

(2008) 05 BOM CK 0011

In the Bombay High Court

Case No : Criminal Application No's. 601 to 612 of 2008

Shriniwas Padiya

APPELLANT

Vs

Akola Janata Commercial Co-Op. Bank Ltd. and Another

RESPONDENT

Date of Decision : 06-05-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 2, 251, 259, 262, 263
Negotiable Instruments Act, 1881 (NI) — Section 138, 143, 143(1), 143(2), 143(3)

Citation : (2009) 2 CivCC 590 : (2009) CriLJ 110 : (2008) 5 MhLj 161

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : G.B. Lohiya, for the Appellant; R.L. Khapre and S.S. Wandile, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—Heard Mr. Lohiya, learned Counsel for the applicant, Mr. R.L. Khapre, learned Counsel for respondent No. 1 and Mrs. Wandile, learned A.P.P. for respondent No. 2 in all the applications.

2. Rule. By consent heard forthwith.

3. All these applications u/s 482 of the Code of Criminal Procedure are being disposed of by common judgment since the facts as well as question of law involved are identical.

4. Respondent No. 1 in all these applications filed Summary Criminal Case Nos. 6650/2003, 2548/2003, 4418/2003, 6651/2003, 9052/2003, 3105/2003, 4419/2003, 6652/2003, 3426/2003, 6649/2003, 2549/2003, 4417/2003, and 9051/2003 against the present applicant alleging commission of offence u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act") since the cheques issued by the applicant were dishonoured. After issuance of process, the applicant filed separate applications in each of Criminal Case purporting to be u/s 259 of the Code of Criminal Procedure (hereinafter referred

to as "the Code") read with Section 143 of the Act. By these applications, the applicant-accused prayed that the cases be tried as warrant cases on the following grounds:

- (i) The applicant disputes the amount mentioned in the cheques;
- (ii) Several witnesses may be required to be examined by the bank to prove the liability and the accused may be required to cross-examine the witnesses at length;
- (iii) The complaint was not filed by authorised person nor Section 138 of the Act was complied with;
- (iv) The bank had started proceedings under Securitization Act against the applicant and the same was pending for adjudication; and
- (v) The matter is contested and complicated.

5. The applications were opposed by the respondent No. 1/complainant by filing replies and by common order dated 12-4-2007 all the applications were rejected. The learned Magistrate held that the applicant had not made out any case for trying the cases as warrant cases and consequently dismissed the applications. As against the said common order, the applicant preferred Criminal Revision Applications bearing Nos. 101 of 2007 to 112 of 2007 which were also dismissed by common judgment and order dated 30-11-2007.

6. Mr. Lohiya, learned Counsel for the applicant reiterated the same grounds urged before the learned Magistrate as well as Revisional Court and submitted that having regard to several factors, which were mentioned in the applications filed by the applicant, the learned Magistrate ought to have converted summary case into warrant case and, therefore, both the orders passed by the learned Magistrate as well as Revisional Court are liable to be quashed and set aside. According to Mr. Lohiya, since the amount involved in each case is quite substantial and complicated issues are likely to arise during the trials, serious prejudice would be caused to the applicant in case the cases are tried as summary criminal cases and not as warrant cases. In support of his submissions, Mr. Lohiya placed reliance upon second proviso to Section 143 of the Act. He, therefore, submitted that both the impugned orders be quashed and set aside and the learned Magistrate be directed to try the cases as warrant cases.

7. Per contra, Mr. Khapre, learned Counsel placing reliance upon Section 143 of the Act submitted that there is no illegality or perversity in the impugned orders and the reasons given by both the Courts below for dismissing the applications filed by the applicant cannot be said to be illegal or perverse warranting inference in exercise of inherent jurisdiction by this Court. Mr. Khapre placed reliance upon the judgment of this Court in Shivaji Sampat Jagtap v. Rajan Hiralal Arora reported in 2006 (2) Bom.C.R. (Cri.) 590 and judgment of M.P. High Court in Steel Tubes of India Vs. Steel Authority of India, .

8. Mrs. Wandile, learned A.P.P. supported the impugned judgment and order.

9. Mr. Lohiya submitted that the Madhya Pradesh High Court in *Steel Tubes of India v. Steel Authority of India* has not considered second proviso to Section 143 of the Act and, therefore, the said judgment does not lay down correct law.

10. I have carefully considered the submissions made by learned Counsel for the parties and perused records. In order to appreciate the rival submissions, it would be appropriate to quote Section 143 of the Act. It reads thus:

Section 143. Power of 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 re-hear 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 interest of justice, be continued from day to day until its conclusion, unless the Court finds that 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.

11. Sub-section (1) of Section 143 of the Act provides that 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 and 265 of the Code shall, as far as applies to such trials. Sections 262 to 265 of the Code are to be found in Chapter XXI of the Code which deals with summary trials. First proviso to Section 143 of the Act permits the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees. The second proviso to Section 143 of the Act gives discretion to the Magistrate to recall any witness who may have been examined and proceed to hear or re-hear the case in the manner provided by the said Code. Sub-section (2) of the Act provides that the trial of a case shall be

held from day to day and consistently with the interest of justice. Sub-section (3) of the Act provides that every trial shall be conducted as expeditiously as possible and an endeavour should be made to conclude the trial within six months from the date of filing of the complaint.

12. From a bare reading of Section 143 of the Act, it is evident that it is the intention of the legislature that ordinarily offences under Chapter of the Act should be tried in summary way and it is only in a case where sentence of more than one year may have to pass or for any other reason, it is undesirable to try the case summarily that the Magistrate can proceed to recall the witness already examined and further proceed to re-hear the case.

13. When a case alleging commission of an offence punishable u/s 138 of the Act is filed in view of Section 143(1) of the Act, the Magistrate has to register it as a summary case. One of the grounds on which the Magistrate may decide not to try a case summarily is that the sentence of imprisonment for a term exceeding one year may have to be passed. Obviously, the Magistrate can hold so only after recording of some evidence led by the complainant. Even before the evidence is led by the complainant, it would be premature for the Magistrate to come to the conclusion that a sentence of imprisonment for a term exceeding one year will have to be passed.

14. The other ground mentioned in second proviso of the Act is "for any other reason". It is pertinent to note that second proviso to Section 143 of the Act permits the Magistrate not to try the case as summary case even at the commencement of the trial. The Magistrate in order not to try the case as summary case even at the commencement of the trial must have some good reason not to try the case as summary case. One of the reasons which can be visualised is that on the basis of the material produced by the complainant, the Magistrate forms an opinion that having regard to the nature of the material produced, which may include the replies given by the accused to statutory notice u/s 138 of the Act, it would not be desirable to try the case summarily.

15. In a case which is tried as summary case, the procedure prescribed for summons case, as far as possible, has to be followed in terms of Section 262 of the Code. The trial of summons case by the Magistrate is governed by Chapter XX of the Code. There is no provision in Chapter XX of the Code nor any other provision in the Code which permits an accused in a summons case from putting his defence before the witnesses are examined on behalf of the complainant. No doubt, when substance of accusation is explained to the accused u/s 251 of the Code while not pleading guilty, it is open for him to state his defence. In the present case, the applicant-accused by filing applications prayed that the cases be tried as warrant cases u/s 259 of the Code read with Section 143 of the Act. Firstly, Section 259 of the Code is clearly not attracted inasmuch as that the powers u/s 259 of the Code can be exercised in the course of the trial of summons case. In the present cases, the trial of the cases had not begun. Therefore, obviously the applications filed by the applicant invoking Section 259

of the Code were clearly not maintainable.

16. Insofar as second proviso to Section 143 of the Act upon which heavy reliance has been placed by Mr. Lohiya, I am of the considered opinion that the same does not advance the case of the applicant.

17. As stated above, in the absence of any provision under the Code the applicant could not have filed applications stating therein the grounds on which the cases should not be tried as summary cases. In a summons case after the accused is summoned, the case starts with the Magistrate explaining the substance of accusation to the accused u/s 251 of the Code. There is no provision under Chapter XX of the Code, which permits filing of an application stating the grounds on which the accused wants the case not to be tried as summons case. On this ground alone, the application filed by the applicant was liable to be rejected.

18. In *Steel Tubes of India's case* (supra) learned Single Judge of Madhya Pradesh High Court observed thus in para 8 of the judgment dealing with an identical situation:

Section 143 gives power to the Court to try cases summarily. This Section has a mandatory effect and the provisions start from non-obstante clause. This means that provisions of Section 259 of the Code regarding warrant trial shall have no application in the case for trying the offence falling under the Act. This is further strengthened by the provisions of Sections 4 and 5 of the Code.

Section 4 of the Code says that when in the Statute there is specific provision for trying a particular offence of the said Statute then the provision of the Code shall not apply and the Special Provisions of the Statute or law that is provisions u/s 143 of the Act is saved by saving provision of Section 5 of the Code. Sub-section (3) of Section 143 of the Code has also saved for expeditious trial and endeavour shall be made to conclude trial within six months from the date of filing of complaint. There is no room of doubt that for the purposes of trial an offence falling under the Act, provisions of summary trial Sections 262 to 265 of the code would be applicable and the summary trial cannot be converted in the warrant trial. Therefore, arguments advanced by the learned Counsel for application of summary trial or summons trial into warrant trial would have no application for the purpose of trying the cases falling u/s 138 of the Act". I am in respectful agreement with the observations made by M.P. High Court in the above case.

19. One more aspect which requires to be taken note is that u/s 138 of the Act maximum punishment which can be imposed is two years imprisonment in terms of Section 138 (as amended) with effect from 6-2-2003. Section 2(x) of the Code defines "warrant case" a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Section 2(w) of the Code defines "summons case" means a case relating to an offence, and not being a warrant-case. Since maximum punishment prescribed u/s 138 of the Act is two years imprisonment, the question of the accused asking complaint

alleging offence u/s 138 of the Act to be tried as warrant case does not arise in view of Sub-section (1) of Section 143 of the Act. Under second proviso of Section 143 of the Act if it appears to the Magistrate that it is undesirable to try the case summarily, the Magistrate after hearing the parties, has to pass an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or re-hear the case in the manner provided by the said Code. Thus, a plain reading of second proviso to Section 143 of the Act makes it clear that in case the Magistrate decides that it is undesirable to try the case summarily, he has to try the case in the manner provided under the Code which means Magistrate has to follow procedure provided under Chapter XX of the Code which is applicable in the case triable as summons case by the Magistrate. In my considered opinion, a complaint filed alleging offence u/s 138 of the Act can never be tried as warrant case. The learned Counsel for the applicant has not been able to point out any other provision in the Negotiable Instruments Act, 1881 which permits trial of an offence punishable u/s 138 of the Act as warrant case. For the reasons aforesaid, I find that the applicant has not made out any case/for interference with the impugned judgment and order in exercise of jurisdiction u/s 482 of the Code. Hence, all these applications are dismissed with costs of Rs. 1000/- (Rs. One thousand only) each to respondent No. 1. Rule is discharged.