

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.10409 OF 2017

ORDER:

This criminal petition is filed under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to recall the NBW issued against the petitioner/A-2 in P.R.C.No.17 of 2017 dated 14.10.2017 on the file of IV Additional Chief Metropolitan Magistrate, Visakhapatnam, on the ground that the order passed by this Court in CrI.P.No.3866 of 2017 dated 05.09.2017 not to arrest the petitioner, pending investigation.

That apart, the petitioner made an allegation in paragraph 5 of the petition that the petitioner moved this Court only for limited relief to recall the NBW issued against this petitioner in P.R.C.No.17 of 2017, in view of the order passed by this Court in CrI.P.No.3866 of 2017.

During hearing, learned counsel for the petitioner Sri R. Siva Sai Swaroop contended that when there is an order not to arrest this petitioner, except due to necessity to arrest, during pendency of investigation, therefore issuing NBW is an illegality and the Court below instead of issuing summons issued NBWs, which is an illegal order and requested this Court to recall the NBW. Further, the learned counsel for the petitioner placed reliance on the judgment of this Court in **Chunduri Srinivasa Rao and others v. Akasapu Nageswara Rao and another**¹ to contend that this Court can pass such an order.

¹ 2010 (2) ALD (Criminal) 963 (AP)

Heard learned Public Prosecutor for the State of Andhra Pradesh.

In view of the specific contention raised before this Court, it is apposite to extract the directions issued by this Court in Crl.P.No.3866 of 2017 dated 05.09.2017, which reads as follows:

“A perusal of the material referred supra of the crime still under investigation no way requires interference to quash the FIR but for not to arrest unless there is necessity of arrest pending investigation apart from the petitioners seeking to compound at the crime stage by securing defacto-complainant was already dismissed on 04.08.2017. It is made clear that the dismissal order, dt.04.08.2017 no way prejudice any of the available rights of the accused but for after completion of investigation only if any to invoke if there is no material to take cognizance in the event of filing report and otherwise on taking cognizance.”

The specific contention urged in paragraph no.5 of the petition is to cancel the NBW issued against the petitioner, in view of the order passed by this Court in Crl.P.No.3866 of 2017 dated 05.09.2017. Thus, the contention of the learned counsel for the petitioner is that, since this Court passed an order not to arrest during pendency of investigation, the NBW issued against him has to be cancelled. Of course, in the last paragraph of the affidavit, learned counsel for the petitioner requested this Court to recall the NBW which is inconsistent with the allegation made in paragraph 5 of the petition.

In view of the limited relief granted by this Court in Crl.P.No.3866 of 2017 dated 05.09.2017, the investigating agency was indirectly restrained from arrest of the petitioner, pending investigation. But, in the present case, the investigation is completed and charge sheet is also filed before the Court below

and the same was registered as P.R.C.NO.17 OF 2017 on the file of IV Additional Chief Metropolitan Magistrate, Visakhapatnam. Thus, by the date of issuing NBW, no investigation is pending. Therefore, the order passed by this Court in Crl.P.No.3866 of 2017 would not come in the way of passing any order for issue of NBW. As such, on the strength of the order passed by this Court in Crl.P.No.3866 of 2017, the petitioner is not entitled to claim either cancellation or recall of NBW issued against him.

The other contention of the learned counsel for the petitioner is that, when a case is registered as P.R.C, the course open to the Court is to issue summons, but instead of issuing summons, the Court issued NBW against this petitioner, which is contrary to the law. But, the order passed by the Court below issuing NBW is not under challenge in this petition in any of the grounds. Therefore, this Court cannot set-aside the order passed by the Court below, since it was not challenged in this criminal petition filed under Section 482 Cr.P.C.

Learned counsel for the petitioner would draw attention of this Court to the decision rendered by this Court in **Chunduri Srinivasa Rao**¹ case, wherein, this Court in paragraphs 5 & 7 held as follows:

“5. After filing of the charge sheet, the learned Magistrate issued summons to the accused. The accused, who received the summons have been attending the Court regularly in PRC.No. 37 of 2009. While so, the Additional Public Prosecutor filed a petition before the learned Magistrate on 30-10-2009 under section 204 Cr.P.C. stating inter alia that the learned Magistrate ought to have issued Non-bailable warrants against the accused instead of issuing summons. By allowing the application, the learned Magistrate issued Non-bailable warrants against the accused and now the Non-bailable warrants are pending execution.”

7. Thus, according to the accused, since the learned Additional Judicial Magistrate of First Class,

Tadepalligudem, after filing of the charge sheet exercised his jurisdiction to issue summons and in obedience thereof the accused have been attending the Court regularly, issuance of Non-bailable warrants against them on the petition filed by the Additional Public Prosecutor is illegal.

No doubt, if the Magistrate passed the order on such application filed by the learned Public Prosecutor and issued NBW, the order is illegal or atleast, when there was no challenge about the order passed by the Court issuing NBW, this Court cannot set-aside the order. Though, the petitioner sought two reliefs; (i) to cancel the NBW and (ii) to recall the NBW, the course open to the petitioner is to appear before the Court and file a petition under Section 70(2) Cr.P.C to recall NBW or if he is aggrieved by the order of issuing NBW instead of issuing summons, the petitioner has to challenge the same. But, in the present case, on the ground that this Court passed an order in CrI.P.no.3866 of 2017 not to arrest the petitioner during pendency of investigation, NBW cannot be recalled or cancelled. Hence, I find no ground to exercise power under Section 482 Cr.P.C, to quash the proceedings, as I find no illegality in the order passed by the Court below. Consequently, the criminal petition is liable to be dismissed.

In the result, the criminal petition is dismissed, at the stage of admission. However, it is left open to the petitioner to move appropriate application before the Magistrate concerned.

Consequently, miscellaneous applications pending if any, shall stand closed.

JUSTICE M. SATYANARAYANA MURTHY

09.11.2017

SP