

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION Nos.9681 AND 9713 OF 2018

COMMON ORDER:

Both these Criminal Petitions, under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Code'), are filed by the petitioner – complainant represented by his General Power of Attorney Holder, to quash the common order, dated 04.09.2018, in CrI.M.P. Nos.979 of 2018 and 980 of 2018 in Calendar Case No.162 of 2017, passed by the learned Special Magistrate Court-I, Rajendranagar, Ranga Reddy District, dismissing the petitions filed by the petitioner to recall PW.1 and to receive documents along with CrI.M.P. No.978 of 2018 filed for reopen the case.

2. The petitioner herein is the complainant - Maddi Ramesh Babu, while respondent No.2 is the accused - Challa Anil Chowdary, in Calendar Case No.162 of 2017, pending on the file of the learned Special Magistrate Court-I, Ranga Reddy District at Rajendranagar. The said case is filed by the petitioner - complainant represented by his GPA Holder - Maddi Madan Mohan against respondent No.2 - accused for the offence punishable under Section 132 read with 142 of the Negotiable Instruments Act, 1881 (for short 'Act 1881').

3. When the aforesaid case was posted to pronouncement of judgment, a day prior to it, the GPA Holder of complainant filed CrI.M.P. No.979 of 2018 under Section 311 of the Code to recall PW.1, while CrI.M.P. No.980 of 2018 under Section 254 (1) of the Code to

receive the documents, such as promissory note dated 10.08.2012 executed by accused in favour of the complainant; reply notice dated 19.09.2017 issued by the accused; E.mails 32 in number sent by the accused and original sale deed bearing document No.5397 of 2008, and also another Crl.M.P. No.978 of 2018 to reopen the case before the Court below alleging that he was examined as PW.1 and marked Exs. P-1 to P-15; that at the time of examination of PW.1, due to communication gap between himself and the complainant, the aforesaid documents were not filed before the Court below which are essential to establish the case of complainant and, therefore, the GPA Holder requested to reopen the case and recall PW.1 by receiving the documents for marking the same.

4. Respondent No.2 - accused filed counter denying the material allegations, *inter-alia*, contending that no reason was assigned the purpose for which PW.1 is to be recalled and nothing has been stated satisfactorily in the petition as to why the complainant could not produce the documents at the appropriate stage and the main case is coming up for judgment, just one day before the date of judgment, the petitioner filed the aforesaid petitions with an intention to protract the proceedings for some more time and, finally, requested to dismiss all the petitions.

5. Considering the rival contentions, the Court below dismissed all the petitions, by way of a common order, dated 04.09.2018.

6. Aggrieved of the said order, the present Criminal Petitions are filed on the ground that sufficient opportunity is to be afforded to the petitioner to produce certain documents and to recall PW.1 for marking those documents by reopening the case as the said documents are essential to decide the real controversy between the parties. But, the Court below did not afford sufficient opportunity to the petitioner for adducing evidence to substantiate his contentions and it amounts to denial of an opportunity to substantiate his case and finally, requested to allow the present petitions by setting aside the impugned order passed by the Court below.

7. During hearing, learned counsel for the petitioner, Sri Nambi Krishna, contended that the witness, who was examined as PW.1, is competent to speak about the documents being a GPA Holder and brother of the complainant and, therefore, requested to set aside the impugned order. He also placed reliance on the judgment rendered by a learned Single Judge of Karnataka High Court in **M/s. Forever Precious Jewellery @ Diamonds Ltd., v. Balaji Designer Jewellery¹**, to contend that to afford a reasonable opportunity and to have a fair trial, Court cannot decline to allow such petitions by giving reasonable opportunity to the party to let in evidence. He also placed reliance on another judgment rendered by a learned Single Judge of Madras High Court in **D. Swornapushpam v. A. Rajkumar²**, to substantiate his contention that in the absence of any provision in the Code, Court can

¹. Crl.P. No.3092 of 2014, dated 02.11.2015

². Crl.R.C. (MD) No.587 of 2013 and M.P. (MD) No.1 of 2013, dated 10.09.2014

exercise power to reopen the evidence and drawn the attention of this Court to paragraph Nos.6, 7, 8 and 9 of the said judgment. In another judgment rendered by a learned Single Judge of Madhya Pradesh High Court in **Re:Shantilal v. Unkonwn**³, the same view was expressed by the Court and on the strength of the principles laid down in the said judgments, the learned counsel for the petitioner requested to allow the petitions setting aside the impugned order.

8. Whereas, learned counsel for respondent contending that in view of the law declared by the Hon'ble Supreme Court in **A.C. Narayanan v. State of Maharashtra**⁴, PW.1 is incompetent to speak about the documents proposed to be filed and that the petitions are filed only to protract the proceedings for some more time, placed reliance on the judgment in **A.C. Narayanan**⁴, and also another judgment in **A.G. v. Shiv Kumar Yadav**⁵, and on the strength of these principles, he contended that there are no merits in the petitions and requested to dismiss the petitions.

9. Undoubtedly, the evidence on behalf of the complainant was closed and the entire trial was completed, the Court heard the arguments and about to pronounce the judgment, the aforesaid petitions were filed before the Court below for one reason or other, more particularly, on the pretext that the complainant wanted to produce certain documents and the petitioner was already examined as a witness before the Court below

³. AIR 1959 MP 290

⁴. (2014) 11 SCC 790

⁵. 2016 (2) SCC 402

and after completion of his evidence, one more witness was examined and closed the evidence on his behalf and later examination of accused under Section 313 of the Code was over and on reporting no evidence by the accused, the Court below closed the evidence. After hearing both sides, the case was posted for judgment and at that stage, the aforesaid petitions were filed on the ground that certain documents were not produced before the Court below which are essential to prove his case.

10. No doubt, Section 311 of the Code confers power on the Court to summon any witness or to examine any witness, who was present though not summoned or re-examine any witness subject to recording satisfaction by the Court. At the same time, the Law is well-settled that this Court cannot exercise such power in casual manner and that the Court must take into consideration the consequence of allowing such applications at belated stage. Section 311 of the Code consists of two limbs. The first limb confers power on the Court to summon, recall and re-examine any witness already examined and record evidence of any witness who was present though not summoned, and the second limb of Section says that when the Court satisfied that the evidence of any witness is essential, the Magistrate may record reasons and recall any witness. The facts in the present case would not fall within the second limb; it would fall within the first limb. But, the petitioner did not explain the reason for his failure to file documents at the earliest stage and PW.1 was only a power of Attorney Holder of the complainant, whereas the documents pertain to the period prior to

execution of Power of Attorney in favour of PW.1 by the complainant. Therefore, PW.1, at best, is entitled to adduce evidence which is within his knowledge after execution of power of attorney, but the documents sought to be produced before the Court below are pertaining to the period prior to execution of General Power of Attorney in favour of PW.1. Therefore, he is not competent to speak about the documents which are sought to be produced by the petitioner - PW.1. However, this Court cannot exercise power under Section 311 of the Code to reopen the evidence of any witness. Section 311 of the Code limits power of the Court to certain extent, as referred to in the earlier paragraphs. Therefore, at this stage, this Court cannot exercise such power to reopen the evidence as there is no provision in the Code to reopen the evidence of any witness. But, the learned counsel for the petitioner would contend that the Court can exercise such power though such power is not conferred on the Court and drawn the attention of this Court to paragraph Nos.6, 7, 8 and 9 of the judgment in **D. Swornapushpam²**, which are as under:

“6. Though the revision petitioner would contend that there is no provision in the Code of Criminal Procedure corresponding to the provisions found in the Code of Civil Procedure for condoning the delay in producing the documents relied on by the complainant, the learned counsel for the revision petitioner is not in a position to point out any provision in the Code of Criminal Procedure that bars the Court from receiving any document in evidence, which was not filed along with the complaint. The absence of a provision mandating the complainant to annex all the documents which are relevant for the proof of the

complainant's case or a provision requiring the complainant to list such documents in a separate list that could be appended with the complaint, as documents to be produced at a later point of time, will be enough to negative the contention of the revision petitioner that the complainant shall not be permitted to produce any document which was not produced along with the complaint, during the course of trial.

7. Of course, if the document is one based on which complaint itself has been preferred, the non-production of the same along with the complaint can be found fault with. When a relevant fact is sought to be proved by the production of such additional document, it must be considered leniently so that the opportunity to the complainant to prove his / her case shall not be denied without there being a reasonable ground for such denial.

8. Considering the above said aspects, this Court comes to the conclusion that the order of the learned Judicial Magistrate permitting the respondent herein / complainant to produce the promissory note allegedly executed by the revision petitioner / accused to prove that there was pre-existing debt in discharge of which the dishonoured cheque was issued, cannot be said to be either infirm or defective capable of being interfered with and reversed by this Court in exercise of its power of revision.

9. The very scheme provided in the Negotiable Instruments act for the prosecution of the accused for an offence under Section 138, provides for an initial presumption under Section 139 of the Negotiable Instruments Act that the receipt of the cheque shall be for the discharge of the debtor / liability, which presumption can be rebutted by the accused. On such rebuttal, the burden shall be cast on the complainant to prove the existence of the debt and also the complainant's claim that the cheque was issued for the discharge of the debt

or other liability. When such is the case, till the presumption is rebutted and the burden is shifted on the complainant, the complainant cannot be expected to lead any evidence in proof of the debt and the fact that the cheque was issued in discharge of such debt or other liability. The said position will make it clear that the document required for the proof of the debt or other liability can be produced at a later point of time, when the burden shall stand shifted on the complainant. If these aspects are taken into consideration, this Court can, without any hesitation, come to the conclusion that there is no defect or infirmity in the order of the learned Judicial Magistrate, which is sought to be challenged in the revision. There is no merit in the revision and the revision deserves to be dismissed.”

When a similar question came up before the Karnataka High Court, the Karnataka High Court in **M/s. Forever Precious Jewellery @ Diamonds Ltd.**¹, had an occasion to consider an identical question and concluded that the Court can exercise power under Section 482 of the Code in the absence of any provision to reopen the evidence. But, I am unable to agree with the law declared by the learned Single Judge of the other High Courts referred supra, and in the absence of any provision in the Code to reopen the evidence of any party to the proceeding, the Court cannot normally exercise such power unless it concludes that the evidence of witness was necessary for just decision. In the present case, the petitioner intended to produce certain documents which are listed along with the petition, such power can be exercised, but he is not entitled to adduce any evidence. Recall of a witness under Section 311 of the Code is for a limited period and when the proposed witness is not competent person to speak about the documents, his recalling is of no

use, and apart from that, the material on record shows that when the case was already posted for judgment and at that stage, the petitioner cannot seek such a relief of reopening the case and recalling a witness in view of the judgment of **Arjun Singh v. Mohindra Kumar**⁶, where the Apex Court had an occasion to consider the similar issue but on civil side and held thus:

“.....So far as the case before us is concerned the order under appeal cannot be sustained even on the basis that the finding recorded in disposing of an application under O. IX, r. 7 would operate as res judicata when the same question of fact is raised in a subsequent application to set aside an ex parte decree under O. IX, r. 13. This is because it is not disputed that in order to operate as res judicata, the court dealing with the first matter must have had jurisdiction and competency to entertain and decide the issue. Adverting to the facts of the present appeal, this would primarily turn upon the proper construction of the terms of O. IX, r.7. The opening words of that rule are, as already seen, 'Where the Court has adjourned the hearing of the suit ex parts'. Now, what do these words mean? Obviously they assume that there is to be "a hearing" on the date to which the suit stands adjourned. If the entirety of the "hearing" of a suit has been completed and the Court being competent to pronounce judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under O. XX, r. 1, there is clearly no adjournment of "the hearing" of the suit, for there is nothing more to be heard in the suit. It was precisely this idea that was expressed by the learned Civil judge when he stated that having regard to the stage which the suit had reached the only proceeding in which the appellant could participate was to hear the judgment pronounced and that on the terms of rules 6 & 7 he would permit him to do that. If,

⁶. AIR 1964 SC 993

therefore, the hearing was completed and the suit was not "adjourned for hearing", O. IX, r.7 could have no application and the matter would stand at the stage of O. IX, r.6 to be followed up by the passing of an ex parte decree making r. 13 the only provision in order IX applicable. If this were the correct position, it would automatically follow that the learned Civil Judge would have no jurisdiction to entertain the application dated May 31, 1958 purporting to be under O. IX, r.7, or pass any order thereon on the merits. This in its turn would lead to the result that the application under O. IX, r. 13 was not only competent but had to be heard on the merits without reference to the findings contained in the previous order."

11. In view of the law declared by the Apex Court in **Arjun Singh⁶**, when the Calendar Case is posted for judgment, filing petitions for reopening etc. does not arise, since the duty of the Magistrate is to pronounce the judgment without involvement of petitioner and respondent, and when the principles applied to the facts of the present case, I find that it is not a fit case to quash the impugned order passed by the Court below and, consequently, the Criminal Petitions are liable to be dismissed.

12. Accordingly, both the Criminal Petition are dismissed, at the stage of admission itself.

Consequently, Miscellaneous Petitions, if any, pending in both the Criminal Petitions, stand closed.

M. SATYANARAYANA MURTHY, J

October 1, 2018
Mgr