
(2009) 09 MAD CK 0144

Madras High Court

Case No: Criminal Revision Petition No. 1330 of 2006

Ms. Pankajam
Ramaswamy

APPELLANT

Vs

M.R. Elangovan

RESPONDENT

Date of Decision: Sept. 1, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 284, 285, 285(1), 286, 311
- Negotiable Instruments Act, 1881 (NI) - Section 138, 139

Citation: (2009) 2 LW(Cri) 1086

Hon'ble Judges: T. Sudanthiram, J

Bench: Single Bench

Advocate: K.V. Sridharan for, TDK. Govindarajan, for the Appellant; Maharajan, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

T. Sudanthiram, J.

The revision petitioner herein is the complainant in CC.No.16557 of 2004, on the file of the V Metropolitan Magistrate, Chennai and he had filed the complaint for an offence u/s 138 of the Negotiable Instruments Act against the accused/respondent herein. The complainant is also represented by his power agent who is the husband of the complainant. On the side of the complainant, already four witnesses have been examined, but none of the witnesses has been cross examined by the accused. At this stage, the respondent herein filed a petition before the trial Court u/s 311 Cr.P.C, for issuing summons to the complainant and to examine her, as her evidence is essential for the first decision of the case. The trial Court also allowed the application filed by the respondent u/s 311 to examine the complainant as a witness. It is not mentioned in the petition filed by the accused that whether complainant is to be examined as court witness.

In the said circumstances, the application u/s 311 Cr.P.C being filed by the accused for summoning the complainant, it amounts to examining the complainant as a defence witness. It is peculiar and not known as to how the learned Magistrate allowed the said application. After allowing the said application, the petitioner herein/complainant filed a petition u/s 284 Cr.P.C., praying the Court to pass an order for appointing a Commissioner to examine her at her residence. An affidavit was also filed by the petitioner before the learned Magistrate stating that the petitioner is a lady aged about 71 years and she had undergone knee replacement surgery on both legs and she is unable to walk and move freely and she had again undergone surgery due to revision arthroplasty right knee and unable to stand and practically she is a handicapped person. Due to health condition, the petitioner prayed for appointment of Commissioner to examine her as a witness. The learned Magistrate also allowed the said petition. After passing that order, the learned Magistrate also appointed an Advocate Commissioner to record the evidence of the petitioner. The accused/respondent herein aggrieved by the order passed by the trial Court, preferred a revision before the learned Sessions Court, Chennai and the said order was set aside by the learned VI Additional Sessions Judge, Chennai in Crl.R.C. No. 113 of 2006. Aggrieved by the order of the VI additional Sessions Judge, the complainant/petitioner herein has preferred the present revision before this Court.

2. Mr. K.V. Sridharan, learned Counsel appearing for the petitioner submitted that after the trial Court considering the reasons given by the petitioner herein on medical grounds permitted the petitioner to be examined at her residence by appointing a Commissioner but the learned Sessions Judge, without giving any sufficient reasons, had reversed the order.

3. The learned Counsel appearing for the respondent submitted that the learned Magistrate had erroneously invoked the provision u/s 284 Cr.P.C and on earlier occasion, the complainant avoided entering into the Box and she is represented in the complaint only by her husband and she had come forward with an application u/s 284 Cr.P.C only after knowing that she could not escape from entering into the Box as application filed u/s 311 Cr.P.C was allowed to summon and cross examine her.

4. The learned Counsel for the respondent further submitted that u/s 284 Cr.p.C, the learned Magistrate has no power to appoint an Advocate as a Commissioner to record evidence. The learned Counsel for the respondent also pointed out certain difficulties of the accused to go to the place of the complainant and felt it may cause unnecessary harm.

5. This Court considered the submission made by both sides and perused the records. Originally the accused has filed an application u/s 311 Cr.P.C., seeking the court to issue summon to the complainant/ Mrs. Pankajam Ramaswamy to appear before the trial Court to examine. At the stage of filing the said application, the complainant has not chosen to examine herself to be examined as a witness in the case. Even in the complaint in the list

of witnesses only the power of attorney holder who represents the complainant and the Manager of the Bank were cited as witnesses.

6. As per Section 311 Cr.P.C at any stage of the trial any person can be summoned as a witness. It is not made clear by the accused in his application whether the complainant has to be examined as a court witness or as a complainant's witness or a defence witness, In the trial of this case, the stage has not come for the examination of the defence witness. An accused cannot compel the complainant to examine anyone as the prosecution witness and if at all the non examination of any important witness by prosecution could be commented at the time of argument by the accused for drawing an inference in favour of the accused. Though the learned Magistrate has erroneously allowed the application filed by the accused u/s 311 Cr.P.C., for examining the complainant as a witness, at present, the complainant herself had come forward to examine her as a witness. In the affidavit filed by the complainant also, it is mentioned that the complainant is ready to give evidence by filing the proof affidavit.

7. This Court now feels that though the learned Magistrate has erroneously allowed the application filed by the accused u/s 311 Cr.P.C for examining the complainant, now as the complainant herself has come forward to examine as a witness, she may be permitted to give her chief examination by filing proof affidavit as provided u/s 139 of the Negotiable Instruments Act.

8. The next question which arises for consideration is whether the complainant could be examined by appointment of a Commissioner or she has to appear before the trial Court for the purpose of cross examination by the accused. The learned V Metropolitan Magistrate has allowed the application filed by the complainant u/s 284 Cr.P.C accepting the medical records filed by the complainant and the bona fide reasons given by the complainant. Of course the said order has been set aside by the learned Additional Sessions Judge, for the reason the learned Magistrate has no power to appoint an Advocate Commissioner to examine the complainant and the appointment of Commissioner to record the evidence of complainant based on the medical report is not provided under the Criminal Procedure Code.

9. Section 284 Cr.P.C is as follows:

284. When attendance of witness may be dispensed with and commission issued.

(1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court of Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter: Provided that where the examination of the President or the

Vice-President of India or the Governor of a State or the Administrator of a Union Territory as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness. (2) The court may, when issuing a commission for the examination of a witness for the prosecution direct that such amount as the court considers reasonable to meet the expenses of the accused including the pleader's fees, be paid by the prosecution.

As per the above provision, when the Court feels that the witness cannot be procured without any inconvenience, the Court may dispense with the attendance of the witness and may issue commission for the examination of witness. Of course, recording of evidence on Commission in criminal cases should be most sparingly resorted to. In this case, as the Magistrate has also made up his mind and satisfied for appointment of Commissioner, this Court also feels considering the health condition of the complainant that appointment of a Commissioner to examine her is proper. At the same time, it is brought to the notice of this Court that the Court has appointed an Advocate as a Commissioner and the learned Sessions Judge also observed that appointing an Advocate Commissioner to examine the complainant is not permissible u/s 284 Cr.P.C.

10. Section 285 Cr.P.C is as follows:

285. Commission to whom to be issued.

(1) If the witness is within the territories to which this Code extends, the commission shall be directed to the Chief Metropolitan Magistrate or Chief Judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to be found. (2) If the witness is in India, but in a State or an area to which this Code does not extend the commission shall be directed to such court or officer as the Central Government may, by notification specify in this behalf. (3) If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of such country or place for taking the evidence of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such court or officer, and sent to such authority for transmission as the Central Government may, by notification prescribe in this behalf.

As per Section 285(1) Cr.P.C no Advocate could be appointed as Commissioner for recording the evidence of witness.

11. Section 286 Cr.P.C is as follows:

286. Execution of commissions.

Upon receipt of the commission, the Chief Metropolitan Magistrate or Chief Judicial Magistrate, or such Metropolitan or Judicial Magistrate as he may appoint in this behalf, shall summon the witness before him or proceed to the place where the witness is, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant cases under this Code.

As per Section 286 Cr.P.C., either the Metropolitan Magistrate or Judicial Magistrate may be appointed as Commissioner for taking down the evidence of the witness.

12. In the above said circumstance, this Court feels that as the complainant is the resident of Anna Nagar, Chennai, the learned V Metropolitan Magistrate, Chennai himself may go to the place of the complainant and record her evidence. The order passed by the learned Additional Sessions Judge in Crl.R.C.No.113 of 2006 is set aside and the Criminal revision petition before this Court is allowed.

13. As it is brought to the notice of this Court by the learned Counsel for the respondent that the appearance of the accused at the time of recording evidence in the house of the petitioner may cause an inconvenience to him, the learned Magistrate is directed to dispense with the personable appearance of the accused at the time of recording the evidence of the complainant, and the counsel representing the accused may cross examine the complainant.