

HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.16083 OF 2016

ORDER:

This Transfer Criminal Petition is filed under Section 482 of Cr.P.C. to quash the order in CrI.M.P.No.1447 of 2015 in C.C.No.65 of 2015 passed by the Principal Junior Civil Judge, at Tiruvur dated 20-8-2015 whereby the learned Judge, dismissed the application filed under Section 311 of Cr.P.C. to recall P.W.1 for the purpose of cross-examination.

The petitioner filed petition under Section 311 of Cr.P.C. to recall P.W.1 for the purpose of cross-examination on the ground that when P.W.1 was cross-examined, the handwriting on Exs.P.1 to P.3, validity of the cheque and as to how and when the transaction took place between them and other aspects were not put to the witness during his cross-examination and the petitioner filed the present petition for further cross-examination of P.W.1.

The Principal Junior Civil Judge, Tiruvur at para 10 of the order passed by him narrated various instances that took place during trial of cases filed for the offences punishable under Section 138 of the Negotiable Instruments Act. The specific para is extracted hereunder which reads as follows:

“As seen from the record, complainant/P.W.1 filed his chief examination affidavit on 15-5-2015 on that day, the documents on behalf of P.W.1 was marked. The learned counsel for the petitioner/accused not cross examined by requesting time. However, recorded nil. After 313 Cr.P.C.examination of the accused, it was posted for defence evidence at that stage, he filed a petition under Section 311 Cr.P.C., same is allowed and P.W.1 was

recalled and cross examined at length on 18-6-2015, thereafter posted for defence evidence, opportunity given timely to the petitioner/accused even on costs. After having ample opportunity to the petitioner/accused, cross examined P.W.1, while this matter coming for defence evidence, changed his counsel and the present advocate for petitioner/accused filed these 311 Cr.P.C. petitions to reopen and recall the evidence of P.W.1 for the purpose of further cross examination."

Based on the applications filed one after another, the trial court concluded that there is no sufficient cause to recall the witness. Section 311 Cr.P.C. permits the court to issue summons to recall and re-examine any witness after recording its satisfaction as to the necessity to issue summons to recall and re-examine witness but the lacunae in evidence cannot be filled up by recalling a witness in normal course.

It is a common knowledge of every one that matters pertaining to an offence punishable under Section 138 of the Negotiable Instruments Act are being protracted for years together and in the present case, advocate on record did not cross-examine the witness on the day when the matter was posted for cross-examination i.e., on 15-5-2015 and the court recorded the cross-examination as nil, even after examination of accused under Section 313 Cr.P.C., the petitioner filed a petition under Section 311 of Cr.P.C. which was allowed and the witness was recalled and cross-examined at length on 18-6-2015 with reference to the defence set up by the petitioner-accused and thereafter, the matter was posted for defence evidence and after availing sufficient number of adjournments, even

defence evidence was not adduced but curiously filed application under Section 311 Cr.P.C. again to recall the same witness.

It appears from the record that the petitioner is filing petitions consecutively one after another to protract the trial of the matter, and such practice cannot be encouraged by this court. However, fair trial is the main aim of the procedure but to misuse of such power under Section 311 of Cr.P.C., the court cannot permit to file petitions successfully for the same relief under Section 311 of Cr.P.C. in the name of fair trial.

Here, the reasons mentioned by the trial court apparently show that the petitioner is protracting the matter without any reason and changing the advocates one after another. The apex court in recent judgment reported in *GAYATHRI v. M.GIRISH*⁽¹⁾ dealing with the application filed under Order 18 Rule 17 of C.P.C. for recalling witness held that counsel appearing for a litigant has to have institutional responsibility and Code of Civil Procedure so command and applications are not to be filed on grounds which are referred in this case and that too in such a brazen and obtrusive manner and it is wholly reprehensible and law does not countenance it, and professional ethics decries such practice and it is because such acts are against majesty of law.

In the facts of the above judgment, the petitioner filed application one after another for recalling of witness on different reasons and the matter went upto Supreme Court, then the apex

¹ 2016 (3) L.S. 17 (S.C)

court pointed out the institutional responsibility of advocate for filing such applications one after another and deprecated the practice of filing such applications.

Mere change of advocate and filing of application for recalling of a witness, is not a ground and more particularly, when P.W.1 was cross-examined at length on 18-6-2015 itself, no reason was explained for failure of the advocate on record to cross-examine the witnesses with reference to certain facts sought to be elicited by recalling witness in the present petition. In the absence of any details of failure of the advocate to cross examine witness on 18-6-2015, it is difficult to recall P.W.1 again for the same purpose.

Here, it is a best example where the petitioner counsel avoided to cross-examine witness initially and after 313 Cr.P.C. examination of the accused, he filed application and cross-examined the witness and again changed the advocate and filed another application, this is nothing but a dilatory tactic adopted by the petitioner so as to see that matters shall not be disposed of by the courts. Therefore, it is difficult to accept the reason assigned by the petitioner for recalling of P.W.1.

Hence, I find no illegality in the order passed by the trial court warranting interference by this court while exercising jurisdiction under Section 482 Cr.P.C. and consequently, this petition is liable to be dismissed.

Accordingly, this Criminal Petition is dismissed at the admission stage.

As a sequel to the disposal of this petition, the Miscellaneous
Petitions, if any, pending, shall stand dismissed.

JUSTICE M.SATYANARAYANA MURTHY

Dated 22-11-2016.

Dvs.



HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY



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Dated 22-11-2016.

Dvs