dependent upon the 'hostility' or 'adverseness' of the witness".

8. Considering the above, it is very much clear that Section 154 of the Indian Evidence Act confers discretionary power and that though the discretionary is wide in scope, it is entirely left to the discretion of the Court to exercise it, when the circumstances warrant. It is also settled law that the discretion under Section 154 Cr.P.C., is unqualified and untrammelled and the same has to be exercised liberally. As already pointed out, the Honourable Supreme Court has deprecated the practice of calling the witness as hostile, adverse or unfavourable, as the Evidence Act does not contemplate any of such words.

9. In the present case, as already pointed out, during the cross-examination of D.W.1, the learned Counsel for the petitioner represented that the respondent has sought for permission to treat the witness Sharmila Rose as hostile witness, since she refused to accept the version of the respondent that after receiving the old



cheque, the present cheque now involved in the above case, has been issued to the witness and that the same was utilised by the respondent by filing the cheque dishonour case through her husband's friend, the petitioner herein.

10. As already pointed out, the learned Counsel for the petitioner has raised objections that since there was no earlier statement and she has not given any contra evidence, the question of treating her as hostile does not arise. But the learned Magistrate, after considering the rival contentions, has come to the decision that there are several materials to treat the witness as hostile and permitted the petitioner to cross-examine her. Admittedly, the learned Magistrate has not elaborated anything further and more particularly, has not shown any such material to infer that the witness was not deposing the truth.

11. As rightly contended by the learned Counsel for the petitioner, the respondent was well aware of the fact that the witness Sharmila Rose would not support their case, since the respondent has mainly alleged that the witness Sharmila Rose alone had set up the present petitioner and filed the above case. Moreover, just because the witness has disputed the version of the defence that the cheque now involved in this case was given to her, after receiving the old cheque, it cannot be stated that the witness has turned hostile. As already pointed out, the Honourable Apex Court has specifically held that the Courts should not use the words hostile, adverse or unfavourable witness, as the same are alien to the Indian Evidence Act. Moreover in the absence any material to show that the witness is not speaking the truth or exhibiting the element of hostility to the party who summoned him, the question of treating D.W.1 as hostile does not arise at all.

12. In the case on hand, after declaring the witness D.W.1 as hostile, the learned Magistrate has permitted the accused Counsel to proceed with the cross-examination and D.W.1 was subjected to cross-examination on that day itself. As rightly contended by the learned Counsel for the respondent, considering the defence taken by the respondent, it has become just and necessary to examine the witness D.W.1 for proving their alleged defence and that the permission given by the learned Magistrate to cross-examine the witness D.W.1 should be taken as a permission under Section 154 of the Indian Evidence Act to examine the witness to get out the truth. Moreover, as rightly contended by the learned Counsel for the respondent, no prejudice is caused to the petitioner, in permitting the accused to cross-examine D.W.1. Considering the above, this Court is of the view that though the order passed by the learned Magistrate declaring the witness D.W.1 as hostile is not good in law, the permission given by the learned Magistrate to cross-examine D.W.1 cannot be found fault with. Consequently, the evidence recorded in pursuance of the permission granted by the learned Magistrate is

<https://hccservices.mca.gov.in/hccservices> created as part of deposition of D.W.1.



13. In the result, the order of the Judicial Magistrate declaring the witness D.W.1 as hostile is set aside and that the evidence recorded in pursuant to the permission granted by the learned Magistrate is to be treated as part of the deposition of witness D.W.1. Accordingly, this Criminal Original Petition is disposed of. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (P&A)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

SSL

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 Judicial Magistrate Court, Nanguneri.

+1 CC to M/s.K.P.NARAYANA KUMAR, Advocate (SR-5546[F] dated 11/02/2022)

Crl.O.P.(MD)No.16031 of 2018
09.02.2022

RD(25.02.2022) 6P 3C