HON'BLE SRI JUSTICE P. KESHAVA RAO

CRIMINAL REVISION CASE No.1441 of 2018

ORDER:

Heard the learned counsel for the petitioner and the 1st respondent.

The present revision case is filed questioning the orders passed in Crl.M.P.No.530 of 2018 in C.C.No.16 of 2013 dated 11.05.2018 on the file of the XVI Special Magistrate, Hyderabad, dismissing the petition filed under Section 254 (2) Cr.P.C., to summon Smt. S. Bharathi as a Court witness and permit the petitioner to examine her in the interest of justice.

The facts in brief are that the 1st respondent herein filed C.C.No.16 of 2013 against the petitioner for the offence under Section 138 of the Negotiable Instruments Act (for short, "the Act") on the file of the VI Additional Chief Metropolitan Magistrate, Hyderabad. It is his case that he is a retired Government servant and the petitioner is running a school in the name of Loyola School at Vijayanagar Colony, Hyderabad and is known to him since past several years through his father late M.P.R. Prasada Rao, who was the founder of the Loyola School. Out of the said acquaintance, the petitioner approached him in the month of September, 2012 for a hand loan of Rs.1,25,000/- to meet his urgent financial necessities as well as for the purpose of smooth running of the school, promising to repay the same within three months. In those circumstances, believing the petitioner, the 1st respondent had advanced a sum of Rs.1,25,000/- out of his retirement benefits.

After three months, when the 1st respondent demanded the petitioner for repayment of the said amount, the petitioner issued cheque bearing No.562105 dated 10.12.2012 for the above said amount drawn on Indian Overseas Bank, Vijayanagar Colony branch, Hyderabad, towards discharge of the said legally enforceable debt. When the said cheque was presented for realization in the last week of December, 2012 with Andhra bank, Vijayanagar Colony branch with prior intimation to the petitioner, the same was dishonoured and returned on 04.01.2013 with an endorsement "opening balance insufficient". The 1st respondent got issued a legal notice through RPAD on 12.01.2013 calling upon the petitioner to pay the said cheque amount within 15 days from the date of receipt of the notice. Though the petitioner received the said notice on 15.01.2013, he has neither paid the amount nor got issued reply even after expiry of 15 days. Therefore, the 1st respondent filed the above said complaint.

The Court below, after taking cognizance of the offence, numbered the case as C.C.No.16 of 2013. During the course of trial, the 1st respondent completed his evidence. On behalf of the defence, the petitioner examined himself as DW.1 and the Bank Manager as DW.2 on 22.04.2015. Thereafter, the evidence of defence was closed and the case was posted for arguments on 06.05.2015, in spite of the request of the counsel for the petitioner for further evidence. Since the Presiding Officer was on leave on 06.05.2015, the matter was posted to 19.05.2015. On that day the petitioner filed two petitions to re-open his evidence and to summon one Smt. S. Bharathi as a Court witness for cross-examination. However, on the same day both the petitions are dismissed even without calling for counter from the 1st respondent. In those circumstances, the petitioner was constrained to file a transfer criminal miscellaneous petition before the Metropolitan Sessions Judge, Hyderabad, seeking to transfer the present case along with other connected matters to any other Court. The said petition was dismissed on 09.12.2015. Aggrieved by the same, the petitioner filed Tr.Crl.P.No.30 of 2016 before this Court. On 09.02.2016, this Court, after hearing, was pleased to direct the Court below not to pronounce the judgment in the present case and other connected matters. Meanwhile, in one of the connected calendar cases i.e., C.C.No.473 of 2013 on the file of the IX Special Magistrate Court, Hyderabad, the petitioner filed Crl.M.P.No.1727 of 2015 to summon Smt. S. Bharati, the wife of the 1st respondent herein, and the same was allowed by order dated 11.08.2015. Pursuant thereto, Smt. S. Bharathi was cross-examined as Court witness and certain documents i.e., Ex.X1 to X5 marked through her on confrontation were sent to hand writing expert to compare the admitted signatures of the said Bharathi and the report is awaited for want of her some more admitted signatures. However, during the pendency of Tr.Crl.P.No.30 of 2016 before this Court, the Presiding Officer in the Court of the XVI Special Magistrate, Hyderabad, was transferred and the new Presiding Officer joined. In those circumstances, the said Transfer Criminal Petition was withdrawn. Thereafter, the petitioner filed Crl.M.P.No.530 of 2018 to summon Smt. S.Bharathi as Court witness in the present case and also in other connected calendar cases to elicit the truth, since her evidence is essential to the just decision of the case and also to establish the defence taken by him. In the petition the petitioner has categorically stated that it is his specific defence that the cheques given to Smt. S. Bharati as security have been misused by her in connivance with her son Avinash Sabba and her husband Sabba Siddharth, who filed the batch of complaints under Section 138 of the Act, as referred to above.

After hearing and considering the material on record, the learned Magistrate was pleased to dismiss the petition by orders dated 11.05.2018. Aggrieved by the same, the present revision case is filed.

Learned counsel appearing for the petitioner would contend that the order impugned in the present revision is contrary to the facts and pleadings on record. In the light of the specific defence taken by the petitioner, more so, in the light of the orders passed in Crl.M.P.No.1727 of 2015 in C.C.No.473 of 2013 dated 11.08.2015 on the file of the IX Special Magistrate, Hyderabad, the Court below ought to have allowed the petition. The Court below ought not to have dismissed the petition in the light of the specific defence taken by the petitioner that the cheques given to Smt. S.Bharati as security have been misused by her in connivance with her son and her husband. The learned counsel also contended that there is change in the circumstances in the light of the orders passed in Crl.M.P.No.1727 of 2015 and thereby the learned Magistrate ought to have allowed the petition. The learned Magistrate, after holding that there is no bar to file second petition, erred in dismissing the present petition on the ground that the C.C. pertains to the year 2013, even while holding that the relief sought by the petitioner cannot be rejected. The learned counsel emphasized on the specific defence taken by him that the subject cheques have been given to Smt. S. Bharati as security to the loan obtained by his father and even after discharge of the said loan, the cheques were retained by her and her son and husband have misused them and filed batch of complaints against the petitioner and his brother for the offence under Section 138 of the Act only to arm twist them to part with money. In fact, there is no liability of any sort leave alone the legally enforceable debt. Even if the said Bharati is summoned as a Court witness, no prejudice will be caused to the 1st respondent, since he also has a right to examine her. Since the examination of Smt. S. Bharati, is vital which tilt the decision of the case otherwise the learned Magistrate ought to have allowed the petition.

Per contra, the learned counsel appearing for the 1st respondent submit that the main case was filed in the year 2013 and the petitioner is successfully dragging on the matter for one reason or the other for a period of more than five years particularly by filing one petition after another. The present petition is also one such petition for the purpose of dragging on the matter. He also contended that the evidence of Smt. S. Bharati is not necessary and she is no way concerned to the transaction. In fact, the petitioner has already filed similar application in the year 2015 and the same was dismissed by the Court, against which, no appeal or revision is filed and therefore it is binding on the petitioner.

Having heard both the counsel and from the perusal of the material on record, it is revealed that the 1st respondent filed C.C.No.16 of 2013 (Old C.C.No.231 of 2013) against the petitioner for the offence under Section 138 of the Act. His specific case is that in the month of September, 2012, the petitioner approached him for hand loan of Rs.1,25,000/- to meet his urgent financial necessities as well as for the purpose of smooth running of his school and after receiving the amount, he issued the subject cheque. On presentation, the same was dishonoured with an endorsement "opening balance insufficient" leading to filing of the complaint against the petitioner. The evidence on the part of the 1st respondent is completed and the petitioner also examined himself as DW.1 apart from examining the Manager of the Bank as DW.2. Immediately, thereafter, he filed two petitions to reopen the case and to summon Smt. S. Bharati as a Court witness. The said two petitions were dismissed on the very same day of their filing without even inviting any counter from the 1st respondent. In those circumstances, the petitioner was constrained to file a transfer criminal miscellaneous petition before the Metropolitan Sessions Judge, Hyderabad, and the same was dismissed on 09.12.2015. Aggrieved by the said orders, the petitioner filed Tr.Crl.P.No.30 of 2016 before this Court. During the pendency of the said petition, as the Presiding Officer was transferred, the said petition was withdrawn. Immediately, the present petition is filed, wherein, the petitioner has categorically stated that his specific defence is that the cheques given to Smt. S. Bharati as security have been misused by her in connivance with her son and husband, who filed the batch of cases against him. In one such similar case i.e., C.C.No.473 of 2013 on the file of the IX Special Magistrate, Hyderabad, the petitioner filed Crl.M.P.No.1727 of 2015 seeking to summon Smt. S. Bharati, the wife of the 1st respondent. The said petition was allowed on 11.08.2015 and she was cross-examined as a Court witness. During the course of the examination, she was confronted with certain documents and the disputed signatures in the diaries i.e., Exs.X1 to X5 were sent to hand writing expert to compare with her admitted signatures and the report is awaited. In fact, it is the specific case of the petitioner that the issue involved in all the ten calendar cases filed by the 1st respondent and his son is one and the same. In these circumstances, the issue that crops up for consideration is:

> Whether the Crl.M.P.No.530 of 2018 is liable to be allowed or not?

In the present case, the petitioner on an earlier occasion filed similar petition, but the same was dismissed on the same day without even inviting for any counter from the 1st respondent. A perusal of the said order filed in the material papers vide Crl.M.P.No.438 of 2015 dated 19.05.2015, it is revealed that no reasoning has been given by the learned Magistrate while dismissing the petition except saying that he is of the opinion that no purpose will be served by summoning Smt. S. Bharati as a

Court witness for the petitioner against her own husband and such petitions cannot be allowed. Apart from the same, the learned Magistrate also observed that the petitioner has to prove his case independently and not by filing petition to summon the opposite party to give evidence in his favour. It is relevant here to mention that the specific defence of the petitioner is that the subject cheques were given to Smt. S. Bharati as security and the same have been misused by her in connivance with her son and husband leading to the present batch of cases against him and his brother.

It is settled law that at the stage of examination of a person as a witness the relevance of evidence of the said witness is to be considered and not its probative value. The Court below cannot pre-judge the evidence of witness sought to be examined by observing that the present case is pertaining to the year 2013 and more so, the 1st respondent is a senior citizen. Apart from the same, the Court has already passed an order for the same relief. In fact, on facts, when it is established that there is a change of circumstances and as observed by the Court below that there is no bar to file a second petition even though the Court disallowed the petition for the same relief on an earlier occasion, the learned Magistrate ought to have allowed the petition in the light of the specific defence taken by the petitioner. In fact, when the petitioner has categorically put up his defence that the cheques issued by him towards security to Smt. S. Bharati have been misused, it is for him to rebut the presumption under Section 118 (a) of the Indian Evidence Act and Section 139 of the Negotiable

Instruments Act, an opportunity must be given to him. In fact, under the provisions of the Negotiable Instruments Act, the law places burden on the accused to prove that there is no legally enforceable debt. In those circumstances, the petitioner should be given an opportunity to examine Smt. S. Bharati as a Court witness in the light of his specific defence, more particularly, from the perusal of the orders passed in Crl.M.P.No.1727 of 2015 in C.C.No.473 of 2013 dated 11.08.2015 on the file of the IX Special Magistrate, Hyderabad, as well as the answers elicited through her by confronting certain documents in Exs.X1 to X5, which were sent to hand writing expert for opinion. In fact, in **Natasha Singh vs. Central Bureau of Investigation**[1] the Apex Court was pleased to consider the scope of Section 311 Cr.P.C. and held as under:

> "A. Criminal Procedure Code, 1973 – S. 311 – Examination of person as witness under – Issue(s) to be considered – Only admissibility/relevance of evidence of witness concerned is to be considered, and not its likely probative value – Held, trial Court cannot prejudge evidence of witnesses sought to be examined – Examination of a witness cannot be refused on ground that evidence of that witness would not be conclusive – Only issue to be considered is whether evidence proposed to be adduced is relevant or not – Court can weigh the evidence only and only once the same has been laid before it and brought on record – On facts, trial Court was not justified in dismissing application of appellant-accused under S.311 for permission to examine three witnesses, by prejudging evidence of these witnesses and holding the examination unnecessary for the case – Application for their examination, allowed."

In the light of the above said decision and having regard to the circumstances of the case, this Court is of the opinion that the order impugned in the present revision case is liable to be set aside.

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[1] (2013) 5 SCC 741

Accordingly, the criminal revision case is allowed, setting aside the order passed in Crl.M.P.No.530 of 2013 in C.C.No.16 of 2013 dated 11.05.2018 on the file of the XVI Special Magistrate, Hyderabad.

Miscellaneous petitions, if any, shall stand closed.

P. KESHAVA RAO, J

Date: 30.07.2018.
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