
(2013) 02 KAR CK 0141

In the Karnataka High Court

Case No : Criminal Revision Petition No. 2628 of 2010

Shashidar

APPELLANT

Vs

Bhimarao

RESPONDENT

Date of Decision : 18-02-2013

Acts Referred:

Citation : (2013) 4 AKR 838

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : Shivanand V. Pattanshetty, for the Appellant; Shivashankar H. Manur, for the Respondent

Judgement

Anand Byrareddy, J.—Heard the learned counsel for the petitioner and the learned counsel for the respondent. The petitioner was the accused in an offence punishable u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the NI Act" for brevity). The complaint was contested by the petitioner herein and the court having held that the offence was established and having convicted the petitioner for the offences punishable u/s 138 of the NI Act, the Court imposed a punishment of payment of fine in a sum of Rs. 2,00,000/-, though incorrectly indicated as compensation, as 138 of the NI Act does not contemplate the award of any such compensation and is only fine that could be imposed out of which the court has the power to grant compensation in terms of Section 357 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C." for brevity), in any event, that is irrelevant in view of the further circumstances of this case.

2. An appeal having been preferred, the appeal was also dismissed with costs of Rs. 10,000/-. The present petition however does not address the merits of the case, but rather, on a question of jurisdiction. In that, it is pointed out from the record that the petitioner was the accused and the sworn statement of the complainant was recorded by way of an affidavit in lieu of a sworn statement and thereafter, the trial having commenced, an affidavit by way of evidence was

received. The petitioner had not cross-examined the complainant. It was only belatedly that an application was filed seeking permission to cross-examine the complainant, which was allowed on costs. It is thereafter that before the judgment could be pronounced, there was a change in the Presiding Officer. The succeeding Presiding Officer who had not recorded the evidence, rendered the judgment in the Trial Court. It is that which is sought to be questioned as being void. It is pointed out that in terms of Section 143, all offences under Chapter XVII of the NI Act are to be summarily tried, and the provisions of Sections 262 to 265 of the Cr.P.C. would apply to such trials. Therefore, in terms of Section 326, Cr.P.C., though in matters where a Judge or a Magistrate records a whole or part of any inquiry or 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 the succeeding Judge or Magistrate is of the 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. However, the section would not apply to summary trials. In this regard, the learned counsel would submit that it is laid down by the Apex Court in the case of Nitinbhai Saevatilal Shah and Another Vs. Manubhai Manjibhai Panchal and Another, , in an identical situation, where the accused was being tried for an offence punishable u/s 138 of the NI Act, where the trial had been conducted by one Magistrate and the judgment rendered by another, the proceedings were held to be in violation of Section 326(3). That Section 326, Cr.P.C. is an exception to the cardinal principle of trial of criminal cases. If the principle is violated by a particular Judge or a Magistrate, he would be doing something not being empowered by law in that behalf and to that extent, the proceedings would be void, and void proceedings cannot be validated even u/s 465 of the Cr.P.C. Therefore, the learned counsel would point out that in the present case on hand, the affidavit was tendered in lieu of evidence on 26.05.2007 and the witness was cross-examined on 29.12.2007 and thereafter, there was a change in the Presiding Officer. That the next Presiding Officer has taken up the case with effect from 27.05.2008. The record does not indicate that there was fresh evidence recorded by the succeeding Magistrate, in which event, the judgment of the Apex Court would clearly cover the present case on all fours, and the entire proceedings would be rendered void.

3. The learned counsel for the respondent on the other hand would seek to justify the judgment of the Trial Court while pointing out that there is an amendment to Chapter XVII of the NI Act, whereby Sections 143 to Section 147 have been inserted by Act No. 55/2002 with effect from 6.2.2003, and the procedure prescribed is a complete departure from the provisions of the Cr.P.C. In that, though it is stated that any offence punishable u/s 138 of the NI Act

shall be summarily tried and that Sections 262 to 265 shall apply, as far as may be, to such trials. The further provision u/s 145 which provides for tendering evidence by way of affidavit is a complete departure from the procedure prescribed for such a summary trials and therefore, the procedure having been separately provided under the NI Act which is a special legislation, the contention that there is a Violation of the cardinal principle u/s 326(3), with reference to the decision of the Apex Court, can certainly be distinguished, as the Apex Court did not address the effect of the subsequent amendments to the NI Act even though the judgment was rendered on 1.9.2011. He further contends that the petitioner is, for the first time, raising such an objection and it was never raised before the Trial Court or before the Appellate Court and is therefore, estopped from raising any such contention after having suffered concurrent judgments of both the Trial Court, as well as the Appellate Court.

4. In the light of the above rival contentions, the point for consideration is, whether notwithstanding the said procedure that is prescribed under Chapter 17 of the NI Act, insofar as the procedure for the trial of cases involving an offence punishable u/s 138 of the NI Act, the rigour of Section 326 would still apply and whether the Apex Court in the judgment decided, has overlooked the provisions of the NI Act in applying the principle emanating from Section 326(3) in its strict sense.

5. From a reading of the provisions of the NI Act and the amendments thereof, notwithstanding that the Legislature has thought it fit to prescribe a special procedure insofar as the trial of the cases arising under the NI Act are concerned, the very provisions have made the provisions of the Cr.P.C. applicable insofar as may be relevant. Therefore, the legislation in its wisdom, has still made the provisions of the Cr.P.C. applicable to the extent as stated therein. A summary trial shall follow, as far as possible, the procedure prescribed for summons cases. Section 326 which falls under Chapter XXIV of the Cr.P.C. is a general provision that will be applicable to any enquiry for trial. Therefore, it is a provision which will be applicable insofar as a summary trial is concerned as well especially in the light of the fact that Section 326(3) draws specific reference to a summary trial. Hence, the law laid down by the Apex Court, notwithstanding the departure insofar as the manner in which evidence is tendered under the NI Act, would make little difference, as the principle remains the same insofar as Section 326(3) is concerned. Section 326 is reproduced hereunder for ready reference:

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, 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. It is laid down by the Apex Court that the cardinal principle of law in a criminal trial, is that it is the right of an accused that his case should be decided by a Judge who has heard the whole of it, and it is so stated in the case of Payare Lal Vs. State of Punjab, . This was being rigorously applied prior to the introduction of Section 350 of the old code. From the language of Section 326(3) of the Code, it is clear that the provisions of Section 326(1) and 326(2) are not applicable to summary trials. Therefore, except in regard to those cases which fall within the ambit of Section 326 of the Code, the Magistrate cannot proceed with the trial placing reliance on the evidence recorded by his predecessor. He has to try the case de novo. In this view of the matter, the Apex Court had held that the High Court should have ordered a de novo trial. However, had further proceeded to hold that the next question that would arise is as to from what stage the learned Judge should proceed with the trial de novo. Section 326 is an exception to the cardinal principle of trial in a criminal case. It is crystal clear that, if a principle is violated, he would be doing something not being empowered by law in that behalf. Therefore, Section 461 of the Cr.P.C., 1973 would be applicable. Section 461 of the Cr.P.C., 1973 narrates irregularities which vitiate proceedings, one of which is, if a Magistrate not being empowered by law, tries an offender, his proceedings would be void. The proceedings held by a Magistrate to the extent that he is not empowered by law, would be void and void proceedings cannot be validated u/s 465 of the Code. The defect is not a mere irregularity and the conviction even if sustainable on the evidence, cannot be upheld u/s 465 of the Code. Since it would not be a case of irregularity but want of competency. Section 326(3) does not conceive of such a trial. Hence, Section 465 of the Code cannot be called in aid to make what was incompetent, competent. Therefore, the appeal was allowed by the Apex Court. The same would apply on all fours to the present case on hand. The proceedings are rendered void on account of the above infirmity, which has gone unnoticed. The fact that the petitioner has not raised a protest at any point of time except in this petition, makes no difference.

7. Accordingly, the proceedings are vitiated and would not bind the petitioner. The only course open is to remit the matter for a fresh trial. In that, the proceedings shall re-commence from the stage of receiving the affidavit of the

complainant, and the proceedings shall go on from that stage. The office is directed to remit the papers to the Trial Court expeditiously; and the Trial Court shall issue fresh summons to the complainant as well as to the accused and recommence the proceedings. The amount in deposit made by the petitioner during the pendency of these proceedings are subject to the result of the fresh proceedings that shall recommence.