

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

Crl.P. No.9836 OF 2018

ORDER:

This criminal petition is filed under Section 482 Cr.P.C. challenging the order dated 24.08.2018 passed in Crl.M.P.No.1252 of 2017 in C.C.No.217 of 2014 by the Judicial Magistrate of First Class, Mummidivaram, East Godavari District.

The petitioner, who is the accused in C.C.No.217 of 2014, filed petition under Section 311 Cr.P.C. to reopen and to recall PW.1 for further cross examination on vital aspects relating to execution of promissory note and issue of cheque for effective adjudication, when the matter was posted for arguments. The 2nd respondent filed counter denying the material allegations while contending that the petitioner's the then counsel cross examined the witnesses at length in all aspects. Moreover, on 21.10.2016 when the matter was posted for examination of the accused under Section 313 Cr.P.C., the present petition is filed on 06.02.2017 after long lapse of time only to harass the respondent and that there are no merits to allow the petition and requested to dismiss the petition. The Court below upon hearing arguments of the counsel, dismissed the petition on the ground that the petition was belated and that the witness was cross examined at length.

Aggrieved by the said order, the present petition is filed on the ground that an opportunity should be accorded to the petitioner to prove his innocence as the criminal prosecution leads to serious consequences of punishment including imprisonment and that absolutely there was no delay in filing the petition, but the Presiding Officer was on leave till 16.08.2018 and the matter was not taken up for passing orders by the in-charge Presiding Officer. and requested to set aside the order passed by the Court below.

During hearing, learned counsel for the petitioner contended that the counsel on record before the Court below earlier cross examined the witnesses, but did not cover all aspects relating to execution of promissory note and issue of cheque and later the petitioner engaged another counsel, who advised the petitioner to file an appropriate application under Section 311 Cr.P.C. to recall PW.1 so as to enable the counsel on record to cross examine PW.1 on vital aspects relating to execution of promissory note and issue of cheque. But the Court did not consider the same in proper perspective and committed an error attributing delay. Therefore, finding recorded by the Court below is erroneous and prayed to set aside the same.

The respondent filed private complaint against the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act by following necessary procedure, allegedly. The then counsel for the petitioner cross examined PW.1 and later the trial was completed, accused was examined under Section 313 Cr.P.C and when the calendar case was posted for arguments, petition under Section 311 Cr.P.C. was filed by the counsel, whom the petitioner engaged subsequently, on the ground that PW.1 was not cross examined effectively on the aspect of execution of promissory note and issue of cheque. The petition was filed on 06.02.2017, whereas PW.1 was cross examined on 02.09.2016, later the accused was also examined under Section 313 Cr.P.C. on 06.10.2016. Thus, there is a gap of four months approximately between examination of the petitioner under Section 313 Cr.P.C. and filing petition on 06.02.2017, the delay itself is not a ground to dismiss the petition, if the petitioner is otherwise entitled to such relief, but here the arguments of learned counsel for the petitioner is that earlier the counsel on record did not cross examine PW.1 effectively. But later the petitioner engaged another counsel, who advised the petitioner to file petition to cross examine PW.1 further, on the aspect of execution of

promissory note and issue of cheque. The ground urged by learned counsel for the petitioner before the Court is not a sufficient ground to recall PW.1 by exercising power under Section 311 Cr.P.C. in view of the law declared by the Apex Court in **AG vs. Shiv Kumar Yadav and Others**¹ issued certain guidelines at paragraph 29, they are extracted hereunder:

- i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross- examination. They were under no handicap;
- (ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;
- (iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;
- (iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;
- (v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;
- (vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the **end** of the trial;
- (vii) Mere change of counsel cannot be ground to recall the witnesses;
- (viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;
- (ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;
- (x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.

According to Guideline No.vii, change of counsel and filing petition to recall witness for further examination is not a ground and applying the principles laid down in the above judgment, accepting the contention of

¹ AIR 2015 SC 3501

learned counsel for the petitioner, I find that it is not a fit case to exercise power under Section 311 Cr.P.C. and consequently, the criminal petition is dismissed at the stage of admission.

In the result, the criminal petition is dismissed.

Pending miscellaneous petitions in the petition, if any, shall stand closed.

M.SATYANARAYANA MURTHY,J

17.09.2018
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