

[S.143 NI Act] Failure To Record Summary Nature Of Proceedings In Order Does Not Vitiating Trial Unless Prejudice Shown: Karnataka High Court

2022 LiveLaw (Kar) 511

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

H.B. PRABHAKARA SASTRY; J.

CRIMINAL REVISION PETITION No. 773 OF 2013; 5 December, 2022

M/s. Pradhan Mercantile Pvt. Ltd. versus M/s. Virgin Apparels

Petitioner by T.V. Vijay Raghavan, Advocate

Respondents by Geetha Menon, Advocate

ORDER

The present petitioner, as a complainant had filed a complaint under Section 200 of the code of Criminal Procedure, 1973 (hereinafter for brevity referred to as “the Cr.P.C.”) in C.C.No.25334/2010, against the present respondents, arraigning them as accused No.1 and accused No.2 respectively in the Court of the XIII Additional Chief Metropolitan Magistrate, Bangalore (hereinafter for brevity referred to as “the Trial Court”) for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter for brevity referred to as “the N.I. Act”).

2. After holding a trial and recording the evidence led by both side, the learned Magistrate of the Trial Court, by her judgment of conviction and order on sentence dated 01-02-2013 convicted the accused No.1 and accused No.2 before her for the offence punishable under Section 138 of the N.I. Act and sentenced the accused No.2 to pay a fine of ₹66,49,881/- and in default of the payment of the said fine amount, to undergo simple imprisonment for a period of one year.

Aggrieved by the same, the accused No.1 and accused No.2 in the Trial Court preferred Criminal Appeal No.103/2013, in the Court of the LII Additional City Civil and Sessions Judge, Bangalore City (CCH 53) (hereinafter for brevity referred to as “the Sessions Judge’s Court”) which Court, by its judgment dated 02-09-2013, allowed the appeal, setting aside the impugned judgment passed by the Trial Court and remanded the matter to the Trial Court ordering for a *de-novo* trial.

Aggrieved by the same, the complainant in the Trial Court has preferred this criminal revision petition.

3. The respondents No.1 and 2 herein, who are accused No.1 and accused No.2 in the Trial Court are represented by their learned counsel.

4. The Trial Court and the Sessions Judge's Court's records were called for and the same are placed before this Court.

5. Learned counsel for the revision petitioner (complainant) and the learned counsel for the respondents No.1 and 2 (accused Nos.1 and 2) are physically appearing in the Court.

6. Heard the learned counsels from both side. Perused the materials placed before this Court including the memorandum of revision petition, impugned judgments, the Trial Court records and also the Sessions Judge's Court's records.

7. For the sake of convenience, the parties would be henceforth referred to as per their rankings before the Trial Court.

8. After hearing the learned counsels for the parties, the only point that arise for my consideration in this revision petition is:

Whether the impugned judgment passed by the Court of the LII Additional City Civil and Sessions Judge, Bangalore City (CCH-53) dated 02-09-2013 in Criminal Appeal No.103/2013, warrants any interference at the hands of this Court?

9. Learned counsel for the complainant (revision petitioner) in his argument submitted that, though Section 143 of the N.I. Act prescribes the proceedings for the alleged offences to be tried as a summary trial, however, the matter in the Trial Court was tried as a regular trial. For the same, the Magistrate of the Trial Court has also assigned reasons in her impugned judgment. That being the case, the Sessions Judge's Court was not justified in remanding the matter to the Trial Court ordering for a *de-novo* trial.

In his support, he relied upon a judgment of the Hon'ble Apex Court in the case of **J.V. BAHARUNI & ANR. Vs. STATE OF GUJARAT & ANR.** reported in **(2014) 10 Supreme Court Cases 494.**

With this, the learned counsel submitted that the impugned judgment passed by the Sessions Judge's Court be set aside and the matter be remanded to the Sessions Judge's Court for its disposal on the merits of the case.

10. Learned counsel for the accused No.1 and accused No.2 (respondents No.1 and 2 in the Trial Court) also in her brief argument submitted that, since the Sessions Judge's Court has not decided the matter on its merit, the same deserves to be remanded.

11. As per Section 143 of the N.I. Act, the nature of the proceedings for the trial for the offence punishable under Section 138 of the N.I. Act is summary in nature. However, the very same Section also enables the Magistrate when it appears to him 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, after hearing the parties, to 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 Criminal Procedure Code. Thus, it enables the Magistrate to try the case as a summons case.

12. The Sessions Judge's Court, accepting the contention of the appellants before it (accused No.1 and accused No.2) that the Magistrate of the Trial Court ought not to have relied upon the evidence recorded by her predecessor and should have held a *de-novo* trial, referring to a judgment of the Hon'ble Apex Court in the case of **Nitinbhai Saevatilal Shah and Anr. Vs. Manubhai Manjibhai Panchal and Anr.**, reported in **AIR 2011 SUPREME COURT 3076** and relying upon an order of a co-ordinate bench of this Court in the case of **Shashidar Vs. Bhimarao** in **Criminal Revision Petition 2628/2010** disposed of on the date **18-02-2013** and further observing that there is no specific order as contemplated under Section 143 of the N.I. Act to try a summary case as a summons case, proceeded to set aside the impugned judgment of conviction passed by the Trial Court and remanded to the Trial Court for a *denovo* trial in the matter.

13. The Hon'ble Apex Court in **Nitinbhai's case (supra)**, wherein matter involved was an offence punishable under Section 138 of the N.I. Act, while analysing the nature of the trial and the scope of Section 326(3) of the Cr.P.C., was pleased to

observe that, the mandatory language in which Section 326(3) of the Code is couched, leaves no manner of doubt 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/her predecessor. In summary proceedings, the successor Judge or a Magistrate has no authority to proceed with the trial from a stage at which his/her predecessor has left it. The reason why the provisions of sub-sections (1) and (2) of Section 326 of the Code have not been made applicable to summary trials is that, in summary trials, only the substance of evidence has to be recorded and the Court does not record the entire statement of the witnesses. Therefore, the Judge or the Magistrate, who has 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.

14. The Hon'ble Apex Court in **BAHARUNI's case (supra)** observed that, in **Nitinbhai Saevatilal Shah's case (supra)**, the matter was tried purely as a summary trial, as such, the Court proceeded to observe that a successor Magistrate cannot rely upon the summary of the evidence recorded by his predecessor. Further, the Hon'ble Apex Court made a distinction between a summary trial and a regular trial and observed that, wherein a case that may be tried summarily, if the Court records the evidence elaborately and in verbatim and gives the opponent full scope to cross-examine, then the procedure adopted is indicative that it is not summary procedure. It further observed that, before arriving at any conclusion with regard to the nature of the trial, there should be proper application of judicial mind and evidence on record must be thoroughly perused. Thus, when the case in substance is not tried in the summary, where though triable summarily and is tried as a regular summons case, the successor Magistrate need not hear the case *de novo* and can act on evidence recorded by his predecessor to decide the case.

15. The Hon'ble Apex Court, to ensure speedy disposal of the cheque dishonor cases, issued several directions in **BAHARUNI's case (supra)**, wherein the direction Nos.2, 5 and 6 read as bellow:

"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.

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.

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 re-examination 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."

16. In the instant case, the accused in the Trial Court itself, had taken a contention that a *de novo* trial is required to be conducted by the Magistrate. A memo to that effect was also filed by them. The complainant had filed his detailed objection to the said memo. After recording the filing of such a memo and objection to the memo, the Magistrate of the Trial Court in her impugned judgment has made a detailed discussion on the contention taken up by the accused and has made a specific observation that the predecessor Magistrate had recorded the entire memorandum of evidence of witnesses and not the substance of evidence as required under the summary trial.

The predecessor Magistrate had not recorded only the substance of evidence. The predecessor Magistrate might have decided to try the case as a warrant case. Therefore, the Magistrate of the Trial Court adopted the procedure which has to be adopted in a warrant trial while recording his evidence. She recorded the memorandum of evidence given by the witness in full and given sufficient opportunity to the opponent party to cross-examine the witness fully and thoroughly and has recorded the evidence in its entirety as given by the parties.

With the above observation, the Magistrate of the Trial Court proceeded to decide the case on its merit.

However, the Sessions Judge's Court only on the point that the Magistrate, before proceeding to record the evidence as in summons case or a warrant case, had not recorded her reason in writing, had set aside the impugned judgment passed by the Trial Court and remanded the matter to the Trial Court for a *de novo* trial.

In that regard, the Sessions Judge's Court, though claims to have kept in mind the judgment of the Hon'ble Apex Court in ***Nitinbhai Saevatilal Shah's case (supra)***, but referred to an order passed by a co-ordinate bench of this Court in ***Shashidar's case (supra)***, however, it failed to notice that, as on the date of passing of the order in ***Shashidar's case (supra)***, the judgment of the Hon'ble Apex Court in ***BAHARUNI's case (supra)*** was not pronounced. As such, the principle laid down in ***BAHARUNI's case (supra)*** was not available before the Court, while passing its order in ***Shashidar's case (supra)***. Further it appears that, ***Nitinbhai Saevatilal Shah's case (supra)***, the reference about which was made in the order by a co-ordinate Bench of this Court, had clearly observed that, the procedure followed by the Magistrate in recording the evidence was purely as in a summary trial.

However, the learned Sessions Judge's Court failed to notice that, in the instant case, the evidence recorded was as in a regular trial but not as in a summary trial. In that regard, a detailed observation has also been made by the Magistrate of the Trial Court in the impugned judgment itself.

17. A careful perusal of the evidence recorded by the Trial Court would also go to show that, the evidence recorded was in full and in verbatim as stated by the witness but not only the summary of the evidence given by the parties. As observed by the Hon'ble Apex Court in ***BAHARUNI's case (supra)***, remitting the matter for a *denovo* 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 (Sessions Judge's Court in the instant case) should be very cautious and exercise the discretion judiciously while remanding the matter for a *de-novo* trial.

18. However, in the instant case, though the Magistrate of the Trial Court has demonstrated through her judgment that, the evidence recorded was not in a summary manner but as though it was a warrant case, the evidence of the parties in its entirety and as given by them were recorded but not its summary and that the other side was given sufficient opportunity to cross-examine the witness, cannot be ignored. In such a circumstance, when the evidence of the parties, in the chief examination, crossexamination and re-examination (if any) were recorded in verbatim and was faithfully placed on record then for merely not recording the order observing that the matter would be tried as a summons case or as a regular trial would not itself vitiate the trial conducted by the Magistrate of the Trial Court, when it has not resulted in miscarriage of justice. Therefore, the judgment passed by the Sessions Judge's Court only on technicalities and setting aside the impugned judgment passed by the Trial Court and ordering for a *de-novo* trial would not sustain. The Sessions Judge's Court ought to have decided the appeal before it on its merit, as such, the revision under consideration deserves to be allowed and the matter requires to be remanded to the Sessions Judge's Court for its fresh disposal, in accordance with law.

Accordingly, I proceed to pass the following:

ORDER

- [i] The Criminal Revision Petition is **allowed**;
- [ii] The impugned judgment dated 02-09-2013 passed by the Court of the LII Additional City Civil and Sessions Judge, Bangalore City (CCH-53), in Criminal Appeal No.103/2013, is set aside;
- [iii] The matter stands remanded to the Court of the LII Additional City Civil and Sessions Judge, Bangalore City (CCH-53), for fresh disposal of the Criminal Appeal No.103/2013 on its merits and in accordance with law;
- [iv] Considering the age of the petition, which has arisen from a criminal case of the year 2010 and in order to avoid any further delay in the matter, both parties are directed to appear before the Court of the LII Additional City Civil and Sessions Judge, Bangalore City (CCH-53), where the Criminal Appeal No.103/2013 earlier came to be allowed, without anticipating any fresh notice or summons from it, on **09-01-2023 at 11:00 a.m.**, and participate in the further proceedings of the matter;
- [v] The early disposal of the matter by the Court of the LII Additional City Civil and Sessions Judge at Bangalore City (CCH-53), is highly appreciated.

Registry to transmit a copy of this order to both the Trial Court as well the Sessions Judge's Court along with their respective records immediately.