

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Crl.P.No.348 of 2015 and Tr.Crl.P.No.9 of 2015

COMMON ORDER :

Crl.P.No.348 of 2015:

The petitioner/Accused N.Sridevi of C.C.No.414 of 2010 on the file of the Special Judl.Magistrate of First Class, for P.C.R. offences, Warangal, a private complaint of the 2nd respondent-defacto-complainant B.Shobharani, for the offence under Section 138 of the Negotiable Instruments Act(for short, 'the Act'), and Section 420 I.P.C. that was taken cognizance by the learned Magistrate, filed this Criminal Petition seeking to quash the dismissal order dated 02.01.2015 in Crl.M.P.No.626 of 2014 filed under Section 311 of Cr.P.C. to re-open and recall of P.W.1 for better adjudication of the case C.C.No.414 of 2010. The impugned order speaks that the accused did real estate business and collected money from the prospective purchasers of house plots and as per complaint induced to pay money and the question of the capacity of payment of huge amount is not a relevant factor, without even making a case as to how the impugned cheque is in the hands of the complainant. Moreover, the P.Ws. 1 to 3 were examined and also cross-examined and the accused also as D.W.1 deposed and cross-examined by the complainant and there are no grounds to allow the application. Earlier in the Criminal Petition vide Crl.P.No.12548/2010 filed by the petitioner/accused herein sought to quash the proceedings in the same Calander Case (C.C.No.414 of 2010) was disposed of for no grounds to quash by the order dated 27.08.2013 with a direction to dispose of the C.C.No.414 of 2010 within three months.

2. The grounds in Crl.P.No.348 of 2015 are that the learned Magistrate did not apply his mind in passing the dismissal order in Crl.M.P.No.626/2014 dated 02.12.2014 which in the month of August, 2014 in recalling of P.W.1 and posted the case to 19.12.2014, 22.12.2014 and further to 02.01.2015 after keeping pending for long time for counter of 2nd respondent/defacto-complainant and an opportunity ought to have been given to the petitioner/accused and thereby the dismissal order is liable to be set aside and an opportunity to be afforded to the petitioner/accused.

Tr.Crl.P.No.9 of 2015

3. This petition is filed by the self-same petitioner of CrI.P.No.348 of 2015 to transfer the C.C.No.414 of 2010 from the file of the Judicial Magistrate of First Class for PCR cases at Warangal to Special Judicial Magistrate, at Erramanzil, Hyderabad or Hastinapuram, Ranga Reddy district or any other Court in Hyderabad with the grounds of the petition as well as contentions that the trial Court did not apply its mind in passing of the order in CrI.M.P.No.626 of 2014 in C.C.No.414 of 2010, dt. 02.12.2014 dismissing of recalling the P.W.1 and posted the matter to 05.01.2015 for final submissions, prior to that issued N.B.W. on 11.09.2014 and further posted to 02.12.2014 in spite of presence of the petitioner besides complainant failed to pay process which is purely abuse of process of law, that on 02.12.2014 the petitioner filed warrant recall petition under Section 70(2) Cr.P.C. that was posted to 08.12.2014 for counter of the complainant, then to 10.12.2014 on which day the petition is dismissed without assigning any reasons, that a copy of counter was also supplied to the petitioner on the same day and the surprise is that the recall petition CrI.M.P.No.673 of 2014 is dismissed on 08.12.2014 and the main matter posted to 15.12.2014 for filing of counter in CrI.M.P.No.626 of 2014, then to 19.12.2014 and 22.12.2014, and in the meantime the petitioner/accused was arrested on 17.12.2014 at the instance of the complainant and even bail application moved, the accused was remanded by posting bail application to 18.12.2014 i.e. next day for counter and hearing when granted conditional bail and it shows the trial Court is proceeding prejudicially and even the High Court in the earlier quash petition directed to dispose of within three months from 27.08.2013 but the trial Court failed to obey and thereby sought for transfer of the case from that Court to any other Courts stated supra.

4. The contention of the 2nd respondent/defacto-complainant is that the accused has been doing business in construction and real estate business along with her husband by establishing the firm in the name and style of 'Jesse Builders Private Limited' having its office at H.No.2-2-7/5/B, Vidhya Nagar, that the accused induced her saying to construct independent houses in the land situated in Sy.Nos.82 and 83 and to allot the plots bearing Nos.131 and 132 and received Rs.8,90,000/- towards sale consideration, however knowingly of she has no title over the property and when the complainant came to know and questioned about the suppression of the facts, the accused agreed to issue a cheque for the said amount and the cheque was accordingly issued and when the same was presented returned dishonoured for

'insufficiency of funds' and complainant, having issued statutory notice dated 20.02.2009 for non-payment filed the case from the cause of action accrued from the cheque dishonour as well as for the offence under Section 420 IPC supra.

5. The defence of the petitioner/accused is that there is no service of notice for accrual of cause of action to maintain cheque bouncing case and there is no liability much less any offence including of cheating.

6. The Hon'ble High Court in the earlier quash petition in the background of facts held that as the trial already commenced and at the stage of evidence of complainant (under Section 145 of N.I.Act), no grounds to quash and in directing the trial Court to dispose of the case by completing the trial within three months therefrom.

7. As both the matters are inter-related, this Court has chosen to dispose of both the matters by common order. Heard in common and perused the material on record.

8. In fact, on perusal of the order in CrI.M.P.No.673 of 2014 dated 08.12.2014 shows *'Counter filed. Heard. Accused called absent and the petition stands dismissed.'* It is a petition to recall the warrant filed on 02.12.2014 stating that on 11.09.2014 the petitioner came to the Court and on that date the presiding officer was on leave and he did not observe the notice that the cases are being called in in-charge Court and it is when the matter called she was absent thereby the N.B.W. issued against her and her absence was neither deliberate nor intentional, hence N.B.W. to be recalled. The counter filed by the complainant in opposing the NBW recall petition saying that the case is of the year 2010 and adjourning from time to time due to the attitude of the accused who initially avoiding to receive the summons and after service of summons appeared through an advocate and later filed in High Court quash petition dated 24.05.2010 and went unsuccessful and there was a direction to dispose of the case within three months by order dated 27.08.2013, however one way or other the accused has been dragging on and in the case arguments of the complainant were completed on 09.07.2014 and since then it is coming for arguments of accused and because of accused absence N.B.Ws. were issued on 11.09.2014 and previously also for number of occasions for absence of accused with no representation, N.B.Ws. issued and recalled and thereby there are no grounds to recall the N.B.W. It is from the respective contest and factual background and conduct of accused, the dismissal order passed by the learned Magistrate is though a one line order, that

order is made final. The order though not supported by reasons, it cannot be said per se unsustainable in the factual background. Undisputedly, the N.B.W. was executed and on production, on application for regular bail, bail was granted. That by itself cannot be a ground to attribute any prejudice in the mind of Magistrate that too, the N.B.W. is issued by the in charge Magistrate for the accused called absent. The notice board is clear about the matters being called by in charge Court but, the petitioner was absent. It is, in fact in routine course, in-charge Magistrate call all criminal cases and the accused was supposed to be present. The decision of the trial Court cannot be called as outcome of prejudice much less a ground thereby for seeking transfer.

9. There remains the CrI.P.No.626/2014 dismissal order dated 02.01.2015 of the recall petition of the P.W.1 filed by the accused impugned herein in CrI.P.No.348 of 2015.

10. No doubt, on perusal of the impugned order of the learned Magistrate including the docket proceedings show after recall petition of P.W.1 filed on 22.08.2014 both the accused and complainant were absent, Presiding Officer on O.D, case adjourned to 11.009.2014 and on that day the complainant present and accused absent with no representation and thereby issued N.B.W. Later, on 02.12.2014 the complainant absent, petition filed and allowed and in recall warrant petition filed by the leaned counsel for the accused, notice given to the complainant and posted to 08.12.2014 for counter and on 08.12.2014 counter filed. Further on 10.12.2014 the complainant was absent, petition u/sec.256(3) was allowed and posted to 15.12.2014 and 19.12.2014, on which day both the complainant and the accused were present. The petition (present one) pending posted to 22.12.2014 and again to 02.01.2015 and on that day complainant absent, petition 256(3) allowed and the accused was present and the CrI.M.P.No.626 of 2014 was dismissed and posted for arguments finally to 05.01.2015. On perusal of the record in fact shows the P.W.1 was examined in chief way back on 01.12.2010 that is also the observation in CrI.P.No.12545 of 2010 dated 27.08.2013 by the another Bench of this Court while dismissing the quash petition directing to dispose of the case within three months, however the P.W.1 was cross-examined by the accused only on 08.01.14 after three years which shows how the accused could gain time despite direction of the High Court, dated 27.08.2013 to dispose of the case within three months and not satisfied with that, finding fault with the lower Court or complainant including in the grounds

for transfer petition as if the Court delayed so meaninglessly and also alleged the lower Court not assigned its own reasons but there is nothing to attribute any prejudice in the mind of the trial Judge in dismissing the recall petition but for to say some other view also possible or at best could have been afforded one more opportunity for bringing on record the means of the complainant in doubt in support of the defence disputing issue of the cheque. Other than that is not tenable, there is nothing made act to transfer the case and thereby the Tr.Crl.P.No.9 of 2015 filed at the fag end, has no merits and same is liable to be dismissed as held in the expression of the Apex Court in **Satish Jaggi Vs. State of Chattishghad** that was followed in **Suricharandas Vs. State** of Rajasthan earlier expression of the Apex Court in referring to it the other expressions including Sahara, this Court also reiterated the same with guidelines for transfer, role of litigant public and Court by well laid down in **Madhapara Maddileti Vs. State of A.P.**

11. Now coming to the recall petition of P.W.1 sought no doubt it is one of the contentions that belatedly raised the questions relating to means of complainant for the alleged lending even for purchase of the house site with house construction transaction of more than 8, 90,000/- for which cheques said to have been issued. Undoubtedly, the cheque is routed from the account of the accused with signature of the accused not in dispute but for any legally enforceable debt or not.

12. It is the burden of the accused under the reverse onus clause as laid down in the expression of Apex Court in **Rangappa vs. Mohan** (3-Judges Bench). It is no doubt for the accused to discharge the burden and as part of it, the accused want to show by putting some more questions which she could not earlier to P.W.1 regarding the capacity to invest such huge amount. The trial Court did not advert to it but for simply dismissed as belated and as putting spokes to the fair disposal despite direction of the High Court for earlier disposal way back. In fact, Section 311 of Cr.P.C. part-II speak as well as Section 165 of the Indian Evidence Act, the Court on its own also can permit further cross-examination by recall of a witness, that was not considered by the trial Court within its power. It is not the observation that such evidence is not necessary. It is not the contest or observation that question regarding the means already put to the witness P.W.1 from perusal of deposition of P.W.1.

13. Having regard to the above in the factual background, it shows necessity for permitting only in relation to the means of P.W.1 to put few questions of any relevancy to P.W.1 by accused, for that recall petition (Crl.M.P.No.626 of 2014) the trial Court supposed to have allowed. However, that cannot be a ground for transfer. It is because irrespective of right of parties to the recall not available, from the necessity arise as per part-II of Section 311 of Cr.P.C. referred supra to recall to subserve the ends of justice, same is required to be allowed.

14. In the result, i) the **Crl.P.No.348 of 2015 is allowed** by setting aside the order dated 02.01.2015 in Crl.M.P.No.626 of 2014 on the file of the Spl. Judl. Magistrate for PCR Cases, Warangal, directing the trial Court to recall the P.W.1 for further cross-examination only in relation to means of the P.W.1 and nothing beyond that.

and

ii) The Tr.Crl.P.No.9 of 2015 is dismissed. The trial Court shall fix date, after receipt of the order copy, for securing P.W.1 and direct the accused to put any questions only relating to the means of P.W.1 for the cheque amount covered lending or invested, as the case may be, and after that to hear arguments further if not of the complainant and the accused on the same day, at least by next day and to dispose of the case. It is needless to say if the accused not chosen to put questions in further cross-examination from the present concession by this order on the day being fixed by the Court, he is not entitled to any further concession and the accused if at all to file any written arguments can file and submit any oral arguments on the day being fixed, else the Court can reserve the matter and pronounce judgment on its own merits from sufficient opportunity having already been given since once again by virtue of this direction to be given that does not entitle procrastination further.

15. Consequently, miscellaneous petitions, if any, pending in these Criminal Petitions shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:13.10.2015

Vvr

