

(2010) 09 MAD CK 0333

Madras High Court

Case No: Criminal Original Petition (MD) No. 8183 of 2010 and M.P. (MD) No's. 1 and 2 of 2010

K. Ramalingam

APPELLANT

Vs

Mustafa Kamal

RESPONDENT

Date of Decision: Sept. 3, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 243(2), 397, 397(3), 482
- Evidence Act, 1872 - Section 45
- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2011) 2 RCR(Criminal) 972

Hon'ble Judges: R. Mala, J

Bench: Single Bench

Advocate: Veera Kathiravan, for the Appellant; G.R. Swaminathan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

R. Mala, J.

The Petitioner approaches this Court with a prayer to set aside the order dated 10.02.2010-passed in Crl. R.C. No. 25 of 2009 on the file of the Principal District and Sessions Judge, Dindigul confirming the order dated 05.10.2009 passed in Cr.M.P. No. 7143 of 2009 in S.T.C. No. 1081 of 2008 on the file of the Judicial Magistrate, Nilakkottai.

2. The Petitioner herein as arrayed as accused in S.T.C. No. 1081 of 2008 and the Respondent herein has preferred a complaint u/s 138 of the Negotiable Instrument Act, which was taken on file in S.T.C. No. 1081 of 2008,. During the trial, the Petitioner herein has preferred a petition in Cr. M.P. No. 7143 of 2009 for sending the cheque for handwriting expert opinion for ascertaining the age of the ink used

in the cheque that has been dismissed by the Judicial Magistrate, Nilakkottai, Aggrieved by the said order, the petitioner has been preferred a revision before the District and Sessions Judge, Dindigul, where, the same was dismissed on 10.02.2010, against which the Petitioner has come forward with the present petition.

3. The learned Counsel appearing for the Petitioner would contend that since he is facing the criminal case, he has filed a petition u/s 243(2) Code of Criminal Procedure and 45 of Indian Evidence Act to send the cheque in question to the handwriting expert and forensic department to ascertain the age of the ink used in the cheque stating that the cheque is question has been missed from his shop and hence, it is necessary to ascertain the age of the ink used in the cheque; but, the Judicial Magistrate has not considered the fact and dismissed the application and the revisional court has also not considered the same in proper perspective; he has been relied upon several judgments, that has not been properly considered by both the Courts below and hence, he prayed for the allowing of the petition.

4. Per contra, Mr. G.R. Swaminathan, the learned Counsel appearing for the Respondent would submit that it is a second revision which is bared u/s 397(3) Code of Criminal Procedure and the same is not maintainable. He would further submit that as per the decision of this Court, no facilities are available in Tamilnadu to ascertain the age of the ink used in the cheque. To substantiate his argument, he relied upon the judgments of Apex Court and prayed for the dismissal of the application.

5. Heard the learned Counsel appearing for the Petitioner as well as the learned Counsel appearing for the Respondent and perused the materials available on record.

6. The Respondent herein has filed a private complaint u/s 138 of the Negotiable Instrument Act, stating that the Petitioner herein has borrowed money and issued a cheque for a sum of Rs. 2,75,000/-, which has been admitted by the Respondent herein in his reply notice; since, the Respondent herein has not repaid the amount, the Petitioner presented the cheque for encashment, which was returned, for which, he issued a statutory notice and then he filed the private complainant, which was taken on file in S.C. No. 1081 of 2008. During the pendency of the criminal case, the Respondent herein has filed a petition in Cr. M.P. No. 7143 of 2009 to send the cheque to handwriting expert and forensic department, that has been dismissed, against which he has preferred a revision in Cr. R.C. No. 25 of 2009 before the revisional Court, which was also dismissed. Aggrieved by the said dismissal order, the Petitioner has come forward with this petition invoking the provision of Section 482 Code of Criminal Procedure since it is a second revision bared u/s 397(3) Code of Criminal Procedure

7. Now, this Court has to decide in this matter whether this criminal original petition is maintainable?

8. It is appropriate to incorporate the of Sections 397 and 482 of Code of Criminal Procedure -

S. 397(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior criminal court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

(2) The powers of revision conferred by Sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

S. 482 - Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any other under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

9. While considering Section 397(3), it barred second revision. When the Sessions Judge refused to interfere with the order of the Magistrate, the High Court's jurisdiction was invoked to avoid the order of the Magistrate and not that of the Sessions Judge. The bar of this section was, therefore, effectively attracted and the bar could not be circumvented by the subterfuge of treating the revision application as directed against the Sessions Judge's order. When revision against the order of Magistrate restoring complaint has been dismissed by Sessions Judge application to the High Court u/s 482 against the order of dismissal would not lie as it would amount to circumventing this provision which prohibits second revision. When a person aggrieved by the final order made u/s 145 filed a revision application before the Sessions Judge and sought stay, on his refusal, second revision petition before the High Court is not maintainable. The bar to a second revision applies to the person who has filed in the Court of Session and failed in it. Where cognizance was taken and accused was discharged under the old Code, second revision to the High Court is not maintainable in view of the bar. If a person moves the High Court u/s 397 under its revisional jurisdiction without approaching the Sessions Court, he cannot be refused relief on the ground that special circumstances have to be made out. But if he chooses to move the Sessions Court u/s 397, he cannot thereafter approach the High Court for another revision. However, the power of revision u/s 397, is without prejudice to the power of the High Court u/s 482 of Code of Criminal

Procedure.

10. Inherent powers cannot be invoked in a manner that the effect would be just entertaining a second revision which has been expressly barred except in extraordinary cases. The bar, as Contained in Sub-section (3) cannot be circumvented by resort to Section 482. A second revision in the garb of petition u/s 482 Code of Criminal Procedure is not maintainable. An order passed in revision cannot be quashed u/s 482 Code of Criminal Procedure The bar of this section would be attracted effectively and it cannot be circumvented by the subterfuge of treating the revision application as directed against the Sessions Judge's order instead of one directed against the order of a Magistrate. It is not permissible to do so.

11. At this juncture, it is appropriate consider the decision in Shakuntala Devi and Ors. v. Chamru Mahto and Anr. reported in 2009 (2) R.C.R.Cri 125 : 2009 (2) R.A.J. 82 : 2009 (2) CTC 242, wherein, the Apex Court has held as follows:

Para 17. We have carefully considered the sub-missions made on behalf of the respective parties and we see no reason to take a stand which is different from the stand that was taken both in Dayanand's case (supra) and Krishnan's case(supra). It is well settled that the object of the introduction of Sub-section (3) in Section 397 was to prevent a second revision so as to avoid frivolous litigation, but, at the same time, the doors to the High Court to a litigant who had lost before the Sessions Judge was not completely closed and in special cases the bar u/s 397(3) could be lifted. In other words, the power of the High Court to entertain a petition u/s 482, was not subject to the prohibition under Sub-section (3) of Section 397 of the Code, and was capable of being invoked in appropriate cases. Mr. Sanyal's contention that there was a complete bar u/s 397(3) of the Code debarring the High Court from entertaining an Application u/s 482 there of does not, therefore, commend itself to us.

12. I am of the considered view that since the Petitioner has filed a petition u/s 397(3) of Code of Criminal Procedure before the revisional Court, he is barred to file a second revision in the guise of Section 482 of Code of Criminal Procedure and hence, the petition is liable to be dismissed as not maintainable.

13. However, this Court is inclined to decide whether the Petitioner is entitled to send the document/cheque for handwriting expert and forensic department and-whether the orders passed by the both the Courts below suffered any illegality and irregularity.

14. The signature in the cheque is an admitted one. The prayer of the Petitioner is that the age of the ink used for writing the amount in the cheque to be ascertained. At this juncture, this Court is considered the decisions relied upon the Petitioners.

In A Jesudhasan v. N. Gopi, unreported judgment of this Court in CrI. Rs. C.(MD) No. 843 of 2008, this Court has held as follows:

Para 7. In the case of P.R. Ramakrishnan v. P. Govindarajan, reported in 2007 Cri.L.J. 1897, it was held that the Magistrate shall send the disputed cheque for comparing the same with admitted signature of accused to handwriting expert. In the present case, the Petitioner is entitled to rebut the case of the Respondent and if the cheque on which the Respondent has relied upon for initiating criminal proceedings against the Petitioner would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the hand-writing expert has deprived the Petitioner of an opportunity of rebutting it. The Petitioner cannot be convicted without an opportunity being given to him to present his evidence and if it is denied to him, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law and prove his innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and Courts should be jealous in seeing that there is no breach of them. The Petitioner in this case requests for sending the cheque in question, for the opinion of an expert. The Magistrate should have granted such a request unless he thinks that the object of the Petitioner is vexatious or delaying the criminal proceedings. In 2007 Cri.L.J. 1897, the right of the accused to send the documents for expert's opinion was upheld

In M/s. Sivanandha Steel Ltd v. Upasana finance Ltd unreported judgment of this Court in 2011 (1) R.C.R.Cri 86 : CrI. R.C. Nos. 744 to 747 of 2003.

Para 15. The principle laid down by the Hon'ble Apex court in the decisions cited supra is squarely applicable to the facts of the instant cases as in these cases also the Petitioners rightly filed the petitions to send the cheques for expert opinion to compare the signatures of A2 after closing of the prosecution evidence and after examining the witnesses for defence as per the provision u/s 243(2) Code of Criminal Procedure Therefore, there is absolutely no illegality in preferring such applications at that stage, viz., at the defence stage.

In P. Arumugam v. rajamani, reported in 2007 (2) MWN (Cr.) DCC 20, this Court has held as follows:

Para 8. In view of the settled proposition of law laid down by the Honourable Supreme Court, as stated in the decision cited supra, I am of the considered view that no prejudice would be caused to the Respondent on directing the learned Judicial Magistrate No. II, Cuddalore to send the disputed, cheque for hand writing expert to ascertain the age of the typed matter as well as the signature of the accused in the disputed cheque Ex. Pl.

This Court in the case in P.R. Ramakrishnan v. P. Govindarajan, has held as follows:

Section 243(2) is clear that a Magistrate holding an inquiry under the Code of Criminal Procedure in respect of an offence triable by him does not exceed his powers u/s 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a handwriting expert because even in adopting this course, the purpose is to enable the Magistrate to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The Appellant is entitled to rebut the case of the Respondent and if the document viz., the cheque on which the Respondent has relied upon for initiating criminal proceedings against the Appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the handwriting expert has deprived the Appellant of an opportunity of rebutting it. The Appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right.

Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and Courts should be jealous in seeing that there is no breach of them. We have not been able to appreciate the view of the learned Judge of the High Court that the Petitioner has filed application u/s 243, Code of Criminal Procedure Without naming any person as witness or anything to be summoned, which are to be sent for handwriting expert for examination. As noticed above, Section 243(2), Code of Criminal Procedure Refers to a stage when the prosecution closes its evidence after examining the witnesses and the accused has entered upon his defence. The Appellant in this case requests for sending the cheque, in question, for the opinion of the handwriting expert after the Respondent has closed her evidence, the Magistrate should have granted such a request unless he thinks that the object of the Appellant is vexation or delaying the criminal proceedings. In the circumstances, the order of the High Court impugned in this appeal upholding the order of the Magistrate is erroneous and not sustainable.

Muniraj v. Velu, reported in (2009) 3 M.L.J. 45, wherein this Court has held as follows:

8. In this case, the learned Counsel for the revision Petitioner would appropriately and correctly, appositely and convincingly submit that from the beginning the revision Petitioner/accused has been contending that the purported signature of the accused is a forged one. No doubt, the lower Court adverted to the fact that for several years the accused kept quite. I am also of the view that the accused could have been diligent enough in filing that application. Nevertheless I am of the view that in as much as there are no prevaricate stands on the part of the accused relating to his plea, one more opportunity could be given to him, stipulating certain conditions.

15. Considering all the above said citations, I am of the view that since the Petitioner has admitted his signature, the above said citations are not applicable to the facts of this case.

16. At this juncture, it is appropriate to consider the following decisions relied upon by the Respondents.

In *R. Jagadeesan v. N. Ayyasamy*, reported in 2010 1 L.W. (Crl.) 165, this Court has held as follows:

Para 10. Now I have to consider the judgments relied on by the learned Counsel on either side. In [T. Nagappa Vs. Y.R. Muralidhar](#), have to state that the question whether the age of the writings could be scientifically examined and any opinion in this regard could be offered never came up for consideration before the Hon"ble Supreme Court. In that case, the Hon"ble Supreme Court was concerned with the right of the accused to have fair trial so as to send the document for comparison by an expert. It was never argued before the Hon"ble Supreme Court that there are no experts available to examine the age. Therefore, the judgment of the Hon"ble Supreme Court relied on by the Respondents is not in any manner helpful to them. The learned Counsel for the Petitioner has relied on the judgment of this Court in *S. Gopal's* case wherein Hon"ble Mr. Justice M. Jeyapaul has held that there is no method to find out the age of the document with scientific accuracy. However, the learned Counsel appearing for the Respondents would submit that this judgment was prior to the judgment of the Hon"ble Supreme Court. He would therefore submit that subsequently in another judgment reported in 2010 (7) R.C.M. 789 : 2009 Ind.law Mad 1077, *V.P. Sankaran v. R, Uthirakumar*, this Court has directed to forward the document for such opinion. In my considered opinion, a careful reading of the said judgment would also go to show that there was no occasion for the learned Judge to answer the question as to whether there is any expert available in terms of Section 45 of the Evidence Act to offer any opinion regarding the age of the document. The entire case proceeded under the premise as though there are experts to offer opinion regarding the age of the documents. Now, as I have already stated, the Head of the Department of Forensic Science is before me and from whom I have the benefit of ascertaining that there is no expert in the field and also that all such documents sent already were returned without offering any opinion. Therefore, the said judgment also would not come to the help of the Respondents.

17. In the above said judgment, it was stated that the question whether the age of the writings could be scientifically examined any opinion in this could be offered never come up for considering before the Honourable Supreme Court. But, an earlier occasion, this Court dealt with the same issue, where the Judicial Magistrate No. II Erode has ordered for sending the document for forensic department for ascertaining the age of the cheque, that has been considered by this Court in *R. Jagadeesan v. N. Ayyasamy*, reported in 2010 1 L.W. (Crl.) 165 in Crl. R.C. Nos. 49 and 50 of 2009, and come to the conclusion from the Assistant Director of the Document

Division, Forensic Science Department, Government of India, Chennai, who appeared and explained to this Court, that there is no scientific method available anywhere in this State, more particularly, in the Forensic Department, to scientifically assess the age of any writing and to offer opinion and dismissed the revisions.

18. Considering the above said citations, it is clear that in India, that too in Tamil Nadu, there is no such experts to ascertain the age of the ink are available. Even though, the Court sent the documents for ascertaining the age, without assigning any remarks or comment, they merely returned the same. In such circumstances, the request of the Petitioner to send the document/cheque for Forensic department to ascertain the age of the ink in the cheques question is only to drag on the proceedings. Hence, I do not find any merits in this application since there is no facilities are available to ascertain the age of the ink and there is no illegality and irregularity in the orders passed by both the Courts below and this application is liable to be dismissed.

19. Accordingly, this criminal original petition is dismissed. Consequently, connected miscellaneous petitions are also dismissed.

Criminal original petition dismissed.