HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION Nos.15989 OF 2016, 16003 OF 2016

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16005 OF 2016

COMMON ORDER:

These three Criminal Petitions are filed under Section 482 of Cr.P.C. questioning the order passed in Crl.M.P.Nos.242, 241 and 243 of 2014 respectively filed under Section 294 Cr.P.C. to receive documents and Section 391 read with 315 Cr.P.C. to adduce additional evidence and Section 391 read with 311 Cr.P.C. to recall P.W.4 for further cross-examination to confront certain documents filed along with the petitions.

Petitioner and 2nd respondent herein are accused and complainant respectively and they are one and the same in all the three petitions.

Petitioner was convicted for S.I. for one year and sentenced to pay a fine of Rs.10,000/- with default sentence, for the offence punishable under Section 138 of the Negotiable Instruments Act by Calendar and Judgment dated 27-7-2012 in C.C.No.340 of 2008 passed by the learned XIX Additional Chief Metropolitan Magistrate, Hyderabad.

The brief facts of the case are as follows:

On 7-1-2006, petitioner-appellant-accused borrowed a sum of Rs.12,00,000/- from the respondent and issued a cheque bearing No.997878 dated 22-4-2006 for Rs.12,00,000/- drawn on Andhra Bank, Baghamberpet Branch, Hyderabad in favour of the respondent towards repayment of the loan. The respondent presented the said cheque and the same was dishonoured due to insufficiency of funds, thereupon, respondent got issued a legal notice dated 1-7-2006 acknowledging receipt of the same on 8-7-2006 and petitioner issued a reply on 14-7-2006 whereunder he denied the entire transaction. During trial, on behalf of complainant, P.Ws.1 to 4 were examined and Exs.P.1 to P.17 were marked. Later, the accused was examined under Section 313 Cr.P.C. explaining the incriminating circumstances that appeared in the evidence of P.Ws.1 to 4. He denied the same while reporting that he proposed to examine defence witnesses and by reporting so, he obtained several adjournments, ultimately, failed to examine any witness on his behalf and thereby, defence evidence was closed.

The main reason for filing the present petition is that the counsel for the petitioner-accused before the trial court did not conduct the case properly and thereby, he was put to substantial injury and failure to examine any defence witnesses after completion of examination of accused under Section 313 Cr.P.C. is nothing but negligence of the counsel appearing before the trial court and therefore, sought permission to adduce additional evidence in the appellate court and receive documents as additional evidence and recall P.W.4 to confront those documents received which are 14 in number.

Respondent denied the allegation made in the petition while contending that as the petitioner failed to avail his opportunity before the trial court to adduce defence evidence and petitioner now cannot turn round and seek permission of this court to adduce evidence and recall P.W.1, more particularly, when he did not file such list of documents before the trial court.

Considering the rival contentions, the II Additional Metropolitan Sessions Judge, Hyderabad, by common order dated 23-6-2015 dismissed all the three petitions.

Before this court, learned counsel for the petitioner reiterated that the defence was not conducted properly by his counsel and that his consistent case from the beginning was that cheque was issued as security for due payment of sale consideration etc., and the documents set out in the list are necessary to prove his defence and prayed to set aside the impugned orders passed by the II Additional Metropolitan Sessions Judge, Hyderabad.

The grounds that are urged before this court are relevant in all the three petitions. In Second para of the petition in Crl.M.P.No.242 of 2014, a specific allegation is made and a relevant portion in that para is that

"the respondent-complainant herein has misused the procedure established by Law by filing number of criminal cases in different courts by twisting facts. In trial court the accused engaged a novice-advocate who could not guide the accused properly for taking steps to club the all criminal cases and could not bring on record some important and crucial documents" and filed these documents and sought for permission to recall witnesses raising some other contentions regarding statement etc., and receive additional documents.

Section 391 of Cr.P.C. permits the appellate court to receive additional evidence at appellate stage while dealing with the appeal if the court thinks additional evidence is necessary.

But no guidelines were laid down under Section 391 of Cr.P.C. as to when additional evidence can be received. But the apex court in *RAMBHAU AND ANOTHER v. STATE OF MAHARASHTRA* ([1]) discussed about the scope of Section 391 Cr.P.C. to receive additional evidence and held as follows:

> *The doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under S.391 since the same avoids a de novo trial. It is not to fill up the lacuna but to sub-serve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, S.391 is thus akin to O.41, R.27 of the C.P.Code.*

If that is the case, the petitioner has to establish neither of the grounds contained under Order 41 Rule 27 (a) (aa) (b) but here the allegation is that the petitioner engaged "No voice advocate" who could not bring all important documents on record. But this would not satisfy the requirement under Order 41 Rule 27 (a) (aa) (b) of C.P.C. in view of the judgment of Supreme Court.

In another Judgment of the apex court reported in *ASHOK TSHERING BHUTIA v. STATE OF SIKKIM* ([2]), the apex court discussed about scope of Section 391 Cr.P.C. to receive additional evidence

[1] AIR 2001 SC 2120
[2] 2011 CRL.L.J.1770

and in para 16, by placing reliance on several judgments including judgment of apex court reported in *STATE OF GUJARAT v. MOHANLAL JITAMALJI PORWAL AND ANR.* ([3]) dealing with the issue, the Supreme court held at relevant para 16 which reads as follows:

> *"…To deny the opportunity to remove the formal defect was to abort a case against an alleged economic offender. Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions. The community or the State is not a persona-non-grata whose cause may be treated with disdain. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest….."*

And it is also held in a decision of apex court *RAMBHAU AND ANOTHER v. STATE OF MAHARASHTRA (1th cited)* and finally in para 18, it was concluded as follows:

> *"In view of the above, the law on the point can be summarized to the effect that additional evidence can be taken at the appellate stage in exceptional circumstances, to remove an irregularity, where the circumstances so warrant in public interest. Generally, such power is exercised to have formal proof of the documents etc., just to meet the ends of justice. However,*

[3] AIR 1987 SC 1321

> *the provisions of Section 391, Cr.P.C. cannot be pressed into service in order to fill up lacunae in the prosecution's case."*

If the principle laid down in the above judgment is applied to the present facts and circumstances of the case, the endeavor made by petitioner is to fill up lacunae in his defence and the petitioner having failed to file any documents even during his examination under Section 313 Cr.P.C. and though obtained several adjournments to adduce defence evidence, he failed to examine any witnesses on his behalf, ultimately. Therefore, the trial court having no other alternative closed the defence evidence and heard the arguments and pronounced the judgment. Though appeal was filed in the year 2012, petitioner did not make any endeavor to adduce evidence by invoking Sections 311 and 294 of Cr.P.C. to adduce additional evidence by recalling P.W.4 to confront the documents. This itself would indicate the inaction of the petitioner in prosecuting the proceedings leisurely to fill up lacunae in his defence set up by him and such practice cannot be allowed in view of the later judgment of apex court reported in *ASHOK TSHERING BHUTIA v. STATE OF SIKKIM.* (2nd cited) referred above since the circumstances stated in the petition are not exceptional circumstances. Even otherwise, before 1st appellate court, the petitioner-appellant relied on a decision of the apex court reported in *MISHRILAL AND OTHERS v. STATE OF M.P. AND OTHERS* ([4]) where the Supreme court held "that the witnesses cannot be recalled to confront with the inconsistent

[4] (1) (2005) 10 SCC 701

statement given by him in another proceedings, subsequently could not be confronted except the previous statement made by him, only the documents sought to be confronted under Section 311 of Cr.P.C. or not the previous statement".

Therefore, it would not fall within the scope of previous statement and petitioner cannot be allowed to file those documents to fill up the lacuna.

Even according to the case of the petitioner, the cheque was issued as security for vacating the tenant in occupation of premises purchased by the petitioner and such contention can be established by eliciting some thing in the cross-examination of witness already examined, or by adducing independent evidence as defence evidence after examination of accused under Section 313 Cr.P.C. but the petitioner did not choose to avail the opportunity during cross- examination and after examination of accused under Section 313 Cr.P.C. he leisurely filed these applications after two years from the date of appeal so as to fill up lacunae in the defence and therefore, such applications cannot be allowed in view of the law declared by the apex court referred supra.

In view of my foregoing discussion, I find no ground to receive additional evidence by exercising powers under Section 294 Cr.P.C. i.e., to receive documents and Section 391 read with 315 Cr.P.C. to adduce additional evidence and Section 391 read with 311 Cr.P.C. by recall of P.W.4 for further cross examination.

Hence, I find no ground to receive additional evidence since it is aimed to fill up the lacunae in the defence set up by the petitioner-accused.

In view of my discussion in the earlier paras, when documents cannot be received as additional evidence, the question of recalling P.W.4 for further examination to confront the documents would not arise and consequently, the petition would fail. Similarly, application under Section 294 of Cr.P.C. has no relevancy at all since it applies to the documents included in the list and prosecution of petitioner-accused as the case may be, to dispense with such proof regarding genuineness is admitted. But filing a petition under Section 294 of Cr.P.C.would not arise in the present case. In any way of the matter, I find no merit in all these three petitions and as such, they are liable to be dismissed.

In the result, all the three Criminal Petitions are dismissed.

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

JUSTICE M.SATYANARAYANA MURTHY

Dated 15-11-2016.
Dvs.

HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION Nos.15989 OF 2016, 16003 OF 2016

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Dated 15-11-2016

Dvs