
(2015) 01 CAL CK 0035
In the Calcutta High Court
Case No : C.R.R. No. 2966 of 2014

Debashis Maity

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 29-01-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251, 260, 262, 262, 263
Negotiable Instruments Act, 1881 (NI) — Section 138, 143

Citation : (2015) 01 CAL CK 0035

Hon'ble Judges : Shib Sadhan Sadhu, J.

Bench : Single Bench

Advocate : Prabir Mitra, Pinaki Mitra and Ujjaini Chatterjee, for the Appellant

Final Decision : Dismissed

Judgement

Shib Sadhan Sadhu, J.—This is a petition filed under Section 482 of the Code of Criminal Procedure, 1973 to quash/set aside the impugned order dated 09.07.2014 passed by the Learned Additional Sessions Judge, redesignated Court, Paschim Medinipur in Criminal Revision No. 381 of 2013 dismissing the revision preferred by the present petitioner challenging the order dated 04.09.2013 passed by the Learned Judicial Magistrate, 4th Court, Paschim Medinipur, in connection with case No. CR 662 of 2009.

2. The CR Case No. 662 of 2009 was filed for offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "Act"). The allegation is that the accused/petitioner was granted a loan of Rs. 5,50,000/- by the complainant (O.P. No. 2) on condition of repayment within the month of May, 2009. The petitioner/accused issued a cheque on 16.06.2009 for Rs. 5,50,000/- in favour of the complainant (O.P. No. 2). When it was presented for encashment it was dishonoured due to insufficiency of fund. Even after issuance of statutory notice, there was no payment. In such circumstances, the aforesaid case was filed before the Trial Court. Annexure A (Page-15) is the complaint in that case.

3. The Learned Chief Judicial Magistrate, Paschim Medinipur, after taking cognizance on perusal of the aforesaid complaint transferred the same to the Court of Learned Judicial Magistrate, 4th Court, Paschim Medinipur for disposal. Thereafter, he proceeded with the case and held the trial after recording plea of the accused under Section 251 Cr.P.C. and after recording deposition of witnesses. During the midway that Learned trying Magistrate was transferred. The Learned succeeding Magistrate proceeded with the trial without ordering for a de novo trial. So being aggrieved the petitioner/accused filed an application before the Learned Magistrate praying for de novo trial in terms of Section 143 of the Act read with Section 326(3) of the Cr.P.C.

4. By an order dated 15.09.2012, the Learned Magistrate rejected the said application. Thereafter the Learned Presiding Magistrate was transferred and the petitioner/accused preferred a second application for de novo trial before the Learned succeeding Magistrate. But that second application was also rejected by an order dated 04.09.2013 by the Learned Judicial Magistrate, 4th Court, Paschim Medinipur refusing to grant de novo trial in violation of the principles of section 326(3) of the Cr.P.C.

5. Being dissatisfied with such order the petitioner preferred a revision being Criminal Revision No. 381 of 2013 before the Learned Additional Sessions Judge, Paschim Medinipur, by passing the impugned order dated 09.07.2014 dismissed the revision. Being aggrieved by the said order the petitioner has now approached this Court with the instant revisional application.

6. I have heard Mr. Prabir Mitra, Learned Senior Advocate appearing for the petitioner and Mr. Arijit Dey, Learned Advocate appearing on behalf of the Opposite Party No. 2. I have also perused all the available materials on record including the impugned order and judgment with meticulous care.

7. Mr. Mitra, Learned Advocate appearing on behalf of the petitioner, submitted that the Learned Magistrate proceeded with the trial in terms of the procedure as prescribed under Section 143 of the Act which mandates that the Court is to try offences under Section 138 of the Act in a summary manner as laid down in Sections 262 to 265 of the Criminal Procedure Code. But both the Learned Courts below ignored such statutory mandate without recording any order for deviating from the usual procedure of trying the case summarily and also without following the mandatory procedure provided by the Sub-section 3 of Section 326 of the Cr.P.C. which specifically bars the succeeding Magistrate to act upon the recordings of the findings of the former Magistrate and thereby the principles of natural justice have been violated. Therefore, according to him the impugned order is bad in law and is liable to be set aside. He relied on the decision reported in *Nitinbhai Saevatilal Shah and Another Vs. Manubhai Manjibhai Panchal and Another*, in support of his submission.

8. Mr. Arijit Dey, Learned Advocate appearing on behalf of the O.P. No. 2, on the other hand submitted that since the case was not tried in a summary manner,

the provisions of Section 326(1) and not 326(3) of the Cr.P.C. are squarely applicable in this case. He further submitted that in terms of Section 143 Proviso of the Act, the Magistrate has to either follow the procedure in a summons trial or follow the summary trial. So when the procedure for summons trial was followed from the very inception, the succeeding Magistrate shall complete the trial according to that procedure. Since the procedure of summons trial was adopted by the predecessor Magistrate, there can be no question of seeking resort to the benefit of the Exception as provided under Section 326(3) Cr.P.C. He further submitted that in the instant case, the trial was conducted according to the procedure for summons trial and the petitioner/accused also participated in such trial without raising his voice of protest at any point of time. Not only that he even adduced his evidence and the argument was also concluded and the case is now pending for delivery of judgment. Thus according to him, the instant exercise undertaken by the petitioner is yet another attempt to delay the disposal of the case so long he could. He, therefore, insisted upon dismissal of the instant Revisional Application. He relied on the decision reported in *Mehsana Nagrik Sahkari Bank Ltd. Vs. Shreeji CAB Co., and Indira Gandhi Memorial General Marketing Society Ltd. Vs. Abraham Varghese and Company*, in support of his submission. He also submitted the certified copy of the entire order sheets of case No. C.R. 662 of 2009 pending before the Court of Learned Judicial Magistrate, 4th Court, Paschim Medinipur.

9. Having regard to the rival submission advanced by the Learned Advocates in the light of the decisions placed, let me reproduce the Section 143 of the Act for better appreciation of the matter. Section 143 of the Act reads as follows:

"Power of Court to try cases summarily. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:

Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees.

Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion,

unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint."

10. Whether the aforesaid section commencing with a non obstante clause mandates trial of the offence under Section 138 of the N.I. Act summarily, or is it only an empowerment of the Magistrate to try such offence even summarily, enabling him to do so, is the question to be examined. The marginal heading of the Section states of the empowerment of the court to try the cases summarily. Sub-s.(1) of that Section mandates that the offences under the Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate. In the trial of the case for such offence it is stated the provisions of Ss. 262 to 265, both inclusive, of the Code of Criminal Procedure shall "as far as may be" applied. Is there any significance for the words "as far as may be" which is added to while providing for a trial following the provisions of Ss. 262 to 265 of the Code? That has to be looked into with reference to the aforesaid sections S. 262 of the Code governs the procedure for summary trial. Sub-s.(1) of that section states that the procedure for trial of a summons case has to be followed with the exceptions mentioned in the following sections under Chap.XXI Under the Code when an offence is tried summarily on conviction the maximum sentence of imprisonment can be only three months. But with respect to the offence under S. 138 of the N.I. Act, even if such offence is tried summarily, the Magistrate is competent to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding the limit fixed under S. 29 of the Code. Code contemplates of summary trial in petty offences for which the maximum punishment that can be imposed is only three months. Speedy trial of such petty offences enabling the Magistrate to record the substance of the evidence, dispensing with recording of evidence as in a regular trial, is provided for in petty cases. However, sub.s.(2) of S. 260 of the Code makes it abundantly clear that during the course of such summary trial in a petty case if it appears to the Magistrate that it is undesirable to try the case summarily he shall recall the witness already examined and proceed to rehear the case in the manner provided by the Code. So much so, even in a petty case which could be tried summarily the Magistrate if it appears that such trial is undesirable, can switch over to other procedure provided by the Code. So much so, even in cases commenced as summary trial the Code empowers to switch over to a different procedure provided. The phraseology "as far as may be" used in S. 143 makes it abundantly clear that the Magistrate is not bound to follow the procedure for summary trial and he has a discretion to follow it or not. Second proviso to Sub-s. (1) of S. 143 of the N.I. Act empowers a Magistrate even in a case which has been commenced in a summary manner, to recall any witness already examined or rehear the case in the manner provided by the Code. What is required is only a primary satisfaction of the Magistrate that the nature of the case is such that a

sentence for punishment for a term of one year may have to be passed, or, for any other reason it is undesirable to try the case summarily. Only requirement on arriving of such satisfaction to switch over to a different procedure provided under the Code from summary trial already proceeded is recording of an order thereof by the Magistrate. The non obstante clause under sub-s.(1) of S. 143 of the Act enabling the Magistrate to try the offence following the provisions under Ss. 262 to 265 of the Code though the punishment for such offence on conviction overrides the interdiction under sub.s.(2) S. 262 of the Code has necessarily to be examined with reference to the words "as far as may be" which clearly makes out that there is discretion to the Magistrate whether to follow summary trial or to proceed with trial for the offence as in a summons case. The aforesaid words "as far as may be" makes it clear that it is not mandatory for the Magistrate to follow the procedure for summary trial as contemplated under Ss. 262 to 265 of the Code in the trial of the offence under S. 138 of the N.I. Act.

11. Keeping in view the aforesaid legal proposition and on perusal of the certified copy of the order sheets of the relevant case No. C.R.662 of 2009 it becomes crystal clear that the Learned Trial Magistrate had adopted the procedure for summons trial from the very commencement of the trial. The succeeding Magistrate also followed the same procedure and concluded the trial after taking evidence of the accused/petitioner as D.W. I further find that the accused/petitioner actively participated in such trial and he never raised any objection nor could he show how he has been prejudiced. Be that as it may, when the case is not tried in a summary manner, the provisions of Section 326(1) Cr.P.C. are squarely applicable in this case. The only contention raised by the O.P. No. 2 is that since it is a case under Section 138 of the N.I. Act, based upon a special statute, it will give privilege than the general statute and the trial can only be summary. I fail to be at par with such contention for the simple reason that once the summons trial was followed, it cannot be changed in the midst of the trial. There cannot be any combination of summons trial and summary trial in the same proceeding. The Magistrate is to follow either the procedure of summons trial or of summary trial. So when the procedure for summons trial has been adopted, the trial has to be completed following that procedure only and for that reason no question of claiming any benefit under the Exception of Section 326(3) Cr.P.C. can be allowed to be surfaced at all.

12. For the aforesaid reason, relying on the decision of the Hon'ble Supreme Court in the case of Mehsana Nagrik Sahkari Bank Ltd. V. Shreeji C.A.B. Co. and Ors.(Supra) which took into consideration of the decision cited by the Learned Advocate appearing for the petitioner i.e. Nitinbhai Saevatilal Shah and Anr. Vs. Manubhai Manjibhai Panchal and Anr. (Supra), I am inclined to dismiss the Revisional Application as I find no merit in it.

13. The Revisional petition is dismissed. The impugned order being order dated 09.07.2014 passed in Criminal Revision No. 381 of 2013 by the Learned Additional Sessions Judge, redesignated Court, Paschim Medinipur is hereby

affirmed.

14. Criminal Section is directed to deliver urgent photostat certified copy of this judgment to the parties, if applied for, as early as possible.