THE HONOURABLE Dr.JUSTICE B. SIVA SANKARA RAO

CRIMINAL PETITION No.4085 OF 2017

ORDER :

Petitioner is the complainant and 2nd respondent is the accused in C.C.No.67 of 2016 on the file of XXIII Special Magistrate, Hyderabad. It was taken cognizance for the offence punishable under Section 138 of Negotiable Instruments Act. In the course of trial, after examination of the complainant as PW.1, petitioner-complainant filed Crl.M.P.No.648 of 2017 which is a petition invoking Section 254 Cr.P.C., to summon the Manager of Idea Cellular Services Limited as well as to produce the application form of Cell No.9848657579 and payment of bills for the Months of June 2015 to August, 2015 and also to summon the Manager, HDFC Bank, Nacharam Branch, Hyderabad to produce the account opening application form pertains to A/c.No.50200000216149 and statement of account for the period from 20.06.2015 to 25.06.2015.

2. The averments in support of the petition were that the cheque issued was for discharge of legally enforceable debt for the investment made by the complainant in the business of accused and in her evidence, the complainant as Pw.1 changed her counsel and it is during her cross-examination, accused suggested that no acquaintance with her and never requested for any investment in his business and she did not transfer any amounts to his account supra and what the complainant stated is she transferred the amount to the account which belongs to the brother of accused, as per the request of the accused on

20.06.2015 and 27.06.2015 which is an account with HDFC, Nacharam Branch. HDFC Bank, Raj Bhavan Branch issued certificate giving details of transfer of amount into the account of Novel Organics Synthesis and accused also exchanged messages during whatsapp application and there is proof regarding and thereby complainant filed petition to receive documents in Crl.M.P.No.3036 of 2016 that was allowed subject to costs of Rs.500/-. Petitioner was recalled and she was examined and got marked Exs.P.10 and P.11. It was during further cross-examination pursuant to it, on 16.02.2017 it was suggested by the accused of name of accused not reflecting in Ex.P.10 and he was not having joint account in HDFC, Nacharam branch and it is not even his brother's account, but for the cell phone number stands in his name and thereby it is necessary to call the Bank Manager and the Manager of Cellular company to produce the record.

3. The same was opposed by the accused and seeking to dismiss the petition that no foundation or ground to recall time and again as Pw.1 to summon the documents or by to examine those documents and it is pursuant to which the impugned order of the learned Special Magistrate from Para 6 onwards read that during course of arguments the counsel for accused admitted that the cell phone belongs to him. However, the submission that there is no necessity to summon the Manager of Cellular company to produce any document in relation to the Cell. There is nothing to interfere so far as that observation is concerned, as the admitted facts need not be proved against the accused. But so far exchange of messages, order can be marked

by the learned Special Magistrate containing that observation, as Ex.C.1 pursuant to this order to refer in the final orders being passed by the Court.

4. So far summoning of Bank Manager of HDFC, Nacharam Branch is concerned, Para 10 it is the observation in the impugned order of learned Special Magistrate that from Ex.P.10 document issued by HDFC Bank shows Rs.30,000/- was transferred from the complainant's account to Noval Organics Synthesis on 20.06.2015 and Rs.42,500/- on 27.06.2015 and admittedly, no document is filed to show that Noval Organics Synthesis belongs to accused and it is the contention that accused is the partner of above entity. Though complainant admitted the account under Ex.P.10 is not standing in the name of accused and she does not even know that accused got any brother which is also in variation to the very chief-examination of complainant of saying that said amount paid to the accused towards her share through Net transfer and accused received and as per MOU, accused shall run entire business and complainant is only a sleeping partner and for summoning any witness and marking any documents, there shall be some relevancy. In the absence of any pleading that too from the evidence supra, there is no basis to summon the witness to mark the documents from the changed version of complainant and in so far as the pleading that she paid the amount to accused, the proposed summoning of documents regarding payment in the name of Noval Organics Synthesis is not a response thereby, no relevancy. It is impugning the same, the present petition is filed.

5. Notice served on the counsel for 2nd respondent, besides sent to 2nd respondent-accused returned of no such addressee is a sufficient service. Taken as heard for 2nd respondent and heard learned counsel for the petitioner.

6. Perused the material on record.

7. In support of the contentions in the grounds that learned Special Magistrate did not properly advert to the facts and went wrong in dismissing the petition instead of allowing the same, when it is necessary for the just decision of the case and it is not necessary for the learned Magistrate to pre-judge for the purpose of summoning the documents with reference to the evidence in pointing out any discrepancy, but for ultimate appreciation.

8. The whatsapp messages are filed which according to the petitioners shows particularly from the two messages dated 20.06.2017 by furnishing said account mentioning the name of Noval Organics Synthesis, Nacharam Branch, when questioned whose account it is, by his response it is saying that of his brother's and when OK to send by mentioning company joint account, thereby complainant mentioned as going to transfer and response of accused is after completion of transaction to give message back. It is also pointed out other messages for two transactions dated 27.06.2015. When such is the case, it is not found adverting in the impugned order of the learned Special Magistrate, though it is appreciation for just decision of the case, said summoning of Manager of the HDFC, Nacharam Branch to produce the bank account particulars and the

transaction in relation to the relevant period mistakenly mentioned instead of 27.06.2015 as 25.06.2015.

9. Having regard to the above, the Criminal Petition is allowed, subject to costs of Rs.3000/- (Rupees three thousand only) payable to the Army Welfare Fund, within four (4) weeks from the date of receipt of copy of this order and file proof of payment **before the lower court** failing which the lower Court's dismissal order is confirmed for all practical purposes. Pending miscellaneous petitions shall stand closed.

Dr.JUSTICE B. SIVA SANKARA RAO

07th February, 2019
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