THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.10057 OF 2016

ORDER:

This petition is filed under Section 482 Cr.P.C. to quash the proceedings dated 24.06.2016 in Crl.R.P.No.111 of 2016 passed by the IV Additional Metropolitan Sessions Judge, Hyderabad, whereby confirmed the order dated 18.04.2016 in Crl.M.P.No.1704 of 2015 in C.C.No.33 of 2014 of the IX Special Magistrate Court, Hyderabad.

2. The petitioner is the accused in C.C.No.33 of 2014 on the file of the IX Special Magistrate Court, Hyderabad, for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act'). The 2nd respondent is the complainant and filed a private complaint against the petitioner/accused for the offence punishable under Section 138 of the Act, contending that there is a legally enforceable debt and that the cheque was issued towards discharge of legally enforceable debt, which was dishonoured on presentation. Thereafter, he issued notice in compliance of Section 138 of the Act demanding the petitioner/accused to pay the amount covered by cheque. But, the accused failed to pay the same. Thereby, he filed the complaint before the trial Court. The allegation in the complaint is that one Dwaraka Prasad Agarwal, father of the accused, who is no other than maternal uncle of the complainant requested for financial assistance for his business needs and he promised to repay the

amount within six months to the complainant. Accordingly, the complainant advanced an amount of Rs.74,50,000/-between March and June, 2013 i.e. within a span of four months to the accused. But, the accused failed to repay the same even after expiry of six months as agreed. Despite demands by the complainant, the petitioner/accused did not repay the same and issued post dated cheques bearing Nos.221805, 221806, 221820, 221821 dated 10.08.2014 towards part payment to clear debt due and Memorandum of Understanding (MoU) was also executed by the father of the accused on 14.02.2014. Thus, the basis for the claim is Memorandum of Understanding, which is unstamped and unregistered. Since the claim of the 2nd respondent/complainant is based on Memorandum of Understanding, the petitioner/accused filed a petition before the Special Magistrate under Section 33 of the Indian Stamp Act, to impound the Memorandum of Understanding dated 14.02.2014. The 2nd respondent/complainant filed counter contending that the petition is not maintainable, besides raising several other contentions. Upon hearing argument of both the counsel, the Special Magistrate held that the document cannot be impounded and negated the relief.

3. Aggrieved by the order passed by the Special Magistrate, the petitioner preferred the Criminal Revision Petition No.111 of 2016 before the IV Additional Metropolitan Sessions Judge, Hyderabad, and by order dated 24.06.2016 the learned Judge confirmed the order passed by the Special Magistrate, dismissing the revision petition.

4. The order passed by the Sessions Judge is challenged before this Court on several grounds mainly contending that the Memorandum of Understanding, which is sought to be marked by the respondent, is inadmissible in evidence, since the terms and conditions of the document do not virtually amount to mortgage. But, without looking into the contents of the document, the Special Magistrate dismissed the petition and the same was confirmed by the revisional Court. Section 33(i) of the Indian Stamp Act has to be read along with the proviso and it cannot be read in isolation. Even if Sections 35(d) and 33 of the Indian Stamp Act are read conscientiously, the document is liable to be impounded, otherwise it cannot be admitted in evidence. But the Special Magistrate and Revisional Court did not consider the purport of Sections 35(d) and 33(i) of the Indian Stamp Act in proper perspective and committed an error in negating the relief claimed by the petitioner and prayed to set aside the same and allow Crl.MP.No.1704 of 2015 directing the Special Magistrate to impound the document in accordance with the provisions of the Indian Stamp Act.

5. During hearing, Sri Pratap Narayan Sanghi, learned counsel for the petitioner contended that though the Special Magistrate Court is criminal court, it is designated to try the cases under the Negotiable Instruments Act, more particularly, the offence punishable under Section 138 of the Act and virtually the criminal Court is competent to exercise its discretion to impound the documents under Section 33 r/w Section 35 of the Stamp Act, but

without construing the document in proper perspective, the relief claimed by the petitioner is rejected erroneously, and the Court ought to have impounded the document and collect the stamp duty and penalty on the document, as per the provisions of the Stamp Act. When question of collecting stamp duty before the Court arises, the Court has to consider the provisions strictly, since it is a loss to Government exchequer and on strict construing of the document, the Court has to collect stamp duty and penalty payable and failure to exercise such discretion would amount to denial to collect the amount due to the Government. Therefore, such approach cannot be permitted and prayed to set aside the orders of Special Magistrate and Revisional Court.

6. Whereas, Sri B.Chandrasen Reddy, the learned counsel for the 2nd respondent/complainant, argued totally in support of the order under challenge and requested to dismiss the petition.

7. In view of the specific contention raised by the learned counsel for the petitioner/accused, it is relevant to advert to the provisions of Section 33(2) proviso (a) and Section 35(d) of the Indian Stamp Act.

> "33. Examination and impounding of instruments :-- (1) Every person having by law or consent of parties, authority to receive evidence, and every person in charge of a public office, except an officer of a police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions shall, if it appears to him that such instrument is not duly stamped, impound the same.
>
> (2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed :

Provided that--

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898.

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument, under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt--

(a) the State Government may determine what offices shall be deemed to be public offices; and

(b) the State Government may determine who shall be deemed to be persons in charge of public offices. "

35. Instruments not duly stamped inadmissible in evidence etc :-- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that--

(a) any such instrument not being an instrument chargeable with a duty of twenty paise or a mortgage of crop (Article 36(a) of Schedule I-A) chargeable under clause (aa) or (bb) of Section 3 with a duty of forty paise or a bill of exchange or promissory note, shall subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of * [fifteen rupees], or, when ten times the amount of the proper duty or deficient portion thereof exceeds * [fifteen rupees] of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of * [three rupees] by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

> (e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government, or where it bears the certificate of the Collector as provided by Section 32 or any other provision of this Act."

8. Section 33(i) deals with duty of the public officer to impound the document but the proviso annexed to sub-clause(2) is clear that the above provision will have no application to the proceedings under Chapter-XII or Chapter-XXXIV of Code that Code of Criminal Procedure (old), 1898 and now Chapters IX and X of Code of Criminal Procedure, 1975. Thus, it is clear from proviso under Section 33(2), the Magistrate can examine and impound the document in the course of any proceedings only for limited purpose of deciding any questions under Chapters IX and X of Cr.P.C. not otherwise.

9. Section 33 provides for impounding of instruments not duly stamped but the proviso thereto makes exception in case of Magistrate or Judge of a criminal Court in the course of any criminal proceeding the Magistrate or Judge of a Criminal Court need not be impound any document produced before him in criminal proceedings if he does not think fit to do so. Therefore, the power conferred on the Court under the proviso to sub-section (2) of 33 is purely a discretionary and such discretion has to be exercised judiciously.

10. Sub-section (d) of Section 35 is also an exception to receipt of instrument not duly stamped in evidence. Section 35 mandates that no instrument chargeable with duty shall be admitted in evidence for any purpose of any person having by law or consent of

parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. The Special Magistrate is a person under authority to receive evidence in a Calendar Case, Section 35 undoubtedly applicable to the person authorized to record evidence in any proceedings but clauses (a) to (e) of proviso are the exceptions in Jagannath Rahatgir v. Pandit Deokinandan[1]. The proviso (d) is relevant for the purpose of deciding the present issue and it reads as follows:

> "35(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898(Chapters 9 and 10 of Cr.P.C., 1973);"

Proviso (d) to Section 35 permits the Magistrate to receive any document and admit any instrument in evidence in any proceedings in criminal Court but create an interdict on the power of the Magistrate to receive such insufficiently stamped document in any proceedings under Chapters IX and X of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'). Chapter-IX of Cr.P.C. deals with order for maintenance of the wife, children and parents. Chapter X of Cr.P.C. deals with maintenance of public order and tranquility covering Sections 125 to 128 and 129 to 148 Cr.P.C. respectively. Therefore, in the proceedings covered by these Chapters, the Magistrate is incompetent to receive insufficiently stamped document but in other cases the Magistrate is entitled to

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[1] 29 Ind.Cas.671

admit insufficient stamp or unstamped documents in evidence in any criminal case pending before it.

11. A similar issue came up before the High Court of Calcutta in Jagannath Rahatgir (supra), their Lordships, Charles William Chitty and Beachcroft, JJ held that when an instrument insufficiently stamped is produced before a criminal Court and tendered for admitting the document in evidence, it is optional to the Magistrate under Section 33 to impound or examine the document, if it is appeared to be insufficiently stamped. But the prohibition contained in the first part of Section 35 that no instrument chargeable with duty shall be admitted in evidence for any purpose or acted upon unless it be duly stamped, does not apply to proceedings in a Criminal Court.

12. In identical question regarding admissibility of a document, when an appeal for the offence punishable under Section 138 of the Act came up before Madhya Pradesh High Court in Ramesh Giri v. Dheeraj Gobhuj[2], the Single Judge of the Court had an occasion to deal with a similar petition and while deciding an application under Section 482 Cr.P.C. challenging the order passed by the Magistrate and confirmed by the revisional Court, based on Section 33 of the Indian Stamp Act and sub-section (2)(a) proviso held that proceedings under Section 138 of the Act are summary in nature and the Magistrate declined to impound the document. The same was confirmed by the revisional Court since Section 33(2) proviso

[2] 2014(2) JLJ 408

(a) does not require impounding the document which has been produced before the Court by the complainant. In those circumstances, the Court found that proceedings under Section 138 of the Act are criminal in nature although offence may be in the nature of civil and the document is admissible and the bar under Sections 33 and 34 would not apply to the proceedings under Section 138 of the Negotiable Instruments cases and confirmed the order passed by the revisional Court declining to direct the Magistrate to impound the document to levy stamp duty and penalty.

13. As discussed above, Section 33(2) proviso (a) and Section 35(d) of the Indian Stamp Act are made clear only for limited purpose of deciding the matters under Chapters IX and X of Cr.P.C. In other matters, the Court need not exercise discretion to impound the document and a Magistrate or a Judge of a criminal Court is not required to examine any instrument produced before him or come before him for the purpose of ascertaining whether or not instrument is properly stamped and not required to impound the same, if the same is found properly stamped, if such Magistrate or Judge of criminal Court does not think fit to do so. However, this exception is not applicable to Chapters IX and X of Cr.P.C, 1973. Thus exception created under proviso (a) is purely discretion of the Magistrate or Judge of a criminal Court. It is a settled law that whenever discretion is vested with the Court, it has to be exercised judiciously.

14. Having regard to the facts and circumstances of the case on hand, the exception under proviso (a) to sub-section (2) of Section 33 of the Stamp Act is required to be applicable or not is the question.

15. In the present facts of the case, the offence allegedly committed by the petitioner/accused is punishable under Section 138 of the Act and in Section 33 sub-section (2), proviso (a) is an exception to impound such document since the proceedings are criminal trial, where the Court is empowered to impose sentence against the accused. In those circumstances, the Magistrate is bound to exercise his discretion to hold that the mandate of sub-sections 1 and 2 of Section 33 are required to be applied in respect of any instrument in question insufficiently stamped instrument in question and non-exercise of discretion so vested in the Magistrate would result in great hardship and prejudice to the complainant and therefore when the Magistrate exercised his discretion not to impound the document by exercising the discretionary power vested on it by virtue of Section 33 (2) proviso and Section 35 proviso (d), such orders cannot be enquired, while exercising jurisdiction under Section 138 of the Act. A similar question came before Karnataka High Court in Smt.Ravikala v.K.V.Rama Murthy (MANU/KA/0163/2011) in Crl.P.No.5589 of 2010 C/W Crl.P.No.4813 of 2010 decided on 18.03.2011, persuaded by the principles laid down in the judgments of Bangalore, Madhya Pradesh and Calcutta High Courts, where it is abundantly clear that the power vested on the Magistrate or a Judge presiding criminal

Court under Sections 33 and 35 is purely discretionary and the Magistrate has to exercise its power judiciously based on the facts of each case. The offence allegedly committed by the petitioner is punishable under Section 138 of the Act, as discussed above, on the ground that the document i.e., Memorandum of Understanding is inadmissible and reject the claim of the complainant while holding that there is no legally enforceable debt and issue of cheques were not towards discharge of legally enforceable debt. It would frustrate the very object of the incorporating Section 138 of the Act and the power conferred under Section 33(2) proviso (a), 35 proviso (d) of the Stamp Act. Therefore, exercising discretion not to impound the document under Section 33 is purely based on the facts of case so as to uphold the intention of the legislature in incorporating the provisions referred to above and ensure that no accused shall escape from the criminal liability on mere technicality. Hence, I find that the Special Magistrate and IV Additional Metropolitan Sessions Judge at Hyderabad have rightly exercised their discretion judiciously and it warrants no interference of the Court, in view of the law referred to above with reference to the specific provisions under the Indian Stamp Act.

16. The learned counsel for the appellant mainly contended that the Memorandum of Understanding dated 14.02.2014 partakes the character of the mortgage and such an unregistered, un-stamped document cannot be received in evidence and placed reliance on several judgments of the different Courts. In support of his

contention, he has drawn the attention of this Court in Avinash Kumar Chauhan v. Vijay Krishna Mishra[3] and the Apex Court highlighted the words "for any purpose whatsoever" and concluded that the unregistered deed of sale was an instrument and it requires payment of stamp duty applicable to a deed of conveyance. Adequate stamp duty admittedly was not paid. Therefore, the Court is empowered to pass an order in terms of Section 35 of the Indian Stamp Act since the document was inadmissible in evidence and even for the collateral purpose and observed that 'the Parliament has, in Section 35 of the Act, advisedly used the words "for any purpose whatsoever". Thus, the purpose for which a document is sought to be admitted in evidence or the extent thereof would not be a relevant factor for not invoking the provisions and therefore such document cannot be admitted in evidence and further drawn attention of this Court to another judgment reported in Government of Andhra Pradesh v. Smt.P.Laxmi Devi[4], wherein the Supreme Court had an occasion to decide the interpretation of taxing statute and held that all decisions in the economic and social spheres are essentially ad hoc and experimental. Since economic matters are extremely complicated, this inevitably entails special treatment for special situations. The State must therefore be left with wide latitude in devising ways and means of fiscal or regulatory measures, and the Court should not, unless compelled by the statute or by the

[3] AIR 2009 SC 1489(1)
[4] AIR 2008 SC 1640

Constitution, encroach into this field, or invalidate such law. Greater latitude must be given to the legislature while adjudging the constitutionality of the statute because the Court does not consist of economic or administrative experts. It has no expertise in these matters, and in this age of specialization when policies have to be laid down with great care after consulting the specialists in the field, it will be wholly unwise for the Court to encroach into the domain of the executive or legislative and try to enforce its own views and perceptions. The Apex Court also adverted to Section 33(i) and concluded that in view of the language used in Section 33(i) of the Stamp Act there is no discretion in the authority mentioned in Section 33(i) of the Stamp Act to impound the document or not to do so. Thus, the Court is bound to. In M/s. SMS Tea Estates Pvt. Ltd. v. M/s.Chandmari Tea Co.Pvt.Ltd[5], the Apex Court held that when an unregistered sale deed is inadmissible in evidence, but compulsorily registerable document, the same cannot be enforced in the courts of law.

17. He further drawn the attention of this Court to S.Sundram Pillai v. V.R.Pattabiraman[6], while discussing about the interpretation of statutes and functions of the Court held that a proviso laid down certain guidelines to interpret said legislations and held as follows:

> "The next question that arises for consideration is as to what is the scope of a proviso and what is the ambit of an explanation either to a proviso or to any other statutory provision. We shall take up the question of the nature, scope and extent of a

[5] 2011 AIR SCW 4484(1)
[6] AIR 1985 SC 582(1)

> proviso. The well established rule of interpretation of a proviso is that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment."

17 In Andhra Pradesh State Council of Higher Education v. Union of India[7], it was held that provisions of Andhra Pradesh Reorganization Act, 2014 have to be harmoniously considered. Similarly, in Casio India Company Pvt. Ltd., v. State of Haryana[8], while interpreting the provisions of sales tax and VAT the Apex Court reiterated the same principle that the proper manner of interpreting proviso and main provision was highlighted and held that except for instances dealt with in the proviso, it should not be used for interpreting main provision/enactment so as to exclude something by implication.

18 In all the above referred judgments, the dispute is with regard to civil rights and interpretation of various provisions, but the petition before the Special Magistrate is filed in a proceedings in criminal trial i.e. for the offence punishable under Section 138 of the Act. In the judgments referred supra, fiscal enactments and economic legislations must be construed directly and they have no application to the criminal proceedings. The Indian Stamp Act itself contains exemption to Section 33(1) and (2) and Section 35 of the Stamp Act. When such exemption is granted by the Act itself, there is no other scope for interpreting the provisions and the

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[7] 2016(6) SCC 635
[8] 2016(6)SCC 209

intention of the legislature in incorporating proviso (a) to sub-section (2) Section 33 and proviso (d) to Section 35 is only to enable the Courts to receive un-stamped or insufficient stamped documents in evidence without insisting for impound of a document as required under Section 33(i) and (2) and bar under Section 35 of the Indian Stamp Act is to see that no criminal proceedings shall be frustrated on account of such interdict contained in the Act and not to allow any criminal to escape from the criminal laws, un-punished. If the interpretation given by the Courts in civil proceedings is applied to the proceedings in a criminal case, it would frustrate the very object of the legislatures in incorporating true exemptions referred supra. Therefore, the interpretation to the provisions of the Stamp Act, as laid down by the Apex Court in the judgments referred supra, cannot be applied to the proceedings in a criminal case, in view of exemption clauses contained in proviso (a) to sub-section (2) of 33 and proviso (d) of Section 35 of the Stamp Act. Therefore, the principles laid down in the judgments relied on by the learned counsel for the petitioner have no relevance to the present facts and when the Special Magistrate and the Revisional Courts have exercised their discretion under Sections 33(2) proviso (a) and 35 proviso (d), this Court cannot interfere with such orders while exercising inherent power under Section 482 Cr.P.C. Section 482 Cr.P.C. confers inherent power on the High Court being the highest Court of the State only for limited purpose of enforcing the orders passed under the Code, to prevent abuse of process of the Court and to meet the ends of justice in view of the limited power conferred on it, unless the order passed by the trial Court and confirmed by the revisional Court is prima facie erroneous and the court cannot interfere by exercising inherent power under Section 482 Cr.P.C. Therefore, I find no illegality in the order passed by the trial Court in exercising discretion that conferred on the Courts below to set aside the same, consequently, persuaded by the law laid down by Calcutta High Court in as early as in 1950 and in the latter judgment of the Karnataka and Madhya Pradesh High Courts and interpreting the provisions under Sections 33 and 35 of the Stamp Act. I am of the view that the orders passed by the Special Magistrate confirmed by the IV Additional Metropolitan Sessions Judge at Hyderabad, by exercising jurisdiction under Section 397 Cr.P.C., are free from any illegality and legal infirmity calling for interference of this Court, while exercising power under Section 482 Cr.P.C. Hence, petition is devoid of merits and liable to be dismissed.

19. In the result, the Criminal Petition is dismissed at the stage of admission.

M. SATYANARAYANA MURTHY, J

Date: 19.01.2017
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Note: L.R.copy to be marked-yes

* THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

+ CRIMINAL PETITION No.10057 OF 2016

% 19-01-2017

Between:

Preetesh Kumar ...petitioner

Vs.

The State of Telangana and another ... respondents

!Counsel for the petitioner : M/s.Sri Pratap Narayan Sanghi

Counsel for the Respondents: Sri B.Chandrasen Reddy

<Gist :

>Head Note:

? Cases referred:

[1] 29 Ind.Cas.671
[2] 2014(2) JLJ 408
[3] AIR 2009 SC 1489(1)
[4] AIR 2008 SC 1640
[5] 2011 AIR SCW 4484(1)
[6] AIR 1985 SC 582(1)
[7] 2016(6) SCC 635
[8] 2016(6)SCC 209

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD

FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

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CRIMINAL PETITION No.10057 OF 2016

Between:

Preetesh Kumar ...petitioner

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DATE OF JUDGMENT PRONOUNCED: 19 .01.2017

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

1	Whether Reporters of Local newspapers may be allowed to see the Judgments?	Yes/No
2	Whether the copies of judgment may be marked to Law Reports/Journals	Yes/No
3	Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?	Yes/No