(2014) 02 GAU CK 0010

Gauhati High Court

Case No: Criminal Petition No. 49/2013

Smti Dipti Choudhury		APPELLANT
	Vs	
Smti Sangeeta Mandal @ Sangita Das		RESPONDENT

Date of Decision: Feb. 5, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 260, 262, 263, 264, 264
- Negotiable Instruments Act, 1881 (NI) - Section 138, 138, 139, 140, 141

Hon'ble Judges: Arup Kumar Goswami, J

Bench: Single Bench

Advocate: P.J. Saikia and Mr. V. Hansaria, Advocates Amicus Curiae, Advocate for the Appellant; P. Kataki, Advocate for the Respondent

Final Decision: Dismissed

Judgement

A.K. Goswami, J.

By this application u/s 482 of the Criminal Procedure Code, 1973 (for short, ''Cr.P.C.'') the petitioner has challenged the judgment and order dated 19.12.2012 passed by the learned Sessions Judge, Tinsukia in Criminal Revision No. 37(3) of 2012 affirming the order dated 30.8.2012 passed by the learned Judicial Magistrate, 1st Class, Tinsukia, in N.I. Case No. 2071C/2006. The brief facts, relevant for the purpose of disposal of this revision, are that the respondent as the complainant instituted N.I. Case No. 2071C/06 u/s 138 of the Negotiable Instrument, Act, 1881, for short, Act, before the learned Chief Judicial Magistrate, Tinsukia in respect of dishonour of a cheque dated 18.9.2006 for an amount of Rs. 50,000/- issued in favour of the complainant and on being presented on that day itself, the cheque was returned with a memo containing the endorsement, "insufficient fund" in the account of the accused person. A notice of demand was issued u/s 138 of the Act and even after receipt of the notice, the accused did not repay the amount within the stipulated period and hence, the case was filed.

2. Finding a prima facie case, the learned SDJM (S), Tinsukia issued summons to the petitioner and on appearance, he pleaded not guilty and claimed to be tried. The complainant examined three witnesses and the petitioner had examined herself as a defence witness. After the evidence was recorded, the presiding officer was transferred. On 3.8.2012, i.e. the date fixed for argument, making a reference to the decision of the Apex Court, in Nitinbhai Saevatilal Shah and Another Vs. Manubhai Manjibhai Panchal and Another, , the petitioner prayed for recording of the evidence afresh contending that in the case of a summary trial, the successor magistrate has to record fresh evidence.

3. This petition was rejected by the learned Judicial Magistrate, 1st Class, Tinsukia by an order dated 30.8.2012 holding that his predecessor neither proceeded in the manner of summary trial nor recorded the substance of the evidence of the witnesses and therefore, decision cited was inapplicable to the case in hand and accordingly, rejected the prayer for de novo trial and fixed the case for argument on 7.9.2012.

4. The order dated 30.8.2012 was subject matter of challenge before the learned Sessions Judge, Tinsukia in Criminal Revision No. 37(3)/12. On perusal of the case records of the learned trial court, the revisional court recorded the finding that the learned trial court conducted the trial as a regular trial for summons case. The learned Sessions Judge also held that the Apex Court judgment on the basis of which the accused prayed for recording of fresh evidence was not applicable to the facts and circumstances of the case and accordingly, dismissed the revision.

5. I have heard Mr. P.J. Saikia, learned counsel for the petitioner and Mr. P. Kataki, learned counsel for the opposite party/complainant. I have also heard Mr. V. Hansaria, learned senior counsel, who was requested to address the court as an Amicus Curiae.

6. Learned counsel for both the parties are in agreement that the trial was conducted as a summons case and therefore on facts, the finding of the courts below that the trial was conducted as a regular summons case is not in dispute.

7. Mr. P.J. Saikia, learned counsel for the petitioners submits that section 143 of the Act mandates that all offences under Chapter-XVIII, which includes offence u/s 138 of the Act, shall be tried by a Judicial Magistrate of the first class and provisions of section 262 to 265 of the Cr.P.C. dealing with procedure for summary trial will apply to such trials. Learned counsel further submits that section 143 also provides that in case the learned Magistrate, after hearing the parties, opines for some reasons that it is undesirable to try the case summarily, he is to record an order to that effect and then to proceed with the case in accordance with law. The learned counsel submits that the learned trial court did not record any order that it was undesirable to try the case summarily and no hearing had also taken place in this regard. The contention advanced by Mr. Saikia is in substance that in absence of such an order, even

though trial had proceeded as a summons case, in effect, in view of the mandate of section 143 of the Act, it has to be construed that the Magistrate was proceeding with the case in the manner of a summary trial. It is submitted by him that in view of the judgment of the Apex Court in Nitinbhai (supra), there is no escape from the conclusion that in the facts and circumstances of the case, evidence has to be recorded afresh and therefore, the judgment of the learned courts below are required to be set aside and quashed.

8. Mr. P. Kataki, learned counsel for the respondent, on the other hand, submits that merely because there was no order of the learned court below not to hold the trial in a summary manner, will not vitiate the proceedings. When the evidence has been recorded not in substance but in its entirety as in a proceeding of a trial in a summons case, fresh evidence is not called for. Learned counsel further submits that on facts, Nitinbhai (supra) is clearly distinguishable as that was a case which arose, admittedly, out of summary trial.

9. Mr. V. Hansaria, learned Amicus Curiae has placed before the court the following decisions for consideration of the court: (i) Mandvi Co-op. Bank Ltd. Vs. Nimesh B. Thakore, (ii) Tripti Vyas and Others Vs. State of Rajasthan and Another, (iii) Kannan Vs. Narayana Swami, and (iv) Kishore Pallei Vs. Aruna Kumar Panda, .

10. Learned senior counsel submits that a large number of cheque bounce cases are pending disposal all over the country and the Apex Court had considered various facets arising out of such cases in a writ petition numbered as Writ Petition (Civil) No. 18/2013, which was reserved for judgment on 21.1.2014.

11. Sections 143 to 147 of the Act were inserted by the Negotiable Instrument (Amendment and Misc. provision) Act, 2002, for short Amendment Act, 2002. By the said Amendment Act of 2002, a number of changes were also effected in the existing provisions of sections 138 to 142. The said provisions were brought into operation w.e.f. 6.2.2003. Section 143 is material for the purpose of this case and therefore, it is appropriate to reproduce this section for ready reference:

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 rehear 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 interests of justice, be continued from day to day until its conclusion, unless the Court finds the 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.

12. It will also be apposite to reproduce sections 262 to 265 of the Cr.P.C., which read as follows:

262. Procedure for summary trials:-(1) In trials under this Chapter, the procedure specified in this Court for the trial of summons-case shall be followed except as hereinafter mentioned.

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

263. Record in summary trials-In every case tried summarily, the Magistrate shall enter, in such form as the State Government may direct, the following particulars, namely:-

(a) the serial number of the case;

(b) the date of the commission of the offence;

(c) the date of the report or complaint;

(d) the name of the complainant (if any);

(e) the name, parentage and residence of the accused;

(f) the offence complained of and the offence (if any) proved, and in cases coming under clause (ii), clause (iii) or clause (iv) of sub-section (1) of section 260, the value of the property in respect of which the offence has been committed;

(g) the plea of the accused and his examination (if any);

(h) the findings;

(i) the sentence or other final order;

(j) the date on which proceedings terminated.

264. Judgment in cases tried summarily-In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the findings.

265. Language of record and judgment-(1) Every such record and judgment shall be written in the language of the Court.

(2) The High Court may authorize any Magistrate empowered to try offences summarily to prepare the aforesaid record or judgment or both by means of an officer appointed in this behalf by the Chief Judicial Magistrate and the record or judgment so prepared shall be signed by such magistrate.

13. Section 326 Cr.P.C. deals with procedure to be followed when any Magistrate after having heard and recorded the whole or any part of the evidence in an enquiry or a trial ceases to exercise jurisdiction over the matter and is succeeded by another Magistrate who exercises such jurisdiction. u/s 326(1) Cr.P.C., the successor Magistrate can act on the evidence recorded by his predecessor either in whole or any part. If he is of the opinion that any further examination is required, he may call that witness and examine him, but there is no need for re-trial. Thus, by virtue of Section 326(1), successor Magistrate need not re-hear the whole case and he can proceed from the state the predecessor had left it. Section 326(2) lays down that when a case is transferred from one Judge or Magistrate to another Judge or Magistrate, it will be deemed that the former had ceased to exercise jurisdiction. Section 326(3), however, provides that Section 326(1) which authorises the Magistrate who succeeds the Magistrate who had recorded the whole or any part of the evidence in a trial to act on the evidence so recorded by his predecessor, does not apply to some proceedings including summary trial.

14. As the entire case of the petitioner is based on Nitinbhai (supra), it will be appropriate to consider the said judgment in detail. In the said case, the complainant filed the complaint case u/s 138 of the Act with regard to dishonour of a cheque for a sum of Rs. 11,23,000/- on account of "insufficiency of fund" after serving demand notice which was returned unserved, followed by another notice served by post under postal certificate. On the basis of the complaint, Summary Case No. 2785/1998 was registered and after recording verification, the learned Magistrate had issued process. The complainant examined himself and his witness and also produced documentary evidence in support of his case set up in the complaint. The appellants before the Apex Court did not lead any defence evidence. In his examination u/s 313 Cr.P.C., the appellant No. 1 had stated that his signature was obtained on a blank paper by kidnapping him and writing was written on it and that a false complaint was lodged by misusing the signed blank cheque. After recording of the evidence, the learned Magistrate came to be transferred and he was succeeded by another learned Magistrate. On the basis of a purses filed by the appellants as well as the original complainant wherein the parties had recorded

their no objection to proceed with the matter on the basis of evidence recorded by the predecessor-in-interest in office, the learned Magistrate did not record any fresh evidence and considering the evidence already recorded by his predecessor, the appellants were convicted. In appeal, learned Sessions Judge upheld the conviction as recorded by the learned Magistrate. However, the learned Judge, while setting aside the sentence of simple imprisonment of three months imposed upon the appellant No. 2 on the ground that a Private Limited Company could not have been sentenced to simple imprisonment for three months, maintained the full sentence imposed upon the appellant No. 1 as well as the sentence of fine of Rs. 3,000/- imposed upon appellant No. 2. While upholding the conviction, the High Court, however, set aside the final order of sentence and remanded the matter to the learned Magistrate for passing appropriate order with regard to sentence and compensation, if any, payable u/s 357 of the code, within three months, after giving reasonable opportunity of being heard to the parties.

15. It is in the context of the summary proceeding, the Apex Court, taking note of the mandatory language in which section 326(3) is couched, held that when a case is tried as a summary case, a Magistrate, who succeeds the Magistrate who had recorded the part or whole of the evidence, cannot act on the evidence so recorded by his predecessor. It was further held that in summary proceedings, the successor Judge or Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it. It was explained that provision of sub-sections (1) and (2) of section 326 of the Code have not been made applicable to summary trials because of the reason that in summary trials, u/s 264 Cr.P.C., only the substance of evidence has to be recorded and the court does not record the entire statement of witnesses. Therefore, the Judge or the Magistrate who had recorded such substance of evidence is in a position to appreciate the evidence led before him and the successor Judge or Magistrate cannot appreciate the evidence only on the basis of evidence recorded by his predecessor. The Apex Court further held that Section 326(3) of the code does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor, the obvious reason being that if the succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and it would be difficult for a succeeding Magistrate to decide the matter effectively and to do substantial justice.

16. Holding that the conduct of trial in the case was not a case of irregularity but one of competency, in Nitinbhai (supra), the impugned conviction was set aside and the matter was remanded to the learned Magistrate for trial in accordance with law.

17. From the above discussions of Nitinbhai (supra), it becomes crystal clear that trial before the Magistrate was conducted as a summary trial and therefore, the direction for de novo trial as directed by the Apex Court has to be understood in the said context. Here is a case, where by the own admission of the parties, the case was

not tried as a summary trial but was conducted as a regular summons case. Hence, decision rendered in Nitinbhai (supra), is not directly applicable in the instant case.

18. However, a question arises for consideration as to whether in view of provision of section 143 of the Act, such a proceeding would be deemed to be a summary trial inviting application of section 326(3) of Cr.P.C., prohibiting the successor-in-interest in office to act upon the evidence already recorded by his predecessor.

19. In Mandvi (supra), the Apex Court had observed that sections 143 to 147 of the Act were inserted to do away with all the stages and processes in a regular criminal trial that normally cause delay in its conclusion and to make the trial procedure as expeditious as possible without compromising on the right of the accused for a fair trial. It was also held that procedure of summary trial is adopted u/s 143 subject to qualification "as far as possible" thus, leaving sufficient flexibility so as not to affect quick flow of the trial process.

20. In Tripti Vyas (supra), the Rajasthan High Court laid down that second proviso to Section 143(1) of the Act has to be divided into two parts and that no order is to be recorded when it appears to the Magistrate that nature of the case is such where sentence of imprisonment may be for a term exceeding one year. It was further held that only when it is found undesirable to hold summary trial, reasons are required to be recorded after hearing the parties. In the said case, there was no order of the learned Magistrate treating the same to be a summons case. The Rajasthan High Court, finding that case was proceeded with as a summons procedure case, held that section 326(3) Cr.P.C. had no application. It was also held that when it is a summons trial without an order, it would be presumed that it appeared to the Magistrate that sentence of imprisonment may be of more than a year.

21. In Kannan (supra), the Kerala High Court observed that in Nitinbhai (supra), the Apex Court did not express the view that the offence u/s 138 of the Act can be tried only summarily. It was held that phraseology expressed in section 143 makes it abundantly clear that the Magistrate is not bound to follow the procedure for summary trial and he has a discretion to follow it or not and only requirement to switch over to a different procedure provided under the Code from summary trial is recording of an order thereof by the Magistrate. Both the sides having conceded that the trial was conducted following the procedure governing summons case, the Kerala High Court held that in such cases de novo trial is not called for and the evidence recorded by the predecessor Magistrate forming part of the record can be acted upon.

22. In the case arising for consideration in Kishore Pallei (supra), the successor Magistrate, instead of hearing argument, ordered for de novo trial in view of provision of section 326(3) Cr.P.C. on the ground that there was no order at the commencement or in course of trial u/s 143(1) evidencing departure from summary procedure. However, the case was admittedly conducted as a summons procedure

case. It was held by Orissa High Court that without an order being passed to the effect, the Magistrate cannot depart from the summary procedure and any departure from such procedure will render the trial vitiated by illegality. However, as the evidence from both sides had already been recorded by following summons procedure, direction of the learned trial Magistrate for a de novo trial was quashed.

23. It will appear to this Court that having regard to the purpose for which section 143 was inserted, which is to cut short delay and thereby facilitate expeditious disposal of trial, cases u/s 138 of the Act are to be tried summarily. Second proviso to section 143(1), however, empowers the Magistrate to try the case other than in a summary manner by passing an order after hearing the parties if it appears to him that a sentence of imprisonment for a term exceeding one year has to be passed or, for any other reason, undesirable to try the case summarily. Thus, it is not that invariably and mandatorily an offence u/s 138 of the Act has to be tried summarily and some amount of flexibility is in-built in the section itself. Recording of reason and opportunity of hearing is provided for in the proviso when the Magistrate contemplates not to try the case, either at the commencement or during continuance of a summary trial, so as not to prejudicially affect the right of the parties to otherwise have a summary trial. Failure to record reasons or grant opportunity of hearing before proceeding to try the case as a summons procedure case, will not, ipso facto, render the proceeding invalid as being without jurisdiction. It is the substance and mode of the proceeding which is decisive. If any of the parties is aggrieved by initiation or commencement of the trial as in a summons procedure case without there being an order to that effect after hearing the parties, certainly such course of action on the part of the Magistrate could be challenged in an appropriate proceeding at the appropriate time. If the parties allow the proceeding to go on as in a summons procedure case without any demur and participate therein fully, it cannot be countenanced that the proceeding is to be deemed to be a summary proceeding. Non-recording of reasons as well as failure to grant opportunity as contemplated in proviso to section 143(1) is, in that event, only an irregularity which does not invalidate the trial. It does not fall into the category of cases where acquiescence or consent of the parties purport to confer jurisdiction on a Magistrate where he has none otherwise.

24. Admitted position of this case is that the proceeding was conducted as a summons procedure case with full participation of the parties and evidence was recorded in its entirety and not in its substance. Therefore, in the facts and circumstances of the case, recording of evidence afresh is not warranted. For the reasons and discussions above, I find no merit in this petition and accordingly, the revision petition is dismissed.