

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

CRIMINAL REVISION CASE No.990 of 2017

ORDER:

This Criminal Revision Case, under Sections 397 and 401 of the Code of Criminal Procedure, 1973, ('the Code', for brevity), by the petitioner/accused, is directed against the order, dated 28.02.2017, of the learned VII Additional District Judge, Ongole, passed in CrI.M.P.No.79 of 2017 in CrI.M.P.No.79 of 2014 in CrI.A.No.179 of 2012.

2. I have heard the submissions of *Sri P.Nagendra Reddy*, learned counsel for the petitioner/accused (hereinafter referred to as 'petitioner') and of *Sri Venkateswarlu Chakkilam*, learned counsel for the 1st respondent/complainant (hereinafter referred to as '1st respondent'). I have perused the material record.

3. The facts of the case, which are required to be stated as a prelude to this order, in brief, are as follows:-

The petitioner/accused faced trial in C.C.No.25 of 2007 on the file of the learned Additional Junior Civil Judge—cum—Judicial Magistrate of I Class, Chirala, for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. On his conviction, he preferred a Criminal Appeal in CrI.A.No.179 of 2012 before the Court of the learned VII Additional District Judge, Ongole. During the pendency of the said Criminal Appeal, he filed a miscellaneous petition in CrI.M.P.No.79 of 2014, requesting the said appellate Court to permit him to adduce additional evidence and examine certain listed witnesses LWs 1 to 5. The learned Additional District Judge, while allowing the said petition, directed the trial Court

to record the evidence of LWs 1 to 5 and return the depositions recorded to the appellate Court for consideration in the appeal. However, the trial Court is directed to complete the said exercise by 28.12.2015 and adjourned the appeal for hearing to 28.02.2016. Pursuant to such direction by the appellate Court, the trial Court, took up the matter for the limited purpose of recording the depositions of LWs 1 to 5, and accordingly, ordered for issuance of witness summonses to the said witnesses. Except LW2, all other witnesses were served and they appeared before the trial Court on one date of hearing. However, the trial Court, instead of recording their depositions as per the directions of the appellate Court, noted submissions of the said witnesses that they do not know as to for what purpose they were summoned and therefore, they want some time to depose in the matter, and then, granted time to them for their examination and adjourned the matter to a future date. Thereafter, the matter underwent several adjournments and on one of the dates of hearing, the trial Court recorded that in the event of non-appearance of the witnesses on the next date of hearing, their evidence would be closed. Eventually, on 12.07.2016, the trial Court closed the matter without recording the evidence of LWs 1 to 5 and returned the record to the appellate Court for the reason that LWs 1 to 5 were called absent and as no witness batta for appearance of LW2 was paid. Aggrieved thereof, the petitioner/accused filed a miscellaneous petition in Crl.M.P.No.79 of 2017 in the pending appeal before the appellate Court requesting to again remand the matter and direct the trial Court to examine the witnesses as per the earlier directions in the orders of the appellate Court, by giving one more opportunity to the accused. That petition was resisted by the

complainant/1st respondent herein *inter alia* contending that the accused is dragging on the matter and that he is a chronic litigant and that the original Calendar Case is of the year 2007 and that even when the appellate Court granted him an opportunity by directing the trial Court to record the evidence of LWs 1 to 5, he failed to take appropriate steps for attendance of the said witnesses despite granting several adjournments by the trial Court and, therefore, for default on the part of the accused, the trial Court rightly closed the evidence and returned the record to the appellate Court without recording the evidence of LWs 1 to 5 and, therefore, the petitioner is not entitled to request the appellate Court once again to direct the trial Court to record the evidence of LWs 1 to 5 as an opportunity once given was not availed. By the order impugned in this Revision, the appellate Court dismissed the said petition of the accused and refused to give one more opportunity to the petitioner/accused for examination of LWs 1 to 5. Therefore, the petitioner/accused is before this Court.

4. In this factual scenario and the background of chronological events, the learned counsel for the petitioner/accused would submit as follows:-

‘The appellate Court is also of the view that the evidence of LWs 1 to 5 is essential for effective disposal of the appeal. Therefore, the appellate Court granted the request of the petitioner/accused to adduce additional evidence and accordingly directed the trial Court to record the evidence of LWs 1 to 5 and return the recorded depositions of the said witnesses for consideration in the pending appeal. When the trial Court took up the said exercise or recording

the evidence of LWs 1 to 5, as per the orders of the appellate Court, the accused promptly paid the process for attendance of the said witnesses. Among the said witnesses, except LW.2, all the witnesses appeared before the trial Court on one of the dates of hearing. The trial Court, for no fault on the part of the accused, granted adjournment in the matter on the request of the witnesses, who are in attendance and thus adjourned the matter to a future date for recording of the evidence of LWs 1 to 5. Later, summonses were served on the witnesses and they failed to appear before the trial Court. Except non payment of batta/process for attendance of LW2, there is no fault on the part of the accused. Therefore, there is no fault or wilful laches on the part of the accused. The trial Court for no valid reasons refused to record the evidence of LWs.1 to 5 and failed to follow the directions of the appellate Court. Therefore, the trial Court was in error in not recording the evidence of LWs 1 to 5. Despite all the facts and even though there is no fault on the part of the petitioner/accused, the appellate Court also did not give one more opportunity to the petitioner/accused and erroneously dismissed the miscellaneous petition filed by the accused requesting to once again direct the trial Court to record the evidence of LWs 1 to 5. When there are no laches on the part of the accused, it is just and fair to give one more opportunity to the petitioner/accused as even according to the initial findings of the appellate Court, the evidence of LWs 1 to 5 is essential for arriving at a just decision in the matter.

5. Per contra, the learned counsel for the 1st respondent/complainant, while supporting the orders of the Court below, would submit as follows:-

An opportunity was fairly granted by the appellate Court to the accused and directed the trial Court to record the evidence of LWs 1 to 5 and return the recorded depositions to it for consideration in the pending appeal. As per the directions of the appellate court, the trial Court took steps for recording the evidence of LWs 1 to 5. However, the accused did not avail the said opportunity, despite the trial Court granting several adjournments. Therefore, the trial Court was justified in returning the record to the appellate Court without recording the evidence of LWs 1 to 5. He did not pay batta for the attendance of the witnesses before the trial Court. The trial Court adjourned the matter, as a last chance, for recording the evidence of the said witnesses. Even though the accused is aware of the fact that the opportunity is a last opportunity, he did not take steps for attendance of the witnesses. Hence, the trial Court is left with no other option but to close the matter without recording the evidence of LWs 1 to 5 and return the record to the appellate Court. Since there are laches on the part of the accused, the appellate Court dismissed the subject petition of the petitioner by the order impugned in this revision and rightly did not grant him one more opportunity for examination of LWs 1 to 5. The calendar case is a very old matter of the year 2007. The accused is dragging on the matter. Hence, there are no merits in the contentions of the revision petitioner.'

5.1 Be it noted that the learned counsel for the complainant/1st respondent also contended as follows: Though the order of the appellate Court directing the trial Court to record the evidence of LWs.1 to 5 and return to it the recorded depositions of the said witnesses for consideration in the appeal, has become final, since the

accused is again making the very same request to remand the matter, the 1st respondent is entitled to contend that the request for remand or recording the evidence of LWs 1 to 5 is untenable under facts and in law.

5.2 So contending, the learned counsel for the complainant/1st respondent placed reliance upon the following decisions:

- 1) Satyajit Banerjee and others Vs. State of W.B. and others¹
- 2) Mary Pappa Jebamani Vs. Ganesan and others²

Satyajit Banerjee's case (1st supra) is relied upon in support of the proposition that even if a retrial is directed in exercise of revisional powers by the High Court, the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case and that unless there are exceptional circumstances, the remand order cannot be passed by an appellate Court or a revisional Court and that the trial Judge has to decide the case on basis of evidence already on record (recorded at the initial trial) as the said evidence does not get erased or wiped out despite orders of remand and that as per the law laid down, unless there are extraordinary circumstances obtaining in the case, the recording of evidence of further witnesses cannot be directed by the appellate Court and, therefore, the request of the accused herein is liable to be rejected.

Mary Pappa Jebamani's case (2 supra) is relied upon in support of the same proposition that when extraordinary circumstances exists only, retrial is permissible and that unless the Court comes to a conclusion that the first trial is found to be false or a mock trial, retrial is impermissible.

¹ (2005) 1 Supreme Court Cases 115

² (2014) 14 Supreme Court Cases 477

6. I have bestowed my attention to the facts, submissions and the legal position.

7. In the case on hand, it is to be noted that retrial was not ordered. The appellate Court, having considered the request of the accused, directed the trial Court to record the evidence of LWs 1 to 5 and return their depositions to it for consideration in the pending appeal. The order of the appellate Court in that regard has become final. The said order of the appellate Court reflects that it is of the opinion that the evidence of the said witnesses is essential for arriving at a just decision in the pending appeal. Pursuant to the said directions in the orders of the appellate Court, the trial Court, indeed, took up the exercise of recording the evidence of LWs 1 to 5 by ordering issuance of summonses to the said witnesses on payment of batta/process by the accused. On the date of hearing fixed for recording of the evidence of the said witnesses, that is, on 14.03.2016, except LW2, who could not be served with witness summons, all other witnesses, LWs 1, 3, 4 and 5 appeared before the trial Court. When the said witnesses sought time for giving evidence in the matter, the trial Court adjourned the matter on the request of the witnesses in attendance. The trial Court did not follow the procedure on that day and failed to take steps for binding over the witnesses for their attendance on the next date of hearing. In the considered view of this Court, the trial Court committed an error in not taking bonds from the witnesses in attendance for their future attendance before it. Having allowed them to leave the Court without obtaining bonds from them for their future attendance, the trial Court found fault with the accused for non payment of process and batta for

the attendance of the said witnesses on the future dates. In that view of the matter, this Court finds that the accused shall not be faulted and for no fault of him, he shall not be denied an opportunity for bringing on record the evidence of LWs 1 to 5, as the appellate Court, by its earlier orders having taken a view that the evidence of the said witnesses is essential for a just decision in the matter, already directed the trial Court to record the depositions of LWs 1 to 5 and return the same to it for consideration in the pending appeal. Having regard to the facts peculiar to the case, this Court finds that the accused cannot be made to suffer for the mistake committed by the trial Court and that the request of the petitioner/accused in this revision merits consideration. On the above analysis, this Court holds that the order impugned deserves to be set aside, and that an opportunity can be given to the petitioner/accused by directing the trial Court to complete the exercise of recording of evidence of LWs 1 to 5 and return the recorded depositions to the appellate Court for consideration in the appeal, which is pending before it. In the well considered view of this Court, such a course sub-serves the ends of justice.

8. In the result, the Criminal Revision Case is allowed and the impugned order is set aside. As a sequel, Crl.M.P.No.79 of 2017 is allowed. The trial Court is accordingly directed to record the evidence of LWs 1 to 5, as directed by the learned VII Additional District Judge, Ongole, in his initial order, dated 30.10.2014, in Crl.M.P.No.79 of 2014 in Crl.A.No.179 of 2014. The trial Court shall complete the said exercise by following the procedure established by law, however, as

expeditiously as possible, and preferably within one month from the date of receipt of a copy of this order.

Pending miscellaneous petitions, if any, shall stand closed.

27th July, 2017
Bvv

M.Seetharama Murthi, J

