

(2011) 03 MAD CK 0515

In the Madras High Court

Case No : M.P. No. 1 of 2010 and Criminal O.P. No. 25787 of 2010

R. Srinath

APPELLANT

Vs

The State by The Inspector of Police

RESPONDENT

Date of Decision : 11-03-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Criminal Law (Amendment) Act, 2005 — Section 9(1), 9(2)
Criminal Procedure Code, 1973 (CrPC) — Section 161, 161(3), 482
Evidence Act, 1872 — Section 137, 142, 154, 154(1)
Penal Code, 1860 (IPC) — Section 120B, 409, 420
Prevention of Corruption Act, 1988 — Section 13(1), 13(2)

Citation : (2011) 4 RCR(Criminal) 578

Hon'ble Judges : T. Mathivanan, J

Bench : Single Bench

Advocate : P.N. Prakash and B. Satish Sundar, for the Appellant; N. Chandrasekaran, Spl. P.P. for CBI Cases, for the Respondent

Final Decision : Allowed

Judgement

T. Mathivanan, J.—Invoking the inherent jurisdiction of this Court u/s 482 of Code of Criminal Procedure the Petitioner has preferred this petition to set aside the order passed in the Memorandum in C.C. No. 22 of 2006, dated 18.09.2010, pending on the file of the learned XI Additional Special Judge for CBI Cases, Chennai.

2. The facts, which are absolutely necessary for the disposal of the petition are as under:

The Petitioner has been employed as the Branch Manager of Union Bank of India at Chetput Branch, Polur Taluk, Tiruvannamalai District. He has been facing charges under Sections 120-B read with 409, 420 I.P.C. and Section 13(2) read with 13(1)(c)(d) of the Prevention of Corruption Act, 1988, in connection with the case in C.C. No. 22 of 2006, on the file of the learned XI Additional Special

Judge for CBI Cases, Chennai.

3. The case of the prosecution in nutshell is that during September 2003 to February 2004, the Petitioner along with the other accused had conspired to cheat the bank by abusing their official position by permitting M/s. Anand Agencies to indulge in Kite Flying Operation by giving immediate credit to the high value outward clearing cheque, while on the other hand sending them in local MICR clearance and denying the debit of already cleared high value inward clearing cheque and thereby causing wrongful loss to the bank and correspondingly bringing wrongful gain to the above accused persons.

4. In this case (C.C. No. 22 of 2006), trial has been commenced. Two witnesses have been examined on behalf of the prosecution. One Mr. N. Venketraman has been examined as P.W. 2 both in chief as well as in cross on 08.04.2010. Under this circumstance, the prosecution through its Special Public Prosecutor had filed a Memorandum dated 09.08.2010 to declare P.W. 2 as hostile to the prosecution. This was vehemently objected to by the Petitioner. The Trial Court has however proceeded to pass an order permitting the Special Public Prosecutor to treat P.W. 2 as a hostile witness and to cross-examine in respect of the hostile portion of the evidence given in the cross-examination. Challenging the order of the trial Court dated 18.09.2010, the Petitioner has approached this Court by way of this petition.

5. In order to dispose of this petition, the relevant portion of the memorandum filed by the Special Public Prosecutor before the Trial Court is very much relevant to be extracted here:

During cross examination by the counsel for accused No. 1, the said witness categorically admitted that prior to 09.08.2004 (before issuance of Ex. D-2 circular) there was no clearing rule in Union Bank of India and the same came in to force only after 09.08.2004. This statement is false and he has deposed facts against what he has deposed in chief examination.

P.W. 2 has also gone to the extent of saying that the Bank has suffered a loss because ICICI Bank failed for timely clearance and if ICICI Bank cleared the four cheques to the extent of Rs. 3.95 crores there would not be any loss to the Bank or a case against A-1. This is also false statement and this is against what he deposed in chief examination and also the statement given to C.B.I. u/s 161 Code of Criminal Procedure

The witness further deposed during cross examination on 13.02.2004, when he went for inspection, A-1 informed him that A-1 was doing the alleged practice not only in the account of M/s. Anand Agencies but other parties of Triplicane Branch. In his 161 statement, he has categorically stated before the I.O. that when he went to the Union Bank of India on 13.02.2004. A1 has not explained anything regarding the clearing adjustment made to M/s. Anand Agencies.

Only under the above circumstance, the Special Public Prosecutor had filed a

Memorandum before the trial Court to declare P.W. 2 as hostile to prosecution.

6. Section 154 of the Indian Evidence Act, 1872 reads as follows:

Section 154(1): The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.

[(2) Nothing in this section shall disentitle the person so permitted under Sub-section (1), to rely on any part of the evidence of such witness.] (Section 154 re-numbered as Sub-section (1) thereof and after Sub-section (1) as so numbered, Sub-section (2) inserted by Section 9 of the Criminal Law (Amendment) Act, 2005 (2 of 2006), (enforced w.e.f. 16.04.2006 vide Notification No. S.O.523(E), dated 12.04.2006.)

7. The scope and application of Section 154 is:

The rule prohibiting the asking of leading questions to a party's own witness, has its foundation on the assumption that a witness is always biased in favour of the party calling him (v Section 142 ante). This rule must of necessity be relaxed when the witness exhibits an opposite feeling, viz when he by his conduct, e.g. attitude, demeanour or unwillingness to give answers or to disclose the truth shows that he is hostile or unfriendly to the party calling him. The Court in such a case, may, in its discretion, permit a party to put any questions to his own witness which might be put in cross-examination by his opponent, i.e. may permit him to lead. This in effect means that the Court may in a fit case permit a party to cross-examine his own witness, as provided for u/s 137 of the Evidence Act. It is to be noted that this discretion of the Court to permit the putting of leading questions, does not always amount to cross-examination. The law makers have carefully coined the languages of this section. The word cross-examination has not been used in this section. Instead, it has been stated that the Court may permit "to put any question to him which might be put in cross-examination", the reason apparently being that "cross-examination" being examination by the adverse party.

8. Section 154 confers a judicial discretion on the Court to permit cross-examination and does not contain any conditions or principles which may govern the exercise of such discretion. However, such discretion must be judicial and properly exercised in the interests of justice.

9. With this backdrop, the learned Counsel for the Petitioner has submitted that though the learned trial Judge had consented with the objection raised by the Petitioner he had allowed and recorded the memorandum filed on behalf of the prosecution with an observation that "if this witness is not treated as hostile, the admission given by the P.W. 2 in cross examination will prejudice the prosecution case". He has also contended that P.W. 2, Mr. N. Venketraman, Assistant General Manager of Union Bank of India was examined and his statement was recorded by the investigating officer u/s 161(3) Code of Criminal Procedure on

01.04.2006. His chief-examination was commenced before the trial Court on 16.02.2010 and completed on 12.03.2010. His cross-examination was commenced on 08.04.2010 and on the same date of petition it was deferred for the cross-examination of A2.

10. The learned Counsel has also submitted that the memorandum seeking permission of the Court to treat P.W. 2 as hostile witness as well as to permit him to cross-examine, was filed by the Special Public Prosecutor on 09.08.2010. He has also contended that this memorandum was not filed before the learned trial Judge, before whom P.W. 2 was examined both in chief as well as in cross-examination. But, it was belatedly filed that too after four months of his cross-examination before his successor in office, who is presently presiding the trial Court. It is also submitted that the subsequent trial Judge might not be in an appropriate position to visualise the truth and genuineness of the allegations alleged by the prosecution in its memorandum, so also the demeanour of the said witness.

11. He would further contend that in his 161(3) Code of Criminal Procedure. Statement, P.W. 2 had not whispered even a single word about the clearing procedure. Whereas while he was in the box to depose in his chief-examination, the prosecution trying to improvise his 161(3) Code of Criminal Procedure. Statement by asking him to speak about the clearance procedure of MICR cheques. He has also added that only in this respect, the defence counsel had to put questions to clarify the ambiguity of such clearing procedure. Even in that case also if the prosecution witness has given certain answers, which are true, but fatal to the case of the prosecution, he could not be found fault with and it should not be the reason to treat him hostile to the case of the prosecution.

12. He has also adverted to that P.W. 2 had spoken in his cross-examination that prior to this incident there were no clearing rule and only on 09.08.2004, the rules were framed. He has also emphasised that this portion of evidence was struck off by the witness without the permission of the trial Court and this was done purely on the intimidation of the prosecution.

13. The learned Counsel has also submitted that totally eleven cheques were presented for clearance, of which seven cheques were cleared by the ICICI Bank and four cheques were dishonoured and as a result of which there was serious dispute between the Union Bank of India and the ICICI Bank, for which the matter was referred to RBI, for arbitration and settlement. It was only on the aforesaid context, P.W. 1 was cross-examined with a suggestion that if these four cheques were cleared, there would have been no loss to the bank and no case against A1, for which P.W. 2 had answered in the affirmative. In this connection, the learned Counsel for the Petitioner has also submitted that this answer of the witness was borne out by truth and material evidence in the form of prosecution exhibits and document No. D166, which could not be found fault by the prosecution.

14. Further, the learned Counsel has argued that in his cross-examination P.W. 2 has specifically answered that on 13.02.2004, when he had been to Triplicane Branch of UBI for inspection, the Petitioner (A1) had informed that the practice of providing financial accommodation was given not only to M/s. Anand Agencies, but also to other parties. In this connection, the learned Counsel for the Petitioner has also submitted that this fact has been deliberately screened by the prosecution while recording the statement and filing the final report only for the purpose of making out a case against the Petitioner (A1). The answer for the suggestion given by the P.W. 2 can not be simply brushed aside or shunt by the prosecution and equally ought not to have been ignored by the trial Court.

15. The learned Counsel for the Petitioner has also submitted that the answer in the cross-examination given by P.W. 2 was based on fact and truth and supported by the documentary evidence marked on behalf of the prosecution before the trial Court and that was not a contraversion or something new elicited in the cross examination. He has also argued that even certain new facts could also be elicited from a prosecution witness during the time of cross-examination and that could not be prevented and for that reason the discretionary power vested with the trial Court u/s 154 of the Indian Evidence Act could not be invariably used to simply treat the prosecution witness as hostile to the prosecution case.

16. In support of his arguments, he has placed reliance upon the decision in S. Murugesan and 2 others Vs. S. Pethaperumal and 2 others, and Gura Singh v. State of Rajasthan reported in (2001) 2 SCC 205. In Gura Singh's case, their Lordships Hon"ble Mr. Justice K.T. Thomas and Hon"ble Mr. Justice R.P. Sethi, while writing the judgment on behalf of Division Bench has distinguished the terms "hostile", "adverse" or "unfavourable". As it was the language of their Lordships:

The terms "hostile", "adverse" or "unfavourable" witnesses are alien to the Indian Evidence Act. The terms "hostile witness", "adverse witness", "unfavourable witness", "unwilling witness" are all terms of English law. The rule of not permitting a party calling the witness to cross-examine are relaxed under the common law by evolving the terms "hostile witness" and "unfavourable witness". Under the common law a hostile witness is described as one who is not desirous of telling the truth at the instance of the party calling him and an unfavourable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves the opposite test. In India the right to cross-examine the witnesses by the party calling him is governed by the provisions of the Indian Evidence Act, 1872. Whether it be the grant of permission u/s 142 to put leading questions or the leave u/s 154 to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court. The courts are, therefore, under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view

the attending circumstances. Permission for cross-examination in terms of Section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness. In a criminal trial where a prosecution witness is cross-examined contradicted with the leave of the court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of the fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy.

Their Lordships have also held that it is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. The evidence remains admissible in the trial and there is no legal bar to base the conviction upon the testimony of such witness.

17. In S. Murugesan's case, the learned single Judge of this Court has observed that

From a reading of the abovesaid provision, it is clear that the discretion is conferred upon the Court to permit cross-examination of his witness, and it does not contain any conditions or guidelines which may govern exercise of such discretion. But it is always expected that the courts have to exercise such discretion judicially and properly in the interest of justice. A party will not normally be allowed to cross-examine his own witness and declare the same hostile unless the Court is satisfied that the statement of witness exhibits an element of hostility or that he is resiled from a material statement or where the court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. There must be some material to show that the witness is not speaking the truth or has exhibited an element of hostility to the party for whom he is deposing before a witness can be declared hostile and the party examining the witness is allowing to cross examine him. Merely because the witness speaks about the truth which may not suit the party on whose behalf he deposing the same and favourable to the other side, the discretion to allow the party concerned to cross-examine its own witness cannot be exercised.

18. On the other hand, the learned Special Public Prosecutor for CBI Cases appearing for the Respondent has submitted that during the chief examination P.W. 2 had categorically supported the prosecution case by specifying the clearing rules of Union Bank of India regarding MICR Cheques, High Value Cheques during the relevant period i.e.2003-2004. He has also categorically deposed about how Union Bank of India had suffered a loss to the extent of 6.25 crores because of the violation of the clearing rules by accused No. 1. He has also contended that since the prosecution witness No. 2 had spoken to against what he had deposed in chief examination as well as in the statement given

before the investigating officer u/s 161(iii) Code of Criminal Procedure, the trial Court had rightly recorded the memorandum filed on behalf of the prosecution and permitted to cross-examine the P.W. 1, which need not be interfered with. In support of his arguments, he has placed reliance upon the decision in *The State v. M. Gopalakrishnan and Ors.* reported in 2009 (3) C.L.T. 142. In this case, after referring various decisions viz.

1. *Sat Paul Vs. Delhi Administration*, ,
2. *Shri Rabindra Kumar Dey Vs. State of Orissa*, ,
3. AIR 1979 SC 569, *G.S. Bakshi v. State (Delhi Admn)*,
4. *Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat*, ,
5. AIR 2004 SC 524, *K. Anbazhagan v. Superintendent of Police*,
6. 2003 (3) CTC 291, *State rep.by ADSP, CBCID v. Tmt. Indirakumari and Ors.*
7. *P. Ramachandra Rao Vs. State of Karnataka*, ,
8. *Shri Rabindra Kumar Dey Vs. State of Orissa*, ,
9. *V. Venkata Subbarao Vs. State, represented by Inspector of Police, A.P.*, ,

the learned single Judge of this Court has upheld the principle and scope of Section 154 of the Indian Evidence Act 1872 and held that it is a clear error apparent on the part of court in overlooking legal position, based on the material facts available on record and the Court below failed in exercising its discretion judiciously.

19. This Court has carefully gone through the above cited decisions and of view that the facts and circumstance narrated therein are not made applicable to the instant case on hand. In so far as the general principle u/s 154 of the Indian Evidence Act is concerned, no Court can deviate the original track. But, it has to necessarily adhere to the principles laid down under the Act.

20. As discussed in the earlier paragraphs, Section 154 of the Indian Evidence Act 1872 confers its judicial direction on the Court to permit a party to cross-examination of his witness and does not contain any conditions and guidelines which may govern the exercise of such discretion. However, such discretion must be judiciously and properly exercised in the interests of justice. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Such discretion has to be exercised by the Court before which the matter comes up judiciously on being satisfied that the witness really bears a hostile animus to the party calling him.

21. On coming to the instant case on hand, it appears that P.W. 2 was examined in chief on 16.02.2010 and nearly after one month his chief examination was continued and completed on 12.03.2010 and thereafter he was cross- examined

by the first accused on 08.04.2010 and his cross-examination was deferred on petition for the cross-examination of A2. It is also pertinent to note here that the prosecution had been watching the way of giving evidence by P.W. 2 both in chief as well as in cross- examination. If at all P.W. 2 had deposed as against the case of prosecution that too contrary to his statement, which was recorded by the investigating officer u/s 161(3) Code of criminal Procedure, it is for the prosecution to request the Court to permit the prosecution to treat him hostile to the prosecution case.

22. But it has not been done in this case immediately in the presence of the trial Judge, before whom the veracity of P.W. 2 was testified. But, after his transfer, the memorandum, which is in question in the present petition was filed before his successor in office. The same was vehemently objected to by the learned Counsel for the Petitioner on the ground that the previous trial Judge alone could visualise the demeanour and attitude of P.W. 2 while deposing evidence and that the learned trial Judge, who is presiding over at present in the trial Court would not be in a position to visualise everything. But, he can visualise the things only on the basis of the records. Under this circumstance, the counsel for the Petitioner has urged before this Court that the order passed by the learned trial Judge in the memorandum on 18.09.2010 be necessarily set aside.

23. This Court has carefully analysed the facts, which warranted the Petitioner to come forward with this petition. This Court has also carefully considered the submissions made on behalf of both sides. Besides this, this Court has also perused the memorandum submitted by the learned Special Public Prosecutor before the trial Court as well as the objection filed by the Petitioner to the memorandum. On perusal of the order of the trial Judge, it appears that it has been passed erroneously. In this connection, this Court wishes to place on record that before allowing a witness to be declared hostile, a trial Judge must look into the statement given before the investigating officer to see whether the witness was actually resiling from the position taken during investigation. A party must lay a foundation for cross- examining its own witness. In *Middolla Harijana Thimmaiah @ Thimmappa Vs. State of A.P.*, the Full Bench of Andhra Pradesh High Court has held that before a Court exercises discretion in declaring a witness hostile there must be some material to show that the witness has gone back on his earlier statement or is not speaking the truth or has changed sides and transfers his loyalty to the adversary. Furthermore, it is not merely on the basis of a small or insignificant omission that the witness may have made before earlier authorities that the party calling the witness can ask the Court to exercise its discretion.

24. On coming to the present case on hand, the learned trial Judge has stated in the impugned order dated 18.09.2010 that the alleged versions of P.W. 2 underlined by the prosecution to treat him as hostile are:

i. There was no rule for clearing (in the Union Bank of India) in force before 09.08.2004.

ii. The bank has suffered a loss because ICICI bank failed for timely clearance of four cheques to the extent of Rs. 3.95 Crores.

iii. When P.W. 2 went for inspection A1 informed him that he was adopting the alleged practice not only in the account of M/s. Anand Agencies but also in the account of other parties of Triplicane Branch.

25. The learned trial Judge has therefore concluded that the alleged admissions given by P.W. 2 prima facie shows that there was no procedure in clearing the cheques before 09.08.2004. This appears to be incorrect. Without a procedure the clearing of cheques could not be done. The learned trial Judge has also concluded that the second admission made by the P.W. 2, clearly indicates that if the ICICI bank has given timely clearance of four cheques to the tune of Rs. 3.95 crores, no case would have been filed against A1. This answer gives an impression that it is the mistake of ICICI bank based on which a criminal case is filed against A1. With regard to other answer given by P.W. 2, in his cross-examination that A1 was adopting the alleged practice not only in the account of M/s. Anand Agencies but also in the account of other parties of Triplicane Branch, this goes to the extent of saying that the procedure adopted in the account of M/s. Anand Agencies is a regular procedure and hence the same is adopted in other accounts.

26. Finally, the trial Judge has concluded that all the above three admissions given by P.W. 2 are against the case of the prosecution and in the event, if this witness is not treated as hostile, the admission given by P.W. 2 in cross-examination will prejudice the prosecution case.

27. The reasoning assigned by the learned trial Judge seems to be pre-conceived and it also goes against the fundamental rights of the Petitioner guaranteed under Articles 14 and 21 of the Constitution of India. Since, the trial is in progress there must be some self-restraint on the part of the trial court while passing any interlocutory orders. Because, in so far as the criminal cases are concerned right of speedy trial, right of defence and right of legal aid are guaranteed under Article 21 of the Constitution of India. Articles 21 and 14 are the heart of the chapters and fundamental rights. They cover various aspects of the life of an individual, which includes the right of defence in a criminal case. When such being the case, the order passed by the learned trial Judge seems to be perverted and it appears the trial Court has also not exercised the discretionary power conferred u/s 154 of the Indian Evidence Act judiciously. Hence, the impugned order dated 18.09.2010 is liable to be set aside.

28. In the result, the criminal original petition is allowed and the impugned order dated 18.09.2010 and made in C.C. No. 22 of 2006, on the file of the learned XI Additional Special Judge for CBI Cases, Chennai is set aside. Consequently, connected miscellaneous petition is closed. Keeping in view of this nature of this case and the period of pendency, the learned trial Judge is directed to dispose the case within a period of three months under intimation to this Court.