

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.11675 OF 2017

ORDER:

This petition, under Section 482 of Cr.P.C., is filed by the petitioner-accused to quash the order dated 23.10.2017 in CrI.M.P.No.836 of 2017 in C.C.No.61 of 2015 passed by XV Additional Judge-cum-XIX Additional Chief Metropolitan Magistrate, Secunderabad, wherein and whereby the petition filed under Section 311 of Cr.P.C. to recall PW.1 for further cross-examination, was dismissed.

2. The petitioner, who is an accused in C.C.No.61 of 2015, filed a petition under Section 311 of Cr.P.C. to recall PW.1 for further cross-examination on the ground that during cross-examination of PW.1, he deposed facts contrary and some new facts, which are not mentioned in the complaint. Therefore, after collection of more information pertaining to the defence, the petitioner intends to cross-examine PW.1 further on vital aspects and therefore, sought for recall of PW.1

3. The second respondent filed counter before the trial Court contending that he filed the complaint in the year 2014. Since then the petitioner did not choose to appear before the trial Court though summons were served. In the month of April, 2016, this respondent filed an affidavit in lieu of examination in chief and he was cross-examined on 03.08.2017 i.e., 1½ years after examination in chief, and the present application is filed to drag on

the proceedings for some more time without any basis and requested to dismiss the petition.

4. At the stage of admission, this Court raised an objection about the maintainability of the criminal petition under Section 482 of Cr.P.C., but the learned counsel for the petitioner contended that the trial Court can exercise its power under Section 311 of Cr.P.C. at any stage even after completion of Section 313 Cr.P.C. examination to do complete justice to the parties. But the trial Court did not exercise its power that conferred on it under Section 311 of Cr.P.C. and committed an error in dismissing the petition filed under Section 311 of Cr.P.C. and requested to afford a reasonable opportunity to the petitioner to cross-examine PW.1 further.

5. Admittedly, the order under challenge in a petition filed under Section 311 of Cr.P.C. is of interlocutory in nature and against it, no revision is maintainable in view of bar under Sub-Section (2) of Section 397 of Cr.P.C and in view of the law declared by the Hon'ble Apex Court in **SETHURAMAN v. RAJAMANICKAM**¹. Therefore, instead of filing a petition under Section 397 of Cr.P.C., the petitioner approached this Court invoking the jurisdiction under Section 482 of Cr.P.C. In the later judgment of the Hon'ble Apex Court in "**Girish Kumar Suneja v. C.B.P**", the Full Bench of the Supreme Court had an occasion to decide the similar subject and held as follows:

¹ 2009 Cr.L.J. 2247

² AIR 2017 SC 3620

“The second reason why Amar Nath (AIR 1977 SC 2185) is important is that it invokes the principle, in the context of criminal law, that what cannot be done directly cannot be done indirectly. Therefore, when Section 397(2) of the Code of Criminal Procedure prohibits interference in respect of interlocutory orders, Section 482 of the Code of Criminal Procedure cannot be availed of to achieve the same objective. In other words, since Section 397(2) of the Code of Criminal Procedure prohibits interference with interlocutory orders, it would not be permissible to resort to Section 482 of the Code of Criminal Procedure to set aside an interlocutory order. This is what this Court held:

While we fully agree with the view taken by the learned Judge that where a revision to the High Court against the order of the Subordinate Judge is expressly barred Under Sub-section (2) of Section 397 of the 1973 Code the inherent powers contained in Section 482 would not be available to defeat the bar contained in Section 397(2). Section 482 of the 1973 Code contains the inherent powers of the Court and does not confer any new powers but preserves the powers which the High Court already possessed. A harmonious construction of Sections 397 and 482 would lead to the irresistible conclusion that where a particular order is expressly barred Under Section 397(2) and cannot be the subject of revision by the High Court, then to such a case the provisions of Section 482 would not apply. It is well settled that the inherent powers of the Court can ordinarily be exercised when there is no express provision on the subject-matter. Where there is an express provision, barring a particular remedy, the Court cannot resort to the exercise of inherent powers.

This view was reaffirmed in Madhu Limaye (AIR 1978 SC 47) when the following principles were approved in relation to Section 482 of the Code of Criminal Procedure in the context of Section 397(2) thereof. The principles are:

- (1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;
- (2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;
- (3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

Therefore, it is quite clear that the prohibition in Section 397 of the Code of Criminal Procedure will govern Section 482 thereof. We endorse this view.”

In view of the law declared by the Full Bench of the Hon’ble Apex Court, the present petition is not maintainable, as there is a clear bar under Sub-Section (2) of Section 397 Cr.P.C. to entertain a revision against the interlocutory order and such an order

cannot be challenged in a petition filed under Section 482 Cr.P.C. Therefore, the petition is not maintainable on this ground alone.

6. The other contention raised by the learned counsel for the petitioner is that a just and reasonable opportunity should be given to the petitioner to cross-examine PW.1 further to substantiate his contentions. The main ground relied upon by the petitioner is that during cross-examination of PW.1 on 03.08.2017, he deposed the facts contrary and some new facts, which are not mentioned/averred in his complaint and evidence affidavit. Therefore, the petitioner sought for recall of PW.1, but the petitioner is conscious about the affidavit filed in lieu of examination in chief at the earliest stage, since, he was cross-examined almost after expiry of 1½ years from the date of filing of an affidavit in lieu of examination in chief. However, such cause is not sufficient to recall PW.1 even the allegations made in the petition filed under Section 311 of Cr.P.C. are accepted. It is nothing but negligence on the part of the counsel appearing for the petitioner before the trial Court. Such negligence of the counsel is not a ground to recall PW.1 by exercising the power under Section 311 of Cr.P.C. Hence, I find no ground much less sufficient ground to recall PW.1.

7. In view of my foregoing discussion, the petition is liable to be dismissed on two grounds. The first ground is that the petition under Section 482 of Cr.P.C. is not maintainable in view of the law declared by the Hon'ble Apex Court in **Girish Kumar Suneja's** case (supra 2) and the second ground is that no cause much less

sufficient cause is mentioned in the petition filed under Section 311 of Cr.P.C. enabling the trial Court to exercise its power under Section 311 of Cr.P.C. to recall PW.1.

8. In the result, the Criminal Petition is dismissed. Consequently, Miscellaneous Petitions, if any, pending in this Criminal Petition shall stand closed.

M.SATYANARAYANA MURTHY, J

Date: 29.11.2017

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