(2011) 09 MAD CK 0236

Madras High Court

Case No: Criminal Rc. No. 1164 of 2011

A. Ravishankar Prasad Director, M/s. Prasad Properties and Investments P Ltd., No. 30 (Old No. 60), III Main Road, Gandhi Nagar, Adyar, Chennai-600 020 and A. Manohar Director, M/s. Prasad Properties and Investments P Ltd., II Floor, Rahul Enclave, Cenotaph Road, II Lane, Alwarpet, Chennai-600 018		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Sept. 19, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Evidence Act, 1872 - Section 3, 3(2), 5, 63, 65
- Penal Code, 1860 (IPC) - Section 120B, 420, 467, 468, 471
- Prevention of Corruption Act, 1988 - Section 13(1), 13(2)

Hon'ble Judges: C.T. Selvam, J

Bench: Single Bench

Advocate: Sundarmohan for Mr. A. Natarajan, for the Appellant; N. Chandrasekar Special Public Prosecutor for CBI cases, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Honourable Mr. Justice C.T. Selvam

1. This revision arises against the order passed by the learned Principal Special Judge for CBI cases, Chennai dated 10.08.2011, on a memo filed by the petitioners,

who are the accused 4 & 5 in C.C. No. 82 of 2001 pending trial for the offences under Sections 120-B r/w. 420, 467, 468, 471 IPC and u/s. 13(2) r/w. 13(1)(d) of Prevention of Corruption Act, 1988, objecting to the marking of certain documents which were seized under the seizure memo Ex.B630.

2. The documents sought to be marked were orders passed by the Commercial Tax Department and it was contended that P.W.58, an official of the Vigilance Department could not speak to the contents thereof. It was further informed that such documents were xerox copies and therefore, not primary evidence. It also was complained that it was the prosecution practice to mark inadmissible documents or mark admissible documents through incompetent witness and make the witnesses read the contents and record the same as evidence. It was stated that the statement prepared by P.W.58 at the instance of the Investigating Officer during investigation had been marked as Ex.P628 and Ex.P629 in the case. Further, the contents thereof had been read over by the witness during examination, inspite of the objections made by the defence. Therefore, the memo informed that the method adopted in the cases by the CBI is in gross violation of settled principles of law relating to recording of evidence.

3. The respondent through the learned Special Public Prosecutor informed that P.W.58 was a competent witness. The documents were xerox copies, certified by the officials of the accused company. They had been handed over in the presence of the witness P.W.58 and hence, he could speak to such fact. It was also contended that Ex.P628 and Ex.P629 were in the handwriting and under the signature of P.W.58 and therefore, the same could be proved through him. In response, it is contended that the company disputed the certification of the documents by its officials and even if so, it would still be in the nature of secondary evidence. Section 63 of the Evidence Act would have to be satisfied.

1) The findings of the court below read as follows:

33. Now, coming back to the question of adjudication of the present Memo filed by the accused A4 and A5 in which the said accused had taken a stand that P.W.58 is not a competent witness to vouchsafe for the contents of the documents and prosecution cannot mark the xerox copies of the documents without satisfying the conditions u/s. 65 of Evidence Act required for letting in secondary evidence. The same cannot be sustained since the documents marked already through P.W.58 i.e. Ex.P.628 & Ex.P.629 are in the very handwriting of P.W.58 and documents sought to be marked not only bears the signatures of official A. Mohana Sundaram, Internal Auditor, Gemini Colour Lab, Chennai, of the accused company, but also bears the signatures of P.W.58.

34. The specific case of the prosecution is that the documents sought to be marked through P.W.58 are the documents attested by A. Mohanasundaram, Internal Auditor of the accused company, handed over to the I.O. of this case at the time of

seizure proceedings in the presence of P.W.58 who is in the box before this Court in the middle of his chief examination in a case pending right from 2001 onwards. It is also pertinent to note here that it is not the case of the accused that the said A. Mohanasundaram is not the Accountant or Internal Auditor of the accused company. It is also to be borne in mind that it is not the case of the defence that the documents which are sought to be marked on the side of the prosecution are forged documents. Therefore, the documents including attested xerox copies, certified carbon copies as in the present case can be of course allowed to be marked.

The words relevant and Facts in issue have been described u/s. 3(2) of Indian Evidence Act.

"Relevant''-One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Facts in Issue" - The expression '' facts in issue'' means and includes any fact from which, either by itself or in the connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding necessarily follows".

36. The word ''Evidence'' has also been defined u/s 3 of Indian Evidence Act, 1872 which read as follows:

"Evidence" - ''Evidence" means and includes.

1) all statements which the Court permits or required to be made before it by witnesses, in relation to matters of act under inquiry:

2) (all documents including electronic records produced for the inspection of the court)

Such documents are called documentary evidence.

37. ''Facts in issue'' in this case is the seizure of documents by the I.O. in the presence of P.W.58, handed over by A. Mohanasundaram, Internal Auditor of the accused company. As stated already as far as Ex.P.628 and Ex.P.629 are concerned, P.W.58 is the author of the said documents and the same are in the very own handwriting of P.W.58. Therefore, the objection raised by the accused at para-6 of the memo is not maintainable. As far as the objection raised at para 3 of the memo with regard to Ex.P.630, it is a seizure memo u/s. 172 of Cr.P.C. and P.W.58 has evidently set his hand as a witness to the seizure proceedings conducted by the I.O. in the premises of the accused, as per which para 8(c) of Ex.P.630 also discloses that the person who handed over the document was A. Mohanasundaram, Official of the accused company, with his signature and P.W.58 has signed at the first and last page of Ex.P630.

38. From the perusal of the seizure memos, it is also very clear that the documents were handed over by A. Mohanasundaram official of the accused company in the presence of P.W.58 and he is evidently a party to the seizure proceedings and he had identified the documents. Therefore, under these circumstances, I am of the view that P.W.58 is the competent witness to elicit the facts, nature of documents, who handed over the documents to whom they were handed over, are the relevant facts and facts in issue. Since, the documents had been handed over by the said official of the accused company which is of course fact in issue and the documents certified by him are admissible as secondary evidence u/s. 63 of Indian Evidence Act.

39. The contention put forth on the side of the prosecution that keeping in view of filing of cases before the CBI courts, against M. Gopalakrishnan and others, these documents which are sought to be marked can be considered as secondary evidence under the light of Sec. 63 of Indian Evidence Act, also cannot be brushed aside as unsustainable.

40. That apart, Sec. 5 of Indian Evidence Act is also very explicit that ''Evidence may be given of facts in issue and relevant facts''. Sec. 5 of Indian Evidence Act reads as follows:

"Evidence may be given of facts in issue and relevant facts:-

Evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and of such other facts as are herein after declared to be relevant, and of no others." It is also cannot be lost sight of the fact that in the present case, the nature of documents handed over in the presence of P.W.58 to the I.O. by A. Mohanasundaram by the official of the accused company and they are also certified by him. Under these circumstances, I am of the firm opinion that P.W.58 is the competent witness to speak about the same.

41. More over, the documents in question are relevant documents for the main case of the prosecution, which are of course, also listed in the charge sheet and they are not strange documents coming out of the blue to the accused. All the documents are very much indispensable since they were already reflected in the charge sheet to prove the case of the prosecution that they were seized during the seizure proceedings. With regard to vouchers they are also very much relevant to prove the case of the prosecution and the accused cannot navigate the prosecution as to whom it has to choose as witnesses and to conduct the trial to mark the documents on its side.

42. Now, coming back to the question with regard to non mentioning of certain facts in the statement u/s. 161 of Cr.P.C., of P.W.58 by the I.O. but it cannot be a ground to discard the very evidence of particular witness. As per Sec. 161 of Cr.P.C., examination of witnesses by the police, the I.O is given wide power to examine any person as a witness. Such person ''Shall'' bound to answer truly all the questions relating to such case. Therefore, the usage of word ''Shall'' makes it clear that it is

''Mandatory'' on the part of the witness to answer. Sec. 161(3) of Cr.P.C., speaks about that the police officer may reduce in writing any statement made to him in the course of examination under the said section. Therefore, it is quite apparent that each and every thing need not be reduced into writing u/s. 161(3) of Cr.P.C. by the I.O. Therefore, under these surrounding circumstances, I am of the view that the facts known to the witness P.W.58 can of course be allowed to be let in by this Court.

43. To crown it all, it is also very pertinent to note here that there is no specific prayer in the memo filed by the accused 4 & 5, to grant any relief. The decisions cited supra on the side of the accused 4 & 5 stands on different footings altogether as rightly contended supra on the side of the prosecution and will not be applicable to the facts of this case in which P.W.58 is found to be a competent witness, in whose presence the documents were produced during search and seizure proceedings before the I.O. by the official of the accused company to speak about the documents in question.

We straight away will inform that the order of the court below cannot be sustained.

1) P.W.58 is a witness to the seizure memo, he may speak thereto and inform what are the documents that were seized thereunder, whether xerox or original. He cannot speak to the contents of the documents, particularly where he has informed of no knowledge thereof.

2) The statement tendered by him to the Investigating Officer and records prepared by him at the instance of the Investigating Officer would be covered by Section 161 of Cr.P.C. Therefore, while setting aside the order under challenge, we would refer to the decision of the Hon''ble Apex Court in Bipin Shantilal Panchal Vs. State of Gujarat and another (2001 (3) SCC 1). It would be fit and proper for the court below to follow the procedure informed in the said decision which read as follows:

13. It is an archaic practice that during the evidence-collecting stage, whenever any objections is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fallout of the above practice is this: Suppose the trial Court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or the revisional court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial Court. In such a situation the higher court may have to send the case back to the trial Court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help

acceleration of trial proceedings.

14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.

15. The above procedure, if followed, will have two advantages. First is that the time in the trial Court, during evidence-taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the trial Court, can determine the correctness of the view taken by the trial Court regarding that objection, without bothering to remit the case to the trial Court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

16. We, therefore, make the above as a procedure to be followed by the trial Courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence.

4. In fact, it is the dictum of the Hon''ble Apex court that the above procedure is to be followed by the trial court. For the purpose of clarity, we may state that it would be open to the defence to cross examine the witness on the document despite having objected to the marking of the same. If the objection to marking of the document stands accepted, then the cross examination would have done no harm. If the objection be not accepted, then the cross examination may in a proper case, serve the purpose of the defence. We would also add that once objection is raised to the marking of a document, then it naturally follows that the prosecution would take note thereof and do the needful towards introducing proper mode of proof of the document and avoid contentions challenging the mode of proof at the fag end of the proceedings.

With the above observation, the Criminal Revision Petition stands allowed.