



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT, MADURAI
(Criminal Jurisdiction)

Date : 28/11/2019

PRESENT

The Hon`ble Mr.Justice G.R.SWAMINATHAN

CRL OP(MD). No.16991 of 2019
and
CRL MP(MD). No.10258 of 2019
in
CRL RC(MD). No.339 of 2010

Subbiah ... Petitioner in both Crl.O.P
and Crl.M.P

Vs

1.The Inspector of Police,
Mandaicadu Police Station,
Kanyakumari District.

... Respondent in Crl.O.P. and
1st respondent in Crl.M.P.

2. Gnanadhas ... 2nd Respondent in Crl.M.P

PRAYER in CRL MP(MD). No.10258 of 2019:-

Petition is filed under Section 482 of Cr.P.C., to recall the
order passed in CRL.RC.(MD) No.339 of 2010 on 17.06.2019

PRAYER in CRL OP(MD). No.16991 of 2019 :-

Petition is filed under Section 438 of Cr.P.C., to enlarge the
petitioner/sole accused on anticipatory bail in the event of his
arrest by the respondent police on the strength of the non bailable
warrant issued by the learned Judicial Magistrate No.III, Nagercoil,
Kanyakumari District in C.C.No.204 of 2002, pending execution by the
respondent police.

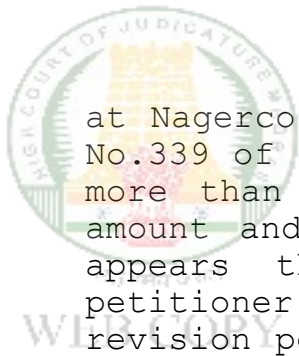
For Petitioner : Mr.G.Ramanathan
(in both Crl.O.P. and Crl.M.P.)

For Respondents : Mr.A.Robinson,
Govt. Advocate (Crl.Side) for R1
(in both Crl.O.P. and Crl.M.P.)

: Mr.M.Rajesh
(in Crl.M.P.) For Mr.R.Saravanakumar for R2

COMMON ORDER

Gnanadhas, Kattuvilai, Kanyakumari District filed C.C.No.204 of
2002, on the file of the learned Judicial Magistrate No.III,
Nagercoil, under Section 138 of Negotiable Instruments Act against
Thiru.Subbaiah. The case ended in conviction and sentence. The
judgment passed by the trial Magistrate was confirmed in Crl.A.No157
of 2004, on the file of learned Sessions Judge, Kanyakumari Division



at Nagercoil. Challenging the same, the accused filed Crl.R.C.(MD) No.339 of 2010 before this Court. This Court adjourned the case on more than one occasions to enable the accused to pay the cheque amount and thereby compound the matter with the complainant. It appears that the learned counsel appearing for the revision petitioner could not get it touch with the revision petitioner. The revision petitioner/Subbaiah states that he is to blame himself for the said communication gap and that he has no issues with his earlier counsel namely., Mr.K.P.Krishna Doss. I had dismissed the revision petition by judgment dated 17.06.2019. Following the dismissal of the revision petition, the Trial Magistrate issued NBW for enforcing the sentence. Thereupon, the convicted accused filed Crl.O.P.(MD)No.16991 of 2019, seeking anticipatory bail.

2.In the meanwhile, the revision petitioner was able to persuade the complainant/Mr.Gnanadhas to compound the matter. He had also taken a demand draft in favour of the complainant and the same has been handed over to the complainant in my presence. The complainant states that he has no objection for compounding the matter and that he is not interested in sending the accused to jail.

3.I am conscious that when once the matter has been finally disposed of, the bar under Section 362 of Cr.P.C. will operate. But then, I cannot lose sight of the fact that this is only a case arising under Section 138 of Negotiable Instruments Act, it is essentially civil offence. The parties have also compromised the matter between themselves. The amount payable to the complainant has also been settled in my presence. As already mentioned, the case was adjourned from time to time to enable the accused to pay the cheque amount to the complainant. It is only on account of the communication gap between the revision petitioner's counsel and the revision petitioner, the matter could not be compounded. Again the revision petitioner informs the Court that he is to be blamed for such communication gap and that no blame can be attached to his counsel.

4.The petitioner's counsel brings it to my notice in similar circumstances, the Honourable High Court of Kerala had shown indulgence even post judgment in a criminal revision. In ***W.P. (Civil) No.34540 of 2006, dated 14.02.2007 (Sabu George Vs. Home Secretary and P.K.Ravi)***, the Honourable Kerala High Court held as follows:-

"25. But these decisions cannot be held to cover a situation when post-revision there has been a substantial change in the circumstances and a later request is made in a separate application under Section 482 Cr.P.C. or Article 226 of 227 of the Constitution. That question was specifically considered by the Supreme Court in Mostt. Simrikhia v. Smt. Dolley Mukherjee(1990 Crl.L.J. 1599). In paragraph 2 of the said decision, the Supreme Court has observed thus:

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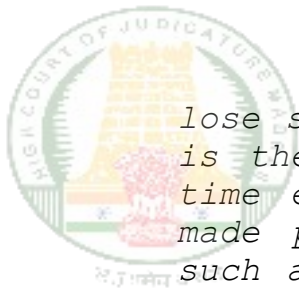


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"If there had been change in the circumstances of the case, it would be in order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the Court. Where there is no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review, which is expressly barred under S.362."

26. In the instant cases, when the revision petition was disposed of by this Court, this circumstance - that the parties settled the dispute and the complainant compounded the offence - was not there at all. It is a subsequent change in circumstance. The decision in *Mostt. Simrikhia W.P.C. No. 34540 of 2006* & connected cases (*supra*) squarely applies. That was a case where an earlier application under Section 482 Cr.P.C. was dismissed, but still the Supreme Court held that a change in circumstances is sufficient to justify the invocation of the powers afresh under Section 482 Cr.P.C. Notwithstanding the bar under Section 362 Cr.P.C. In the instant case, the powers under Section 482 Cr.P.C. have not been sought to be invoked earlier. Only the revisional powers were exercised. That is all the more the reason why under the changed circumstances the extraordinary inherent jurisdiction under Section 482 Cr.P.C. can be invoked. In the light of the dictum in *Mostt. Simrikhia* earlier decisions rendered and subsequent decisions, which do not refer to the said decision specifically and in which the opinion is expressed that the powers under Section 482 Cr.P.C. cannot be invoked after disposal of the revision in view of the bar under Section 362, cannot be held to lay down the law correctly.

27. Lastly, the question arises whether, in the facts and circumstances of this case, such power can or need be invoked. The prosecution is under Section 138 of the N.I. Act. Basically the crux of the offence is the inability of a person to make payment of the amount due under the cheque within the stipulated period of time when demand is made W.P.C. No. 34540 of 2006 & connected cases on the basis of a dishonoured cheque. Virtually culpability lies in the failure to discharge a financial liability. One cannot



lose sight of the fact that essentially and basically it is the failure to pay the amount within the stipulated time even after notice of demand is received, which is made punishable under Section 138 of the N.I. Act. In such a case conscience of the court would be hurt if in spite of composition the accused were to be compelled to undergo a substantive sentence of incarceration in prison. The prison sentence is frightening for the polity. The polity abhors it. Unless absolutely necessary, such deprivation of liberty should not be resorted to. These circumstances also must weigh with the court while considering the question whether powers under Section 482 Cr.P.C. can and ought to be invoked in cases like the instant ones.

28. Having rendered my very anxious consideration to all the relevant inputs, I am satisfied that these are eminently fit instances where powers under Section 482 Cr.P.C. can and ought to be invoked in favour of the petitioners herein, who have settled their disputes with the respective complainants and have made payment of the amounts payable to the respective complainants/payees under the cheques in question. To direct the parties to go to the Supreme Court to get the composition accepted or to W.P.C. No. 34540 of 2006 & connected cases knock at the door of the Government for invocation of the powers under Sections 432 or 433 to avoid incarceration in prison would be heartless and would amount to unjustified abdication of the jurisdiction under Section 482, I feel.

29. Will not such invocation of the powers militate against the majesty of law and the finality of decisions rendered? If composition can be reached at any time after the conviction and sentence have become final, what respect can decisions of the Courts command? These questions do disturb me. But in the final analysis they do not persuade me to hold differently. The offence is compoundable. Parties have settled their disputes amicably. Complainants have voluntarily compounded the offence. There is no specific bar against such composition after the finality of the conviction and sentence. The offence is only one under Section 138 of the N.I. Act. If the powers under Section 482 Cr.P.C. were not invoked by this Court, the petitioners will have to necessarily undergo the dreadful ordeal of punitive incarceration in prison. By being humane and considerate towards such an accused who has made amends and reversed his culpable conduct, the majesty of the law will not suffer at all. Quality W.P.C. No. 34540 of 2006 &



connected cases of mercy is the most important dimension of justice. I hold that these are fit cases to invoke the powers under Section 482 Cr.P.C.

30. I may hasten to observe that I do not intend to lay down a rule of the thumb that there can be post revision composition as a matter of routine. Facts in each case will have to be considered carefully. That the petitioners shall have to undergo punitive substantive sentence of imprisonment in prison in these cases, under Section 138 of the N.I. Act does perhaps persuade me in the final analysis to invoke such powers."

5. I am satisfied that the ratio laid down in Sabu George's case can apply to the case on hand also. Of course, this case is not to be treated as precedent. The inherent powers of this Court are invoked to show indulgence to the revision petitioner considering the special facts and circumstances of the case. The petitioner is aged about 57 years. He is also having certain cardiac related issues. He has an unmarried daughter. Therefore, exercising my inherent power under Section 482 of Cr.P.C., the order earlier passed stands recalled and the parties are permitted to compound the offence between themselves. This criminal original petition and the criminal miscellaneous petition are disposed of accordingly. The NBW issued against the petitioner pursuant to the order earlier made in Cr1.R.C.(MD)No.339 of 2010 stands recalled.

Sd/-

Assistant Registrar (Cr1 Side)

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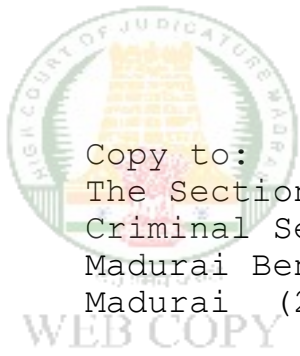
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Sub Assistant Registrar(CS)

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To:

1. The Sessions Judge,
Kanyakumari Division at Nagercoil.
2. The Judicial Magistrate No.III,
Nagercoil, Kanyakumari District.
3. The Inspector of Police,
Mandaicadu Police Station,
Kanyakumari District.
4. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.



Copy to:
The Section Officer,
Criminal Section(Records),
Madurai Bench of Madras High Court,
Madurai (2 Copies)

+ 1cc to Mr.G.RAMANATHAN ,Advocate, SR No.102737

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