

(2013) 02 DEL CK 0408

In the Delhi High Court

Case No : Criminal Rev. P. 478 of 2011 and Criminal M.A. No. 12757 of 2011

Ajay Jain

APPELLANT

Vs

Purshottam Nath Jain and Sons (Huf)

RESPONDENT

Date of Decision : 04-02-2013

Acts Referred:

Citation : (2013) 2 BC 723 : (2013) 3 RCR(Civil) 860

Hon'ble Judges : Pratibha Rani, J

Bench : Single Bench

Advocate : K.K. Aggarwal, for the Appellant;

Judgement

Pratibha Rani, J.—The petitioner has filed this revision petition impugning the order dated 27.09.2011 passed by learned Trial Court whereby his application u/s 311 Cr.P.C. to resummon the defence witness was dismissed. The circumstance giving rise to this petition needs to be referred in some detail for the reason that not only the legality and validity of the impugned order needs to be examined in this revision petition but also the manner in which the trial has been conducted by learned Trial Court. This is a case requiring exercise of inherent power vested in this Court u/s 482 Cr.P.C. for not only giving effect to the order under Code of Criminal Procedure but also to secure the ends of justice. The procedure followed in this case by learned Trial Court is such that it has rendered the accused, who is petitioner before this Court, virtually defenseless. A complaint u/s 138 NI Act was filed by the respondent/complainant against the present petitioner. After the cross examination of the complainant was completed on 15.04.2011, the learned Trial Court posted the case for defence evidence without examining the accused recording that in view of the latest case law, statement of accused was not required.

2. Thereafter, on application of the accused, witness from HDFC Bank was ordered to be summoned for 24.08.2011. Though the witness was present, learned counsel for the accused was not available due to illness. The learned Trial Court, while declining the prayer of the accused for adjournment, discharged the

witness and closed the defence evidence posting the case for final arguments. On the next date of hearing, an application to resummon the witness from HDFC Bank was filed by the accused but the same was also dismissed by the learned Trial Court. Feeling aggrieved, the petitioner filed this revision petition.

3. On 10.10.2012 during hearing of this petition, learned counsel for the petitioner informed that after recording complainant's evidence and closing defence evidence, the matter has been adjourned for final arguments without even recording the statement of the accused, who is petitioner before this Court. Thus, this Court was constrained to summon the TCR to find out how without examining the accused, the case has been straight away fixed for defence evidence and then after closing defence evidence, for final arguments.

4. This CrI. Rev. P. No. 478/2011 has provided a window to this Court to peep into the functioning of learned Trial Court who was dealing with large pendency of cases u/s 138 NI Act. The procedure being followed by learned Trial Court in conducting trial of these cases is neither in consonance with the summary procedure prescribed u/s 143 of Negotiable Instrument Act nor in accordance with Chapter XXI of Cr.P.C. laying down procedure for summary trial or under Chapter XX for summons trial cases. The guidelines/procedure laid down by this Court in *Rajesh Agarwal Vs. State and Another*, , were infact intended to guide subordinate judiciary as "Light House" so that the huge pendency of cases under Negotiable Instrument Act can be tackled in such manner that the very object of provisions of Section 138 NI Act i.e. expeditious disposal in cheque bouncing case could be achieved, have also not been followed in letter and spirit.

5. The TCR has been perused. The manner in which the trial was conducted by learned Trial Court, warrants interference by this Court in exercise of the inherent jurisdiction vested u/s 482 Cr.P.C. Thus, though the relief claimed in the petition is only limited to the extent that petitioner may be allowed to examine witnesses in his defence, certain other illegalities committed by learned Trial Court in following the procedure for conducting the trial in a case u/s 138 NI Act, need to be rectified.

6. Perusal of the TCR reveals that on 27.02.2006, the Court ordered for summoning of the accused and the summoning order reads as under:

27.2.06

Pr: Complainant in person.

Complainant examined CW1 by way of affidavit.

CE closed.

Arguments at point of summoning heard.

Material perused.

Sufficient material proved on record to summon the accused u/s. 138 NI Act.

Let accused be summoned accordingly on filing of PF/RC for 9.01.07.

Sd/-

MM/Delhi

27/2/06

7. At the stage of notice u/s 251 Cr.P.C., which was served on the accused on 28.05.2009, the proceedings of that date are to the following effect:

28/5/09

Present: Both the parties along with respective counsel.

SHO PS Model Town in person.

SHO undertakes for the execution of the warrants sincerely in future and request for dropping the notice. Considering the submissions, the SHO is dropped and he is directed to execute the process issued by the court sincerely.

On the basis of material available on filed notice of accusation explained to accused to which accused pleaded not guilty and claimed trial. Put up on 1/10/09 for PE.

Sd/-

ACMM-01: Delhi

8. The notice u/s 251 Cr.P.C. served on the accused is extracted hereunder:

NOTICE

I, Sunil Chaudhary, ACMM-01(Central), Delhi do hereby serve you Sh. Ajay Jain, Prop. of M/s. Datasutch Embroideries following notice:

That you accused issued cheque no 064082 for Rs. 600,00/- dated 28.10.05 drawn on Bank of Punjab Ltd., Gujranwala Town, Part-1, Opp. Model Town, Ring Road, Delhi in favour of the complainant in discharge of legally enforceable liability towards the complainant from the account maintained by you in the name your firm bearing no. 72-CA11181719 which was dishonoured by your bank on presentation due to payment stopped by drawer and your failed to make the payment within the stipulated period despite service of demand notice dated 11.1.06 sent to you through registered AD and UPC thus thereby you committed an offence punishable u/s. 138 r/w 141 of Negotiable Instrument Act and within my cognizance.

And I hereby direct that you be tried by the said Court on the said notice.

ACMM-1: DELHI

This notice is read over and explained to the accused and following question is asked:

Q. Do you plead guilty or claim trial?

Ans. I plead not guilty and claim trial

Sd/-

RO&AC

sd/-

ACMM-1: DELHI

9. Cross examination of complainant was conducted on 15.04.2011 and the proceedings recorded on that date are as under:

15.04.2011

Pr: Complainant in person.

Accused in person with counsel.

One witness is present who is cross examined as CW1 and discharged.

No other witness is to be examined by the complainant and as per the latest case law, statement of the accused is not required as the affidavit tendered in pre summoning evidence was duly explained at the time of accusation of notice. As such put up on 20.05.2011 for DE.

Sd/-

ACMM-01: DELHI

10. Thereafter the accused moved an application u/s 311 Cr.P.C.. After obtaining reply from the complainant and hearing the parties, the application to summon the Bank Manager from HDFC Bank alongwith the statement of bank account of the accused and the details of the cheque was allowed for the reason that the matter was pending for defence evidence and case was adjourned to 24.08.2011 for defence evidence. Learned Trial Court should have noted that there was hardly any requirement of filing an application u/s 311 Cr.P.C., obtaining reply and its disposal. Accused was only required to file an application for summoning the defence witnesses and no reply was required. He was only supposed to deposit the expenses.

11. The proceedings of the date 24.08.2011 are extracted as under:

24.08.2011 at 10.30

Pr: Complainant with counsel.

Accused in person with proxy counsel.

Matter is passed over awaiting the witness who has not been turned up despite service.

Sd/-

ACMM-01: DELHI

At 11.50AM

Pr. As above.

File taken up again on the appearance of witness namely Ashish Kumar from HDFC Bank but the adjournment is prayed by the accused submitting that the main counsel is not available due to illness. Neither the affidavit nor the medical certificate is attached with the application. The witness is a formal witnesses who has brought the summoned record and despite the directions of the court counsel appearing with the accused is not examining the summoned defence witness, so the witness is discharged. Put up on 27.09.2011 for final arguments.

Sd/-

ACMM-01: DELHI

12. On 27.09.2011, the application was filed by the counsel for the accused praying for recalling the Manager, HDFC Bank, Gujarawala Town Branch in defence which was dismissed by impugned order for the following reasons:-

- (i) The presence of the accused was secured to face trial by coercive steps;
- (ii) The accused was not present when complainant was examined and thereafter opportunity was given to him to cross examine the complainant;
- (iii) After the dispensation of examination of accused in view of the latest case law, as the evidence was already explained to him at the time of explanation of accusation u/s 251 Cr.P.C., accused was provided an opportunity to lead defence evidence;
- (iv) Summons were issued to the bank witness for the date fixed but accused failed to examine the witness;
- (v) Request for adjournment by the accused was declined as the application was neither supported by any affidavit nor with the medical certificate to show that counsel was not available due to ailment; and
- (vi) Even the application u/s 311 Cr.P.C. is not supported with any affidavit or medical certificate and the submissions made in the application did not appear to be trustworthy, thus meriting dismissal.

13. At the request of learned counsel for the accused, the case was adjourned to 17.10.2011 for final arguments. The petitioner has impugned the order dated 27.09.2011 before this Court.

14. First I would like to examine the correctness, legality and justifiability of the impugned order and then proceed to examine the manner in which the trial has been conducted so that miscarriage of justice is prevented.

15. The learned Trial Court has not given the citation or name of the "latest case law" relying upon which the statement of accused was dispensed with and the matter was straight away posted for defence evidence.

16. Although citation has not been given by learned Trial Court but it appears that learned Trial Court was referring to Rajesh Agarwal's case but without caring to go through the entire report, preferred to concentrate on para 17 wherein steps required to be taken by learned Trial Court in conducting the trial in case u/s 138 NI Act were prescribed. Had the learned Trial Court taken the pain to go through the entire report, he would have taken note of the discussion made in this regard in paras 6, 7 and 8 of the decision. In Rajesh Agarwal's case (Sura), while disposing of three petitions i.e. CrI.M.C. No. 1996/2010, 1700/2009 and 1397/2010, feeling concerned that the High Court is being flooded with the petitions u/s 482 Cr.P.C. for quashing the complaints u/s 138 NI Act and the grounds on which generally the quashing was sought, the learned Single Judge highlighted the objective of the proceedings u/s 138 NI Act. He also considered that this situation has arrived for the reason that the lower Courts are not following the mandate of the Statute of conducting trial of the cases u/s 138 of NI Act in a summary manner and despite amendment in NI Act, continue trying these cases as summons trial cases and a long drawn procedure is followed. In paras 4 and 5 of the report, it was observed by learned Single Judge, as under:-

4. Section 143 of N.I. Act, as amended by Legislature in 2002, specifically provides that all offences under this chapter of N.I. Act are to be tried by Judicial Magistrate of First Class or MM in accordance with summary trial provisions of Sections 262-265 Cr. P.C. (both inclusive). It is provided that in case of conviction of the accused u/s 138 N.I. Act under summary trial, it shall be lawful for the Magistrate to pass a sentence of imprisonment up to one year and a fine exceeding Rs. 5000/-. Section 143 further provides that if at the commencement or during the course of summary trial, MM finds that nature of case was such that a sentence of imprisonment exceeding one year may have to be passed or for some other reason MM comes to conclusion that case should not be tried summarily, the Magistrate has to pass an order after hearing the parties, giving reasons as to why he would like to try the case not in a summarily manner but as a summons trial and he could recall witnesses who may have been examined and proceed with the case to hear it as a summons trial case.

5. In order to ensure that the cases u/s 138 N.I. Act are tried before the Court of MM/JM in an expeditious manner, Legislature provided for summary trial. Section 145 of N.I. Act provides that evidence of complainant may be given by him by way of affidavit and such affidavit shall be read in evidence in any inquiry, trial or other proceedings in the court. This also makes clear that a complainant is not required to examine himself twice i.e. one after filing the complaint and one after summoning of the accused. The affidavit and the documents filed by the complainant along with complaint for taking cognizance of the offence are good enough to be read in evidence at both the stages i.e. pre-summoning stage and

the post summoning stage. The complainant is not required to be recalled and re-examined after summoning of accused unless the MM passes a specific order as to why the complainant is to be recalled. Such an order is to be passed on an application made by the accused or u/s 145(2) of N.I. Act suo moto by the Court.

17. Section 143 of NI Act provides that the cases u/s 138 NI Act shall be tried summarily by a Judicial Magistrate of First Class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265, (both inclusive) of the Code of Criminal Procedure shall, as far as may be, apply to such trials.

18. Code of Criminal Procedure in Chapter XXI prescribes procedure to be followed in Summary Trials. Section 262 Cr.P.C. provides that the procedure specified for trial of summons case shall be followed, except as mentioned in Section 262 Sub-Section (2). The sentence which can be awarded by following the summary trial procedure in a case u/s 138 NI Act is governed by Section 143(1) of NI Act.

19. Section 263 Cr.P.C. provides that in every case tried summarily, the Magistrate shall enter in such form as the State Government may direct, the following particulars namely:

- (a) the serial number of the case;
- (b) the date of the commission of the offence;
- (c) the date of the report or complaint;
- (d) the name of the complainant (if any);
- (e) the name, parentage and residence of the accused;
- (f) the offence complained of and the offence (if any) proved, and in cases coming under clause (ii), clause (iii) or clause (iv) of sub-section (1) of Section 260, the value of the property in respect of which the offence has been committed;
- (g) the plea of the accused and his examination (if any);
- (h) the finding;
- (i) the date on which proceedings terminated.

20. It may be noted that even Section 263(g) referred to above, requires the plea of the accused to be recorded and his examination (if any).

21. Chapter XXI of Code of Criminal Procedure consists of Sections 260 to 265 and deals with the procedure to be followed when the case is being tried summarily. If the accused does not plead guilty, the Magistrate has to record the substance of the evidence. In the instant case, it is noticed that the complainant filed his affidavit and manner in which the cross examination has been recorded, indicates that the procedure followed is not of summary trial. In other words, the

case though triable summarily, was tried as regular summons case.

22. The procedure for trial of summons case by Magistrates is incorporated in Chapter XX of the Code of Criminal Procedure. Section 251 Cr.P.C. provides that when in a summons case, the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge.

23. Section 252 Cr.P.C. deals with conviction on plea of guilty.

24. Section 253 Cr.P.C. deals with conviction on plea of guilty in absence of accused in petty cases.

25. As in this case, after serving of notice u/s 251 Cr.P.C., the accused pleaded not guilty and claimed trial, now we are concerned with the procedure that is required to be followed when the accused is not convicted u/s 252 or 253 of Code of Criminal Procedure. The procedure is prescribed u/s 254 of Code of Criminal Procedure, which reads as under:

254. Procedure when not convicted.-(1) If the Magistrate does not convict the accused u/s 252 or Section 253, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

(2) The Magistrate may, if he thinks fit, on the application of the prosecution or the accused, issue a summons to any witness directing him to attend or to produce any document or other thing.

(3) A Magistrate may, before summoning any witness on such application, require that the reasonable expenses of the witness incurred in attending for the purposes of the trial be deposited in Court.

26. The learned Magistrate was bound to record the witnesses, if any, produced by the complainant, hear the accused and examine the witnesses whom the accused wanted to produce in his defence. The words used in Section 254 Cr.P.C. that "Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence" makes it clear that a duty is cast on the Magistrate to hear the accused after the prosecution evidence was closed. The purpose behind is to enable the accused to explain the circumstances appearing in the prosecution evidence against him. The requirement to hear the accused is for the purpose to ask the accused what he has to say in his defence against the incriminating evidence which has been brought on record against him. It is the duty of the Magistrate to hear the accused on every circumstance appearing in evidence against him. Not only that, the accused is required to be examined under this Section and if he offers to lead evidence, the same has to be recorded.

27. From the above, it is clear that not only Section 263(g) Cr.P.C. (if the case is tried summarily) but also u/s 254 Cr.P.C. (if it is a summons trial), a duty is cast upon the Magistrate to examine the accused.

28. In Rajesh Agarwal's case (Supra), this Court has not dispensed with the examination of the accused. The learned Trial Court has preferred to just concentrate on para 17 of the report wherein steps required to be taken are mentioned. First of all, in para 17 of the report, it has nowhere been specified that after the stage of Section 145(2) of NI Act is over, the statement of accused is dispensed with. Secondly, in para 8 of the report, it was recorded that "normally the first date is wasted by the courts of MM just by taking bail bond of the accused and passing a bail order, while Section 251 & 263(g) of Cr. P.C. provide that when the accused appears before MM in a summary trial proceedings, the particulars of the offence, to which he is accused, shall be stated to him & he should be asked whether he pleads guilty or he has any defence to make. This is the mandate of Section 143 of N.I. Act, which provides summary trial of offence in terms of Cr. P.C. u/s 263(g) of Cr. P.C., the court has to record the plea of the accused and his examination."

29. Chapter XX of Code of Criminal Procedure prescribes procedure for Summons Trial cases. u/s 251 Cr.P.C., when the accused appears before the Magistrate, particulars of the offence for which he is an accused, are required to be explained to him. It is the duty of the Court to question the accused whether he pleads guilty or has any defence to make. Section 254 Cr.P.C. contemplates the necessity of the Magistrate to hear the accused and record the defence evidence.

30. Reverting to the facts of the present case, proceedings of the Trial Court reveal that at the stage of serving notice u/s 251 Cr.P.C., he was only questioned to the extent as to whether he plead guilty or claim trial and not on the aspect as to what defence he has to make. The answer given by the accused to the notice is to the effect that "I plead guilty and claim trial".

31. In the proceedings dated 15.04.2011, the learned Trial Court, while dispensing with statement of accused, observed that affidavit tendered in evidence by the complainant was duly explained to accused after serving notice u/s 251 Cr.P.C.. However, the proceeding dated 28.05.2009 only speaks of "accusation explained" and not evidence by way of affidavit. Even while questioning the accused, he was not asked what defence he has to make. Thus, right from the stage of serving of notice till final arguments, he was not questioned about his defence. It was a case of "stop payment" and it was necessary to record his plea in defence.

32. Worst part of the procedure followed by learned Trial Court is that at that stage of serving notice u/s 251 Cr.P.C., except questioning him and recording his answer in the manner, extracted above, till the stage of listing the case for final arguments, accused has not been given any opportunity to explain what defence he has to make or the circumstances appearing against him. Even non-

availability of the defence counsel due to his illness despite the fact that not only defence witness was summoned, but accused alongwith proxy counsel was also present but due to inability of the proxy counsel to examine the defence witness as he was a new entrant to the profession, the learned Trial Court preferred to discharge the defence witness and close defence evidence. If learned Trial Court was of the view that witness was formal pertaining to record and he was present along with the record, even the Court could have taken the pain by questioning the accused as to on what aspect the witness was to be examined and then could have recorded the statement. As if this is not the end of the misery of the petitioner, his prayer to recall the defence witnesses for examination and the plea by his counsel explaining his ailment to be the reason for his absence on the date when the defence witnesses, though present, defence evidence was closed, were not considered to prevent miscarriage of justice which has already been done to the accused. Of course, it was not within the power of the accused to ask his counsel to support the application u/s 311 Cr.P.C. by his medical certificate and if the Court really desired so, he could have directed learned defence counsel to file his own medical certificate if the genuineness of the ground due to which learned defence counsel could not appear, was not found convincing by learned Trial Court. Thus, the trial was conducted in a manner that accused was virtually rendered defenceless despite his efforts to produce defence witnesses.

33. Only one opportunity was given to the accused to lead defence evidence. The petitioner/accused took steps for examining defence witness from HDFC Bank. Witness was present but non-availability of the defence counsel on the ground of illness should have been considered by the Court. On the very first date fixed for defence evidence, instead of passing harsh order by closing the defence evidence despite the defence witness being present in the Court, for just decision of the case, at least the prayer of the petitioner/accused to recall the defence witness should have been considered by the learned Magistrate.

34. This case could be only a tip of an iceberg as learned Trial Court must be following this procedure in all the cases u/s 138 NI Act being tried by him by not recording the plea as to what defence he has to make and statement of accused thereby causing grave prejudice to the accused persons, thus resulting in serious miscarriage of justice which causes serious concern in the mind of this Court. I am rather pained to note that learned Trial Court neither cared to follow the procedure laid down under Negotiable Instrument Act and Code of Criminal Procedure for conducting trial in such type of cases nor the guidelines laid down by this Court in Rajesh Agarwal's case which was, infact, meant for speedy disposal of cases u/s 138 NI Act by the Courts struggling with huge pendency of such cases.

35. In Krishnan and another Vs. Krishnaveni and another, , the Apex Court held that in exercise of its paramount power of continuance superintendence, the High Court is justified in interfering with the order leading to miscarriage of justice and in setting aside the order of the Courts below. In case of serious miscarriage

of justice or abuse of the process of Courts or where mandatory provisions of law were not complied with and where High Court feels that the inherent jurisdiction was to be exercised to correct the mistake committed by the Trial Court that the extra ordinary inherent power u/s 482 Cr.P.C. can be exercised.

36. Having regard to the foregoing facts and circumstances, I find the grievance of the petitioner to be well founded. Learned Trial Court has overlooked the provisions of Cr.P.C. prescribing procedure to be followed in conducting an inquiry into an offence punishable u/s 138 NI Act by following the procedure prescribed for summary trial/summon trial. Not only procedure prescribed for conducting the trial had been bid good by learned Trial Court, even the guidelines by this Court in Rajesh Agarwal's case prescribing the manner in which the trial is to be conducted in cases u/s 138 NI Act, have been ignored. Accused cannot be made to suffer for lack of understanding of procedure required to be followed by the Court of Magistrate in such cases. In view of above situation, I am of the considered opinion that the order suffers from grave illegality and the same is liable to be set aside.

37. In view of above discussion, this is a fit case for exercise of inherent power by this Court u/s 482 Cr.P.C. to meet the ends of justice. Accordingly, the order dated 15.04.2011 passed by learned Trial Court to the effect that statement of accused is not required to be recorded and the subsequent proceedings in the trial are quashed. Learned Trial Court will proceed with the trial in accordance with the procedure prescribed by examining the accused and if the accused desires, to give him an opportunity to lead defence evidence.

38. With above observations, the petition stands disposed of. Copy of this order be sent to learned Trial Court for compliance. Trial Court Record be also sent back. Parties are directed to appear before the Trial Court on 15.02.2013