

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CRIMINAL PETITION No.2861 OF 2017

ORDER:

The present Criminal Petition, under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'the Code'), is filed requesting to set aside the order, dated 28.03.2017, passed in CrI.M.P.(Sr).No.1677 of 2017 in C.C.No.239 of 2015 on the file of XXV Special Magistrate, Hyderabad, whereby and whereunder, the petition filed by the petitioner under Section 70 (2) of the Code, seeking to recall the non-bailable warrant issued against him on 28.02.2017, was rejected.

2. Heard Sri P. Subash, learned counsel for the petitioner - accused.

3. Learned counsel for the petitioner has projected the fact-situation. The sum and substance has been that the petitioner was tried for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881, and was convicted under Section 255 (2) of the Code. Since, he was not present on the date of pronouncement of the judgment and when conviction was recorded i.e., on 28.02.2017, non-bailable warrant was issued against him. Thereafter, the petitioner filed a petition on 27.03.2017 for his surrender. The learned Magistrate required the petitioner to explain as to how the said petition can be entertained by that Court as the quantum of sentence has been pending in the said case. Thereafter, the petitioner filed the

present petition, under Section 70 (2) of the Code, to recall the non-bailable warrant issued against him, but the Court below rejected the petition by the order under challenge, recording thus:

“In this case on 28-2-2017 Complainant present. Accused absent though conditional order passed by this court. Accused did not turn up to the court. Judgment pronounced in the result accused is found guilty for the offence U/s.138 N.I. Act. Accordingly he is convicted U/s.255 (2) Cr.P.C. In this case N.B.W. issued against the accused N.B.W. is pending. The case is posted for quantum of sentence of the accused. At this stage petition filed U/s. 70 (2) Cr.P.C. to recall of N.B.W. against the petitioner / Accused.

This Court has no Jurisdiction to entertain the petition U/s.70(2) Cr.P.C. since Judgment pronounced on 28-2-2017 and case is posted for quantum of sentence. Hence petition is rejected.”

4. In these circumstances, the petitioner approached this Court with the request herein before mentioned. The proper course open to the petitioner is to explain as to the maintainability of the surrender petition before the Court below and resubmit the same.

5. Learned counsel for the petitioner now would submit that when the said petition was called on Bench, the learned Magistrate appears to have informed that the Court has become *functus officio* and one month period elapsed from the date of pronouncement of judgment and hence, the petition could not be entertained.

6. It is no doubt true, conviction was recorded on 28.02.2017 and for recording quantum of sentence, which the learned Magistrate thought to decide by calling the petitioner and affording a chance to him, perhaps as to period of imprisonment to be inflicted, the case was postponed. In such an event, it may not be said that the Court has become *functus officio*, as what could be challenged by the petitioner would not be known to him, except the order of conviction. In such an event, the Calendar Case remains at that stage when there being no order as regards infliction of sentence of imprisonment or fine. So, till such time the learned Magistrate punishes the petitioner in accordance with law, as he has already recorded conviction, the Court cannot become *functus officio*. The accusation and the sentence to be awarded to the petitioner would form part of the judgment and when once the said exercise gets completed, a right would be accruing to the petitioner to challenge it by way of appeal and seeking interim orders even.

7. Therefore, the petitioner is hereby directed to approach the learned XXV Special Magistrate, Hyderabad, by resubmitting the surrender petition he has filed in the material papers, which contains the original endorsement of the Court. On resubmission of the said petition, the learned Magistrate would proceed in accordance with law.

8. With the above direction, the present Criminal Petition is disposed of. Miscellaneous Petitions, if any, pending in this Criminal Petition, shall stand closed.

9. Registry is directed to return the original of surrender petition to the learned counsel for petitioner, on record, forthwith.

A. SHANKAR NARAYANA, J

April 07, 2017.
MD

