

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CRL.P. Nos.1680, 1681, 1682, 1683 AND 1684 OF 2017

COMMON ORDER:

Questioning the identical orders, dated 21.02.2017, in C.F.R. Nos.491, 492, 493, 494 and 495 of 2017 in Calendar Case Nos.62, 63, 64, 65 and 66 of 2014, respectively, passed by the learned IV Special Magistrate, Hyderabad, the present Criminal Petitions under Section 482 of the Code of Criminal Procedure, 1973 (for short 'the Code') are filed.

2. The petitioner in all the aforesaid Criminal Petitions is accused in the aforesaid Calendar Cases in the respective complaints filed by respondent No.2 - complainant for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

3. Since the issue involved in all these Criminal Petitions is one and the same, it would be appropriate to dispose of all the petitions by tendering a common order and, accordingly, these petitions are being disposed of by way of common order.

4. The petitioner - accused filed respective applications under Section 311 of the Code requesting to summon one Smt. Vemulapalli Vishnu Priya, Managing Director of respondent No.2's Company viz., M/s. Contec Syndicate Private Limited, to depose in the said Calendar Cases on the ground that Ex.D8 - agreement of sale, dated

28.01.2009, was executed by Smt. Vemulapalli Vishnu Priya being Managing Director of the said company and the payments were made by her through cheques and she alone collected the blank pro-notes and blank cheques from the petitioner towards collateral security to the said transaction under Ex.D8 and, therefore, her evidence is very much essential for fair and proper adjudication and for just decision of the case.

5. It appears no counter was filed by respondent No.2 company. The learned Special Magistrate, somehow, without assigning any regular miscellaneous application numbers in the calendar cases, at the stage of C.F.R., rejected the request on the ground that application in Crl.M.P. No.2270 of 2016 filed by the petitioner - accused under Section 311 of the Code to recall PW.1 for the purpose of further cross-examination after Ex.D8 was marked though, allowed by the learned Magistrate, but, when it was challenged by respondent No.2 by filing Crl.P. No.16836 of 2016, the same was allowed by order, dated 28.12.2016 setting aside the order of the learned Special Magistrate, and since the witness now sought to be examined is no other than the wife of PW.1 being authorized signatory of the Company and PW.1 was already cross-examined twice at length and the petitions under challenge are only filed to drag on the proceedings, rejected the same.

6. Heard Sri C. Damodar Reddy, learned counsel for the petitioner - accused and Sri Venkateswara Rao Gudapati, learned counsel for respondent No.2 - complainant.

7. The learned counsel for the petitioner tendered elaborate arguments. He would submit that pursuant to the orders passed by a learned Single Judge of this Court in Criminal Petition No.659 of 2015 and batch, dated 04.04.2016, photostat copy of agreement of sale in the direction of leading secondary evidence was marked as Ex.D8, and in case the proposed witness is not summoned and examined, the very purpose of filing Ex.D8 would get defeated. He places reliance in **Rajaram Prasad Yadav v. State of Bihar**¹ as to the power of the Court to summon material witness or examine person present under Section 311 of the Code.

8. On the other hand, the learned counsel for respondent No.2 - complainant would strongly resist the request on the ground that the petitioner has not established the circumstances under which secondary evidence can be admitted, and subject to admissibility of Ex.D8, the said document was marked and question of summoning the proposed witness does not arise for the reasons; firstly, the very request made to summon PW.1 was earlier, though, allowed by the learned Special Magistrate, but was set aside by this Court; second, the change of advocate in place of earlier advocate on record is no

¹. (2013) 14 SCC 461

ground to allow the present application by setting aside the identical orders of the learned Special Magistrate, which are challenged in these petitions.

9. Before advertng to the respective contentions, it would be appropriate to extract Section 311 of the Code. It reads thus:

“311. Power to summon material witness, or examine person present:- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re- examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

10. So, the very object of enacting Section 311 of the Code is nothing but achieving a just decision of the case, and that has been the reason, the power vested under the said provision is made available to the Court, at any stage, in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness etc. It would be apt to refer to the expression of the Hon’ble Supreme Court contained in paragraph Nos.14 and 15 in **Rajaram Prasad Yadav’s Case** (Supra) thus:

“14. A conspicuous reading of Section 311 Code of Criminal Procedure would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the

expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Code of Criminal Procedure and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Code of Criminal Procedure. It is, therefore, imperative that the invocation of Section 311 Code of Criminal Procedure and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose

the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

15. In this context, we also wish to make a reference to certain decisions rendered by this Court on the interpretation of Section 311 Code of Criminal Procedure where, this Court highlighted as to the basic principles which are to be borne in mind, while dealing with an application under Section 311 Code of Criminal Procedure. In the decision reported in **Jamatraj Kewalji Govani v. State of Maharashtra – AIR 1968 SC 178**, this Court held as under in paragraph 14:

“14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction.”

(Emphasis added) ”

11. In the fact-situation occurring in the present case, one thing cannot be lost sight of. A learned Single Judge of this Court, by

orders, dated 04.04.2016, in Crl.P. No.659 of 2015 and batch, allowed the petitioner - accused to lead secondary evidence, of course, subject to a rider contained in Section 65 of the Indian Evidence Act, 1872, to establish the circumstances mentioned therein before leading secondary evidence. It is not in dispute that, the said document is marked as Ex.D8, but subject to admissibility by the learned Special Magistrate, which aspect requires to be adjudicated upon in the main hearing of the case by the learned Special Magistrate. This apart, as could be gathered from the orders under challenge, no counter was filed, perhaps, there would not be an occasion for filing counters as the petition was disposed of at C.F.R. stage but not after assigning miscellaneous petition number.

12. Be that as it may, once Ex.D8 is marked leaving apart that it was marked subject to admissibility as objection was raised by respondent No.2 - complainant, certainly, the request made by the petitioner herein to summon Smt. Vemulapalli Vishnu Priya, Managing Director of respondent No.2 Company cannot be disallowed. The rejection tantamount to defeating the very purpose of allowing the petitions in Crl.P. No.659 of 2015 and batch permitting the petitioner - accused to lead secondary evidence. This apart, the petitioner has set out the reasons to summon the proposed witness. The reasons being; firstly, the proposed witness is the Managing Director of respondent No.2 Company; second, she made payments

through cheques; and third, she alleged to have collected the cheques from the petitioner towards collateral security to the transaction under Ex.D8. Therefore, to arrive at just decision, it is imperative to summon the proposed witness for the purpose of cross-examining her. One important circumstance occurring in the present fact-scenario cannot be ignored. The learned Special Magistrate, somehow, allowed the petitions to recall PW.1 for the purpose of cross-examining him with reference to Ex.D8, but, somehow, a learned Single Judge of this Court in Crl.P. No.16823 of 2016 and batch, disallowed the same, setting aside the order of the learned Special Magistrate. Thus, the petitioner - accused had lost chance to confront Ex.D8 to PW.1, as it was subsequently marked only when this Court permitted to lead secondary evidence. Thus, viewed from any angle, summoning of proposed witness is absolutely indispensable for fair and proper adjudication in order to arrive at a just decision of the case.

13. It is no doubt true, the learned Special Magistrate has expressed his view by assigning reasons in rejecting the request stating that the petitioner has been filing petition after petition with a view to protract the litigation. Such a view appears to be incorrect for the reasons mentioned hereinbefore. However, to put an end to the present litigation, it is desirable to direct the learned Special Magistrate to dispose of the Calendar Cases within a period of two (2) months from the date of receipt of a copy of this order. The parties

are directed to cooperate with the Court. The proposed witness is no other than the wife of PW.1 and would be available for accepting summons and on receipt of summons, it would be appropriate for her to attend the Court to depose on the date appointed by the learned Special Court for her examination.

With the above observation, all the Criminal Petitions are allowed. As a sequel thereto, miscellaneous petitions, if any, pending in the petitions, stand closed.

A. SHANKAR NARAYANA, J

March 08, 2017.
Mgr

