

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :10.02.2017

CORAM

THE HON'BLE MR. JUSTICE T.MATHIVANAN

CrI.O.P. No.7032 of 2010

K.B.Shankar

... Petitioner

Vs.

A.Velu

... Respondent

Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure to set aside the docket order passed in C.C.No.81 of 2009 on the file of the District Munsif-cum-Judicial Magistrate I, Walajapet, dated 10.03.2010 as illegal and without jurisdiction.

For Petitioner : Mr.Avinash Wadhwani
for Mr.Raghavachari

For Respondent : No appearance

ORDER

Heard Mr.Avinash Wadhwani, learned counsel appearing on behalf of Mr.V.Raghavachari, learned counsel on record for the petitioner. Despite service of notice on the respondent, he has not chosen to appear either in person or through his counsel. This Court has perused the grounds of this petition and the relevant materials placed before this Court.

2. Having given due regard to the facts and circumstances of the case and on hearing the learned counsel for the petitioner, the following order is being passed.

3. The petitioner herein is the accused in the case in C.C.No.81 of 2009. On a private complaint preferred by the respondent herein, the learned Judicial Magistrate I, Walajapet, had taken cognizance of the offence under Section 138 of the Negotiable Instruments Act as against the petitioner and taken the complaint on his file in C.C.No.81 of 2009. When the case was posted for hearing, the petitioner had failed to appear on 18.12.2009. Therefore a Non-Bailable Warrant was issued against

him. Subsequently, on a petition in Crl.O.P.No.28183 of 2009, the petitioner was ordered to be released on anticipatory bail by this Court in the event of his arrest or on his appearance before the concerned Judicial Magistrate I, Walajahpet on certain conditions.

4. According to the learned counsel for the petitioner, the condition imposed on the petitioner by this Court in its order dated 22.12.2009 was complied with. It appears from the records that again the petitioner herein had approached this Court with a petition in Crl.O.P.No.1271 of 2010 seeking the relief of dispensing with his personal appearance before the learned Judicial Magistrate's Court, Walajahpet in connection with the hearing of the case in C.C.No.81 of 2009. This petition was allowed by this Court on 29.01.2010. The operative portion of the order is extracted hereunder:

"The personal experience of the petitioner is dispensed with, however, shall be represented through a counsel. On the failure of the counsel's appearance, the order issued by this Court shall stand automatically vacated without any further reference."

5. Now the learned counsel has drawn the attention of this Court to the impugned order passed by the learned Judicial Magistrate I, Walajahpet dated 10.03.2010. From the order dated 10.03.2010, this Court is able to understand that the case in C.C.No.81 of 2009 stood posted on that day for questioning. In this regard, the learned District Munsif-cum-Judicial Magistrate, Walajahpet, in his order dated 10.03.2010, has observed as under:

"...NBW was earlier issued only on the failure of the Accused to appear before this Court for questioning. The Accused has proved the Hon'ble High Court against the said order in Crl.O.P.No.28183/09 wherein the Hon'ble High Court has directed the accused to appear before this Court. But now under the accused is not appearing to answer the questioning considering the above facts and that there is no stay this case is Adj. To 19.03.2010 for appearance of the accused for questioning above failing which warrant would be issued."

(Operative portion of the order is extracted as it is without making correction)

The said order has been challenged in this petition.

6. It is significant to note there that by the order of this Court dated 29.01.2010, the personal appearance of the accused was dispensed with and he was directed to be represented through his counsel . On failure of his counsel's appearance, the order issued by this Court dated 29.01.2010 would automatically be vacated without further reference to this Court. From the impugned order it is revealed that there was no representation on behalf of the accused when the matter stood posted on 10.03.2010. Even in the opening paragraph of the order, the learned Magistrate has stated that the complainant was absent and the accused was also absent, but represented by his counsel Thiru.Kiraharaj. Again it is stated that when the case was posted for appearance of the accused for questioning, he was absent and his counsel was also absent. In the fourth line of the order it is stated that the counsel for the accused was not ready to answer the plea on behalf of the accused.

7. Since the order of the learned Judicial Magistrate seems to be ambiguous in nature, this Court was constrained to call for a report from the District Munsif-cum-Judicial Magistrate I, Wallajapet. The District Munsif-cum-Judicial Magistrate had submitted a report on 30.11.2016 wherein she has stated that the learned counsel for the petitioner (accused) in C.C.No.81 of 2009 on the file of the District Munsif-cum-Judicial Magistrate was present on the date of hearing on 10.03.2010.

8. When the counsel for the petitioner had made his appearance on the particular date of hearing i.e 10.03.2010 , it is surprise to note as to how the learned District Munsif-cum-Judicial Magistrate had proceeded to direct the accused to make his presence on the next hearing and to observe saying that failing which a Non-Bailable warrant would be issued. The order of the learned Magistrate seems to be in total negation of the order of this Court dated 29.01.2010. It is to be reiterated that this Court, in its order dated 29.01.2010 and made in Cr.O.P.No.1271 of 2010, had directed the accused to appear through his counsel and his personal appearance was also dispensed with. Only in case of his counsel's failure to make his appearance, then the order of this Court would be vacated automatically. However, from the report received from the learned Principal District Judge, Vellore, this Court understands that the learned counsel for the petitioner had made his appearance on the date of hearing. However, this was suppressed by the learned District Munsif-cum-Judicial Magistrate saying that the petitioner was not present and his counsel was also not present to answer the question.

9. Under this circumstance, the order of the learned Judicial Magistrate dated 10.03.2010 is liable to be set aside. Accordingly, this petition is allowed and the order of the learned District Munsif-cum-Judicial Magistrate I, Walahjapet dated 10.03.2010 is set aside. The learned District Munsif-cum-Judicial Magistrate I, Walahjapet is directed to dispose of the case in C.C.No.81 of 2009 within a prescribed period of two months from the date of receipt of a copy of this order. The respondent, who is the complainant in the criminal case in C.C.No.81 of 2009, is also directed to cooperate with the Court to dispose of the case. Registry is directed to call for an explanation from the learned District Munsif-cum-Judicial Magistrate I, Walahjapet to explain under what circumstance he had proceeded to pass such an order in total negation of the order of this Court dated 29.01.2010. The explanation shall reach this Court within a period of two weeks from the date receipt of a copy of this order.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

gpa

To

- 1.The District Munsif-cum-Judicial Magistrate I,
Walahjapet.
- 2.The Section Officer,
'B' Section, High Court, Madras.
- 3.The Section Officer,
Criminal Section, High Court, Madras.

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