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CrI.O.P.No.29158 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.08.2023

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THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

CrI.O.P No.29158 of 2022

S.Saravanan

...Petitioners

vs.

R.Nirmala

...Respondents

PRAYER:

Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to set aside the docket order passed in CrI.M.P.S.R.No.398/2022 on 12.08.2022 in CrI.A.No.46 of 2022 by the learned Additional District Judge, Namakkal.

For Petitioners : Mr.S.Govindarajulu
For Respondent : Mr.T.Saikrishnan
for Mr.L.Poovendra Perumal

ORDER

This criminal original petition has been filed challenging the docket order passed by the Court below rejecting the application filed under Section 391 of CrPC on the ground that the petitioner is attempting to file a set of documents, which is beyond the scope of Section 391 of CrPC, which deals with taking additional evidence during the pendency of the case.



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2. Heard the learned counsel for the petitioner and the respondent and also perused the materials available on record.

3. It is seen from records that the learned Judicial Magistrate, Additional Mahila Court, Namakkal, had passed final orders in DVC.No.19 of 2020 on 12.04.2022. It is further seen from the order that the first petitioner has in fact examined himself as PW1 and no documents were marked on the side of the first petitioner. The trial Court on considering the facts and circumstances of the case, was pleased to allow the Domestic Violence case filed by the respondent and issued directions under Section 18, 19 and 22 of the Domestic Violence Act.

4. The petitioners aggrieved by the same, filed an appeal before the Court below and the same was taken on file in Criminal Appeal No.46 of 2022. During the pendency of the appeal, the petitioner filed an application under Section 391 of CrPC to permit the petitioners to mark the documents relied upon by them. This application was returned by the Court below with the following endorsement:

“திருப்பப்படுகிறது:

மனுதாரர்/மேல்முறையீட்டாளர் விசாரணை நீதிமன்றத்தின் முன்பு எ.சா.1 ஆக விசாரிக்கப்படும் நிலையில், கிசாரணை



நீதிமன்றம் முன்பு ஆவணங்களை குறியீடு செய்ய முடியாமல்
எவ்வாறு மேல் முறையீடு வழக்கில் தாக்கல் செய்ய முடியும்.
எனவே மனு, ஆவணங்கள் திருப்பப்படுகிறது.”

5. Aggrieved by the same, the present petition has been filed before this Court.

6. It is seen from the affidavit filed in support of the application that the petitioners have taken a specific stand that the case was not properly handled by the junior advocate before the trial Court and that they have provided more than 10 documents to the counsel while conducting the case before the trial Court and the same was not marked.

7. The Court below has returned back the application and documents filed on the ground that the petitioners ought to have marked all these documents before the trial Court and it cannot be permitted at the stage of appeal.

8. The learned counsel for the petitioners submitted that the proceedings were conducted during the COVID period and the counsel on record was not



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able to travel to Namakkal and conduct the proceedings and hence, the learned counsel shall have one last opportunity for the petitioners to make out their case by relying upon the additional documents that are sought to be filed under Section 391 of CrPC.

9. The crucial issue to be considered is as to whether the petitioners have satisfied the requirements of Section 391 of CrPC. The Appellate Court has been given power to take further evidence, when the Appellate Court finds that such additional evidence is necessary. While interpreting this provision, it has been held that the Court must satisfy itself that there is no failure of justice. A useful reference can be made to the judgement of Hon'ble Apex Court in ***Rajeswar Prasad Misra vs. State of West Bengal and another*** reported in ***AIR 1965 SC 1887*** and the relevant portion is extracted hereunder:

“10. Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if it was possible) to list here. We do not propose to do what the Legislature has refrained from doing, namely, to control discretion of the appellate Court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly Sup./165--13 and only in



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suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise. Commentaries upon [the Code](#) are full of cases in which the powers under [S. 428](#) were exercised. We were cited a fair number at the hearing. Some of the decisions suffer from the sin of generalization and some others from that of arguing from analogy. The facts in the cited cases are so different that it would be futile to embark upon their examination. We might have attempted this, if we could see some useful purpose but we see none. We would be right in assuming the existence of a discretionary power in the High Court and all that we consider necessary is to see whether the discretion was properly exercised.”

10. The subject matter of challenge in this petition is the docket order passed by the Court below returning the application and the documents filed by the petitioner. The Court below did not go into the grounds that have been raised by the petitioners while filing the application and satisfy itself as to



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whether the additional evidence can be permitted under Section 391 of CrPC. In view of the same, this Court does not want to substitute its views on the sustainability of the plea taken by the petitioners as to why they were not able to mark the documents before the Court below at the time of trial.

11. In the light of the above discussion, the matter is remanded back to the file of the learned Additional District Judge, Namakkal. The learned Additional District Judge, Namakkal shall deal with the application filed by the petitioners on its own merits and in accordance with law and see if the petitioners have satisfied the requirements under Section 391 of CrPC. If ultimately the Appellate Court finds that the additional evidence must be entertained, an opportunity shall be given to the respondent to cross-examine the first petitioner on the documents that are sought to be relied upon. In any event, the proceedings in CrI.A.No.46 of 2022 shall be completed within a period of three months from the date of receipt of copy of this order.

12. The Registry is directed to return back the original affidavit and petition filed by the petitioners to the learned counsel for the petitioners to enable the learned counsel to re-present the same before the Court below and in order to enable the Court below to deal with the application on its own merits.



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WEB COPY 13. This criminal original petition is disposed of in the above terms.

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Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
nsa

To

- 1.The Sessions Judge,
Magalir Neethimandram,
Tiruppur/Fast Track Mahila Court,
Tiruppur.
- 2.The Inspector of Police,
Tiruppur North Police Station,
Crime No.1328 of 2021,
Tiruppur District.
- 3.The Public Prosecutor,
High Court, Madras.



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N. ANAND VENKATESH, J.

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