

(2005) 12 J&K CK 0025
In the Jammu And Kashmir High Court
Case No : Criminal Ref. No. 26 of 2005

Yashpal Kapoor

APPELLANT

Vs

Gandotra Finance Corporation

RESPONDENT

Date of Decision : 01-12-2005

Acts Referred:

Jammu and Kashmir Criminal Procedure Code, 1989 — Section 252, 253(2), 448, 537
Negotiable Instruments Act, 1881 (NI) — Section 138
Ranbir Penal Code, 1989 — Section 420

Citation : (2005) 12 J&K CK 0025

Hon'ble Judges : J.P. Singh, J

Bench : Single Bench

Advocate : P.N. Goja, for the Appellant; M.L. Gupta, for the Respondent

Judgement

J.P. Singh, J.—A complaint of offences under Sections 138 of Negotiable Instruments Act, 1881, and 420 of Ranbir Penal Code, triable as

a ""warrant case"" was tried by Judicial Magistrate 1st Class (Forest Cases), Jammu, as a ""summons case"". Accused led its evidence in the case. It

was subsequently, noticed that wrong procedure has been applied for the trial of the complaint. Learned Magistrate, therefore, corrected its error

and framed charge against the accused u/s 138 of Negotiable Instruments Act, 1881, and Section 420 of Ranbir Penal Code.

2. Aggrieved by this order of the learned Magistrate, a criminal revision was taken before learned 2nd Additional Sessions Judge, Jammu. Learned

2nd Additional Sessions Judge, Jammu, has made reference for holding the order of the learned Magistrate bad in law.

3. I have considered the recommendation of learned 2nd Additional Sessions Judge, Jammu, as also submissions of learned Counsel appearing for

the parties.

4. First plea raised by Sh. P. N. Goja, learned Counsel for the petitioner, that error committed by learned Magistrate in trying the complaint as a

summons case', could not have been cured by him because this was an illegality, incurable by Section 537 of the Code of Criminal Procedure, Svt.

1989. Learned Counsel refers to The Public Prosecutor, A.P.P. Vs. Vajinath and Another, Accused, .

5. I do not agree with the submission of Sh. Goja for two reasons; (1) Correction of an error by a Magistrate, in adopting procedure prescribed

by law, can not be termed correction of an illegality. It, in other words, amounts to following a procedure prescribed by law; and (2) The plea of

irregularity or illegality, is irrelevant during the trial of a case. Such a plea becomes relevant only if an Appellate Court has to upset a finding or

sentence of a Criminal Court.

6. Nothing of the sort has, however, happened in the present case, so the plea of irregularity or illegality in correcting the procedure required to be

followed in the case, is irrelevant for deciding the controversy raised in the present case.

7. Additional plea of Sh. Goja that the course adopted by learned Magistrate has resulted in prejudice to the accused, too is untenable in view of

the law laid down by the Hon'ble Supreme Court of India in Gopal Das Sindhi and Ors. v. State of Assam and Anr. reported as AIR 1961 SC

986. Para 8 of this judgment is relevant, which is reproduced hereunder: ""Regarding the second contention, it is true that after the amendment of

the Criminal Procedure Code an offence u/s 448 is triable as a summons case and Mr. Goswami adopted the procedure prescribed for a case

triable as a warrant case. We are, however, of the opinion that this irregularity does not vitiate the proceedings and is curable by the provisions of

Section 537, as no prejudice to the accused has been established in the case.

8. In view of the law laid down by the Hon'ble Supreme Court of India, judgment cited by learned Counsel, may not be of any help to him.

9. Next contention of Sh. Goja that while framing charge, the Magistrate should have considered the defence evidence too for holding as to

whether or not a case for charge was made out, is without any substance because Section 252 of the Code of Criminal Procedure does not

contemplate the consideration of defence evidence for finding out as to whether or not a case for charge has been made out on the basis of evidence led by complainant/prosecution.

10. Sh. Goja relied on Section 253(2) of the Code of Criminal Procedure to project his plea that nothing stops the Magistrate from considering the defence evidence already on records while considering the question of framing charge.

11. I do not agree with the submission of Sh. Goja because Section 253(2) of the Code of Criminal Procedure contemplates a situation entirely different from the one sought to be projected by the learned Counsel. Section 253(2) of the Code contemplates a stage prior to the framing of the charge. Evidence led by accused, when the proceedings were being held against the procedure prescribed by law, in my opinion, can not be taken into consideration at the time of framing charge in a complaint case.

12. No prejudice can be said to have been caused to the petitioner because even after framing charge against it, a fresh opportunity would be available to it to re-cross examine the prosecution witnesses and thereafter lead its evidence in defence.

13. View taken by learned 2nd Additional Sessions Judge, Jammu, Finding fault in the order of learned Magistrate, whereby he has corrected the procedure, which was required to be followed for the trial of a complaint in a warrant case, cannot be sustained.

This reference is, accordingly, declined.