
(2009) 07 CAL CK 0041
In the Calcutta High Court
Case No : C.R.R. No. 3058 of 2008

Shibnath Sharma

APPELLANT

Vs

Sisir Kumar Das and Another

RESPONDENT

Date of Decision : 15-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251, 254, 255
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 420

Citation : (2010) 2 BC 276 : (2010) 1 CALLT 131 : (2011) 6 RCR(Criminal) 855

Hon'ble Judges : Ashim Kumar Roy, J

Bench : Single Bench

Advocate : Uday Shankar Chatterjee, for the Appellant; Joymalya Bagchi, Sudipto Moitra, for the Respondent

Judgement

Ashim Kumar Roy, J.—The Judgment of the Court was as follows:

The petitioner is the complainant of a case relating to an offence punishable u/s 138 of the Negotiable Instruments Act, now pending before the learned Chief Judicial Magistrate, Burdwan. The said case was initially instituted u/s 420 of the Indian Penal Code read with Section 138 of the Negotiable Instruments Act and the case being a warrant case instituted otherwise than on a police report, procedure prescribed for trial of a warrant case instituted not on a police report was followed and before charge the complainant and his witnesses were examined and after recording of evidence as the Court did not find any material relates to offence punishable u/s 420 of the Indian Penal Code no charge thereunder was framed against the opposite party No. 1. However, he was placed on trial to answer a charge u/s 138 of the Negotiable Instruments Act and a formal charge was framed and the same was read over and explained to him. Finally, in the said trial the accused/opposite party was found guilty u/s 138 of the Negotiable Instruments Act and was sentenced to suffer simple imprisonment for one year and to pay a sum of Rs. 60,000/- to the petitioner as a compensation. The opposite party No. 1 in a criminal appeal challenged the said

order of conviction before the Sessions Court and the appellate Court set aside the order of conviction and remanded back the case to the trial Court with a direction to proceed with the trial from the stage of Section 251 of the Code of Criminal Procedure. It appears the learned Judge set aside the order of conviction and sentence on the ground although a trial for offence u/s 138 of the Negotiable Instruments Act has to be conducted following the procedure prescribed for trial of a summons case but in spite thereof the opposite party No. 1 was never examined u/s 251 of the Code of Criminal Procedure and on the contrary a formal charge has been framed and thereby the accused was seriously prejudiced. The said order passed by the appellate Court way back in April, 2006 was not challenged and the matter went back to the learned trial Court for re-trial where the same is now pending. In the meantime, the accused was examined u/s 251 of the Code and the date for recording of the evidence of the witnesses of the complainant was fixed. On the date so fixed for examination of the complainant the learned trial Court directed the petitioner to file his evidence by way of affidavit. The petitioner in the instant criminal revision challenged the said order.

2. Mr. Uday Shankar Chatterjee, the learned Counsel for the petitioner assailing the impugned order vehemently urged, that the appellate Court while sent the case back to the trial Court on remand setting aside the order of conviction and sentence recorded against the opposite party No. 1 directed the trial Court to pronounce its judgment only after examining the accused u/s 251 of the Code, which was not done earlier. Except direction of examining the accused u/s 251 of the Code no order was made by the appellate Court for examination of the witnesses afresh and as such the trial Court has no option but to give its decision on merit only examine the accused u/s 251 of the Code. Thus, the impugned order whereby the learned trial Court directed re-examination of the witnesses afresh after examination of the accused u/s 251 of the Code is wholly illegal and is liable to be set aside.

3. On the other hand, Mr. Sudipto Moitra, the learned Counsel, appearing on behalf of the opposite party No. 1 strenuously contended when the appellate Court setting aside the order of conviction and sentence remanded the case back to the trial Court with a specific direction to proceed from the stage of Section 251 of the Code, the only logical interpretation of such order would be that the direction was for a de novo trial and accordingly the trial Court very rightly directed recording of evidence afresh after examining the accused u/s 251 of the Code and no mistake has been committed by the learned Court below and as such the order impugned does not warrant any interference.

4. I have given my anxious consideration to the rival submissions of the parties. Now having regards to the order of the Appellate Court there is no iota of doubt that the same in essence is an order for de novo trial. When the Appellate Court setting aside an order of conviction and sentence directed the Trial Court to proceed from the stage of Section 251 of the Code, which is a substitute of

framing of charge in a trial of warrant case or Sessions Trial, obviously the direction was for a de novo trial and there cannot be any other plausible and logical conclusion. According to the scheme of Chapter XX of the Code which prescribes the procedure for trial of summons case by Magistrate, the trial commenced on examination of an accused u/s 251 of the Code and where accused pleads not guilty and claims for trial the Court has to record the evidence in terms of Section 254 of the Code and then to record the order conviction or acquittal u/s 255 of the Code. The Court has no scope to gallop from the stage of Section 251 straight to the stage of Section 255. Thus, in the instant case the learned Magistrate has committed no mistake to proceed for recording evidence when the accused pleaded not guilty and claimed to be tried. The submission of Mr. Chatterjee is wholly without any substance and has no merit.

5. Nevertheless, the order impugned does not suffer from any illegality and deserves no interference, still this Court cannot afford to overlook and ignore the gross illegality manifest on the face of the judgment of the appellate Court passed in connection with Criminal Appeal No. 2 of 2006, pursuant to which the case in question is now pending before the Court of the learned Chief Judicial Magistrate, Burdwan for a de novo trial. It is true that the said order of the appellate Court has already reached its finality and was never challenged by the party affected by it, but there is no iota of doubt that same is wholly and palpably erroneous and brings out a situation which is completely an abuse of process of Court. The appellate Court set aside the order of conviction on a mere ground that the trial of a summons case was held following the procedure prescribed for trial of a warrant case. In a long catena of decisions of the Apex Court it has now been crystallized to a settled law that the trial of a summons case, as a warrant case, does not amount to an illegality but is a mere irregularity and does not vitiate the trial unless a prejudice is caused to the accused. In this connection it would be sufficient to refer the following decisions of the Hon''ble Apex Court viz. in the case of Gopal Das Sindhi v. State of Assam AIR 1961 SC 986 and Superintendent and Remembrancer of Legal Affairs, Supdt. and Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and Others, . I find the appellate Court held that the accused has been prejudiced as charge was framed and he was not examined u/s 251 of the Code, but there was nothing on record to show as to how the accused was prejudiced far less what was the prejudice the accused suffered. There is no foundation for arriving at such a conclusion. On the other hand, during the said trial pre-charge evidence was recorded and accused had the advantage of cross-examine the witnesses twice, once before and then after framing of charge and same has been duly availed of, although in a summons procedure the accused is never entitled to the same, Furthermore, the accused had also the opportunity to resist framing of charge and claim for discharge on the evidence recorded before the Court, there is no such scope in a trial following summons procedure. In the case at hand the accused was tried in connection with a case instituted otherwise than on police

report relating to the offence punishable u/s 420 of the Indian Penal Code and u/s 138 of the Negotiable Instruments Act, of which the offence punishable u/s 420 of the Indian Penal Code is a warrant case, as such by following the procedure prescribed for trial of a warrant case and then after recording of evidence when it was found that there was no material for framing of charge u/s 420 of the Indian Penal Code the learned Magistrate cannot be said to have committed any mistake in framing charge u/s 138 of the Negotiable Instruments Act. The appellate Court find there was no form of charge and only it was noted in the order sheets that the charge was read over and explained to the accused, who pleaded not guilty and claim to be tried. However, by going through the order passed by the trial Court being the order No. 14 dated January 1, 2005,¹ find otherwise and the same is to the effect as follows:

Complainant is absent. Accused Sisir Das on bail is present. Case is taken up for consideration of charge.

Perused the records including the evidence before charge and other materials on record.

Heard the learned Advocate of both sides. It was agreed by both sides that no evidence is forthcoming to frame charge u/s 420, IPC.

On perusal of materials on record I am of the opinion that a prima facie case u/s 138 of the N.I. Act has been established. But, as regards Section 420 of IPC, I do not find any materials on record in this regard.

As such charge u/s 138 of the N.I. Act is framed as per separate sheet placed with the records. Charge so framed is read over and explained to the above named accused persons to which he having understood the same pleads not guilty and claims trial.

Hence fix 16.3.2005 for evidence after charge.

6. Thus, the order of the trial Court for framing of charge cannot be said to be defective far less illegal and after a formal charge was framed against the accused/opposite party No. 1, the same was read over and explained to him and having understood the same the said accused/opposite party pleaded not guilty and claimed for trial. It was never the case of the accused before the appellate Court that no charge was framed or that charge was not read over and explained to him, but it was only urged the trial has been vitiated because of the fact in a trial for offence punishable u/s 138 of the Negotiable Instruments Act, a summons case instead of examining the accused u/s 251 of the Code; formal charge has been framed. It was never the case of the accused that he has suffered any prejudice far less nothing was brought on record to show as to how any prejudice has been suffered by him.

7. It further appears the appellate Court while setting aside the order of conviction and sentence passed against the opposite party No. 1 on the ground for trial of a summons case warrant procedure was followed directed the trial

Court to proceed afresh from the stage of Section 251 of the Code, i.e., for a de novo trial. A de novo trial should be the last resort and that too only when such a course becomes desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial. In this connection reliance may be placed in the case of *State of Maharashtra v. Bhoooraji* 111 (2001) CCR 202 (SC) : AIR 2001 SC 2272.

8. In this case neither any prejudice nor any illegality far less a failure of justice has established. Now in the back drop of the aforesaid position a very pertinent question arises for consideration before this Court as to whether this Court in suo motu exercise of its inherent jurisdiction read with revisional power should interfere with an order which is manifestly erroneous and illegal after about three years when the party affected by the same never challenged such order and submitted to the same.

9. Mr. Sudipto Moitra, the learned Counsel, appearing on behalf of the opposite party vehemently urged that when the party against whom such order went and such party never choose to challenge the same and not only the order has reached its finality but the party has accepted such order and acted thereupon, this Court should not interfere with the same in exercise of its suo motu revisional power, otherwise the party in whose favour such an order was passed shall definitely suffer serious prejudice.

10. On the other hand, learned Amicus Curiae, Mr. Joymalya Bagchi submitted the power of the High Court to suo motu exercise its revisional or inherent jurisdiction against a gross illegality committed by a subordinate Court is in no way restricted, even though the party affected by the same has not approached the High Court, but such power to be exercised cautiously and in rarest of rare cases to prevent failure of justice.

11. I have given my anxious and thoughtful consideration to the submissions made before me. As already observed hereinabove, the order of the appellate Court in question is glaringly illegal and erroneous and same has brought out a situation which is completely an abuse of process of Court. Merely because the trial of a summons case was held by following the warrant procedure and when no prejudice has been suffered by the accused nor there can be any question of suffering of any prejudice, the order of the appellate Court directing de novo trial is grossly illegal and unjust. The appellate Court before interfering with the order of conviction has not given even any slightest indication in its order what was the prejudice suffered by the accused persons, except recording that the accused suffered prejudice. I am of the firm opinion, that it is the order of de novo trial that would certainly cause serious prejudice to the complainant and inflict great hardship to him, who has to bring all his witnesses before the Court once again to repeat their whole deposition, who once took all troubles to prove his case by examining his witnesses in the selfsame case. The possibilities of filling up the lacunas by the parties in this case cannot also be ruled out. In such

circumstances, in my opinion this is a fit case where this Court must interfere with the order of the appellate Court, whereby the appellate Court directed de novo trial, in suo motu exercise of its inherent jurisdiction read with revisional jurisdiction to do the real and substantial justice for the administration of which alone it exists and to prevent the miscarriage of justice.

12. Last but not the least, it was heavily contended by Mr. Moitra that at the present moment exercise of revisional power even suo motu by the High Court is hopelessly time-barred. I am unable to accept such contention of Mr. Moitra. The power of the High Court to interfere with a grossly illegal order of any subordinate Court in suo motu exercise of its inherent jurisdiction as well as revisional or appellate power, when it is necessary to prevent miscarriage of justice and do real and substantial justice, is unlimited and unfettered. Even though the order in question was passed long back, the High Court's power to exercise its inherent jurisdiction as well as its revisional power suo motu is not trammelled by any procedural restriction and when the High Court has noticed a glaring illegality it cannot remain silent, simply because the order in question is time-barred and thereby perpetuating the illegality and miscarriage of justice. The suo motu exercise of its revisional power by the High Court cannot be denied on the ground of limitation. In this connection reliance may be placed in the case of *Municipal Corporation of Delhi Vs. Girdharilal Sapuru and Others*, .

13. Accordingly, the order dated April 19.2006 passed by the learned Sessions Judge, Burdwan in connection with Criminal Appeal No. 2 of 2006 arising out of the judgment and order dated February 10.2006 passed in connection with C.R. Case No. 47/2003 is set aside and appeal stands revived and restored. It is directed the records of the trial Court be immediately brought before the appellate Court and appellate Court shall dispose of the appeal in accordance with law after giving reasonable opportunity of hearing to the parties. Both the petitioner and the opposite party No. 1 are directed to appear before the Appellate Court within four weeks from this date. The Appellate Court is directed to conclude the hearing of the appeal as expeditiously as possible preferably within six months from the date of communication of this order.

14. In view of the fact the order passed by the Appellate Court pursuant to which the proceeding before the Trial Court has been re-initiated being set aside the proceeding now pending before the Trial Court has become infructuous and the order impugned lost its force.

15. The office is directed to communicate this order to both the Trial Court as well as to the appellate Court for taking necessary steps in this regard.

Criminal section is directed to deliver urgent photostat certified copy of this judgment to the parties, if applied for.