

(1997) 11 MAD CK 0056

In the Madras High Court

Case No : Criminal R.C. No. 91 of 1997 and Criminal M.P. No. 498 of 1997

K. Senthamarai and Another

APPELLANT

Vs

State by Inspector of Police, CB CID and Another

RESPONDENT

Date of Decision : 18-11-1997

Acts Referred:

Constitution of India, 1950 — Article 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 91

Citation : (1997) 3 CTC 196

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : K.A. Panchapagesan, for the Appellant; N.R. Elango, Government Advocate for Respondent No. 1 and Govindaswaminathan for T. Susindran, for the Respondent

Final Decision : Allowed

Judgement

M. Karpagavinayagam, J.—The Petitioners Tmt. K. Senthamarai, the wife and Thiru. Krishnaraj, the husband, who are the accused in

Crime No. I of 1996 on the file of CB CID, Madurai, have preferred this revision challenging the order passed in CrI.M.P.No.105 of 1997 on the

file of Additional District Judge-cum-chief Judicial Magistrate, Kamarajar District at Srivilliputhur, dated 28-1-1997 directing the petitioners to

appear on 17-2-1997 and to produce the original relinquishment deed in document No. 221 of 1995 registered on 4.7.1995 and a registered will

in document No. 72 of 1995.

2. The facts that are discernible from the petition and the counter filed before the Court and are relevant and required for the disposal of this

revision, could be stated as follows:-

(a) One Tmt.Dhanalakshmi, the wife of J.K.K. Natarajan, the second respondent in this revision, filed a complaint to the first respondent police

on 5.2.1996 alleging that the above referred documents, which were sought to be summoned, were forged and that the petitioners 1 and 2, who

are the accused 1 and 2, along with the others have committed the offences of cheating, forgery, etc.

(b) On 28.3.1996, the first respondent registered the case for the offences under Sections 419, 420, 467 and 468,1.P.C. against the petitioners

and others.

(c) While so, the first petitioner Senthamarai filed a civil suit in O.S.No 57 of 1996 before Sub Court, Erode, praying for declaration that the will in

document No. 72 of 1995, said to be executed by J.K.K. Natarajan in her favour, is a genuine and valid document.

(d) In the said suit, the complainant is the defendant, who filed a memo before the Civil Court to direct the plaintiff to produce the original will

before the Court for inspection as referred earlier. The will, the subject- matter of the suit, is one of the documents, which is sought to be

summoned by the impugned order.

(e) At this stage, the first respondent Police filed a requisition, which was numbered as CrI.M.P.No.105 of 1997, before the Additional Sessions

Judge-cum-Chief Judicial Magistrate, Srivilliputhur, where the F.I.R. is pending, requesting the Court to issue summons to the accused, the

petitioners Senthamarai and Krishnaraj to produce the two questioned documents, namely, document No. 221 of 1995, the relinquishment deed,

said to be signed by the complainant, and the original will (document No. 72 of 1995), said to be executed by J.K.K.Natarajan, the husband of

the complainant, the first respondent herein, in favour of the first petitioner, and to direct them to appear for obtaining their specimen signature and

thumb impression for comparison.

(f) The above requisition was entertained and the learned Chief Judicial Magistrate by the order in question dated 28.1.1997 directed the peti-

tioners 1 and 2 to appear and produce the above documents. However, there is no direction to appear for obtaining their specimen signature and

thumb impression for comparison. This is how this revision has come up before this Court questioning the impugned order dated 28.1.1997 by the

petitioners.

3. Mr.K.A. Panchapagesan, the learned counsel appearing for the petitioners, would contend that the learned Magistrate, obviously acting u/s 91,

Cr.P.C, has passed impugned order, without jurisdiction, directing the petitioners for production of documents, in total violation of Article 20(3) of

the Constitution of India.

4. Per contra, the Government Advocate appearing for the first respondent, the Investigating Officer, and Mr.Govindaswaminathan, the learned

senior counsel representing Mr.Susindran, appearing for the second respondent, would contend that the learned Magistrate is well within his rights

to pass such an order u/s 91, Cr.P.C, as those documents summoned are not such as the documents which are the statements of the accused

conveying their personal knowledge relating to the accusation against them. It is further contended that the documents summoned by the Court are

said to be the documents of the complainant and the complainant's husband, which are in possession of the petitioners 1 and 2.

5. In order to buttress the submissions made on the either side, the counsel on the respective side would cite several authorities, which would be

considered later.

6. The main thrust of the arguments put forward by Mr.K.A.Panchapagesan, is on the strength of the judgment in State of Gujarat v. Shyamlal

A.I.R.1965 S.C.1251 rendered by 5 Judges Bench, which would hold that Section 94 (presently 91), Cr.P.C. would not apply to the accused, as

it violates Article 20(3) of the Constitution.

7. In reply to this, the counsel for both the respondents strongly placing reliance on the decision render by 11 Judges Bench in The State of

Bombay Vs. Kathi Kalu Oghad and Others, contended that Section 94 (presently 91), Cr.P.G.would apply to the accused also on some

contingencies.

8. Therefore, the question that arises for consideration is as to which of the judgments has to be followed by this Court?

9. In this connection, it must be pointed out that there is no dispute in two important aspects. The first aspect is that the petitioners are admittedly

the accused persons, whose names are mentioned in the F.I.R. The requisition filed by the police and the impugned order would also indicate that

the petitioners Senthamarai and Krishnaraj are the accused persons in the case registered in Crime No.1 of 1996 in which the above referred

requisition was filed. The second aspect is that the source for passing the impugned order has been admittedly derived from Section 91 Cr.P.C.

10. Only on admitting these aspects, the counsel for the respondents would submit, on the strength of The State of Bombay Vs. Kathi Kalu Oghad

and Others, , that Section 91 would certainly be applicable to the accused also, in the light of the present facts of this case, as the contents of these

documents are not in the personal knowledge of the accused persons.

11. Let me, at the out set, quote the various decisions referred on behalf of the petitioners to support the contention that Section 91 Cr.P.C. would

not at all be applicable to the accused persons, which are as under:

(1) Dhulipalla Veeraiah Choudhury v. Kurra Veeraiah and Anr. 1988(1) Cri 46 ; (2) State of Gujarat v. Shyamlal AIR 1965 S.C.1251; (3) V.S.

Kuttan Pillai Vs. Ramakrishnan and Another, ; (4) V. Gopalakrishnan Nayanar and Another Vs. K.V. Sasidharan Nambiar and Another,

Ramaswami Iyer v. S.Subramaniam 1990 L.W.484; (6) Surya Narayanan and Anr. v. M.V.Vijayan 1995 (3) Cri 765; (7) K. Hiriyantha Setty Vs.

State of Mysore, (8) M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, ; (9) Swarnalingam Chettiar v. Asst.

Labour Inspector, Karaikudi AIR 1956 Mad.165 (D.B.);

12. On the respondents' side, the following decisions were cited:-

(1) The State of Bombay Vs. Kathi Kalu Oghad and Others, ; (2) Raveendran v. T.S. Prakasan 1989 (2) K.L.J. 154 : 1989 M.L.J. (Cri.) 370;

(3) State V. Prabhu Singh, 1964 (2) Cri. L.J.199 : AIR 1964 Pun. 325.

13. The conspectus of the authoritative pronouncements as cited by the counsel for the petitioners would give detailed reasons to conclude that

Section 91, Cr.P.C.would not include the accused persons.

14. After referring to the fundamental canons of the British System of Criminal Jurisprudence that the accused should not be compelled to

incriminate himself, the Courts have stated that if the legislature were minded to make Section 91, Cr.P.C. applicable to an accused person, it

would have said so in specific words. The object of the section is that he cannot be compelled to disclose documents which are incriminatory and

based on his knowledge. If Section 91, Cr.P.C. were to be constructed to include an accused person, as pointed out by the Apex Court, many

unfortunate consequences would follow. As per these decisions, the guarantee under Article 20(3) would extend to any compulsory process of

production of evidentiary documents which are likely to support the prosecution against the accused.

15. The words of Justice K.T. Thorns as Acting C.J. of Kerala, while presiding over the Division Bench in this context is quite relevant and the

same is reported in *V. Gopalakrishnan Nayanar and Another Vs. K.V. Sasidharan Nambiar and Another*, as under:-

We may point out, at this stage itself, that a majority of the Constitution Bench of the Supreme Court has held in *State of Gujarat v. Shyamlal*,

AIR 1965 SC 1251 : 1965 (2) Cri. L.J. 256. that this section (it was the corresponding section of the old Code which was dealt with in the

decision) does not apply to an accused. It was decided so on the premise that the protection contained in Article 20(3) of the Constitution would

insulate an accused from being ordered to produce document or thing. Even today the said ratio stands undisturbed and hence we are bound to

follow the same . Hence the only limited question which needs consideration now is whether a person arrayed as accused in a complaint filed

before a Magistrate is "a person accused of any offence" as contemplated in Article 20(3) of the Constitution until the Magistrate has issued

process to him.

16. In the instant case, the impugned order also would show that if the direction given by the Court is not complied with, the coercive steps would

be taken for compelling their attendance. This would indicate that while invoking Section 91, Cr.P.C, the learned Chief Judicial Magistrate has also

reflected the nature of the compulsion in his proceedings. In this connection, some of the paragraphs in *State of Gujarat v. Shyamlal* AIR 1965

S.C.1251 would be useful reference:

(33) Keeping the above considerations in mind, let us look at the terms of the section. It will be noticed that the language is general, and prima

facie apt to include an accused person. But there are indications that the Legislature did not intend to include an accused person. The words

"attend and produce" are rather inept to cover the case of an accused person. It

would be an odd procedure for a Court to issue a summons to an accused person present in Court to attend and produce" a document. It would be still more odd for a police officer to issue a written order to an accused person in his custody to "attend and produce" a document.

(36) If, after a thing or a document is produced, its admissibility is going to be examined and the document or thing in question is not going to be admitted in evidence if it incriminates the accused person, the order to produce the thing or document would seem to serve no purpose; it cannot be overlooked that it is because the document or thing is likely to be relevant and material in supporting the prosecution case that on most occasions the power u/s 94(I) would be resorted to, so that on the alternative view which seeks to exclude incriminating documents or things, the working of Section 94(I) would yield no useful result.

17. In the light of the discussion made in the above paragraphs (33) and (36), the Apex Court held that Section 94 (presently 91) Cr.P.C, on its true construction, does not apply to an accused person. These decisions would make it clear that the order of the Magistrate issuing summons to the accused to produce documents which are not only incriminating but also likely to be incriminatory is illegal.

18. In the instant case, apart from the requisition made by the complainant against the accused stating that the petitioners are responsible for the commission of forgery of those documents, the report of the expert, which is sought to be obtained by the investigating officer on examination of these documents sought to be summoned from the accused persons would also be likely to be incriminatory.

19. Therefore, the ratio decided by the Bench of 5 Judges as reported in *State of Gujarat v. Shymalal* A.I.R.1965 S.C.1251 would hold good, as pointed out by the Division Bench in *V. Gopalakrishnan Nayanar and Another Vs. K.V. Sasidharan Nambiar and Another*, . However, the counsel for the respondents, as indicated in the earlier paragraphs, have very much put their strength on the basis of the judgment rendered in *The State of Bombay Vs. Kathi Kalu Oghad and Others*, by the larger Bench comprising of 11 Judges.

20. No doubt it is true that there is some reference in the said judgment in support of the contention raised by the counsel for the respondents. The

reference is as follows :-

The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document which is not

his statement conveying his personal knowledge relating to the charge against him, he may be called to the charge against him, he may be called

upon by the Court to produce that document in accordance with the provisions of S. 139 of the Evidence Act, which, in terms, provides that a

person may be summoned to produce a document in his possession or power and that he does not become a witness by the mere fact that he has

produced it; and therefore, he cannot be cross-examined".

21. So, the question to be considered in the light of these observations is whether this Court could hold in favour of the respondents on the strength

of the judgment referred to above, though there is a judgment of the Supreme Court, comprising of 5 Judges Bench, holding in favour of the

petitioners? 22. However, the above question has already been settled in V.S. Kuttan Pillai Vs. Ramakrishnan and Another, . The relevant

observations are as follows :-

There appears to be some conflict between the observations in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and

Others, as reconsidered in The State of Bombay Vs. Kathi Kalu Oghad and Others, and the one in the case of Shyamlal Mohanlal. However, as

this case is not directly relatable to a summons issued u/s 91(1), we do not consider it necessary to refer the matter to a larger Bench to resolve the

conflict.

In view of the decision in Shyamlal Mohanlal's case, one must proceed on the basis that a summons to produce a thing or document as

contemplated by Section 91(1), cannot be issued to a person accused of an offence calling upon him to produce document or thing considered

necessary or desirable for the purpose of an investigation, inquiry, trial or other proceeding under the Code of Criminal Procedure.

23. In view of this verdict on this aspect by the Supreme Court, this Court is bound to hold that the order passed by the Chief Judicial Magistrate

is not valid in law and liable to be set aside. But, at the same time, the learned Chief Judicial Magistrate is competent to direct for the appearance

of the accused to obtain specimen signature or thumb impression, etc., as held in

The State of Bombay Vs. Kathi Kalu Oghad and Others, . But,

that question does not arise in this case, as there is no such direction given in this case.

24. Furthermore, I must point out that already the first petitioner filed a suit before the Sub Court, Erode, praying for declaration that the

document, viz., the will was valid and genuine one. Therefore, the complainant in this case, who is the defendant in the said suit, could very well

approach the civil court to send the said document for comparison by the Expert concerned.

25. However, the order passed in this petition or any observation made in this order will not preclude the investigating agency to continue with the

investigation by collecting the materials from other sources through the suitable methods as the investigating agency deem it fit. I further make it

clear that the verdict in this order should not be mistaken as to have given a clean chit to the accused persons. Therefore, the investigating agency

could very well continue the investigation in order to find out the truth in the accusation made by the second respondent, the complainant to the first

respondent, the investigating officer.

26. With the above observation, the revision is allowed setting aside the impugned order. Consequently, no separate order is necessary in

CrI.M.P.No.498 of 1997.