

HON'BLE SRI JUSTICE P. KESHA RAO

CRIMINAL REVISION CASE No.1606 of 2018

ORDER:

Heard the learned counsel for the petitioner and the 2nd respondent.

The present revision case is filed questioning issuance of Non-bailable Warrant dated 24.05.2018 against the petitioner based on Memo dated 20.02.2018 on the file of the Additional Judicial First Class Magistrate, Kurnool.

The facts in brief are that the 2nd respondent filed C.C.No.265 of 2005 against the petitioner for the offence under Section 138 of the Negotiable Instruments Act. In the said case, the learned Magistrate convicted and sentenced the petitioner to undergo simple imprisonment for six months and to pay a fine of Rs.10,000/- (in default simple imprisonment for two months) and also further ordered to pay compensation of Rs.41,000/-. Aggrieved by the said orders, the petitioner preferred an appeal in CrI.A.No.51 of 2008 on the file of the IV Additional District and Sessions Judge, Kurnool. After hearing, the learned District and Sessions Judge confirmed the conviction passed by the learned Magistrate by judgment dated 09.03.2015. Aggrieved by the said judgment, the petitioner filed CrI.R.C.No.1733 of 2016 before this Court. The said revision case along with CrI.R.C.No.1732 of 2016 were allowed in part by common order dated 23.03.2017. The operative portion of the said order is as under:

“So far as conviction judgments concerned on finding of guilt, but for if at all to modify the sentence either of imprisonment or of fine as the case may be. In this regard in C.C.No.265 of 2015 confirmed by CrI.A.No.51 of 2008, for the Ex.P1 cheque amount of Rs.40,880/- the trial Court found accused guilty and sentenced the accused to undergo six (6) months simple imprisonment and to pay fine of Rs.10,000/- in

default to undergo two months simple imprisonment and further compensation of Rs.41,000/-. A combined reading of Section 138 read with Section 143 of the Act and Section 357 Cr.P.C., though under Section 143 of the Act the Court can impose sentence of imprisonment up to one year and fine unlimited for the bar under Section 29 Cr.P.C. has no application. Once fine is imposed compensation to be paid out of the fine and not otherwise, the lower appellate Court in CrI.A.No.51 of 2008 thereby set aside the fine amount by ordering refund in confirming on other aspects, however, the same also requires modification by following the expression of the Apex Court in **Somnath Sarka vs. Utpal Basu Mallick (2013 (16) SCC 465)** from the principle laid down and also from the say of the endeavour of the complainant is to recover rather than punishing the accused and keeping in jail, by converting into simple imprisonment till raising of the day and to pay fine of Rs.60,000/-, out of which Rs.10,000/- goes to the State and remaining Rs.50,000/- as compensation to the complainant.

Likewise in C.C.No.658 of 2005, the accused sentenced to undergo six months simple imprisonment and fine of Rs.10,000/- in default to undergo two months simple imprisonment and Rs.6,00,000/- compensation from Ex.P1 cheque for Rs.5,93,885/- modified by the lower appellate Court to the extent of setting aside the fine of Rs.10,000/- by confirming other aspects, however the same also requires modification by following the expression of the Apex Court in **Somnath Sarka supra** from the principle laid down and also from the say of the endeavour of the complainant is to recover rather than punishing the accused and keeping in jail, by converting into simple imprisonment till raising of the day and to pay fine of Rs.7,50,000/-, out of which Rs.50,000/- goes to the State and remaining Rs.7,00,000/- as compensation to the complainant.”

Pursuant thereto, the 2nd respondent filed memo dated 20.02.2018 seeking issuance of non-bailable warrant against the petitioner and to commit him to jail serving the sentence. In reply to the said memo, the petitioner filed objections stating that no case is pending before the Court and the same was adjudicated on 08.04.2008. In respect of the same transaction, a civil proceeding between the petitioner and the 2nd respondent being lodged vide O.S.No.83 of 2007 on the file of the Court of the Additional Senior Civil Judge, Kurnool. The decree obtained in the said suit nullifies the decree and judgment dated 07.02.2008 as the same is obtained by the 2nd respondent by playing fraud not only on the petitioner but also on the Court. Therefore, he sought for rejection of the memo and also to declare that the 2nd respondent is not entitled for any amount as per the above said decree and judgment.

The said memo was posted to 24.05.2018. On that day as the petitioner was not able to appear before the Court, he filed a petition under Section 317 Cr.P.C., to dispense with his presence. The learned Magistrate dismissed the said petition and issued non-bailable warrant against the petitioner on payment of process since he was directed to appear before the Court by an order of last adjournment date. Aggrieved by the same, the present revision case is filed.

Learned counsel appearing for the petitioner would submit that without considering the objections raised by the petitioner that there is no case pending before the trial Court and acting on the memo, the case cannot be reopened, since the memo itself is not maintainable. The learned Magistrate has not even considered and appreciated the objections raised by the petitioner. In fact, there is no provision in the code of criminal procedure with regard to filing of a memo for issuing non-bailable warrant against the petitioner.

Per contra, learned counsel appearing for the 2nd respondent supported the impugned orders.

Learned Public Prosecutor appearing for the 1st respondent State has fairly conceded that there is no provision in the code of criminal procedure which enable a party to file a memo, based on which a matter can be reopened and non-bailable warrant can be issued.

Having heard both the counsel and a perusal of the material on record, it is revealed that in response to the memo dated 20.02.2018 filed by the 2nd respondent, the petitioner filed objections on 24.05.2018 raising a dispute with regard to

maintainability of the memo. From a perusal of the order dated 24.05.2018, the objections raised by the petitioner are not even considered. On the other hand, the dispense with petition filed by the petitioner has been simply dismissed and non-bailable warrants have been issued against him. If the case has to be reopened for the purpose of issuing warrant for non-payment of the fine amount as ordered by the Court below, a petition under Section 421 Cr.P.C., is warranted. However, in the case on hand, a memo has been filed. Acceptance of the said memo and issuance of non-bailable warrants, more so, without considering the objections raised with regard to maintainability of the memo is unknown to law and the same cannot be sustained. In these circumstances, this Court feels that the memo dated 20.02.2018 as filed is not maintainable and consequently the order passed on 24.05.2018 for issuing non-bailable warrants against the petitioner is liable to be recalled. Accordingly, the non-bailable warrants dated 24.05.2018 issued against the petitioner is hereby recalled.

Accordingly, the criminal revision case is allowed. However, liberty is given to the 2nd respondent to file an appropriate application and on filing of such application, the learned Magistrate is directed to consider the same and pass appropriate orders as per law.

Miscellaneous petitions, if any, shall stand closed.

P. KESHA RAO, J

Date: 17.07.2018.
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