

(2016) 06 MAD CK 0139

MADRAS HIGH COURT

Case No: Crl. R.C. (MD) No. 219 of 2016 and Crl. M.P. (MD). Nos. 2906 and 4419 of 2016.

P. Shri Santhaji - Petitioner
@HASH A. Rajagopal

APPELLANT

Vs

RESPONDENT

Date of Decision: June 22, 2016

Acts Referred:

- Constitution of India, 1950 - Article 22(1)
- Criminal Procedure Code, 1973 (CrPC) - Section 303, Section 31, Section 311
- Penal Code, 1860 (IPC) - Section 500

Citation: (2016) 4 MLJ Criminal 331

Hon'ble Judges: Dr. P. Devadass, J.

Bench: Single Bench

Advocate: Mr. M. Chokkusamy Balasubramani, Advocate, for the Petitioner; Mr. G.R. Swaminathan for Mr. P. Athimoola Pandian, Advocates, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Dr. P. Devadass, J. - The accused in C.C. No. 2 of 2009 on the file of the learned Chief Judicial Magistrate, Virudhunagar at Srivilliputhur having aggrieved by the dismissal of his recall petition filed under Section 311 Cr.P.C. in Cr.M.P. No. 4498 of 2015 has directed this revision.

2. With regard to certain occurrence took place on 05.02.2008, in the Court Hall of the learned Judicial Magistrate No. II, Srivilliputhur, PW1, an Advocate filed a private complaint under Section 200 Cr.P.C. against the revision petitioner, alleging commission of an offence under Section 500 IPC.

He has engaged PW2, an Advocate of Srivilliputhur Bar to prosecute the revision petitioner. PWs.3 and 4, who are members of the same bar were examined as

occurrence witnesses. So also PW5, the then Presiding Officer of the Court. On 18.04.2011, PW5 has also been cross-examined. Thereafter the case has crossed several stages and hurdles. At last, it is on its last leg of journey, namely, judgment stage.

3. At this stage, the accused filed Cr.M.P.No.4498 of 2015 to recall PW5. On 18.03.2016, the Trial Court delivered a lengthy order, dismissing the recall petition, holding that relevant details for exercising the discretionary power under Section 311 Cr.P.C. has not been given and it is an attempt to drag on the trial proceedings.

4. Aggrieved, the accused is before us.

5. The learned counsel for the revision petitioner would submit that recalling of PW5 for his further cross-examination becomes necessary for marking an order copy of this Court under which PW2 has withdrawn his revision in Crl.R.C.(MD).No.408 of 2008, on 23.04.2008. For the very same issue, again another complaint through the present complainant/PW1 cannot be maintained. To drive home, this point of view recalling of PW5 becomes necessary for the defence.

6. On the other hand, the learned counsel for the respondent/complainant reiterated the very same contentions which were placed before the Trial court. He would also add that the case could not seen the light of the day. The end of it, is not known. The accused is not tired of filing kindred petitions and stalling the trial proceedings. His one more enterprise is the present recall petition. It is nothing less of an attempt to derail the trial.

7. The learned counsel for the respondent further submits that the document, which the accused wants to mark an order copy of this Court. He can very well file it in the Trial Court in the manner provided under law. For that matter recalling PW5, a Judicial Officer is not necessary. It indicates his intention to procrastinate the case.

8. The learned counsel for the respondent also would contend that although Section 311 Cr.P.C. is very wide, parties cannot be permitted to invoke it, to waste public time. Only on valid ground a witness could be recalled under Section 311 Cr.P.C.

9. In support of his submissions the learned counsel for the respondent would cite, **State (NCT of Delhi) v. Shiv Kumar Yadav and another [2016 (1) SCC (Cri)510]**.

10. I have anxiously considered the elaborate arguments of both sides, meticulously scanned the relevant materials and gleaned through the impugned order passed by the Trial court.

11. Actually it is a simple petition under Section 311 Cr.P.C. In practise, it is used to be called "recall petition". There is an object behind Section 311 Cr.P.C. Courts have to render justice. Courts shall be enabled to render correct finding/justice. To achieve this, parties to the case shall place all the relevant evidence before the Court. Justice should not fail, because of incomplete record/evidence before the

Court. For this purpose, discretionary power has been given to the Court. This is the philosophy behind Section 311 Cr.P.C.

12. Under Section 311 Cr.P.C. a new witness as an additional witness can be examined and witnesses who already were examined also could be recalled for their further examination. In this connection, Section 311 Cr.P.C. should be read along with Section 138 of the Indian Evidence Act.

Although Section 138 of Evidence Act enables re-examination of witness, who has already been examined, or who is present in the court, still the guiding principles relating to Section 311 Cr.P.C. cannot be lost sight of.

13. Now, every lawyer knows that the sweeping power of the Court under Section 311 Cr.P.C. cannot be restored to by the mere by mere drop of a hat. It should not be misused to fill up a lacuna, to delay the trial process. If the Court satisfied that the evidence sought to be adduced is necessary for rendering a correct and just decision in the case Court can allow the recall petition, Otherwise such petitions should not be patronised.

14. In **Rajaram Prasad v. State of Bihar AIR 2013 SC 3081 : (2013) (14) SCC 461 : LNIND 2013 SC 605.** their Lordships of the Hon"ble Supreme Court reviewed the entire case-laws on the exercise of discretion by the Court under Section 311 Cr.P.C. and laid down guidelines, when the Court should exercise this power and when it should not exercise it. Very recently by this said principles were recapitulated by the Hon"ble Supreme Court, in **State (NCT of New Delhi) v. Sivakumar Yadav [2016(1)SCC (Cri) 510]** also. We have distilled them and were already given in a concise form.

15. Thus, it follows that first of all the court has to see whether recalling of the witness is necessary for rendering a just decision in the case. A finding on this aspect has to be recorded by the Court before recalling a witness. Incidentally, it can also see, is there any hidden agenda, is it an attempt to drag on the trial proceedings or an attempt to pack up the evidence with unnecessary materials to confuse the other side or the Court or browbeat either, or a futile exercise or an extravaganza. A court should not become a victim of these vices.

16. Now keeping this principles in our mind, let us approach the recall petition of the revision petitioner and also see whether the impugned order suffers from any legality, propriety, regularity or fundamental judicial procedure.

17. When I read the recall petition, there is no clear cut details as to the nature of the documents to be marked through PW5. However, now that is being supplicated by the accused through the submissions of his learned counsel by stating PW5 is to be recalled for the limited purpose of marking a copy of the order passed by this Court in Crl.R.C.No.409 of 2008, which was filed by PW2, as against the very same accused/revision petitioner herein, which was dismissed as it was not pressed by

PW2. According to the learned counsel for the revision petitioner, it is significant that the said order copy will enable the accused to put forth his contention that after such withdrawal, there shall not be filing any further complaint on the same issue. However, the respondent would say that it is a complaint of PW2 and the complaint of PW1(present complaint) is different from that. It is for the Trial Court to resolve this controversy.

18. PW5 is a judicial officer, yet, because of the facts of the case, he has also become a witness. Long back PW5 has been examined. He has left that particular court and now he is serving elsewhere. This case itself might have faded away from his memory. For the purpose of marking the said order copy of the High Court, PW5 need not be troubled, neither he nor his Court should be disrupted. Of course, there are other modes available under the Code of Criminal Procedure for the accused. At the appropriate stage, it is open to him to present the said certified order copy of this Court, under Section 314 Cr.P.C. before the Trial Court by way of a memo and drive home his point of view at the time of his arguments. In such view of the matter, the impugned order does not suffer from any legality.

19. While I was at the close of this order, I came to know that the respondent/complainant has argued and also submitted his written arguments in the Trial court. However, as on date, the revision petitioner/accused, has not argued. "Fair trial" "effective defence" "principles of natural justice" "concept of hear before condemn" "concept of fundamental judicial procedure" emphasises hearing of both sides, otherwise it is unfair. A Judgment cannot be rendered hearing only one side. It will be an infringement of constitutional right of an accused guaranteed under Article 22 (1), Constitution of India (also see Article 21), which has also been statutorily reiterated in Section 303 Cr.P.C. Let, the revision petitioner may be an Advocate, but, he is an accused facing a criminal (private) prosecution. He is not devoid of his basic, constitutional, statutory and human right.

20. In view of the foregoing, it is ordered as under:

- (i) This revision fails and it is dismissed.
- (ii) Consequently, the connected miscellaneous petitions are closed.
- (iii) The Trial Court will receive memorandum, if any, presented by the revision petitioner under Section 314 Cr.P.C. together with documents, if any, hear his arguments and dispose of the case at the quickest possible time according to law.