
(2014) 03 AP CK 0132

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 13161 of 2013

Manju M. Agarwal Proprietrix, The Bamni Bazar Textile and
Manufacturing Company

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 26-03-2014

Acts Referred:

Citation : (2014) 03 AP CK 0132

Final Decision : Dismissed

Judgement

C. Praveen Kumar, J.—This criminal petition is directed against an order dt 15-10-2013 passed in CrI.M.P. No. 52/2013 in CC No. 58/2013 on the file of XIII Special Magistrate, Hyderabad.

2. The facts in issue are as under: The second respondent herein filed a private complaint for an offence punishable u/s 138 of the Negotiable Instruments Act, 1881 (for short "the NI Act"). The said case was initially taken on file as CC No. 337/2013 and, later on, transferred and was renumbered as CC No. 58/2013. The trial in the said case has commenced and P.W.I was examined in chief and was also cross examined. It was posted for further evidence of the complainant. At that stage, the Presiding Officer of the said Court was transferred to some other court. But, however, the trial in the said case was proceeded with by the succeeding Magistrate and the case was posted for examination of the accused u/s 313 Cr.P.C., At that stage, the petitioner/accused filed the above application u/s 326, 461(n), 263 and 264 Cr.P.C praying the court to conduct de novo trial in view of the judgment of the Apex Court in Nitinbhai Saevatilal Shah and Another Vs. Manubhai Manjibhai Panchal and Another, . By an order dt. 15-10-2013 the learned Magistrate rejected the said application holding that the trial in the said case was tried as summons case and not as a summary trial case and therefore question of holding de novo trial would not arise. Assailing the said order, the present criminal petition is filed.

3. Sri Sharad Sanghi, the learned counsel for the petitioner mainly submits that

in view of the wording in section 143 of the NI Act, all the cases under the provisions of the NI Act are to be tried in a summary way though the procedure of summons case is to be followed. In other words, he submits that though the said case is dealt as summons case it is still a summary trial case. Since the offence u/s 138 of the NI Act is tried as a summary trial case, it is mandatory on the part of the trial court to order de novo trial in view of section 326(3) Cr.P.C, Placing much stress on the words "as far as possible" in section 143 of the NI Act, he submits that there is no other option for the Magistrate except to follow the procedure contemplated under sections 262 to 265 Cr.P.C.,

4. On the other hand, Sri K. Ashok Reddy, the learned counsel for the second respondent strenuously contends that the procedure contemplated for trying the summons case and summary trial case is distinct and different and, as such, section 326(3) Cr.P.C, will not come in the way of the court to follow if the case is tried as summons case. As the present case was tried as summons case, which is evident from the record itself, he submits that there is no illegality even if the subsequent Magistrate continues with the recording of evidence.

5. Before proceeding further, it would be relevant to extract section 143 of the NI Act and section 326 Cr.P.C, which read as under:

143. Power of the 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 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.

326. Conviction or commitment on evidence partly recorded by one Judge or 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 any 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 u/s 322 or in which proceedings have been submitted to a superior Magistrate u/s 325.

6. Section 260 Cr.P.C, empowers the Judicial Magistrate of First Class, to try the case in a summary way of the offences enumerated in sub-section (1) thereof if he thinks fit. Sub-section (2) of Section 260 Cr.P.C., enables the Judicial Magistrate of First Class to conduct trial in summary trial case by following the summons procedure. However, section 259 Cr.P.C., enables a Magistrate Court to convert summons case into a warrant case after following the procedure provided in the Code of Criminal Procedure. Thus, the above provision enables the Judicial Magistrate of First Class to convert a summons case into a warrant case and not vice versa. The only requirement is that the Magistrate should be satisfied that such a conversion is needed in the interest of justice. Sections 261, 262, 263 Cr.P.C., deal with the procedure to be followed for trying cases in a summary way. Sections 264 and 265 Cr.P.C., refer to the manner in which a judgment is to be recorded in summary trial offences.

7. Now the question that arises for consideration is whether it is mandatory for the Magistrate to follow summary trial procedure while trying a case for an offence punishable u/s 138 of the NI Act and whether section 143 of the NI Act which commences with a non-obstinate clause mandates trial of the offence u/s 138 of the NI Act summarily or is it only an empowerment of the Magistrate to try such offence even summarily.

8. It is not in dispute that in a summary trial case the judge who records the evidence should conclude the matter. The reason being that while dealing with summary trial case, the judge, who will record only a gist of the evidence, will be

having first hand and direct opportunity to appreciate and evaluate the evidence, so as to avoid chance of drawing misleading inference or conclusion. In that view of the matter, it was contemplated that the Magistrate who records the evidence alone has to deliver the judgment. But the procedure adopted in trial of a summons case is slightly different, wherein the entire evidence of a witness will be recorded by the court.

9. As held by the Bombay High Court in *Pratibha Pandurang Salvi, Mahadev B. Kambale and Suresh Harishchandra Shrighaonkar Vs. State of Maharashtra and Nazim Ahmed Zari*, in a summary trial case, the Magistrate has to follow the procedure u/s 263 Cr.P.C., which is simplified and shortened procedure of the summons case. The Court held that the said procedure can be described as "Bonsai" trial which has all the characteristics and stages of the summons trial. Yet it is not as lengthy and detail as the summons case.

10. Sub-section (1) of section 143 of the NI Act mandates that the offences under the said 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 Cr.P.C., shall as far as may be applied to such trials.

11. As stated earlier, the learned counsel for the petitioner laid stress on the words "as far as may be" and contended that there is no other option for the Magistrate except to follow the summary trial procedure while dealing with an offence punishable u/s 138 of the NI Act.

12. Section 262 Cr.P.C., governs the procedure for summary trial. Sub-section (1) of that section prescribes the procedure for trial of a summons case to be followed with exceptions mentioned therein. The maximum sentence of imprisonment can only be three months in a case trial summarily but with respect to the offence u/s 138 of the NI Act even if such case is tried summarily, the Magistrate is competent to impose a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding the limit fixed u/s 29 Cr.P.C.

13. Sub-section (2) of section 260 Cr.P.C., empowers the Magistrate to recall the witness already examined and re-hear the case in the manner provided under Cr.P.C., He is empowered to switch over to other procedure provided under Cr.P.C., if he deems fit necessary in the interests of justice. Therefore, the words "as far as may be" used in section 143 of the NI Act makes it clear that the Magistrate is not bound to follow the procedure of a summary case while dealing with an offence u/s 138 of the NI Act but has the option of exercising his discretion with regard to the procedure to be followed. Second proviso to sub-section (1) of section 143 of the NI Act makes the situation very clear. The proviso empowers the Magistrate to recall any witness already examined or rehear the case in the manner provided by Cr.P.C. even after the commencement of trial in a summary way. What is required is primary satisfaction or for any other reasons if it is undesirable to try the case summarily.

14. Therefore, the non-obstinate clause under sub-section (1) of section 143 of

the NI Act, which enables the Magistrates to try the offence by following sections 262 to 265 Cr.P.C., though the punishment for such offence on conviction overrides the interdiction under sub-section (2) of section 262 Cr.P.C., has necessarily to be examined with reference to the words "as far as may be" which makes it clear that a discretion is left to the Magistrate to follow the procedure depending upon the facts of each case. Further second proviso to section 143 of the NI Act permits the Magistrate not to try the case as a summary case even at the commencement of the trial. For doing the same, the Magistrate must have a good reason.

15. Relying upon the judgment of the Delhi High Court in *Rajesh Agarwal Vs. State and Another*, , the learned counsel for the petitioner tried to impress upon the court by contending that the offence u/s 138 of the NI Act has to be tried in a summary way. I am afraid the said argument cannot be accepted when a discretion has been given to the Court to adopt the procedure to be followed for trial of the case u/s 138 of the NI Act. Apart from that the words used in section 143 of the NI Act give a discretion to the Magistrate to adopt the procedure to be followed for the trial of the case. As held by Bombay High Court in *Pratibha Pandurang Salvi (supra)*, the use of the word "may" leaves open for the Magistrate to opt the procedure to be followed. Such an option is not open for the offence under the Penal Code which are tried summarily under chapter XXI and in all those matters the provisions under Chapter XXI and section 326 Cr.P.C, have to be strictly followed.

16. From the discussion made above, it can be said that the Magistrate is normally required to try the offence u/s 138 of the NI Act summarily, but there is no bar to try such matter as summons case under the NI Act. If he is contemplating to try the case as summons case, he should record reasons. The judgment of the Apex Court in *Nitinbhai Saevatilal Shah (supra)*, which was relied upon by the learned counsel for the petitioner to substantiate his plea that every case falling u/s 138 of the NI Act has to be tried as a summary trial case, was a case where the learned Magistrate proceeded to try the case in a summary manner and recorded the evidence. The successor Magistrate proceeded with the trial and passed the sentence. Under those circumstances, it was held that saving clause of sub-section (1) of section 326 Cr.P.C, would not apply to such a case as an exception has been carved out in sub-section (3) of section 326 Cr.P.C. The absolute prohibition in sub-section (3) of section 326 Cr.P.C, would apply to such a case. The Judgment of the Apex Court referred to above does not anywhere say that in no circumstance the Magistrate can try the offence u/s 138 of the NI Act as a summons case, which is expressly permitted by second proviso to section 143 of the NI Act.

17. The next question that would fall for consideration is whether it is necessary for the Magistrate to record reasons for trying the case as summons case instead of trying the case in a summary manner.

18. The second proviso to section 143(1) of the NI Act has to be divided into two

parts, so that, no order is to be recorded to show predetermination of the Magistrate in passing the sentence. It is for that reason the opening words of the proviso indicate that when "it appears to the learned Magistrate that nature of the case is such which may require sentence of imprisonment of more than a year", the trial can be by the mode other than summary trial. The use of word "appears" in the second proviso assumes significance. The word "appears" means when the Magistrate prima facie finds or forms an opinion about nature of the case which may require sentence of imprisonment of more than a year, case can be tried other than by summary procedure. Prima facie opinion is not required to be recorded as it would show pre-determination of the issue. The second proviso gives two grounds to depart from the summary procedure. Reasons have to be recorded when it is found undesirable to try the case summarily. (See: *Tripti Vyas and Others Vs. State of Rajasthan and Another*,

19. The impugned order in the instant case clearly show that the evidence of P.W.1 was recorded in full and not the gist of evidence as contemplated in a summary trial case. It is also not in dispute that the instant case was tried as a summons case. The evidence of P.W.1 was recorded in full and was also subjected to lengthy cross-examination touching the facts mentioned in the complaint. Once the case is tried as summons case as laid down in Chapter XX of Cr.P.C., provisions of section 326(1) and (2) Cr.P.C., come into operation. When the said provisions are made applicable, subsequent Magistrate gets every authority and right to continue with the case by recording the evidence of other witnesses. There is no need for him to reopen the case and conduct de novo trial. A perusal of the second proviso to section 143 of the NI Act would indicate that if the Magistrate has to shift the mode of trial after commencement of trial i.e., from summons case to summary trial, the reasons are required to be recorded after hearing both parties. As stated above, no reasons are required to be recorded if the option of trying the case as a summons case is exercised before the commencement of the trial. If exercised, it would indicate the predetermined mind of the Court.

20. For the aforesaid reasons, the judgment of the Apex Court in *Nitinbhai Saevatilal Shah* (supra), relied upon by the learned counsel for the petitioner, is not applicable to the case on hand as it was a case where the procedure that was followed for trial of the case was summary in nature.

21. Accordingly, I am of the view that there are no merits in the criminal petition and the same is liable to be dismissed.

22. The Criminal Petition is accordingly dismissed. Miscellaneous petitions, if any shall stand dismissed.