



CrI.O.P(MD)No.15896 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

ORDERS RESERVED ON: 07.09.2023

ORDERS PRONOUNCED ON: 22.09.2023

CORAM

THE HONOURABLE DR.JUSTICE D.NAGARJUN

CrI.O.P(MD)No.15896 of 2023

Tmt.Padmavathy

... Petitioner

Vs

M/s.Sri Balaji Networks,
Rep. through it Managing Partner,
Mr.P.Venkatachalapathy,
BS-3, SIDCO Industrial Estate,
Kappalur,
Madurai-8.

... Respondent

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records and set aside the impugned order in Cr.M.P.No.5726 of 2023 in STC No.4 of 2022 dated 05.08.2023 on the file of the Judicial Magistrate (Fast Track Court) No.I, Madurai by allowing the Criminal Original petition.

For Petitioner : Mr.M.K.Subramanian

For Respondent : Mr.S.Srikanth



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ORDER

This Criminal Original Petition is filed for quashing the order passed by the learned Judicial Magistrate (Fast Track Court) No.I, Madurai in Crl.M.P.No.5726 of 2023 in S.T.C.No.4 of 2022, dated 05.08.2023 declining to recall the P.W.1 for cross-examination by the petitioner/accused.

2. The facts in brief required insofar as this petition is concerned that the respondent/complainant has filed S.T.C.No.4 of 2022 alleging that the petitioner has committed an offence under Section 138 of the Negotiable Instruments Act. According to the respondent, he has invested Rs.60,00,000/- under the memorandum of understanding dated 04.03.2021 with the petitioner during the course of business transaction. The petitioner allegedly not paid the profit thereby a settlement was arrived at. Basing on which, the petitioner issued a cheque bearing No.000089 for a sum of Rs.75,95,000/- drawn on HDFC Bank, Madipakkam, dated 12.10.2021.

3. The petitioner has presented the said cheque in the Canara Bank, Madurai on 12.10.2021 and it was dishonored on the ground of “Funds Insufficient”. After completion of all the formalities, the respondent has filed a complaint under Section 200 Cr.P.C., and the same was taken on file by the



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learned Judicial Magistrate (Fast Track Court) No.I, Madurai in S.T.C.No.4 of 2022. The petitioner/accused has taken the defence that there was no money transaction between the petitioner and the respondent and that the respondent has forged the day-today accounts. The respondent filed an application in Crl.M.P.No.3769 of 2022 in S.T.C.No.4 of 2022 under Section 91 of Cr.P.C., to call for the statement of accounts for the period from 10.03.2021 to 09.10.2021 from the Chartered Accountant by name Mr.Hanumanth. The respondent has not filed any returns before the trial Court.

4. The petitioner has filed the application under Section 91 of Cr.P.C., for production of Income Tax returns of the respondent from the jurisdictional Income Tax Officer in Crl.M.P.No.939 of 2023 and to send the Exhibits P3 and P4 to the handwriting expert filed another Cr.M.P.No.938 of 2023 and both the applications were dismissed on 12.05.2023. The petitioner has filed Crl.O.P.No.9131 of 2023 before this Court against the dismissal of the petition filed under Section 91 Cr.P.C., and has filed Crl.R.C.(MD)No.523 of 2023 against the dismissal of expert opinion application. This Court allowed the application in Crl.O.P(MD)No.9131 of 2023 whereas, dismissed the Crl.R.C(MD)No.523 of 2023 on 30.06.2023.



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5. It is also submitted that when the petitioner was taking steps to challenge the order in Crl.R.C.(MD)No.523 of 2023 dated 30.06.2023 before the Apex Court, the respondent without obeying the orders passed by this Court in Crl.O.P(MD)No.9131 of 2023, he himself filed the income returns and defeated the orders of this Court. When the case was posted for cross-examination of P.W.1 on 06.07.2023, due to the ill health of the petitioner, the counsel was unable to get instruction for further proceedings, thereby his counsel could not cross-examine the P.W.1 and hence, the same was closed. On the next date of hearing i.e., on 11.09.2023 the respondent examined P.W.2 and immediately the petitioner filed an application under Section 311 Cr.P.C., on 19.07.2023 in Cr.M.P.No.5726 of 2023 and the same was dismissed on 05.08.2023 by way of impugned order. It is submitted that non cross-examination of P.W.1 is not an intentional one and it was on account of ill-health of the petitioner, therefore, sought for recalling of P.W.1 for cross-examination.

6. The learned counsel for the respondent/complainant submitted that ample opportunities were given to the petitioner to cross-examine the P.W.1 and the respondent has filed an application in Crl.O.P(MD)No.17197 of 2022 seeking to expedite and complete the trial in S.T.C.No.4 of 2022. This Court by order dated 10.11.2022 directed the learned trial Judge to dispose of



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the S.T.C.No.4 of 2022 within a period of one month from the date of receipt of a copy of the order. Aggrieved by the said order, the petitioner has filed Special Leave to Appeal (Crl.) No.165 of 2023 before the Hon'ble apex Court and the same was dismissed by the Hon'ble Apex Court on 13.01.2023. It is submitted that the petitioner has taken 47 adjournments and he appeared only thrice and it was informed that the petitioner was not physically health.

7. Now the point for determination is whether the petitioner can be permitted to cross-examine the P.W.1.

8. The petitioner has taken a plea that there was no money transaction as alleged by the respondent/complainant and the respondent has not filed any income tax returns. Pertaining to the year of statement and books of accounts filed by him have been created one. The petitioner has filed an application in Cr.M.P.No.939 of 2023 seeking for a direction to the respondent to file income tax returns and the said application was dismissed. Aggrieved by the dismissal, the petitioner preferred an application in Crl.O.P(MD)No.9131 of 2023 and the same was allowed. The respondent has filed the income tax returns suo motu and got marked by examining himself on 11.09.2023.



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9. Normally, as rightly submitted by the learned counsel for the petitioner, P.W.1 could have been cross-examined on the very same day in respect of income tax returns. According to the petitioner, she was not present in the Court to give instructions to her counsel on account of her ill-health and without any delay she has filed an application for recalling of P.W.1, but the same was not considered.

10. The respondent/complainant has not denied the submission of the petitioner that the petitioner could not cross-examine the P.W.1 as she could not give instructions to her counsel as she was suffering from ill-health. Once the respondent has not denied the fact that the petitioner was suffering from ill-health, when the application was filed for recalling of P.W.1 the trial court should have consider sympathetically. Section 311 of Cr.P.C., give powers to the Court to call and recall the person either for chief-examination or for cross-examination at any stage of the proceedings. However, the only rider is that the examination of the witnesses shall be for the just decision of the case. The endeavour of the trial court is to find the fact in respect of the lis between the parties and determine as to which version of the two is correct.

11. Therefore, cross-examination is an important element of the evidence in the trial Court. Unless, cross-examination is allowed, the trial Court



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will not come to the just conclusion as to whether the accused has committed the offence come to an end. Therefore as far as possible the trial Court shall make an endeavour to see that opportunity to be given for cross-examination of the witness. Therefore, the test applied is whether the petitioner/accused is prevented on account of the circumstances beyond his/her control thereby failed to cross-examine the P.W.1. In the case on hand, has already observed that the petitioner could not give instruction to her counsel on account of her ill-health which is not disputed by the respondent/complainant. Further, the cross-examination of P.W.1 is necessitated only on account of filing of the income tax returns. The petitioner/accused who has filed an application directing the respondent/complainant to file the income tax returns which was dismissed by the trial Court on which the petitioner has filed a petition before this Court in Crl.O.P.No.9131 of 2023 which was allowed and only after that the respondent has filed income tax returns. So the purpose for which the income tax returns were directed to be filed is to cross-examine the respondent by the petitioner in respect of disputed transaction. However, once the respondent has filed the income tax returns, the opportunity is not given to the petitioner to cross-examine thereby law of injustice is caused by the petitioner.

12. The learned trial Judge has observed while dismissing the petition that this Court has directed the trial court to expedite the case and that



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the petition is filed with an intention to drag. It is true that this Court has directed the trial Court to expedite the trial and dispose of the case as quickly as possible, however it does not mean that the trial Court will compromise in principle of giving fair opportunity to the petitioner/accused.

13. The trial Judge, who has mentioned about the orders of this Court as one of the ground for dismissal, has forgotten the fact that the same court has given more than 20 adjournments after the direction was given by this Court. The learned counsel for the petitioner has relied on the decision of the Hon'ble Apex Court reported in **2022 Live Law (SC) 662** decided between **Varsha Garg versus The State of Madhya Pradesh and others**, wherein, the Hon'ble apex Court has as follows:-

“28 Having clarified that the bar under [Section 301](#) is inapplicable and that the appellant is well placed to pursue this appeal, we now examine [Section 311](#) of CrPC. [Section 311](#) provides that the Court “may”:

(i) Summon any person as a witness or to examine any person in attendance, though not summoned as a witness; and

(ii) Recall and re-examine any person who has already been examined.

This power can be exercised at any stage of any inquiry, trial or other proceeding under the [CrPC](#). The latter part of [Section 311](#) states that the Court “shall” summon and examine or recall and re-examine any such person -if his evidence appears to the Court to be essential to the just decision of the case?. [Section](#)



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311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.

29 The first part of the statutory provision which uses the expression -may? postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression -shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case?. Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.

30 A two judge Bench of this Court in Mohanlal Shamji Soni (supra) while dealing with pari materia provisions of [Section 540](#) of the Criminal Code of Procedure 1898 observed:

-16. The second part of [Section 540](#) as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision — either discretionary or mandatory — depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice.?

Justice S Ratnavel Pandian, speaking for the two judge Bench, noted that the power is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which it can be exercised or the manner of its exercise. It is only circumscribed by the principle that the -evidence to be obtained should appear to the court essential to a just decision of



the case by getting at the truth by all lawful means.? In that context the Court observed:

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-18 ...Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.?

31 Summing up the position as it obtained from various decisions of this Court, namely [Rameshwar Dayal v. State of U.P.](#)¹⁹, [State of W.B. v. Tulsidas Mundhra](#)²⁰, [Jamatraj Kewalji Govani v. State of Maharashtra](#)²¹, [Masalti v. State of U.P.](#)²², [Rajeswar Prosad Misra v. State of W.B.](#)²³ and [R.B. Mithani v. State of Maharashtra](#)²⁴, the Court held:

-27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.?

32 The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under [Section 311](#) are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to



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emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.

*42 The Court is vested with a broad and wholesome power, in terms of [Section 311](#) of the CrPC, to summon and examine or recall and re-examine any material witness at any stage and the closing of prosecution evidence is not an absolute bar. This Court in *Zahira Habibulla H. Sheikh (supra)* while dealing with the prayers for adducing additional evidence under [Section 391](#) CrPC at the appellate stage, along with a prayer for examination of witnesses under [Section 311](#) CrPC explained the role of the court, in the following terms:*

*-43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. [Section 311](#) of the Code and [Section 165](#) of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness. Further, in *Zahira Habibullah Sheikh (5) (supra)*, the Court reiterated the extent of powers under [Section 311](#) and held that:*

-27. The object underlying [Section 311](#) of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The



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*determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under **the Code** and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In **Section 311** the significant expression that occurs is “at any stage of any inquiry or trial or other proceeding under this Code”. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.? (emphasis supplied) ”*

14. He has also filed another decision of the Hon'ble Apex Court dated 29.08.2023 the supreme Court decided between **Satbir Singh vs. State of Haryana and others**, wherein para-12 of the order, the Hon'ble Supreme Court has held as follows:-

“12. Having considered the matter and surveyed the law supra, the court finds that a case for interference has been made out. Under the peculiar facts of the present case, the request for recall of the appellant under section 311 CrPC was justified, as at the relevant point of time in his initial deposition, there was no occasion for him to bring the relevant facts relating to similarity of date before the court, which arose after the CFSL expert was examined.”



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15. In view of the above, the petitioner is justified seeking for direction of the trial Court to recall the P.W.1 for cross-examination by the petitioner/accused by setting aside the order passed by the trial Court in Crl.M.P.No.5726 of 2023, dated 05.08.2023.

16. In view of the above, this Criminal Original Petition is allowed by setting aside the order passed by the learned Judicial Magistrate (Fast Track Court) No.1, Madurai, dated 05.08.2023. The trial Court is directed to fix the date specifically for cross-examination of P.W.1 and on that date the petitioner shall cross-examine the P.W.1 without fail.

22.09.2023

NCC:yes/no
Index:yes/no
Internet:yes/no
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To

The Judicial Magistrate (Fast Track Court) No.I,
Madurai.



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DR.D.NAGARJUN, J.

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