

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.11.2016

C O R A M

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

Criminal Revision Case No.1373 of 2016

Nalavirumbi @ Balakrishnan ... Petitioner / Accused

Vs

State rep. By
The Deputy Superintendent of Police
CBCID,
Egmore, Chennai ... Respondent / Complainant

Prayer: Revision filed under Section 397 r/w 401 of the Code of Criminal Procedure to call for the records in C.C.No.1121 of 2012 on the file of the Learned XI Metropolitan Magistrate, Saidapet, Chennai and to set aside the order dated 21.10.2016 in Crl.M.P.No.3015 of 2016 passed by the learned XI Metropolitan Magistrate, Saidapet, Chennai.

For Petitioner ... Mr.M.Krishnamoorthy

For Respondent ... Mr.K.Madhan
Government Advocate (Crl.Side)

O R D E R

Heard both sides.

2. The Petitioner / Sole accused has projected the instant Criminal Revision Petition before this Court (As an aggrieved person) as against the order dated 21.10.2016 in Crl.M.P.No.3015 of 2016 passed by the learned XI Metropolitan Magistrate, Saidapet.

3. The Learned XI Metropolitan Magistrate, Saidapet while passing the Impugned Order in Crl.M.P.No.3015 of 2016 in C.C.No.1121 of 2012 (filed by the Petitioner / Accused) at Paragraph Nos.4 and 5 had interalia observed the following:-

"..... The contention of petitioner that he remained absent on 16.06.2016 and thus this court constrained to issue NBW against him, is found to be untrue. It is pertinent to note that, on 20.01.2016,

when the matter Cross examination of PW1 and PW2, who are all recalled at the instance of accused, the petitioner / accused remained absent. Further on 20.01.2016, the P.W.1 and P.W.2 were present for cross examination and upto 12.10 p.m. no representation for accused. Thus this court constrained to issue NBW to the accused. The cross examination on those witnesses was not commenced from the side of the accused on that day. Further more, on perusal of records it was found that the accused never appeared in person and almost all the hearing Section 317 Cr.P.C. petitions were filed and allowed.

5. During the enquiry, it was represented from the side of the petitioner / accused that he was unable to appear on 16.06.2016 due to Jaundice. Nevertheless this court issued NBW on 20.01.2016. It is worthwhile to mention that the petitioner didn't file any medical records to substantiate his contention. The reason stated supra, for non appearance on the hearing date is untenable and not in accordance with law. Thus, this court declined to recall and cancel the NBW issued against the petitioner / accused." and resultantly dismissed the Petition filed under Section 70(2) of Cr.P.C.,

4. Assailing the correctness, validity and legality of the impugned order dated 21.10.2016 in CrI.M.P.No.3015 of 2016 in C.C.No.1121 of 2012 passed by the trial court, the Learned Counsel for the Revision Petitioner / Accused contends that the impugned order passed by the trial court is illegal, improper and incorrect one in the eye of Law.

5. The Learned Counsel for the Petitioner / Accused urges before this Court that the trial court had failed to appreciate a primordial fact that the Petitioner was afflicted with disease of Jaundice and that precluded him to remain present on 20.01.2016.

6. Lastly, it is the plea of the Petitioner that trial court had failed to take note of the decision of S.Sundar V. State by Inspector of Police, Vigilance and Anti-Corruption, Chennai reported in 2016 (1) TLNJ 385 (Criminal).

7. Per contra, it is the submission of the Learned Government Advocate (Crl.Side) for the Respondent / Complainant that the trial court had borne in mind a very essential fact that on 20.01.2016, when cross-examination of P.W.1 and P.W.2 was slated, after their 'Recall' at the instance of Accused, the Revision Petitioner / Accused remained absent and all the more

P.W.1 and P.W.2 before the trial court were present on 20.01.2016 up to 12.10 P.M. and even till that time, there was no representation on the part of the Revision Petitioner / Accused and further more, the trial court had in a crystalline fashion made a mention in the impugned order that the 'Accused' (Revision Petitioner) never appeared in-person and almost all the hearings Section 317 Cr.P.C., Petitions were filed and allowed etc., and ultimately dismissed the Petition for recall filed under Section 70(2) of Cr.P.C., which does not suffer from serious infirmities in the eye of Law.

8. It is to be borne in mind that only a Judicial Magistrate is quite competent to issue a warrant of arrest in Cr.P.C., for the production of a person before his own court. As a matter of fact, this Court relevantly points out that even without insisting upon the presence of an accused, a Court of Law can 'Recall issuance of NBW'. It is always open to the concerned court to impose conditions to its subjective satisfaction. But care and caution would have to be adhered by the concerned court that the condition to be imposed or imposed on the accused ought not to be a onerous or harden some one.

9. There is two opinion of a candid fact that in the 'acquisitional proceedings' of our criminal jurisprudence, the rights of the accused are to be protected by a Court of Law. But at the same time, a Court of Law is to bear in mind that an accused has to appear till his appearance is dispensed with or is exempted from appearance by means of necessary order passed to that effect. It is not necessary for every hearing in a given case an accused has to appear. However, if he desires that his presence has to be exempted from the court, then, it is open to him to file a necessary Petition, as per relevant provisions of Cr.P.C., of course, in the manner known to law and in accordance with law, till his presence is dispensed with or he is exempted from appearance, he is to appear before the concerned court.

10. It is to be pointed out that 'Refusal to cancel issuance of NBW' may not be a valid one, if a bonafide reason is ascribed on individual's part. Even if an accused is very much present and his Learned Counsel remained absent, yet the Court is to determine the Petition for 'Recall of Warrant, of course on merits, in the considered opinion of this Court.

11. The real fact is that a 'Court of Law' ought not to be used for persecuting the parties. The insistence on the presence of litigants before the Court can only be made if necessary for serving one purpose or other. No doubt, a Court is entitle to pass an order compelling the accused to appear before it. However, such compulsion or coercion is not to be

for the mere pleasure of an accused to be seen in the dock. Furthermore compelling an accused to appear on the day when his presence / appearance has nothing to do with the progress of the case will only lead to an unnecessary harassment and that too when he was suffering from illness / had some inconvenience and his Learned Counsel is ready to represent him.

12. Be that as it may, when a person / accused is suffering from an ailment, his application for exemption from personal appearance can be entertained by the Court and necessary orders being passed, of course, based on the subjective satisfaction arrived at in this regard by the trial court. Ordinarily, the issuance of NBW against him is not a correct order to be passed in the eye of Law. Also a Court of Law can take a practical, pragmatic and a rational approach in a given case (especially in the present case where P.W.1 and P.W.2 are to be cross-examined) overriding technicalities and not adopting a pedantic / rigid view with a view to secure the ends of justice.

13. As far as the present case is concerned, the Petitioner / Accused had categorically averred at Paragraph No.4 of Crl.M.P.No.3015 of 2016 in C.C.No.1121 of 2012 before the trial court that he is still bedridden and is unable to appear etc., and filed this Petition through his Counsel to recall the warrant without his presence. Undoubtedly, on the side of the Petitioner / Accused, no medical record / a semblance of medical evidence was produced or filed into Court to show that the Petitioner was bedridden due to Jaundice and as such, he was not in a position to appear before the trial court on 20.01.2016 when P.W.1 and P.W.2 were present for cross-examination. Certainly no Court of Law would feel Happy / palatable if the prosecution witnesses, who were present for certain hearing were not to cross-examine by the Accused side. That kind of attitude would not be appreciated on any rhyme or reason.

14. In the upshot of detailed discussions, even though the Revision Petitioner / Accused before the trial court had come out with a plea that he was still bed-ridden due to jaundice and was unable to appear before the court on 20.01.2016, when P.W.1 and 2 were present for cross-examination and up to 12.10 P.M no representation was there on his side and therefore, an order of NBW was issued, this Court based on the averment of Petitioner / Accused illness is of the considered view that an opportunity has to be provided to the Revision Petitioner / Accused to establish / prove his absence at the date of hearing before the trial court. If the Court is subjectively convinced that the absence of an accused on a given day was not a deliberate one it can recall the warrant if there is an imminent deed / if situation so warrants, based on the facts and circumstances of the case which float on the surface. Viewed in that perspective, this Court sets aside the Impugned Order dated

21.10.2016 passed by the trial court. Consequently, the Revision Petition succeeds.

15. Resultantly, the Criminal Revision Petition is allowed, the Order dated 21.10.2016 passed by the trial Court in CrI.M.P.No.3015 of 2016 in C.C.No.1121 of 2016 is hereby set aside for the reasons assigned in this Revision.

16. It is open to the trial court to permit the Petitioner to let in oral and documentary evidence, as the case may be, if he so desires / so chooses to substantiate his point as to why / for what reason(s) he remained absent on a particular date of hearing, which ultimately perforced the trial court to issue an order of NBW. Thereafter, the trial court is to dispose of the CrI.M.P.No.3015 of 2016 in C.C.No.1121 of 2012 afresh with an unbiased clear cut mind and to pass a reasoned speaking order on merits, in the manner known to law and in accordance with law.

17. Before parting with the case, this Court makes it abundantly clear that the Revision Petitioner hence forth is directed to appear before the trial court without offering any lame duck excuse for the hearings to follow and on his side, P.W.1 and P.W.2 should be cross-examined and their cross-examination ought to be completed by the side of the Petitioner / Accused without any laxity being shown in this regard. In view of the fact that the Revision Petition is allowed by this Court, the trial court is directed to restore the CrI.M.P.No.3015 of 2016 in C.C.No.1121 of 2012 to its file within a period of one week from the date of receipt of copy of this order. Thereafter, the trial court is to proceed with the main case in C.C.No.1121 of 2012 and that the trial court is further directed to see that the cross-examination of P.W.1 and P.W.2 is completed at an early date.

Sd/-

Asst.Registrar (CS V)

/true copy/

Sub Asst. Registrar

To

1. Learned XI Metropolitan Magistrate, Saidapet, Chennai

2. The Deputy Superintendent of Police
CBCID,
Egmore, Chennai

+1 cc to M/s.M.Krishnamurthy,advocate,sr.65716.

rsk(co)

krd 14/12

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