**THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**CRIMINAL PETITION Nos.4651, 4657 and 4664 OF 2018**

**COMMON ORDER**:

The criminal petition No.4651 of 2018 is filed by the petitioner/accused No.2 under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the order dated 29.03.2018 passed in Crl.M.P.No.785 of 2018 in C.C.No.48 of 2016 by the XII Special Magistrate at Hyderabad, whereby the petition filed under Section 311 of Cr.P.C. to summon the Deputy Commissioner, Commercial/Sales Tax Department, Nalgonda District to produce the record pertaining to the Ex.P.3 tax invoice before the Court, was dismissed.

The criminal petition No.4657 of 2018 is filed by the petitioner/accused No.2 under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the order dated 29.03.2018 passed in Crl.M.P.No.784 of 2018 in C.C.No.63 of 2016 by the XII Special Magistrate at Hyderabad, whereby the petition filed under Section 311 of Cr.P.C. to summon the Deputy Commissioner, Commercial/Sales Tax Department, Nalgonda District to produce the record pertaining to the Ex.P.3 invoice before the Court, was dismissed.

The criminal petition No.4664 of 2018 is filed by the petitioner/accused No.2 under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the order dated 29.03.2018 passed in Crl.M.P.No.786 of 2018 in C.C.No.215 of 2017 by the XII Special Magistrate at Hyderabad, whereby the petition filed under Section 311 of Cr.P.C. to summon the Deputy Commissioner, Commercial/Sales Tax Department, Nalgonda District to produce the record pertaining to the Ex.P.4 invoice before the Court, was dismissed.

The allegations in all the petitions and the findings in impugned orders passed by the trail Court are almost identical, hence it is expedient to decide both the petitions by common order.

For convenience sake, the facts as narrated in Crl.P.No.4651 of 2018, are as follows:

**Crl.P.No.4651 of 2018**:

The petitioner herein filed the petition under Section 311 of Cr.P.C. to summon the Deputy Commissioner, Commercial/Sales Tax Department, Nalgonda District to produce the record pertaining to the Ex.P.3 tax invoice before the Court on the ground that the petitioner/accused No.2 had not purchased any type of lead/remelted lead as alleged by the respondent/complainant at any point of time and the respondent/complainant supplied the raw lead material to the accused No.1 for conversion from raw lead into pure lead, otherwise it can be called as remeltation job work of lead.

It is further contended that during the cross-examination of D.W.1 the respondent/complainant came forward before the Court with a new plea that the respondent/complainant had sold the raw material/ remelted lead to the accused NO.1 company and that for sale of the raw lead to the accused No.1 company and the accused No.2 has issued the subject cheque on behalf of the accused No.1 company and that for sale of either remeleted lead or raw material to the accused No.1 company, the respondent/complainant has to pay sales tax for the subject invoice and the respondent/complainant has not filed any such documentary proof in respect of payment of any sales tax on Ex.P.3 tax invoice in respect of alleged sale of remelted lead and as such Ex.P.3 tax invoice is self serving document, hence it is just and necessary to summon Deputy Commissioner, Commercial/Sales Tax, Nalgonda District to give evidence as to whether proper sales tax has been paid on Ex.P.3 tax invoice.

The respondent/complainant opposed the petition and contended that the respondent/complainant has filed the Tax invoice marked as Ex.P.3 and summoning Deputy Commissioner, Commercial/Sales Tax, Nalgonda District, to know about the payment of sales tax to the said authority is an exercise in futility and the present application is filed to drag the matter for some more time and prayed to dismiss the petition.

Upon hearing argument of both counsel, the trial Court dismissed the petition.

Aggrieved by the order of the trial Court, the present petition is filed on the ground that there was no sale transaction covered by Ex.P.3 and the subject cheque was not issued towards discharge of legally enforceable debt, but the Court below did not consider the case of the petitioner in proper perspective and committed grave error in dismissing the petition.

It is also contended that absolutely there was no sale transaction to treat the issuance of cheque as a cheque towards discharge of whole or part of legally enforceable debt. To substantiate the said contention, the evidence of Deputy Commissioner, Commercial/Sales Tax, Nalgonda District is necessary, except that no other evidence is available and requested this Court to set aside the impugned order and issue summons to the Deputy Commissioner, Commercial/Sales Tax, Nalgonda District to produce the record pertaining to Ex.P.3 and to give evidence.

Learned counsel for the petitioner contended that the subject cheque was not issued towards discharge of legally enforceable debt and no tax was paid on the tax invoice marked as Ex.P.3, unless the record is produced by the Deputy Commissioner, Commercial/Sales Tax, Nalgonda District, it is difficult for him to prove his defence, therefore, sought permission of the trial Court to issue summons by exercising power under Section 311 of Cr.P.C.

Per contra, learned counsel for the respondent opposed the petition on the ground that summoning of Deputy Commissioner, Commercial/Sales Tax, Nalgonda District would not serve any purpose and requested the dismiss the petition.

The defence of the petitioner/accused from the beginning is that the subject cheque was not issued towards discharge of legally enforceable debt and that the complainant did not pay tax on the sale covered by Ex.P.3 and non-payment of tax on Ex.P.3 itself is suffice to conclude that Ex.P.3 is not genuine and if Ex.P.3 is disbelieved, the petitioner would succeed in the main case and to establish the same, the evidence of Deputy Commissioner, Commercial/Sales Tax, Nalgonda District is necessary.

The trial Court dismissed the petition on the ground that the question whether the respondent paid tax on the transaction covered by Ex.P.3, is immaterial and it would not invalidate the transaction and still the petitioner is liable to pay the amount covered by Ex.P.3. However, non-payment of sales tax would attract the consequences under the penal provisions of Sales tax or Value Added Tax and other tax laws, but the same would not invalidate the transaction covered by Ex.P.3 *prima facie.*

The main reason urged in the petition is that the evidence of Deputy Commissioner, Commercial/Sales Tax, Nalgonda District is necessary to prove that no tax was paid on the tax invoice marked as Ex.P.3.

According to Section 311 Cr.P.C, the Court may, at any stage of the proceeding, trial or enquiry, summon any person as 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 be essential to the just decision of the case. Thus, it is clear from the section that the Court is empowered to summon any person as a witness at any stage of enquiry, trial or proceeding and the power is not confined to any particular class of person.

In "***Mohonlal Shamji Soni v. Union of India***[1]", the Apex Court held that the power to summon and examine any witness can be exercised at any stage, however opportunity is to be given to the parties to rebut the evidence.

Thus, in view of the law laid down by the Apex Court in the judgment referred supra, it is clear that the Court not only exercised such discretionary power on the application filed by either the defence or accused or the Court can also recall any person by exercising such discretionary power on its own motion.

[1] AIR 1991 SC 1346

In "***Abdul Rehman Antulay v. R.S. Nayak and another***[2]" the Apex Court made it clear that when a petition is filed to protract or delay the litigation, the Court can decline to recall a witness by exercising power under Section 311 Cr.P.C.

In the present case, the only contention of the petitioner is that the respondent did not pay tax on the tax invoice, Ex.P.3. If for any reason, no tax was paid on the transaction covered by Ex.P.3, would it invalidate the same or not has to be seen.

If the assesses failed to pay tax, such failure would attract the penal consequences under the provisions of Sales Tax or Value Added Tax, as the case may be and it would not invalidate the transaction. Therefore, summoning of witness to prove the document pertaining to payment of tax on the tax invoice, Ex.P.3 would not improve the case of the petitioner since the presumption under Section 139 of Negotiable Instruments Act is in favour of the drawee and not in favour of drawer. It can be rebutted by producing any evidence.

Learned counsel for the petitioner contended that summoning of Deputy Commissioner, Commercial/Sales Tax Department, Nalgonda District is only for the purpose of rebutting the presumption under Section 139 of Negotiable Instruments Act. At best, this evidence is helpful only to prove that no tax was paid on the transaction covered by Ex.P.3, but it would not invalidate the transaction as the default, if any, may attract penal consequences under the provisions of Sales Tax or Value Added Tax. Therefore, the reason recorded by the Court below that summoning of Deputy Commissioner, Commercial/Sales Tax

[2] AIR 1992 SC 1701

Department, Nalgonda District would not serve any purpose, except to protract the litigation, has to be upheld as the transaction covered by Ex.P.3 is still valid *prima facie*.

Hence, the order passed by the trial Court does not warrant any interference of this Court by exercising power under Section 482 of Cr.P.C., consequently, the petition is liable to be dismissed.

In the result, the criminal petition No.4651 of 2018 is dismissed. No costs.

**Crl.P.Nos.4657 and 4664 of 2018**:

In view of the detailed order passed in Crl.P.No.4651 of 2018, the criminal petition Nos.4657 and 4664 of 2018 are also dismissed. No costs.

The miscellaneous petitions pending in both the petitions, if any, shall also stand closed.

**JUSTICE M. SATYANARAYANA MURTHY**

29.06.2018
Ksp