

(2010) 07 MAD CK 0244

Madras High Court (Madurai Bench)**Case No:** Criminal RC. (MD) No. 306 of 2010 and M.P. (MD) No. 1 of 2010

N. Vijayakumar

APPELLANT

Vs

Lazar

RESPONDENT

Date of Decision: July 8, 2010**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 311

Hon'ble Judges: S. Palanivelu, J**Bench:** Single Bench**Advocate:** M. Sur, for the Appellant; N.S. Ramakrishnadass, for the Respondent**Final Decision:** Allowed

Judgement

@JUDGMENTTAG-ORDER

S. Palanivelu, J.

The petitioner is the accused in C.C.No. 96 of 2002, on the file of the Judicial Magistrate Court, Padmanabhapuram, he was examined before the Court on 13.04.2005. Opening of the chief examination goes to the effect that he delivered a cheque dated 01.10.2001 on receipt of a sum of Rs. 1,00,000/- from the complainant and that the cheque produced in the case was give by him. On 12.04.2007, he filed an application before the Court u/s 311 Cr.P.C stating that he had deposed before the Court at the time of his examination that he did not hand over the cheque on 01.10.2001 after receiving Rs. 1,00,000/- but it was wrongly typed in the Court as if he delivered the cheque to the complainant. By means of this mistake, his rights will be prejudiced and hence, it is to be rectified, for which it has to be recalled and examined again.

2. The petition was opposed by the respondent/complainant by stating that only with the intention to defeat the claim of the complainant and on an after-thought the accused filed a petition, that there was no mistake committed either on the side of typist or on the side of the accused and that he could not be recalled to change a

fact already deposed before the Court.

3. The learned Judicial Magistrate, after hearing both the sides, dismissed the application by observing that the petition to request the petitioners has been filed after two years, that if the deposition typed in the Court were not correct, on the day itself, at the time of putting his signature, the petitioner might have pointed out the said mistake, that had he done so, the error could have been rectified on the day itself and that the request could not be entertained.

4. Mr. M. Suri, learned Counsel for the petitioner would submit that from the inception both in the criminal and civil proceedings, the petitioner has been reiterating his stand to the effect that he did not give any cheque on 01.10.2001 on receipt of a sum of Rs. 1,00,000/- from the complainant. He pointed out the reply notice sent by the accused on 23.11.2001 through his lawyer to the complainant wherein, he has denied the delivery of cheque on 01.10.2001. He has mentioned there that he received only Rs. 10,000/- on 05.01.1997. He also draws attention of this Court to the Judgment copy in O.S. No. 91 of 2004 on the file of the Subordinate Court, Padmanabhapuram, which is the case filed by this respondent against this petitioner for recovery of Rs. 1,00,000/- on the basis of the cheque dated 01.10.2001 reportedly issued to him by this petitioner. The suit was dismissed on 24.01.2005. The learned Subordinate Judge, in the Judgment has recorded a finding that it is unbelievable that for the loan obtained on 28.07.1999, the defendant gave the cheque on 01.10.2001 after two years. He has concluded that there is no proof to show that the defendant received a sum of Rs. 1,00,000/- from the plaintiff. The suit was dismissed on the point of limitation and also on other grounds.

5. The learned Counsel for the respondent would submit that the delay in filing the application u/s 311 Cr.P.C by the petitioner would go to show that he very well knew about the alleged error crept in the deposition on the date of recording of the oral evidence itself and his request, after two years is not at all entertainable. In support of his contention, the learned Counsel for the petitioner would place strong reliance upon a decision of the Supreme Court in Rajendra Prasad v. Narcotic Cell 1999 SCC 1062, wherein Their Lordships have observed as follows:

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

6. The Hon"ble Apex Court is of the view that if a party fails to bring forth material evidence by inadvertence, the Court has to be generous in entertaining him to rectify the mistake.

7. As far as the facts of the case is concerned, the first line in the chief examination of the petitioner would show that he delivered the cheque on 01.10.2001 on receipt of Rs. 1,00,000/-. But the following sentences in the deposition would indicate that they are in consonance with the allegations contained in the reply notice and the defence raised by him in the civil suit. In the present case on hand, even if the accused is recalled and examined again, there could be no prejudice to the complainant, since he has got ample opportunity to cross examine him and the evidence already adduced is very much available on record.

8. This Court is of the considered view that an opportunity may be accorded to him to depose again and it is for the Court below to appreciate the evidence available on record at the time of final disposal of the matter. In such view of these things, the order passed by the Court below has to be set aside and it is accordingly set aside.

9. In the result, the Criminal Revision is allowed setting aside the order challenged before this Court. The learned Judicial Magistrate shall recall D.W.2, namely, the accused and examine him and to appreciate the evidence available on record at the time of final hearing of this case within a period of one month from the date of receipt of a copy of this order. Consequently, connected miscellaneous petition is closed.