
(2009) 01 KAR CK 0085
In the Karnataka High Court
Case No : Criminal R.P. No. 1423 of 2006

Leo Granex

APPELLANT

Vs

Pavillion Granites and Others

RESPONDENT

Date of Decision : 27-01-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 244, 251, 259
Negotiable Instruments Act, 1881 (NI) — Section 138, 143

Citation : (2010) 1 ALD(Cri) 28 : (2010) 1 BC 536 : (2010) 2 CivCC 82 : (2009) ILR (Kar) 4062 : (2010) 1 KCCR 621 : (2010) 1 RCR(Civil) 944 : (2010) 1 RCR(Criminal) 870

Hon'ble Judges : Jawad Rahim, J

Bench : Single Bench

Advocate : C.V. Nagesh, for the Appellant; C.H. Hanumantharaya, for the Respondent

Judgement

Jawad Rahim, J.—Complainant is in revision under Sections 397 and 401, Cr.P.C. questioning the legality and sustainability of the order dated 29.5.2006 passed in C.C. 14009/03 on an application filed u/s 259, Cr.P.C. filed by the 3rd respondent seeking conversion of Trial from summary case to one of warrant case.

2. Heard the Learned Counsel on both sides. The matter is admitted and taken up for final disposal with consent.

3. The contextual facts are:

a) Petitioner herein initiated prosecution against the respondents by a petition u/s 200, Cr.P.C. for the offence punishable u/s 138, Negotiable Instruments Act (hereinafter referred to as the Act, for short) on the premise that respondent No. 1, a proprietary concern, had business transaction with it and in relation thereto, issued a cheque in a sum of Rs. 8,10,00,000/- towards discharge of the debt and legal liability. The said cheque on presentation, was dishonoured for "insufficiency of funds" and consequent action taken by the complainant to call upon the accused to make good the amount by statutory notice as envisaged

under Clause (b) of Section 138, was not complied.

b) Cognizance was taken on the complaint and the presence of respondent-3 was secured as she was shown to represent the company as managing director.

c) In response to the process issued, she was before Court on 10.3.2004 and soon filed an application u/s 259, Cr.P.C. requesting the jurisdictional magistrate to convert Trial of the accused from summary Trial to one of warrant Trial.

d) The application faced heavy resistance from the complainant on several grounds, one amongst it was, it is a deliberate attempt of the accused to procrastinate the proceedings by her absence, and also that she had indulged in acts to impede the proceedings and that no relief as sought could be granted u/s 259, Cr.P.C.

e) Both sides did urge several grounds which were taken into consideration by the Trial Court and by the impugned order, the application has been allowed. Consequent to it, the accused will be subjected to Trial and the procedure prescribed for conduct of warrant cases is to be followed. The complainant apprehends it will be seriously affected by such order and is, therefore, in revision questioning the same.

4. Learned Counsel, Sri C.V. Nagesh for the petitioner/complainant, would contend that the magistrate, while entertaining the application u/s 259, Cr.P.C. had ignored the circumstances in which the provision would become applicable. In this regard, he drew my attention to the phraseology used in Section 259, Cr.P.C. to contend that though under the said provision, power is conferred on the magistrate conducting Trial to convert a summons case into warrant case, but the power could be exercised by the magistrate only after Trial has commenced.

5. Specific reference is made to the language used in the Section which reads:

259. Power of Court to convert summons cases into warrant cases:

When in the course of the Trial of a summons-case relating to an offence punishable with imprisonment for a term exceeding six months, it appears to the magistrate that in the interests of justice, the offence should be tried in accordance with the procedure for the Trial of warrant-cases, such magistrate may proceed to re-hear the case in the manner provided by this Code for the Trial of warrant-cases and may recall any witness who may have been examined.

Placing emphasis on the words "course of Trial" appearing in the said section, it was submitted that in the instant case Trial has not commenced; plea of the accused has not been recorded; before such proceedings the accused appeared in response to summons and moved the application. Therefore, he submits, the magistrate was required to examine the stage of the case and as Trial had not commenced, the application should have been dismissed in limine.

6. Secondly, it was urged that exercise of power conferred on the jurisdictional

Magistrate u/s 259, Cr.P.C. is subject to the stage of the case; it is only when the Trial has commenced, in the course of Trial the magistrate would be in a position to form an opinion as to whether circumstances necessitate conversion of the case from summary Trial to warrant Trial. To form such opinion, there must be at least chief-examination of witnesses to make out a case requiring such indulgence. In the instant case, as Trial had not yet commenced, it would not have been possible for the magistrate to notice whether such detailed Trial was necessary.

7. Thirdly, it was urged as reference is made to the stage of the trial in the said provision to exercise such power, the magistrate will not have jurisdiction to entertain the application, unless circumstances enumerated u/s 259, Cr.P.C. are shown to exist. It is further contended that on merits also, it must be noticed that as proceedings relate to action u/s 138, N.I. Act, u/s 143 of the same Act, it must be tried summarily. The power to try such cases summarily is conferred statutorily by Section 143; use of the word "shall" mandates that the procedure referred to must only be followed, unless circumstances as shown in the second proviso is made out. Thus, he submits a combined reading of Sections 143, N.I. Act and 259, Cr.P.C. make it clear that the accused has no right to seek conversion of a case from summary Trial to warrant Trial. The decision as to whether a case requires to be tried as summary case or as a warrant case would rest only with the magistrate and request on behalf of the accused in this regard is not noticed either in Section 259, Cr.P.C. or Section 143, N.I. Act.

8. With regard to merits, it was submitted that whatever the accused had urged as grounds in support of the application filed u/s 259, Cr.P.C, is virtually the defense. That defense will not be taken away even if she is tried applying the procedure for summary case. In short, the core of his contention is that the impugned order has been passed by the Trial Court at a premature stage and circumstances which permit exercise of power were not shown to exist.

9. Per contra, Learned Counsel Sri C.H. Hanumantharaya for the respondents, in negation of all contentions urged by Learned Counsel, Sri C.V. Nagesh, contends that the accused has, at no point of time, indulged in any act to procrastinate the proceedings or cause impediment in the Trial. In fact, soon after service of notice, accused had appeared before Court on 10.3.2004 and moved an application u/s 259, Cr.P.C., considering the serious charge levelled against her. He would submit that out of 17 dates of hearing, she has attended 7 hearings, and on the rest of the dates of hearing, she did not appear as her presence was not required and also because her application was still pending consideration.

10. Referring to the scheme of the Code of Criminal Procedure, particularly the provisions of Sections 244 to 251, he submits that if the procedure prescribed under the Code to try the case as summary case is applied, the accused will lose valuable defense; the nature of dispute involves heavy stakes and a full-fledged enquiry is necessary. If the magistrate applies summary procedure, she will lose the right for detailed defense evidence, as summarily the case will be decided

against her. In such a situation, injustice that will result will be in compensatable.

11. Learned Counsel would further contend that apart from initiating action against the respondent-accused for Rs. 8,10,00,000/- by invoking Section 138 of the Act, the complainant has started civil litigation. Several documents relating to the alleged transaction are to be produced and several witnesses have to be examined; accused also desires to seek discharge to avoid unnecessary prosecution as the dispute between the parties is of civil nature. If she is put to summary Trial, she has to seek summoning of witnesses and documents through several applications which will also impact the proceedings. Therefore, he submits that rightly she had sought to apply for adopting the procedure applicable for Trial of warrant cases which the Learned magistrate is competent to grant.

12. With regard to the petitioner's contention that the provisions of Section 259, Cr.P.C. is not applicable and the stage at which the application was made was premature, he submits the petitioner has not only invoked Section 259, Cr.P.C. but also the special provision of Section 143 of the Act. Since Section 143 is part of the statute, accused has the right to seek relief available under that provision which does not prevent him from making an application at any stage of the proceeding, unlike the provision u/s 259, Cr.P.C.,

13. I have heard persuasive arguments of the Learned Counsel on both sides in supplementation to the material on record.

14. At the first look, it may appear that the Learned Counsel, Sri C.V. Nagesh is right in his submission that the power conferred upon a magistrate u/s 259, Cr.P.C. could be exercised "during the course of Trial". It would mean that the magistrate could exercise the power to convert Trial of the case from summons case to warrant case only after commencement of Trial, and the accused could make such application only after Trial has commenced. But we must notice that the proceedings in the instant case relates to an action for the offence u/s 138 of the Act. Therefore, the scheme of the Act has to be examined.

15. The conspectus of the provision of Sections 138 to 147 of the Act give a clear picture as to under what circumstances Trial could be converted from summons case (summary Trial) to the procedure applicable for Trial of warrant cases. Necessarily reference has to be made to Section 143 of the Act which reads thus:

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 the metropolitan magistrate and the provisions of Section 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 live 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 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.

From the extracted provision, it is noticed that the non-obstante Clause appearing in it as "notwithstanding anything contained in Cr.P.C ", the procedure prescribed u/s 143 of the Act has to be applied for Trial of the accused for the offence u/s 138 of the Act. The second proviso to Section 143 of the Act reads thus:

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.

16. For decision in this case, what is envisaged in the said proviso is of relevance. Unlike the provision in Section 259, Cr.P.C, a different language has been used in Section 143 of the Act. It has to be noticed that unlike in Section 259, Cr.P.C, in Section 143 of the Act, the words "at the commencement of Trial" are incorporated. If the provision of Section 259, Cr.P.C. is applied, then the power conferred on the magistrate is exercisable "during the course of Trial", whereas by virtue of the second proviso to Section 143 of N.I Act, power conferred is exercisable by the magistrate even at the commencement of Trial.

17. Undoubtedly the accused here is facing charge for the offence u/s 138 of the Act and keeping in mind the non-obstante Clause appearing in Section 143 of the Act, what is envisaged u/s 143 becomes applicable. As we are dealing with action u/s 138 of the Act, it stands to reason that the Trial Court must follow the mandate of Section 143 of the Act and not necessarily the provision of Section 259, Cr.P.C. In the resultant position, it can be said that in view of the words "at

the commencement of Trial" and "during the course of Trial", the power of the magistrate to decide as to whether the case should be tried as summary case or warrant case could be exercised at any of the stages referred to above. Thus, it could be affirmatively stated that there is no impediment to convert a case from summons case to warrant case for the offence u/s 138 of the Act either before commencement of Trial or even after Trial has commenced.

18. Thirdly, it has to be kept in mind that unlike prosecution of the accused for the offence punishable under Indian Penal Code, in an action u/s 138 of the Act, the complainant would have filed detailed pleadings to substantiate the dispute between the parties which includes assertion that the accused is a debtor and in relation to the said transaction and in discharge of the existing debt or legal liability, the cheque impugned came to be issued. All the ingredients which constitute the offence u/s 138 of the Act have to be spelled out by the complainant to sustain the charge. It must also be noticed that in an action u/s 138, the complainant stands on a safe footing in view of certain legal presumptions available in his favour and against the accused. Like in Section 118 of the Act, there is a presumption that the cheque was issued by the drawer after passing of consideration, and in Section 139 the presumption is in favour of the holder of the cheque that the cheque was issued by the drawer (accused) in discharge of full or part of the existing debt or legal liability. These presumptions are, however, rebuttable. Therefore, the accused is in a vulnerable position in view of the presumptions and he is required to rebut them with reference to the evidence against him tendered by the complainant or by his/her direct evidence or by preponderance of possibilities. The accused is, therefore, required to be given full opportunity to rebut such presumptions and to do so, the case has to pass from stage to stage, providing him opportunity for defence evidence.

19. In the instant case, no doubt the accused has the right of defense even in summary Trial, but the scheme of Sections 262 to 265, Cr.P.C. narrow down such opportunity which is wider in the procedure prescribed under the Code for Trial of warrant cases. It is for this reason when the burden is cast on the accused to rebut such presumptions a detailed enquiry becomes necessary like in a warrant case.

20. The conspectus of the provisions of Cr.P.C. prescribe separate procedures to be followed in Trial of summons case and warrant case from which legislative intent can easily be gathered. In a case relating to prosecution u/s 138 of the Act, particularly when the stakes are high and the accused intends to establish that the dispute is of civil nature or that there was no existing debt or legal liability, he may have to rely on certain documents and witnesses to substantiate his defense. The scope of enquiry therefore, becomes enlarged and the magistrate has to weigh defence evidence against prosecution evidence. If summary procedure is applied, it is likely that the accused may not get full opportunity and ultimately fail in substantiating his defense.

21. Apart from the provisions of Section 259 Cr.P.C. and Section 143 of the Act,

we cannot ignore the provisions of Sub-section (2) of Section 260 which makes it clear that even in summary Trial, after recording of evidence, if it appears to the magistrate that the nature of case is such that it is undesirable to try it summarily, he may recall such witnesses who may have been examined and proceed to re-hear the case in the manner provided under the Code. Thus, it is clear that the law requires, nature of dispute should be kept in mind to decide even suo moto as to which procedure should be applied in the interest of justice.

22. From the gamut of the provisions of Cr.P.C. and of Section 143 of the Act, it is clear that the magistrate has been give a free hand to decide which procedure has to be applied and such decision shall depend on the nature of charge in a case relating to offences under Indian Penal Code and the nature of charge as also dispute between the parties in an action u/s 138 of the Act. In the instant case, the contention of the accused throughout is that she is not due the amount claimed by the complainant and that detailed accounting is necessary to determine the liability. As stated above, stakes are very high. If the accused is denied the relief sought, then the magistrate would apply summary procedure in which event it is likely that she may suffer adversely. In fact, necessary safeguards provided under the Code of Criminal Procedure are to be made available to the accused.

23. Considering the reasons assigned by the Learned Trial Judge, I am satisfied that the accused had made out a case for grant of relief sought for and the decision to try the case as warrant case is fully justified, as otherwise it may have caused prejudice to the accused. By applying the procedure contemplated for warrant case, no prejudice would be caused to the complainant. Therefore, the impugned order suffers from no infirmity, legal or otherwise. However, considering the contention of Sri C.V. Nagesh that considerable period of time has elapsed after issuance of cheque, that is about 6 years, it is necessary to direct the Trial Court to expedite the Trial and dispose of the case within an outer limit of four months from the date of receipt of a copy of this order.

24. In the result, the revision stands dismissed. However, the Trial Court is directed to dispose of the case within a period of four months from the date of receipt of a copy of this order.