

**IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT: HYDERABAD
CORAM:**

*** THE HON'BLE SRI JUSTICE K. LAKSHMAN
+ CRIMINAL PETITION Nos.4448 AND 4449 OF 2021**

% Delivered on:12-04-2022

Between:

# Smt. P. Rama Devi	Vs.	.. Petitioner
\$Smt. M. Seeta & another		.. Respondents

! For Petitioner	:	Mr. K. Sai Babu
^ For Respondent No.1	:	Mrs.Neeraja Sudhakar Reddy
For Respondent No.2	:	Khaja Vizarath Ali, Asst. Public Prosecutor.
< Gist	:	
> Head Note	:	
? Cases Referred	:	

1. 2010 (2) ALD (Cri) 951
2. 2003 (2) ALD (Cri) 258
3. 2003 (1) ALD (Cri) 508
4. AIR 1981 SC 736
5. AIR 1966 SC 1047
6. (2011) 5 SCC 142

HON'BLE SRI JUSTICE K. LAKSHMAN

CRIMINAL PETITION Nos.4448 AND 4449 OF 2021

COMMON ORDER:

Heard Mr. K. Sai Babu, learned counsel for the petitioner, Mrs. Neeraja Sudhakar Reddy, learned counsel for respondent No.1 and learned Assistant Public Prosecutor appearing on behalf of respondent No.1 in both the petitions.

2. The *lis* involved, the parties and the offence are one and the same and, therefore, the same was heard together and being disposed of by way of this common order.

3. Crl.P. No.4448 of 2021 is filed by the petitioner - accused to quash the docket order dated 24.02.2020 passed in Crl.A. No.288 of 2016 by the VI Additional District and Sessions Judge (FTC), Ranga Reddy District. Like-wise, the petitioner herein has filed Crl.P. No.4449 of 2021 to quash the docket order dated 24.02.2020 passed in Crl.A. No.289 of 2021 by the very same Court.

4. Mrs. M. Seeta, respondent No.1 in both the criminal petitions, filed two complaints vide C.C. Nos.48 of 2016 and 51 of 2016 against Mrs. P. Rama Devi, petitioner herein in both the criminal petitions for the offence under Section - 138 of the Negotiable Instruments Act, 1881. Learned Special Magistrate, Cyberabad at Kukatpally Court-I, vide separate judgments both dated 30.03.2016, convicted the petitioner herein for the said offence and accordingly sentenced her to undergo simple imprisonment for six (06) months in each case. The learned Magistrate had also directed her to pay a compensation amount of Rs.14,68,500/- and Rs.11,97,000/- respectively to the complainant with simple interest at 9% per annum from the date of judgment till payment of the said compensation amount in default to suffer simple imprisonment for six (06) months respectively. One month time has granted to the petitioner herein for payment of the said compensation amount.

5. Feeling aggrieved by the said judgment, the petitioner herein had preferred appeals vide Crl.A. Nos.288 of 2016 and 289 of 2016 respectively before the District and Sessions Judge (FTC),

Ranga Reddy District. The appellate Court, vide docket order, both dated 24.02.2020 in Crl.A. Nos.288 and 289 of 2016, remanded the matters back to the learned Magistrate Court for sending the file in proper form on the ground that there is discrepancy in the depositions. In both the cases, the parties and the advocates are same except variation in the cheque amount. There is possibility of changing the depositions in both the cases. Deposition of PW.1 in C.C. No.48 of 2016 might have kept in C.C. No.51 of 2016. The appellate Court further referred that on verification it is observed that in the cross-examination of PW.1, the amounts pertaining to the concerned case is changed from the file of other case. Therefore, the appellate Court reopened the matter and enquired with both the advocates. They said that they would verify the record and submit before the Court. Accordingly, on 30.01.2020, the appellate counsel reported that they could not get the certified copies and in fact he wanted to file judgment on the said aspect and he has also pointed out the same and gave a suggestion also. In the cross-examination, there is no specific suggestion that in the complaint she claimed so and so amount and in the cross-

examination she stated so and so amount. The appellate Court further referred that the both the counsel asked the Court to make correction by placing the depositions in the relevant files or send the same to the trial Court with a direction to make them corrected and send back to the appellate Court. The appellate Court further referred that the depositions were changed and the accused never taken the plea of inconsistency in the amount claimed by the complainant and stated in the cross-examination, even in the revision also he had not taken such a plea. Therefore, the appellant Court cannot *suo motu* change the depositions by keeping one deposition in another file and thought it proper to send the file to the concerned Court for sending the correct depositions by keeping them in proper files. With the said observations, the trial Court has remanded both the cases to the trial Court with a direction to send the files in proper form.

6. Challenging the said orders, both dated 24.02.2020 in Crl.A. Nos.288 and 289 of 2016, the petitioner herein – accused filed the present criminal petitions.

7. Mr. K. Sai Babu, learned counsel for the petitioner in both the criminal petitions, referring to Section - 386 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), would submit that the appellate Court has no power to remand the appeal with a direction to the trial Court to send the file in proper form. Sending to the trial Court by the appellate Court is contrary to the powers vested in the appellate Court under Section - 386 of the Cr.P.C. He would further submit that on remand, respondent No.1 - complainant had filed petitions under Section - 465 of the Cr.P.C. vide Crl.M.P. Nos.01 of 2021 and 4 of 2021 in C.C. Nos.48 of 2016 and 51 of 2016 respectively stating that the trial Court while sending the records to the appellate Court due to oversight and inadvertently kept the depositions wrongly into another file belonging to the same parties and, therefore, requested to correct the number on the depositions as per the judgment *vice versa* in both the files and the same may be sent to the appellate Court. The petitioner herein had filed counter opposing the said request.

8. The trial Court vide order dated 25.01.2021 allowed both the applications. The observations made by the trial Court in both

the petitions is one and the same except the case number, it is relevant to extract the observations made in the order passed in Crl.M.P.1 of 2020 is as under:

“In the result the petition is allowed directing the Office to detach the Cross Examination page from Chief Examination of P.W.1 in this C.C. No.48/2016 and attach the same to the Chief Examination in C.C. No.51/2016 on the file of this Court which is connected Case and further detach the Cross Examination page from Chief Examination of P.W.1 in C.C. No.51/2016 and attach to Chief Examination of P.W.1 in this case which is C.C. No.48/2016 and submit the Case record to the Honourable VI Additional District and Sessions Judge Court Kukatpally, immediately by indexing the Case file carefully.”

9. In view of the above, the very docket orders in both the appeals dated 24.02.2020 are illegal and, therefore, the consequential orders dated 25.01.2021 passed by the trial Court in Crl.M.P. Nos.1 and 4 of 2021 are also liable to be quashed.

10. In support of his case, the learned counsel for the petitioner has placed reliance on the principle laid down by the combined High Court of Andhra Pradesh at Hyderabad in

Yenuganti Tata Rao v. The State¹ and **P. Mazher v. State of A.P.**² and also the principle laid down by the Hon'ble Supreme Court in **Amar Singh v. Balwinder Singh**³. With the said submissions, learned counsel sought to quash the orders both dated 24.02.2020 in Crl.A. Nos.288 of 2016 and 289 of 2026.

11. On the other hand, Mrs. Neeraja Sudhakar Reddy, learned counsel for respondent No.1 - complainant, would submit that it is mistake committed by the clerical staff for which parties cannot be suffered. It may be corrected. Therefore, the appellate Court has rightly remitted the matter to the trial Court with a direction to send the files in proper form. She has also placed reliance on the principle laid down by the Apex Court in **Sooraj Devi v. Pyare Lal**⁴ and **Master Construction Co. (P) Ltd. v. State of Orissa**⁵. With the said submissions, she would submit that there is no error committed by him and sought to dismiss the present criminal petition.

¹. 2010 (2) ALD (Cri) 951

². 2003 (2) ALD (Cri) 258

³. 2003 (1) ALD (Cri) 508

⁴. AIR 1981 SC 736

⁵. AIR 1966 SC 1047

12. In view of the above said rival submissions, this Court thought it relevant to extract Section - 386 of the Cr.P.C. which is as under:

“386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

- (i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or
- (ii) alter the finding maintaining the sentence, or
- (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;
- (d) in an appeal from any other order, alter or reverse such order;
- (e) make any amendment or any consequential or incidental order that may be just or proper; Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.”

13. This Court also feels it appropriate to extract Sections -
362 and 465 of the Cr.P.C.

“ **362. Court not to after judgment.** Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or

review the same except to correct a clerical or arithmetical error.”

“465. Finding or sentence when reversible by reason of error, omission irregularity.

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.”

Thus, as per Section - 386 of the Cr.P.C., appellate Court has the three options viz., (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of

competent jurisdiction subordinate to such Appellate Court or committed for trial, or ii) alter the finding maintaining the sentence, or (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same.

14. It is also relevant to refer to Section - 2 (g) of the Cr.P.C. which deals with 'inquiry' and it means every inquiry, other than a trial, conducted under the Code by a Magistrate or Court. Thus, inquiry does not mean trial, and it follows that further inquiry does not mean further trial. Therefore, no further inquiry can be ordered by the appellate Court.

15. In **Yenuganti Tata Rao**¹, the High Court of Andhra Pradesh at Hyderabad had an occasion to deal with the scope and ambit of Section - 386 of the Cr.P.C. and powers of the appellate Court under Section - 386 of the Cr.P.C. and also considering the facts of the case therein, held that Criminal Law knows only remand of an accused and not remand of a case. The concept of remand of a case is outside the scope of criminal procedure. Like in a civil appeal, the Sessions Judge has no power to remand an

appeal to the trial Court. Making an order for re-trial can be an exceptional cases and not exceptional circumstances. Even in a given civil appeal, remand cannot be resorted to by the appellate Court unless the circumstances are within the parameters contained in Order XLI Rules 23 to 26 of Code of Civil Procedure.

16. In **P. Mazher**², the High Court of Andhra Pradesh at Hyderabad while examining the powers of appellate Court under Section - 386 of the Cr.P.C., facts of the case therein and also the principles laid down by the Delhi High Court, the Calcutta High Court and the Madras High Court held that the Appellate Judge has got the option to reverse the finding and sentence and acquit the accused of the offence of which he was charged. The Appellate Court is also at liberty to order retrial of the accused by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial. The Appellate Court is also at liberty to alter the finding and maintain the sentence imposed by the Trial Court. It has also got the option with or without altering the finding, alter the nature and extent of the sentence. However, it has no power to enhance the sentence given by the Trial Court. Section

386(b), Cr.P.C., does not entitle the Appellate Judge in an appeal from conviction to confirm the conviction and at the same time remit back the case to the Trial Court for consideration regarding the sentence alone. Thus, the learned Metropolitan Sessions Judge has committed an error in remitting the case to the Trial Court regarding the sentence alone after confirming the conviction imposed by the Trial Court.

17. The Madras High Court in **Roja Kamalam v. State [AIR 1971 Mad 41]** held that the Appellate Court cannot remand the case for the purpose of passing proper sentence. The Calcutta High Court in **State v. Pulish Ghosh [1973 Crl.L.J. 510]** reiterated the same principle. In **Mukand Lal v. State [1979 Crl.L.J. 105]**, the Delhi High Court held that the order of the Sessions Judge remanding the case to the lower Court to offer an opportunity of hearing on the question of sentence is irregular.

18. In **Sooraj Devi⁴**, it was a case where the Hon'ble Supreme Court drew distinction between the power under Section - 482 and 362 of the Cr.P.C. Therefore, the facts in the said case and the law laid down therein are different to the facts of the present

case. Therefore, the principle laid down in the said case has no application to the facts of the present case.

19. In **Master Construction Co. (P) Ltd.**⁵ which is a case under Sales Tax Act, and the Apex Court examined the facts of the said case including Rule - 83 of the Orissa Sales Tax Rules, held that Commissioner reviewed its previous order which was passed on merits mainly on two grounds that the application for refund in respect of certain amount-was barred by limitation ,and that the assessee was not entitled to a refund of the amounts paid before the assessment orders were made on the ground that the said amounts were not the subject matter of the appeals wherein the assessments were set aside. The errors, if any, arose because the Department did not raise those points before the Commissioner. They were also errors not apparent on the face of the record for the decision depends upon consideration of arguable questions of limitation and construction of documents. Indeed the Commissioner re-heard arguments and came to a conclusion different from that which he arrived on the earlier occasion. The same is not permissible under Rule - 83 of the Rules. Therefore, the facts of the said case are not

applicable to the facts of the present case in view of the powers of the appellate Court under Section - 386 of the Cr.P.C.

20. In view of the principle laid down in the above referred decisions, as discussed above, the above said two appeals are against the conviction judgments. The appellate Court heard the matters and reserved the same for orders on 29.01.2020 itself. Thereafter, the appellate Court came to the conclusion that the depositions were not changed in both the cases, parties and advocates are same except variation in the cheque amount. The appellate Court also came to the conclusion that there is possibility of changing of depositions in both the cases. With the said findings, the appellate Court has remanded the matter back to the concerned Magistrate for sending the files in proper form. Thereafter, the complainant had filed an application in both the Calendar Cases under Section - 465 of the Cr.P.C. and the same were allowed on 25.01.2021.

21. Section - 465 of the Cr.P.C. deals with finding or sentence when reversible by reason of error, omission irregularity. As discussed above, the appellate Court has no power to remand

the matter back to the learned Magistrate with a direction to send the files in proper form while exercising its power under Section - 386 of the Cr.P.C.

22. In view of the above discussion, both the counsel appearing on either side before the Magistrate were at fault and were negligent as the said mistake was not pointed out by them either while recording the depositions or subsequently. The parties were also at fault as they signed the deposition without reading its contents. Normally, witness would sign the deposition after going through its contents. Further, learned Magistrate and the learned Appellate Court failed either to detect such mistake or rectify the same while hearing the matters. However, there is a procedure to correct the same by the appellate Court by invoking its power under Section - 386 of the Cr.P.C.

23. Referring to the doctrine 'failure of justice' Mrs. B. Neeraja Sudhakar Reddy, learned counsel for respondent No.1, would submit that the mistake committed by the Ministerial Staff can be corrected and the party should not be suffered. As discussed above, it is not the mistake committed by the Ministerial Staff

alone and both the counsel appearing before the Magistrate Court as well as Appellate Court, both the parties, learned Magistrate and the learned Appellate Court were at fault.

24. It is a settled legal proposition that if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In such a fact situation, the legal maxim *sublato fundamento cadit opus* is applicable, meaning thereby, in case a foundation is removed, the superstructure falls as held by the Apex Court in **Chairman-cum-Managing Director, Coal India Limited v. Ananta Saha**⁶.

25. It is relevant to note that this Court has power to pass an order which was not sought in a criminal petition by invoking its inherent power under Section - 482 of the Cr.P.C. Therefore, the said docket order, both dated 24.02.2020 in Crl.A. Nos.288 and 289 of 2016 passed by the learned VI Additional District and Sessions Judge, Ranga Reddy District are liable to be quashed. In view of the same, the consequential orders, both dated 25.01.2021

⁶. (2011) 5 SCC 142

in Crl.M.P. Nos.01 and 04 of 2021 in C.C. Nos.48 and 51 of 2016 respectively passed by the learned I Special Magistrate, Kukatpally are also liable to be quashed.

26. For the foregoing discussion, the docket orders, both dated 24.02.2020 passed in Crl.A. Nos.288 and 289 of 2016 respectively by the learned VI Additional District and Sessions Judge, Ranga Reddy District, and the consequential orders, both dated 25.01.2021 passed in Crl.M.P. Nos.01 and 04 of 2021 in C.C. Nos.48 and 51 of 2016 respectively passed by the learned I Special Magistrate, Kukatpally, are hereby quashed. Both the matters are remanded back to the learned VI Additional District and Sessions Judge, Ranga Reddy District, for fresh disposal in exercise of its power under Section - 386 of the Cr.P.C.

27. It is relevant to note that both the appeals are of the year 2016. Thus, learned Judge is directed to dispose of the same within three (03) months from the date of receipt of a certified copy of this order.

28. Both the Criminal Petitions are accordingly allowed.

As a sequel, miscellaneous applications, if any, pending in the criminal petitions shall stand closed.

12th April, 2022

K. LAKSHMAN, J

Note:

L.R. Copy to be marked.

(B/O.) Mgr