Helcino Aleixo Fernandes Vs Milind Madhukar Bhende

Criminal Application (Main) Nos. 118 to 126 of 2015

Court: Bombay High Court (Goa Bench)

Date of Decision: Aug. 7, 2015

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) - Section 177, 326(3), 461#Negotiable Instruments Act, 1881 (NI) - Section 138, 143, 145(2)

Hon'ble Judges: C.V. Bhadang, J

Bench: Single Bench

Advocate: J.E. Coelho Pereira, Senior Advocate and Vledson Braganza, for the Appellant; R.G. Ramani, Advocates for the Respondent

Final Decision: Dismissed

Judgement

C.V. Bhadang, J
Admit. Mr. Ramani, the learned Counsel waives notice for the respondent. Heard finally by consent. As the applications

involve common question of law and fact they are being disposed of by this common judgment.

2. The petitioner herein is the original complainant, who is a businessman residing at Majorda, within the jurisdiction of Judicial Magistrate, First

Class at Margao in South Goa District. The respondent happens to be a resident of Mapusa within the jurisdiction of Judicial Magistrate, First

Class at Mapusa. The respondent/ accused had obtained a hand loan from the petitioner. Towards repayment of the said loan, the respondent had

passed in all 9 cheques in favour of the petitioner. All these cheques were drawn on the account of the respondent with H.D.F.C. Bank Ltd. at

Panaji within the jurisdiction of Judicial Magistrate, First Class, Panaji, North Goa. All these cheques were payable at par at all the branches of

H.D.F.C. Bank Ltd. The petitioner presented the cheques for encashment in his account with Corporation Bank at Uttorda, Majorda. All these

cheques were dishonoured on account of insufficient funds. Hence, after issuing the statutory notice, the petitioner filed in all nine complaints under

Section 138 of the N.I. Act, (the Act, for short) against the respondent, in the Court of Judicial Magistrate, First Class at Margao. The respondent

appeared in the complaint cases and filed separate applications contending that no cause of action had arisen within the jurisdiction of the Judicial

Magistrate, First Class at Margao and seeking dismissal of the complaints for want of territorial jurisdiction. The learned Judicial Magistrate at

Margao dismissed all such applications. That was challenged by the respondent before the learned Sessions Judge, in which the learned Sessions

Judge reversed the finding recorded by the Magistrate and while upholding the objection raised by the respondent, directed the return of the

complaints for presentation to the proper Court. The learned Sessions Judge did not indicate as to which was the proper court, when the

complaints were returned. This was challenged by the petitioner before this Court in Criminal Application No. 84/2009 and others. This Court, by

an order dated 22/04/2009, allowed the application and while setting aside the orders passed by the learned Sessions Judge, directed restoration

of the complaints before the Judicial Magistrate, First Class at Margao.

3. It appears that after trial the learned Magistrate convicted the respondent for an offence punishable under Section 138 of the Act and sentenced

him to undergo Simple Imprisonment for six months. The learned Magistrate also directed payment of compensation of various amounts/

depending on the amount of the cheques and in default thereof, directed the respondent to undergo Simple Imprisonment to various periods. This

was challenged by the respondent before the Sessions Judge at South Goa, Margao. Incidentally, the appeals came before the same learned

Sessions Judge, who had earlier upheld the objection to territorial jurisdiction of the learned Magistrate at Margao. Be that as it may, the learned

Sessions Judge allowed the Criminal Appeals, on the basis of the judgment of the Hon''ble Supreme Court in the case of Nitinbhai Saevatilal Shah

and Another Vs. Manubhai Manjibhai Panchal and Another, AIR 2011 SC 3076 : (2011) 4 RCR(Criminal) 148 : (2011) 9 SCALE 583 : (2011)

10 SCR 804 . It was found that the complaint cases were tried by two successive Magistrates although they were tried as summary cases. It was

held that the entire proceedings stood vitiated under Section 326(3) of the Code of Criminal Procedure for want of de novo trial. It was found that

such an irregularity could not have been cured, as it falls under Section 461 of the Code. It was further found, on the basis of the judgment of the

Hon''ble Apex Court in the case of Dashrath Rupsingh Rathod Vs. State of Maharashtra, (2014) AIRSCW 4798 : (2014) 3 BC 513 : (2014) 9

SCALE 97 : (2014) 9 SCC 129 that the learned Judicial Magistrate, First Class at Margao had no territorial jurisdiction. It was held that as the

subject cheques were drawn on H.D.F.C. Bank at Panaji, it is the Court of Judicial Magistrate, First Class at Panaji, which would have territorial

jurisdiction. Holding so, the complainant has been relegated to the Court of Judicial Magistrate, First Class at Panaji. Feeling aggrieved, the

petitioner is before this Court in this second round of litigation.

4. I have heard Shri Ceolho Pereira, the learned Senior Counsel for the petitioner and Shri Ramani, the learned Counsel for the respondent. With

the assistance of the learned Counsel for the parties, I have perused the impugned orders as also the order passed by this Court in Criminal

Application No. 84/2009 and connected applications. I have also perused the record and proceedings of the Criminal Cases, out of which, these

applications arise.

5. In view of rival circumstances and the submissions made, the following points arise for my determination in these applications :

(i) Whether the trial and the consequent conviction and sentence of the respondent is vitiated under Section 326(3) read with Section 461 of

Cr.P.C. for want of de novo trial ?

(ii) Whether the trial and consequent conviction and sentence is vitiated for want of territorial jurisdiction to the Court of Judicial Magistrate, First

Class at Margao ?

(iii) If not, whether the Judicial Magistrate, First Class at Margao would have territorial jurisdiction to try the complaint cases in the face of the

judgment of the Hon''ble Apex Court in the case of Dashrath Rathod (supra) ?

6. It is submitted by Shri Pereira, the learned Senior Counsel for the petitioner that in the earlier round of litigation, this Court had already held that

the Court of Judicial Magistrate, First Class at Margao had territorial jurisdiction. It is submitted that thus, it was not open to the learned Sessions

Judge to again examine this issue and give a contrary finding. The learned Senior Counsel has referred to certain observations by the learned

Sessions Judge in paragraph 13 in which the learned Sessions Judge has observed that in the earlier round of litigation, ""the High Court had

brought the case to square one."" It is submitted that in view of the judgment of the Hon''ble Apex Court in the case of Dashrath Rathod (supra),

proceedings in the present complaints were clearly saved in as much as they were already decided when the judgment in the case of Dashrath

Rathod (supra) came. It is submitted that the judgment in the case of Dashrath Rathod (supra) has prospective effect, in as much as the pending

proceedings in which the evidence has started under Section 145(2) of the Act are all saved. It is submitted that the finding recorded by the

learned Sessions Judge on the point of requirement of de novo trial is also misconceived. It is submitted that the learned Sessions Judge failed to

look into the record of the trial, in order to ascertain whether the complaints were indeed tried as summary cases. The learned Counsel has placed

reliance on the decision of the Hon''ble Supreme Court in the case of J.V. Baharuni Vs. State of Gujarat, (2015) 124 CLA 457 : (2014) 4 Crimes

541 : (2015) 1 JCC 43 : (2014) 4 RCR(Civil) 763 : (2014) 4 RCR(Criminal) 696 , in order to submit that if the Magistrate has not followed the

summary procedure and has recorded detailed evidence, the proceedings cannot be vitiated for want of de novo trial under Section 326(3) of the

Code. The learned Senior Counsel has, in particular, placed reliance on paragraph 43 of the said judgment, in order to submit that even absence of

a formal order by the learned Magistrate regarding the reasons why it was deemed fit to try the case by a procedure other than summary

procedure, would not vitiate the entire trial. It is submitted that de novo trial should be ordered in exceptional and rare cases only. The learned

Senior Counsel would submit that the learned Sessions Judge fell into error in applying the ratio in the case of Dashrath Rathod (supra), in holding

that the Judicial Magistrate, First Class at Margao had no jurisdiction and thereby relegating the complainant to the Court Judicial Magistrate, First

Class at Panaji. He, therefore, submitted that the impugned order be set aside and the appeals be remitted back for decision on merits in

accordance with law.

7. On the contrary, it is submitted by Shri Ramani, the learned Counsel for the respondent that the proceedings stood vitiated for want of de novo

trial as has been rightly held by the learned Sessions Judge. It is submitted that under second proviso to Section 143 of the Act, the Magistrate has

to record reasons as to why it is undesirable to try the case summarily and then recall any witness, who has been examined and proceed to hear or

rehear the case in the manner provided by the said Code. It is submitted that admittedly, in this case, there is no such order passed. Therefore, the

petitioner cannot place reliance on the fact that the complaint cases are not tried as summary cases and detailed evidence is recorded. The learned

Counsel has also placed reliance on the decision of the Hon''ble Apex Court in the case of J.V. Baharuni (supra) and in particular, the directions

given in paragraph 60.1 to 60.6 of the judgment.

8. In so far as the issue of territorial jurisdiction is concerned, it is submitted that once, the learned Sessions Judge had come to the conclusion that

the trial stood vitiated, it has to be held that on the date on which the decision in the case of Dashrath Rathod (supra) came, the trial before the

Magistrate had not started. In that view of the matter, the learned Sessions Judge was right in not placing reliance on the savings clause, by which

the cases, in which the evidence has started, were saved. He, therefore, submitted that the applications are without any merits.

9. AS TO POINT NO.1 :-

In the case of Nitin Bhai Shah (supra), the Hon''ble Apex Court has held that in the matter of a summary trials, the successor Magistrate cannot act

on the basis of the evidence recorded by his predecessor and the successor Magistrate is obliged to try the case de novo. It is held that even

consent by the other side to read the evidence recorded by the predecessor, cannot cure such irregularity. The judgment in the case of Nitin Bhai

Shah (supra) has been considered by the Hon''ble Apex Court in the case of J.V. Bahruni and another (supra). The Hon''ble Apex Court framed

the following issues for determination in paragraph 22 :

(i) What is the legislative intent of the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 and the object of

incorporating Section 143 ?

(ii) What are the factors, the appellate Court has to keep in mind while arriving at a conclusion about the procedure adopted by the trial Court in

conducting the trial ?

(ii) In what circumstances a case should be remanded back for de novo trial ?

10. It has been held in paragraph 25of the judgment as under :

25. An analysis of Section 143 brings out that the Magistrate, initially, should try the case ''summarily'' if he is of the opinion that he is not going to

pass sentence of imprisonment not exceeding one year and fine of Rs. 5,000. In case during the course of trial, if the Magistrate forms a different

opinion that in the circumstances of the case, he may order a sentence of a term exceeding one year, or for any other reason it is undesirable to try

the case summarily, he must record the reasons for doing so and go for a ''regular trial''. Thereafter, the Magistrate can also recall any witness who

has been examined and proceed to hear or rehear the case. So, the second proviso to Sub-section (1) of Section 143. gives discretion to the

Magistrate to conduct the case other than in summary manner.

11. Ultimately, in paragraph 60, the Hon''ble Supreme Court gave the following directions :

60. However, to summarise and answer the issues raised herein, following directions are issued for the Courts seized of with similar cases:

60.1. All the subordinate Courts must make an endeavour to expedite the hearing of cases in a time bound manner which in turn will restore the

confidence of the common man in the justice delivery system. When law expects something to be done within prescribed time limit, some efforts

are required to be made to obey the mandate of law.

60.2. The learned Magistrate has the discretion Under Section 143 of the N.I. Act either to follow a summary trial or summons trial. In case the

Magistrate wants to conduct a summons trial, he should record the reasons after hearing the parties and proceed with the trial in the manner

provided under the second proviso to Section 143 of the N.I. Act. Such reasons should necessarily be recorded by the Trial Court so that further

litigation arraigning the mode of trial can be avoided.

60.3. The learned Judicial Magistrate should make all possible attempts to encourage compounding of offence at an early stage of litigation. In a

prosecution under the Negotiable Instruments Act, the compensatory aspect of remedy must be given priority over the punitive aspect.

60.4. All the subordinate Courts should follow the directives of the Supreme Court issued in several cases scrupulously for effective conduct of

trials and speedy disposal of cases.

60.5. Remitting the matter for de novo trial should be exercised as a last resort and should be used sparingly when there is grave miscarriage of

justice in the light of illegality, irregularity, incompetence or any other defect which cannot be cured at an appellate stage. The appellate Court

should be very cautious and exercise the discretion judiciously while remanding the matter for de novo trial.

60.6. While examining the nature of the trial conducted by the Trial Court for the purpose of determining whether it was summary trial or summons

trial, the primary and predominant test to be adopted by the appellate Court should be whether it was only the substance of the evidence that was

recorded or whether the complete record of the deposition of the witness in their chief examination, cross examination and reexamination in

verbatim was faithfully placed on record. The appellate Court has to go through each and every minute detail of the Trial Court record and then

examine the same independently and thoroughly to reach at a just and reasonable conclusion.

(emphasis supplied)

12. It can, thus, be seen that there is a discretion under Section 143 of the Act, vesting in the Magistrate either to follow summary procedure or to

go for a regular trial. In the case, where the Magistrate wants to conduct a regular trial, he should record reasons after hearing the parties and

proceed with the trial in the manner provided under second proviso to Section 143 of the Act. It has been held that such reasons should

necessarily be recorded by the Trial Court so that further litigation arraigning mode of trial can be avoided. These observations have to be read

along with the observations of the Hon''ble Apex Court in paragraph 43 of the judgment which read as under :

43. 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.

(emphasis supplied)

13. It is thus, clear that although where the Magistrate intends to hold a regular trial, he has to record reasons as to why he deems it fit not to try

the case summarily, the mere absence of such an order cannot vitiate the entire trial. In paragraph 46, it has been held thus :

46. The de novo trial of entire matter which should be ordered in exceptional and rare cases only when such course of fresh trial becomes

indispensable to avert failure of justice. [See Mohd. Hussain @ Julfikar v. State (Govt. of NCT of Delhi) (2012) 9 SCC 408 , State of Madhya

Pradesh Vs. Bhooraji and Others, (2001) 6 AD 624 : AIR 2001 SC 3372 : (2001) CriLJ 4228 : (2001) 4 Crimes 190 : (2001) 7 JT 55 : (2001)

5 SCALE 423 : (2001) 7 SCC 679 : (2001) AIRSCW 3313 : (2001) 6 Supreme 311 and Ganesha Vs. Sharanappa and Another, AIR 2014 SC

1198 : (2014) 1 CCR 121 : (2014) CriLJ 1146 : (2013) 15 JT 163 : (2013) 14 SCALE 59 : (2014) 1 SCC 87 : (2014) 2 SCJ 725 . Hence, de

novo trial is only for exceptional cases when the finding of acquittal is on a total misreading and perverse appreciation of evidence.

14. While examining the nature of the trial conducted by the trial Court for the purpose of determining whether it was summary trial or regular trial,

the Appellate Court, should examine whether only substance of the evidence (notes of evidence) was recorded or whether complete record of the

depositions of the witnesses in their chief-examination, cross-examination and re-examination in verbatim was faithfully placed on record. The

Appellate Court has to go through each and every minute details of the trial Court record and then examine the same independently and thoroughly

to reach at a just and reasonable conclusion. The Hon''ble Apex Court has also sounded a caution while saying that the de novo trial of entire

matter should be ordered in exceptional and rare cases only when such course of fresh trial becomes indispensable to avert failure of justice.

15. Coming to the present case, a perusal of the record before the learned Magistrate would make it explicit that the Magistrate has recorded

detailed evidence and not in the form of notes of evidence. Although the nomenclature may not be decisive, still, none of the cases are registered as

summary criminal cases. It was also not disputed by the learned Counsel for the respondent that there is anything on record to indicate that the

Magistrate had tried the complaints as summary trials. It is true that there is no specific order recorded by the Magistrate as to why it was deemed

fit to have a regular trial. In the first instance, this was not a ground raised or considered by the learned Sessions Judge while holding that the trial is

vitiated. In fact, a perusal of the judgment of the learned Sessions Judge would show that this aspect about the examination of the record of the

learned Magistrate, in order to find out and ascertain as to whether the trial was indeed a summary trial is totally absent. From the perusal of the

paragraph 43 in the case of J.V. Baharuni (supra), it is clear that mere absence of such an order cannot vitiate the proceedings. I have carefully

gone through the record of the complaint cases before the Magistrate and I find that the Magistrate has not tried the complaints as summary trials

and thus, the finding of the learned Sessions Judge that the trial stood vitiated for want of a de novo trial, is clearly misconceived. The point is

accordingly answered in the negative.

16. In the case of Dashrath Rathod (supra), the Hon''ble Apex Court has held that territorial jurisdiction to entertain and try the complaints under

Section 138 of the Act is restricted to the Court within whose local jurisdiction the offence was committed, which in the context of Section 138 of

the Act is where the cheque is dishonoured by the Bank, on which it was drawn. The Hon''ble Apex Court after gauging magnitude of the impact

of such a decision, further saved the complaints, where post summoning and the appearance of the accused, the recording of evidence of the

witnesses has commenced as envisaged under Section 145(2) of the Act, such complaint cases are allowed to be continued at the place where

they were filed. The following observations in paragraphs 21 and 22 may be reproduced with profit :

21. The interpretation of Section 138 of the NI Act which commends itself to us is that the offence contemplated therein stands committed on the

dishonour of the cheque, and accordingly the JMFC at the place where this occurs is ordinarily where the Complaint must be filed, entertained and

tried. The cognizance of the crime by the JMFC at that place however, can be taken only when the concomitants or constituents contemplated by

the Section concatenate with each other. We clarify that the place of the issuance or delivery of the statutory notice or where the Complainant

chooses to present the cheque for encashment by his bank are not relevant for purposes of territorial jurisdiction of the Complaints even though

non-compliance therewith will inexorably lead to the dismissal of the complaint. It cannot be contested that considerable confusion prevails on the

interpretation of Section 138 in particular and Chapter XVII in general of the NI Act. The vindication of this view is duly manifested by the

decisions and conclusion arrived at by the High Courts even in the few cases that we shall decide by this Judgment. We clarify that the

Complainant is statutorily bound to comply with Section 177 etc. of the Code of Criminal Procedure and therefore the place or situs where the

Section 138 Complaint is to be filed is not of his choosing. The territorial jurisdiction is restricted to the Court within whose local jurisdiction the

offence was committed, which in the present context is where the cheque is dishonoured by the bank on which it is drawn.

22. We are quite alive to the magnitude of the impact that the present decision shall have to possibly lakhs of cases pending in various Courts

spanning across the country. One approach could be to declare that this judgment will have only prospective pertinence, i.e. applicability to

Complaints that may be filed after this pronouncement. However, keeping in perspective the hardship that this will continue to bear on alleged

Respondent/ accused who may have to travel long distances in conducting their defence, and also mindful of the legal implications of proceedings

being permitted to continue in a Court devoid of jurisdiction, this recourse in entirety does not commend itself to us. Consequent on considerable

consideration we think it expedient to direct that only those cases where, post the summoning and appearance of the alleged Accused, the

recording of evidence has commenced as envisaged in Section 145(2) of the Negotiable Instruments Act, 1881, will proceeding continue at that

place. To clarify, regardless of whether evidence has been led before the Magistrate at the pre-summoning stage, either by affidavit or by oral

statement, the Complaint will be maintainable only at the place where the cheque stands dishonoured. To obviate and eradicate any legal

complications, the category of Complaint cases where proceedings have gone to the stage of Section 145(2) or beyond shall be deemed to have

been transferred by us from the Court ordinarily possessing territorial jurisdiction, as now clarified, to the Court where it is presently pending. All

other Complaints (obviously including those where the Respondent/ accused has not been properly served) shall be returned to the Complainant

for filing in the proper Court, in consonance with our exposition of the law. If such Complaints are filed/refiled within thirty days of their return, they

shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred.

(emphasis supplied)

17. It can, thus, be seen that the judgment in the case of Dashrath Rathod (supra), would apply only in so far as the complaints where recording of

evidence has not commenced as envisaged under Section 145(2) of the Act. The decision in the case of Dashrath Rathod (supra), came on

01/08/2014. The complaints in the present case, were in fact decided much prior thereto i.e. on 23/07/2013 and thus, the complaints would be

obviously saved. It appears that, the learned Sessions Judge, after holding that the proceedings stood vitiated for want of de novo trial, further

extrapolated the conclusion to hold that the evidence had not started in the case and held that the complaints were liable to be transferred to the

Court of Judicial Magistrate at Panaji. As noticed earlier, even on the count of the necessity of de novo trial, it cannot be held that the proceedings

stood vitiated. The complaints had not only travelled much beyond the stage of recording evidence as envisaged under Section 145(2) of the Act,

but were finally decided and thus, in terms of paragraph 23 of the judgment in the case of Dashrath Rathod (supra), could have been continued

before the Judicial Magistrate, First Class at Margao. The point nos. 2 and 3 are answered accordingly.

18. In the result, Criminal Applications are allowed. The impugned judgment and order passed by the learned Sessions Judge, is hereby set aside.

Criminal Appeals are restored to the file of the learned Sessions Judge, for disposal according to law.

19. Criminal Applications are disposed of in the aforesaid terms.