

HON' BLE DR. JUSTICE B. SIVA SANKARA RAO

CRIMINAL PETITION Nos.7911, 7912 and 8948 of 2017

COMMON ORDER:

As the petitions are between same parties in the same pending case in C.C.No.712 of 2000 on the file of the IV Metropolitan Magistrate, Cyberabad at Ibrahimpatnam, these petitions are taken up together for common hearing and disposal.

2. Heard both sides at length and perused the impugned common order of the learned IV Metropolitan Magistrate dated 04.04.2016 in CrI.M.P.Nos.911 and 912 of 2015 and separate order dated 08.09.2017 in CrI.M.P.No.533 of 2017.

3. So far as CrI.P.No.8948 of 2017 is concerned, it is impugning the dismissal application of the de facto complainant of the said C.C., by the order dated 08.09.2017, the criminal petition is filed. In the lower Court, the application filed was under Section 311 Cr.P.C. r/w Section 165 of the Indian Evidence Act to receive the Truth Labs report saying the complainant could trace the signatures of the accused before the Sub-Registrar and found registered General Power of Attorney executed by A1-P.Ramesh Babu, no other than brother, bearing Document No.240/ BkIV/ 2011 dated 09.11.2011, in favour of his mother for certain purposes and send to the Truth Labs for comparison and found certified copy of the document showing fingerprints extracted from the disputed

sale deeds by obtaining the same of there is impersonation in execution of the sale deeds in sale of the property of the de facto complainant. It is in relation to which allegation for the Plot No.26 admeasuring 275 Square Yards and Plot No.27 admeasuring 167 Square Yards, total 234 Square Yards in Survey No.107/ B of Mangalpally Village, allegedly in forging the signature of the complainant by the accused persons executed the document alienating the same. A crime on the report was registered and after investigation, police filed final report that was taken cognizance by the learned Magistrate for the offences punishable under Sections 420, 419, 468 r/ w 34 I.P.C.

4. Now coming back to the impugned order sustainability, what the lower Court after hearing both sides observed is that the prosecution filed CrI.M.P.Nos.910, 911 and 912 of 2015 to take fingerprints of A1 and send the same for comparison with the disputed fingerprints of the sale deeds in question claimed as forged and those were dismissed referred supra which is subject matter of the two CrI.P.Nos.7911 and 7912 of 2015 herein. The de facto complainant did not prefer any appeal over the said orders that became final and later, de facto complainant filed two applications that were returned at S.R. stage and he impugned the same by filing application before this Court in CrI.P.No.1981 of 2017 and it was directed to number or reject the un-numbered return petitions in S.R.Nos.516 and 517 of 2017. In fact, it appears those were rejected at the S.R. stage on the main ground of earlier

orders in CrI.M.P.Nos.911 and 912 of 2015 dated 04.04.2016 attained finality.

5. The order further reads that the petitioner filed these petitions to take the Truth Labs report into evidence by filing the said Truth Labs report with a petition to receive by the Court. It is, he, that applied by collecting the signatures/thumb impressions of A1 and sent the same to the Truth Labs for comparison and obtained report and it is outside the purview of police investigation and petitioner did not file petition before the Court to call for the record of General Power of Attorney executed by A1 in favour of his mother to receive thumb impressions therein and to compare the same with the disputed thumb impressions of document of sale. Common appeal preferred after the orders in CrI.P.Nos.911 and 912 of 2015, against rejection of S.R.Nos.516 and 517 of 2017. The petition to receive the Truth Labs report is not sustainable and not entitled.

6. In fact, there is no bar to receive the Truth Labs report, even it is the petitioner in his endeavour collected the available signatures or admitted signatures/thumb impressions of the accused and sent the same for comparison of the disputed signature/thumb impression, as the case may be for no legal bar to admit being relevant for admission of document is different to appreciation of evidence on the evidentiary value of the report. The evidentiary value of the report of Truth Labs thus cannot be pre-judged by the Court in rejecting the application before

admission on the sole ground. The earlier applications filed by the prosecution in CrI.M.P.Nos.911 and 912 of 2015 to obtain the specimen thumb signatures/impressions of A1 in open Court and send the same with the disputed thumb impressions in the sale deed/ deeds in question to the Government Handwriting Expert were even dismissed leave about the merits of the dismissal orders, the receiving of Truth Labs report in evidence is not a legal bar.

7. Having regard to the above, the impugned order in CrI.P.No.8948 of 2017 is to be set aside by allowing the CrI.M.P.No.533 of 2017, however, with the observation that while marking, the accused can raise objection for its marking, such objection on proof, relevancy and admissibility for ultimately to decide by the trial Court including on its evidentiary value as held by the Apex Court in *Bipin Shantilal Panchal v. State of Gujarat*¹.

8. Now, coming to the two petitions covered by CrI.P.Nos.7911 and 7912 of 2017 against the orders in CrI.P.M.P.Nos.911 and 912 of 2015, these applications were filed by the prosecution as referred supra under Section 311-A Cr.P.C. to take the thumb impression of A1 in the open Court and send the same for comparison with the disputed thumb impressions on the sale deeds in question dated 1.11.2009, 7.11.2009 and 19.11.2009. It was opposed by the accused saying A1 was never arrested pending investigation to invoke Section 311-A Cr.P.C. and there is a bar to

¹ AIR 2001 SC 1158

obtain by virtue of proviso to Section 311(1)(A) Cr.P.C. It is pursuant to which contest the learned Magistrate dismissed the petitions. In fact, the proviso has no application to entertain the petitions for the reason A1 and A2 surrendered before the Court voluntarily, as per CrI.M.P.No.1078 of 2010 dated 19.06.2010 and after taken to custody (by arrest) they were enlarged on conditional bail by execution of bonds and during investigation, the investigating officer did not choose to take ordeal to the collected thumb impression of A1 for the purpose of sending the same with the disputed thumb impression with the sale deed in question for F.S.L.opinion by comparison and charge sheet is filed on 20.10.2010. The trial Court observed therefrom that having not taken any steps after nearly five years filing the application by prosecution is no way sustainable. It is also observed that prosecution also sought for by invoking Section 45 of the Evidence Act to send the left thumb impression of A1 with the sale deed in question and the same was dismissed as infructuous. It is practically all the three petitions dismissed, one is infructuous, and the other two saying Section 311-A has no application.

9. The reasons for said dismissal are not sustainable for the following:

(a) Section 311(A) amended Cr.P.C by Act 5 of 2005 w.e.f.

23.06.2006, reads as follows:

“Power of Magistrate to order person to give specimen signatures or handwriting: if a Magistrate of the first class is satisfied that, for the purposes of any investigation or

proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting.

Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.”

What the provision speaks is to invoke the Section, the person during investigation proceeding or in any proceeding under the Magistrate, once arrested, the specimen signature can be taken and a non-arrested person's signature taking does not arise for directing to appear and subscribe the specimen signature or writing or thumb impression etc., as the case may be.

(b) Here, the impugned order itself speaks the accused voluntarily surrendered before the Court and taken to custody (arrested) and was enlarged on bail. Section 44 Cr.P.C. speaks the taking of custody is by arrest and it is only after taking of custody, granting of bail arises. So it need not be only on arrest by police and even by surrender before the Court is enough from the above.

(c) The very Section 311(A) introduced is to overcome the difficulty of the interpretation of law on the scope of Section 73 of the Indian Evidence Act, which enables only during the proceedings before the Court, at post cognizance stage in any enquiry or trial and not during investigation and even obtaining of any specimen signatures or thumb impressions for comparison or opinion at the instance of the Court from what is sought by the investigating

officer held earlier as beyond the scope of Section 73 of the Indian Evidence Act for not an enabling provision.

(d) Once such is the case, to cure the defect Section 311-A Cr.P.C. is incorporated. It now enables not only during investigation but also in the course of proceedings under the Code which includes trial, the Court got power to direct accused, once arrested or surrendered and taken to custody, to subscribe specimen signatures or thumb impressions or writing etc., equally as per amended Section 53A Cr.P.C. the D.N.A. examination etc.,

(e) Thereby, the dismissal orders are not sustainable on merits there from and otherwise Sections 73 and 45 of the Evidence Act are also permitting being the enabling provisions for the Court to collect and send with disputed and specimen signatures or thumb impressions pending enquiry/trial before Court that was also not properly considered. In fact, mere delay in filing the petitions by itself is not a ground as answered by the Full Bench of this Court in the recent past in saying there is no time limit for asking when to take the recourse during trial but for to decide each case on own facts and from any necessity.

10. Leave these aspects apart, the core question to answer herein from the contention raised by the learned counsel for the accused persons as to fresh applications are barred by any *resjudicata* expressly or impliedly for maintainability of any subsequent petition. The other contention to answer is whether the de facto complainant or prosecution having filed subsequently

two petitions that were rejected at the numbering stage in S.R.Nos.516 and 517 of 2017, having not impugned the same, the present impugment by earlier maintaining a revision with delay condonation petition from holding revisions not maintainable, after lapse of time can invoke Section 482 Cr.P.C., much less with a claim to sub-serve the ends of justice. The contention is that same is nothing but abuse of process.

11. In this regard, it is necessary to mention the fairly settled law by the Constitution Bench expression of the Apex Court in *Arjun Singh v. Mohindra Kumar*² that there is no *resjudicata* for the maintainability of second time interlocutory application unless there is an appeal remedy provided against which and not availed the same. These aspects were also not properly considered by the Court below in saying fresh applications are barred by *resjudicata* suffice to say said contention raised by the counsel for the accused of the subsequent petitions are barred by *resjudicata* noway sustains. For that matter even the second time applications filed were even rejected and now this Court can order for direction to restore instead of entertaining *suo moto* revision or invoking Section 483 Cr.P.C., to sub-serve the ends of justice and to prevent the abuse of process and on the principle of *actus curiae neminem gravabit* (*Act of Court shall prejudice no man unless sanctioned by law*), the two petitions can be closed with liberty to

² AIR 1964 SC 993

the petitioners to file fresh petitions before the lower Court within one week to decide on own merits.

12. Accordingly and in the result,

(a) CrI.M.P.No.8948 of 2017 is allowed with the observations at Para-7 supra and

(b) CrI.M.P.Nos.7911 and 7912 of 2017 are closed by giving liberty to file fresh petitions by the complainant before the lower Court within one week from the date of receipt of this order.

Pending miscellaneous petitions, if any, shall stand closed.

Date: 19.09.2017

JUSTICE Dr. B.SIVA SANKARA RAO

Note:

Issue C.C. in three days.

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