
(2014) 08 P&H CK 0012

In the Punjab And Haryana At Chandigarh

Case No : Criminal Revision Nos. 394, 396 and 397 of 2012 (O and M)

Jagdambey Capitals Private Limited

APPELLANT

Vs

Kisan Agro Tractor and Others

RESPONDENT

Date of Decision : 07-08-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251 254 262 263 264
Negotiable Instruments Act, 1881 (NI) — Section 138 143 143(1) 145
Penal Code, 1860 (IPC) — Section 120B 302
Tamil Nadu Public Property (Prevention of Damages and Loss) Act, 1992 — Section 4
Terrorist and Disruptive Activities (Prevention) Act, 1985 — Section 3 5

Citation : (2015) ALLMR(Cri) 376

Hon'ble Judges : Paramjeet Singh, J

Bench : Single Bench

Advocate : Vinod S. Bhardwaj, Advocate for the Appellant; Pankaj Bali and Sanjay Verma, Advocate for the Respondent;

Final Decision : Allowed

Judgement

Paramjeet Singh, J.

1. This judgment shall dispose of Criminal Revision No. 394 of 2012 titled "M/s. Jagdambey Capitals Private Limited v. M/s. Kisan Agro Tractor and others", Criminal Revision No. 396 of 2012 titled "M/s. Jagdambey Capitals Private Limited v. M/s. Hari Singh Automobiles and another" and Criminal Revision No. 397 of 2012 titled "M/s. Jagdambey Capitals Private Limited v. M/s. Kisan Agro Tractor and others" as the facts of the cases are identical and common question of law is involved. Facts are being taken from Criminal Revision No. 394 of 2012 titled "M/s. Jagdambey Capitals Private Limited v. M/s. Kisan Agro Tractor and others", which has been filed for quashing the order dated 07.01.2012 passed by learned Additional Sessions Judge, Hisar whereby the judgment of conviction dated 29.03.2011 and order of sentence dated 31.03.2011 passed by learned Judicial Magistrate, First Class, Hisar, has been set aside.

2. Brief facts of the case are that petitioner filed a complaint against the respondents under Section 138 of the Negotiable Instruments Act, 1881 (in short "the Act of 1881"). The respondents were convicted by Judicial Magistrate 1st Class, Hisar under Section 138 of the Act of 1881 vide judgment dated 29.03.2011 and sentenced vide order dated 31.03.2011 to undergo simple imprisonment for a period of six months besides fine of Rs. 3,000/- each and were also further directed to pay compensation of Rs. 12,00,000/- to the petitioner/complainant. In case of default of payment of compensation, respondents were to undergo further simple imprisonment for six months. Aggrieved against the judgment of conviction and order of sentence, respondents preferred appeal before the Additional Sessions Judge, Hisar, Learned Additional Sessions Judge, Hisar, vide judgment dated 07.01.2012 noticed that case was transferred to another Judicial Magistrate 1st Class, who was required to proceed de novo and would not have taken into consideration the evidence recorded by his predecessor. In support of this view, learned Additional Sessions Judge has relied upon the judgment of Hon'ble Supreme Court in Nitinbhai Saevatilal Shah and Another Vs. Manubhai Manjibhai Panchal and Another, , and set aside the judgment of conviction and order of sentence and remitted the case to trial Court to record evidence afresh and pass fresh orders. Hence, this revision petition.

3. I have heard learned counsel for the parties and perused the record with their able assistance.

4. Learned counsel for the petitioner vehemently contended that complaint under Section 138 of the Act of 1881 filed by the petitioner was tried as summons case and not as a summary case. Learned counsel vehemently contended that once the case has been tried as a summons case, full evidence has been recorded and opportunity to cross-examination has been given to the respondent, the question of following the summary procedure does not arise. In such situation fresh evidence is not required to be recorded, rather successor Magistrate was required to consider the evidence already recorded. To support his contention, learned counsel for the petitioner relied upon the decision rendered by Hon'ble Supreme Court in Mehsana Nagrik Sahkari Bank Ltd. Vs. Shreeji CAB Co., wherein the case of Nitinbhai Saevatilal Shah (supra) has been considered and distinguished and also cited other judgments of various High Courts, which I need not mention here. As such the order of learned Additional Sessions Judge, directing the Magistrate to record evidence afresh and to hear the entire matter de novo, is not sustainable.

5. On the other hand, learned counsel for the respondents contended that in view of the ratio of the judgment in Nitinbhai Saevatilal Shah (supra) procedure adopted for the proceedings under Section 138 of the Act of 1881 is summary in nature and the bar contained in Section 326(3) of the Code of Criminal Procedure (in short "Cr.P.C.") would apply. If provisions of Section 326(3) Cr.P.C. are not followed such a defect is not a mere irregularity but goes to root of the case. The judgment of learned Additional Sessions Judge is legal and valid. The complaint

under Section 138 of the Act of 1881 cannot be tried as summons case, so successor Magistrate is bound to record fresh evidence, thus, present revision petition is liable to be dismissed.

6. I have considered the contentions raised by learned counsel for the parties.

7. In the light of the arguments addressed by the learned counsel for the parties the following legal question arises for consideration of this Court:-

"If the case under the Negotiable Instruments Act being tried by a Magistrate is transferred to other Magistrate, is it legally permissible for the successor Magistrate to convict the accused on the basis of evidence already recorded by the predecessor?"

8. Before dealing with the contentions raised by the learned counsel for the parties, it would be apposite to reproduce relevant provisions from the Act of 1881 and the Cr.P.C.

Sections 138 and 143 of the Act of 1881 read as under:-

"138. Dishonour of cheque for insufficiency, etc. of funds in the account:- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) The payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer, of the cheque, "within thirty days" of the receipt of information by him from the bank regarding the return of the cheques as unpaid, and

(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation: For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability."

"143. Power of Court to try cases summarily. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, 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."

Section 326 Cr.P.C. reads as under:-

"326. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another:-

(1) Whenever any Judge or Magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another Judge or Magistrate who has and who exercises such jurisdiction, the Judge or Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself: Provided that if the succeeding Judge or Magistrate is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

(2) When a case is transferred under the provisions of this Code from one Judge to another Judge or from one Magistrate to another Magistrate, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub-section (1).

(3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under section 322 or in which proceedings have been submitted to a superior Magistrate under section 325."

9. The controversy pertains to the procedure for trial of complaint under Section 138 of the Act of 1881. Perusal of Section 143 of the Act of 1881 reveals that case under the Act of 1881 should be tried summarily and the same shall be as per Sections 262 to 265 Cr.P.C., as far as may be, applicable to such trials. First proviso refers to sentence of imprisonment for a term not exceeding one year and fine upto Rs. 5,000/-. Second proviso is an exception to summary trial. At the commencement of, or in the course of trial, if it appears to the Magistrate that nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed, the Magistrate shall recall any witness who may have been examined and proceed to hear or re-hear the case in the manner provided under Cr.P.C. Section 143 of the Act of 1881 thus gives option to the Magistrate to try a case as per provisions of the Cr.P.C. in the two eventualities referred to above. Rajasthan High Court in the case of *Tripati Vyas Vs. State of Rajasthan and Another*, has considered the Sections 138 and 143 of the Act of 1881 and also considered the judgment of the Hon"ble Supreme Court in *Nitinbhai Saevatilal Shah* (supra) and held as under:-

"Both sides concede that the two cases were tried following the procedure in a summons case and not by summary trial as under the provisions of Chap. XXI of the Code. When such be the case, continuation of the trial of the case with the evidence recorded by the predecessor magistrate, and disposal of the cases by the successor magistrate will not be in any way vitiated. An offence under S. 138 of the N.I. Act can be tried only summarily, but, not in a different manner provided by the Code is not the purport of S. 143 of the N.I. Act. That Section only empowers the magistrate to try such offence summarily following the procedure applicable to a petty case as far as practicable. The Apex Court in *Nitinbhai Saevatilal Shah*'s case referred to above has not expressed any view that the offence under S. 138 of the N.I. Act can be tried only summarily. In fact the head note of that decision is misleading with a statement that "cheque cases are to be tried summarily". No such expression is found in the discussion made by the Apex Court in paragraph 9 to 16 of that decision. Moreover it is seen that the Apex Court considered and rendered the aforesaid decision in a case for the offence under S. 138 of the N.I. Act which was captioned as a summary case. That is evident from paragraph 6 of the judgment which is indicative that summary trial was followed by the Magistrate in that case. The discussion made by the Apex Court in Paragraph 14 of that decision spells out what was considered was a case summarily tried by the magistrate. Punishment provided by the trial court also to some extent indicates that the case was tried by the magistrate summarily. Whatever that be, the Apex Court in the aforesaid reported decision has not laid down any binding principle to be followed that cheque cases involving the offence under S. 138 of the N.I. Act have to be tried only summarily. What could be the effect when an offence is tried summarily was

considered in the aforesaid decision with reference to a case involving the offence under S. 138 of the N.I. Act, which had been tried as a summary case. Whether a magistrate can try an offence under S. 138 of the N.I. Act otherwise than by a summary trial, with reference to S. 138 of the Negotiable Instruments Act, was not the issue, nor projected for consideration, before the Apex Court in the aforesaid decision. So much so, the head note given "cheque cases are to be tried summarily" which is not in any way supported by the discussion of the Apex Court in the decision has to be treated only as a misnomer. Another reported decision rendered by this court, namely, Baton's case, referred to above, following the decision of the Apex Court, relied by counsel for petitioner, was also rendered in a case, as seen from the judgment, where the magistrate had adopted the procedure prescribed for summary trial (paragraph 7). Where the procedure adopted by the magistrate is one of summary trial then of course the decision rendered by the Apex Court has to be followed; but, in other cases where trial proceeded as in summons case no reliance can be placed on the aforesaid decision of the Apex Court to seek for a de novo trial on transfer of presiding officer in the midst of trial." The courts are over burdened with cases arising out of offence under section 138 of the Act of 1881. If what is contended by learned counsel for petitioners is accepted that regardless of whether a case for offence under section 138 is tried as a summons case, each time a Magistrate is transferred, the witnesses, whose evidence was recorded by him, should be recalled all over again for examination would frustrate very purpose and legislative intent of making procedure simple and expeditious. This is because once it is established that a case has not been tried in a summary way and the Magistrate has proceeded to try it as a summons case, the matter would not fall in sub-section (3) of section 326 of the Code enabling the succeeding Magistrate to proceed with the trial from the stage it was left by his predecessor and, in doing so, succeeding Magistrate would rely on the evidence recorded earlier for all purposes. Such an interpretation would be necessary to make the scheme of the Act workable. Any other interpretation would impel all the courts to recall the witnesses in thousands of matters who have already been examined/cross examined thus creating enormous difficulty for such courts throughout the State, which are over burdened with cases arising out of dishonoured cheques. In this connection, reference is made to the judgment of the Supreme Court in the case of Bhaskar @ Prabaskar and Others Vs. State Represented by Inspector of Police, Vellore Taluk Police Station, Vellore, , which was decided albeit in a slightly different context, where, on abolition of TADA court after expiry of Terrorist & Disruptive Activities (Prevention) Act, 1987 (for short "the TADA Act") in Tamil Nadu, a part heard case involving offence under section 302 IPC read with section 120B IPC and section 3 and 5 of the TADA Act and section 4 of the Tamil Nadu Public Property (Prevention of Damage and Loss) Act, 1992 was transferred to Sessions Court after dropping out the offence of TADA Act. The issue was as to whether evidence recorded by the Special Judge in TADA Court can be relied by the Sessions Judge or not. The observations made by the Apex Court in the aforesaid case in paras 15 and 21 are of great relevance even for the controversy

involved in the present cases thus are reproduced hereasunder- "15. The archaic concept was that the very same judicial personage who heard and recorded the evidence must decide the case. That concept was in vogue for a long time. But over the years it was revealed in practice that fossilisation of the said concept, instead of fostering the administration of criminal justice, v/as doing the reverse. Very occasionally judicial officer of one court was changed and was replaced by another. As evidence had to be recorded afresh by the new officer under the old system, witnesses who were already examined in the cases at the cost of considerable strain and expenses - not only to them but to the exchequer - were re-summoned and reexamined. The litigation cost thereby inflicted on the parties used to soar up. The process would have to be repeated over again if such next judicial personage also was changed. Eventually it was learnt that the object sought to be achieved by such repetitions, when compared with the enormous cost and trouble, was not of much utility. Hence the legislature wanted to discontinue the aforesaid ante-diluvian practice and decided to afford option to the successor judicial officer. Legislature conferred such option only to the magistrates at the first instance and at the same time empowered them to re-examine the witnesses already examined if they considered such a course necessary for the interest of justice. As the new experiment showed positive results towards fostering the cause of criminal justice the Law Commission recommended that such option should advisedly be extended to judges of all other trial courts also."

10. Andhra Pradesh High Court in the case of Manju M. Agarwal v. The State of A.P. while relying upon Tripti Vyas (supra) has also taken an identical view.

11. It is true that when a complaint under Section 138 of the Act of 1881 is filed the same in view of Section 143(1) of the Act of 1881 has to be registered as a summary case, however, Section gives option to the Magistrate not to try case summarily if he considers that sentence of imprisonment for a term exceeding one year has to be passed. Secondly, in the second proviso to the Section words "for any other reason" have been used, which permit the Magistrate not to try the case as summary. Even at the commencement of the trial such an opinion can be formed keeping in view the contents of the complaint and documentary evidence attached with it. In Section 143(1) of the Act of 1881 words "as far as possible", have been used which provide sufficient flexibility with regard to applicability of procedure of summary trial. Not only this, Section 145 of the Act of 1881 allows the complainant to lead evidence by way of affidavit which shall, subject to all just exceptions, be read in evidence in any enquiry, trial or other proceeding under the Cr.P.C. This is impermissible in view of Sections 251, 254 and 273 of the Cr.P.C. even in summary trial.

12. It is cardinal principle of criminal law that person who has recorded the evidence is competent to decide that case. However, Section 326 of Cr.P.C. is an exception to this rule. Section 326(1) of the Cr.P.C. provides that succeeding Judge or Magistrate may act on the evidence recorded by the predecessor. Even

option has been given to the successor to re-summon any witness already examined in the interest of justice. Section 326(2) of the Cr.P.C. applies to the transferred case in similar manner as Section 326(1) of the Cr.P.C. Another exception is mentioned in Section 326(3) of the Cr.P.C., which states that in summary trial if a Magistrate is transferred, successor will have to hold de novo trial, he cannot act upon evidence recorded by his predecessor. Sub-section (3) of Section 326 of the Cr.P.C. starts with non obstante clause and creates exception of summary trials and cases falling within the purview of Sections 322 and 325 of the Cr.P.C. from the field of operation of general principle laid down in sub-section (1). In such circumstances it has to be ascertained how the trial of the given case proceeded, whether the procedure actually adopted was summary or summons case or warrant case.

13. The Hon"ble Supreme Court in the case of Mehsana Nagrik Sahkari Bank Ltd. (supra) considered the judgment in the case of Nitinbhai Saevatilal Shah (supra) and held as under:-

"6. We have perused the notes of evidence which are produced on record. They clearly show that the evidence in this case was recorded in full and not in a summary manner. That being so, we cannot but accept the submission of Mr. Ahmadi.

7. In the fact and circumstances of the case, we allow this appeal, set aside the order passed by the High Court and direct the Additional Chief Judicial Magistrate, Mehsana, to proceed hereafter from the stage where it is pending now. As far as the application of the respondents for adding some other person to the complaint is concerned, we are not inclined to accept that. It is for the complainant to decide as to against which party it wants to proceed. That application will stand rejected."

14. In the light of the position of law, as discussed above, in the present case also from the very beginning the procedure of summons case was followed, not of summary trial. Full evidence has been recorded, even the opportunity to cross-examine the witnesses was provided to the respondents-accused. In the facts of this case, since the provisions of Section 326(2) of the Cr.P.C. apply, the case was transferred, it was legal for the successor Magistrate to convict the accused on the basis of evidence already recorded by the predecessor. The question is answered accordingly.

15. Another aspect of the case is that retrial would lead to wholesome repetition of the entire exercise involving considerable cost to the exchequer, financial strain to the accused and waste of time of the Court. Moreover, it would also inflict inconveniences to the witnesses. This Court cannot afford to be oblivious to the reality that no witness is, on his own volition, desirous of going to the Court for remaining there until his turn is called to mount the witness box and to undergo the agony of facing grilling questions. The witness cannot be unnecessarily recalled again except when Court comes to a conclusion that

recalling is necessary in the interest of justice. In view of above, impugned judgment dated 07.01.2012 passed by learned Additional Sessions Judge, Hisar is set aside, revision petitions are allowed and cases are remitted to learned Additional Sessions Judge, Hisar to decide the appeal afresh on merit. Parties through their counsel are directed to appear before the learned Additional Sessions Judge on 08.09.2014.