

(2016) 04 BOM CK 0155

In the Bombay High Court

Case No : Criminal Application (Apl) No. 678 of 2012

State Bank of India

APPELLANT

Vs

Rakesh

RESPONDENT

Date of Decision : 15-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 326
Negotiable Instruments Act, 1881 (NI) — Section 143

Citation : (2016) ALLMRCri 4313 : (2017) 1 BomCR(Cri) 274

Hon'ble Judges : Z.A. Haq, J.

Bench : Single Bench

Advocate : Shri M. Anil Kumar, Advocate, for the Applicant; None, for the Non-Applciant No. 1; Shri K.R. Lule, Additional Public Prosecutor, for the Non-Applciant No. 2

Final Decision : Disposed Off

Judgement

Z.A. Haq, J.(Oral)—Heard Shri M. Anil Kumar, Advocate for the applicant and Shri K.R. Lule, Additional Public Prosecutor for the non-applciant No. 2. None appears for the non-applciant No. 1 though served. The non-applciant No. 1 is served by publishing notice in newspaper. The orders dated 18-07-2014, 01-08-2014, 08-09-2014, 27-11-2014, 11-12-2014 show appearance on behalf of the non-applciant No. 1. The non-applciant No. 1 has also filed reply.

2. The applicant/original complainant has filed this application under Section 482 of the Code of Criminal Procedure challenging the order passed by the learned Additional Sessions Judge by which the appeal filed by the non-applciant No. 1 is allowed, the judgment passed by the learned Magistrate convicting the non-applciant No. 1 for offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "Act of 1881") is set aside and the matter is remanded to the learned Magistrate for deciding the complaint filed by the applicant, again.

3. The applicant filed complaint under Section 138 of the Act of 1881 against the

non-applicant No. 1, which was allowed by the learned Magistrate by the judgment dated 30-01-2009. The learned Magistrate convicted the non-applicant No. 1 for offence punishable under Section 138 of the Act of 1881 and sentenced him to undergo simple imprisonment for six months and to pay fine of Rs. 45,000/-, out of which amount of Rs. 43,000/- was to be paid to the applicant and Rs. 2,000/- was to be deposited with the Government. The learned Magistrate directed that in default on the part of the non-applicant No. 1 to deposit the amount of fine within thirty days, the non-applicant No. 1 shall undergo simple imprisonment for thirty days.

The non-applicant No. 1, being aggrieved by the order passed by the learned Magistrate, filed appeal which is allowed by the learned Additional Sessions Judge by the impugned judgment. The learned Additional Sessions Judge recorded that the evidence was partly recorded by the earlier Presiding Officer and the learned Magistrate who delivered the judgment and order dated 30-01-2009 assumed the office when the trial was midway and continued the trial from the same stage. The learned Additional Sessions Judge concluded that the learned Magistrate who assumed the office when the trial was midway, should have conducted the trial de-novo. The learned Additional Sessions Judge concluded that as there is fundamental defect in the conduct of trial, the judgment and order passed by the learned Magistrate on 30-01-2009 is not sustainable. Accordingly, the appeal is allowed and the matter is remitted to the learned Magistrate to conduct de-novo trial.

4. In reply filed by the non-applicant No. 1 before this Court, an objection is raised that the application filed by the applicant under Section 482 of the Code of Criminal Procedure is not maintainable and the applicant has remedy of challenging the judgment and order passed by the Sessions Court, by filing revision. As the challenge raised by the applicant regarding legality of the impugned judgment, is purely a law point and even if the legality and propriety of the impugned judgment and order is required to be examined in revisional jurisdiction, the revision would lie to this Court, and it is well established that if it is found that the order passed by the subordinate Court is illegal or improper, this Court can exercise the jurisdiction under Section 397 of the Code of Criminal Procedure suo-motu, the objection raised on behalf of the non-applicant No. 1 in the reply filed by him is overruled.

5. Shri M. Anil Kumar, learned Advocate for the applicant has submitted that in the present case, the learned Magistrate has recorded the entire evidence and the witnesses are cross-examined by the other side and therefore, the provisions of Section 326 (1) of the Code of Criminal Procedure will apply and the learned Magistrate/Presiding Officer who has taken over the charge of the Court when the trial was midway has not committed any irregularity or illegality by proceeding with the trial from the same stage and acting on the evidence recorded by his predecessor. In support of the submission, the learned Advocate has relied on the judgment given in the case of J.V. Baharuni v. State of Gujarat

reported in 2014(10) SCC 494 : 2015(4) Mh.L.J. 192. It is prayed that the judgment passed by the Sessions Court be set aside and the matter be remanded to the Sessions Court for deciding the appeal filed by the applicant, on merits.

6. Section 326(1) and Section 326(3) of the Code of Criminal Procedure, 1973 read as follows :

"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 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, 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 reexamination, if any, as he may permit, the witness shall be discharged.

(2)

(3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under section 322 or in which proceedings have been submitted to a superior Magistrate under section 325."

7. The provisions of Section 326(1) of the Code of Criminal Procedure enables the Magistrate who assumes charge of the Court in the midst of the trial, to proceed with the trial and act on the evidence recorded by his predecessor if the predecessor has recorded the evidence. In the judgment given in the case of J.V. Baharuni v. State of Gujarat, the Hon''ble Supreme Court has dealt with the same point which falls for consideration in the present matter. After considering the earlier judgments, the Hon''ble Supreme Court has laid down in paragraph 38 of the judgment that even in a case which can be tried summarily, if the Court records the evidence elaborately and in verbatim and the defence was given full scope to cross-examine, the procedure indicates that the case was not tried summarily and therefore, the succeeding Magistrate can rely on the evidence on record and de-novo enquiry is not required to be conducted.

8. In the present case, the learned Advocate for the applicant has submitted that the predecessor had recorded part of the evidence and the opponent was given opportunity to cross-examine the witnesses. These facts are specifically stated in the application filed by the applicant before this Court. The grounds which are raised by the non-applicant No. 1 in the memorandum of appeal filed before the Sessions Court, are reproduced in paragraph No. 5 of the judgment passed by the learned Sessions Judge. The non-applicant No. 1 has not disputed the fact

that the predecessor Magistrate had recorded the evidence of the witnesses and opportunity was given to the opponent to cross-examine the witnesses.

9. The learned Additional Sessions Judge has misdirected himself by concluding that the Magistrate who has delivered the judgment should have conducted de-novo trial and should not have relied on the evidence recorded by his predecessor.

10. Section 143 of the Act of 1881 lays down that the Sections 262 to 265 of the Code of Criminal Procedure will apply to the trials for the offences under Chapter XVII of the Act of 1881, second proviso to Section 143 of the Act of 1881 provides that if 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 for any other reason, it is 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 and rehear the case in the manner provided by the Code of Criminal Procedure.

In the judgment given in the case of J.V. Baharuni v. State of Gujarat, the Hon"ble Supreme Court has recorded in paragraph 44 as follows :

"44. There is no straight jacket formula to try the cases falling under the N.I.Act. The law provided therefor is so flexible that it is up to the prudent judicial mind to try the case "summarily" or otherwise. No doubt, the second proviso to Section 143 of the Act specifies that in case the Magistrate does not deem the case fit to try summarily, he shall record an order to that effect after hearing the parties. Just because this directive is not followed scrupulously by the Trial Court would itself not vitiate the entire trial and the appellate Court should not direct for a de novo trial merely on the ground that the Trial Court had not recorded the order for not trying the case summarily."

The non-applicant No. 1 has not raised any grievance on the point that the learned Magistrate has committed an error in not conducting the trial as summary trial. In any case, in view of the proposition laid down by the Hon"ble Supreme Court as recorded in paragraph 44 of the above referred judgment, it cannot be said that the learned Magistrate committed any irregularity or illegality.

11. The conclusions of the learned Additional Sessions Judge that the Magistrate who has delivered the judgment and order convicting the non-applicant No. 1 should not have relied on the evidence recorded by his predecessor and should have conducted de-novo trial, are not in consonance with the law laid down by the Hon"ble Supreme Court. In paragraph No. 38 of the judgment given in the case of J.V. Baharuni v. State of Gujarat, it is recorded as follows :

"38. But where even in a case that can be tried summarily, the Court records the evidence elaborately and in verbatim and defence was given full scope to cross-examine, such procedure adopted is indicative that it was not summary procedure and therefore, succeeding Magistrate can rely upon the evidence on record and de novo enquiry need not be conducted A. Krishna Reddy v. State and

Anr., 1999 6 ALD 279."

12. The learned Additional Sessions Judge has allowed the appeal filed by the non-applicant No. 1 on the preliminary ground that the learned Magistrate has committed an error in not conducting de-novo trial. As I have recorded that the conclusions of the learned Additional Sessions Judge are not in consonance with the legal position and as the learned Additional Sessions Judge has not dealt with the merits of the matter, in my view, it would be appropriate that the matter be remitted to the Sessions Court for deciding the appeal on merits.

13. Hence, the following order :

- i) The judgment and order passed by the learned Additional Sessions Judge, Nagpur in Criminal Appeal No. 41/2009 is set aside.
- ii) The matter is remitted to the Court of Additional Sessions Judge, Nagpur for deciding the appeal filed by the non-applicant No. 1, on merits.
- iii) The applicant shall appear before the learned District Judge-3 and Additional Sessions Judge, Nagpur on 12-07-2016 and abide by the further orders in the matter.
- iv) The learned Additional Sessions Judge shall issue notice to the non-applicant No. 1 and decide the appeal after hearing the non-applicant No. 1. The applicant shall bear the costs of service of notice on the non-applicant No. 1, if required and the amount shall be recovered from the non-applicant No. 1.
- v) As the appeal filed by the non-applicant No. 1 is of 2009, the appeal shall be disposed by the learned Additional Sessions Judge within three months after the non-applicant No. 1 is served.
- vi) The application is allowed in the above terms. In the circumstances, the parties to bear their own costs.