

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.10685 of 2017

ORDER:

This Criminal Petition, under Section 482 Cr.P.C., is filed by the petitioner /accused aggrieved by the order, dated 11.10.2017, in CrI.M.P.No.3720 of 2017 in C.C.No.295 of 2016 passed by the XXI Special Magistrate, Hyderabad.

2. The 1st respondent-*de facto* complainant filed the aforesaid Miscellaneous Petition under Section 92 Cr.P.C., to receive the documents as evidence during trial in the aforesaid Calendar Case. The trial Court after considering the material on record, allowed the petition. Challenging the same, the present petition is filed by the petitioner herein/accused.

3. In the affidavit filed in support of the petition filed before the Court below, it is stated that the 1st respondent herein/complainant filed P.W.1 chief examination affidavit on 03.08.2017 along with documents and the same were marked as Exs.P.1 to P.6 and case is posted for cross-examination of P.W.1. It is stated that during cross-examination of P.W.1, learned counsel for the petitioner herein/accused before the Court below took a stand that the petitioner had no acquaintance with the complainant and there was no transaction between them and the complainant has not filed any document to show that the petitioner has borrowed any amount from him. It is further stated that the petitioner has denied execution of document in favour of the complainant, but, in fact, the petitioner has executed an

undertaking, dated 09.02.2016, in favour of the complainant confirming of the debt taken by him.

4. The petitioner/accused filed counter stating that after completion of cross-examination of P.W.1, the documents cannot be received as evidence. The controversy in this case is with reference to acknowledgment of debt, dated 09.02.2016. Therefore, introducing new document cannot be permitted either under Section 92 Cr.P.C., or any other provision of the law and prayed to dismiss the petition.

5. The trial Court, after considering rival contentions, allowed the petition while permitting the accused to raise all contentions regarding genuineness of document etc., and all other legal pleas at the time of argument.

6. Aggrieved by the order passed by the learned Magistrate, the present petition is filed on the ground that at the stage of cross-examination of P.W.1, without reference to as to the acknowledgment of debt, dated 9.02.2016, in the notice issued in compliance of clause (b) proviso to Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act'), document filed the complainant cannot be received as evidence; that the document was brought into existence for the first time, as such allowing such application at this stage may cause serious prejudice to the petitioner and requested the Court set aside the impugned order.

7. As seen from the order under challenge, the trial Court relied on the judgment of the Apex Court in **T.Nagappa Vs.**

Y.R.Muralidhar¹, where the Supreme Court held that mentioning of wrong provision is not a ground to dismiss the petition, if the petition is otherwise, entitled to claim the relief. This position is not in quarrel. However, the Court below did not record any reason with reference to the contentions raised by learned counsel for the petitioner/accused.

8. Section 242 Cr.P.C., is a relevant provision, which deals with receiving of evidence for prosecution. But, quoting wrong provision under Section 92 Cr.P.C., is in consequential. As per the notice issued in the month of June, 2016, there was no reference about execution of acknowledgment of debt, dated 09.02.2016, contacted by the accused and similarly the complaint in C.C.No.295 of 2016, also there was no whisper about execution of such acknowledgment, but for the first time, the document is introduced since the petitioner during his cross-examination has denied borrowing of amount from the complainant. That necessitated the respondent to introduce the new document. Therefore, in the absence of any reference either in the notice issued in compliance of clause (b) proviso to Section 138 of the Act or in the complaint, the genuineness of the document is doubtful. When the respondent is not relied on such document, receiving document at this stage is impermissible. But, the trial Court did not mark the same as on today. However, the genuineness of the document can be decided based on the allegations made in the complaint and notice issued in compliance of clause (b) proviso to Section 138 of the Act, at the end of the trial. Therefore, receiving document by exercising power under Section 242 Cr.P.C., cannot be faulted, but

¹ 2008 (2) SCC (CrI) 677

the genuineness can be questioned at any stage. Even at the end of the trial, the Court can record its finding with regard to the allegations made in the notice and the complaint including the evidence adduced, if any, in support of the document. Therefore, receiving document at this stage is not illegal since it is subject to proof, relevancy, and admissibility of execution of the document i.e., acknowledgment of debt, dated 09.02.2016.

9. The impugned order is only an Interlocutory in nature and against which, no revision is maintainable. The Hon'ble Apex Court in **Sethuraman v. Rajamanickam**², held that in view of bar under Sub Section (2) of Section 397 Cr.P.C., the petitioner is not entitled to file revision under Sections 397 and 401 Cr.P.C., but filing the present petition under Section 482 Cr.P.C., is to circumvent the power under Section 397 (2) Cr.P.C. When there is a bar under Section 397 (2) Cr.P.C., the interference in respect of Interlocutory application under Section 482 Cr.P.C., cannot be availed to achieve the same objective. In other words, Section 397 (2) Cr.P.C., prohibits interference with interlocutory orders, it would not be permissible to resort to Section 482 Cr.P.C. To set aside an Interlocutor order prohibition, Section 397 Cr.P.C., will govern Section 482 Cr.P.C., thereof as held by the Full Bench of the Apex Court in **Girish Kumar Suneja v. C.B.I**³. Therefore, in view of law declared by the Apex Court, the petition is not maintainable. However liberty is given to the petitioner to question the genuineness of the document during trial by confronting the same to the witness at the time of cross-examination. If such

² 2009 CriLJ 2247

³ AIR 2017 SC 3620

document is not marked, decide the genuineness of the document i.e., acknowledgment of debt, dated 09.02.2016, based on the allegations made in the notice issued in compliance of clause (b) proviso to Section 138 of the Act, in accordance with law.

10. With the above direction, the Criminal Petition is disposed of. Miscellaneous petitions, if any, pending in this petition shall stand closed.

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NOVEMBER 15, 2017
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M. SATYANARAYANA MURTHY, J



THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY



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Date: 15.11.2017

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