

Court No. - 93

Case :- APPLICATION U/S 482 No. - 3099 of 2024

Applicant :- Abhishek Mishra @ Pintu

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Vijay Kumar Pandey

Counsel for Opposite Party :- Ashok Kumar Gupta,G.A.

Hon'ble Arun Kumar Singh Deshwal,J.

1. Heard learned counsel for the applicant, Sri Ashok Kumar Gupta, learned counsel for opposite party no.2 and Sri Rajeev Kumar Sonkar, State Law Officer for the State.

2. The present 482 Cr.P.C. application has been filed to quash the entire proceedings of Case No.311 of 2022 (Old No.744 of 2018) (Shivnath Vs. Abhishek), under Section-138 of Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act, 1881'), Police Station-Shahganj, District-Jaunpur, pending in the Court of learned Additional Civil Judge (J.D.)/Judicial Magistrate Third, Jaunpur, as well as impugned order dated 26.10.2019.

3. The contention of learned counsel for the applicant is that the complaint of the opposite party no.2 was rejected by order dated 13.03.2019 for non-prosecution as well as for not producing any evidence despite giving repeated opportunities and against that order, revision was preferred by the opposite party no.2, which was allowed by order dated 26.10.2019, and the matter was remanded to the Court below to consider the same on merits. It is further submitted that the order of the revisional Court is erroneous as no revision was maintainable because the order

dismissing the complaint amounts to acquittal and the same can be challenged in appeal under Section-378(4) of Cr.P.C. and revisional court has no jurisdiction to entertain the revision against that order. In support of his contention, learned counsel for the applicant has also relied upon the judgement of the coordinate Bench of this Court passed in **Vinay Kumar Vs. State of U.P. in Criminal Revision No.3426 of 2005 decided on 04.09.2007.**

4. Per contra, learned counsel for opposite party no.2 and State Law Officer has submitted that proceeding under the Act, 1881 is a summary proceeding and procedures of Cr.P.C. is not applicable in the proceeding of the Act, 1881. It was also submitted that u/s 143 Cr.P.C., it was explicitly mentioned that in the proceeding of the Act, 1881, Sections 262 to 265 of Cr.P.C. will be applicable, and provision of appeal is provided u/s 148 of the Act, 1881 against the conviction u/s 138 of the Act, 1881.

5. After considering the submission of parties and on perusal of the record, it is undisputed that proceeding under the Act 1881 is summary proceeding, and Section-143 of the Act 1881, itself provides the procedure of the complaint under the Act 1881 and further provides that Sections 262 to 265 Cr.P.C. will be applicable as far as maybe even without adopting the strict procedure of summons cases. For ready reference, Section 143 of the Act 1881 is being quoted as under:

"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."

6. Similarly, the process for issuing summons and taking evidence was also provided in the Act, 1881 and provision of appeal is provided u/s 148 of the Act, 1881, against the order of conviction u/s 138 of the Act, 1881 with the caveat that notwithstanding anything contained in the Cr.P.C. Therefore, if a complaint is dismissed, that order will not be appealable u/s 148 of the Act, 1881. The only remedy available for the complaint is filing a revision.

7. From the perusal of the second proviso of Section-143 of the Act, 1881, it is clear, if the Magistrate thinks that the case is of such nature that a sentence of imprisonment exceeding one year may have to pass, or for any other reason, it is undesirable to try the summary. In that case, the Magistrate, after recording his reason, will proceed to hear the case as per the procedure provided for the summons case in Cr.P.C. Therefore, it is clear if the Magistrate has not recorded any

reason to convert the trial from summary to summons case, and then the summary trial procedure will continue.

8. The Apex Court in the **Expeditious Trial of Cases U/s 138 of N.I. Act, 1881 in RE Suo Motu Writ Petition (Crl.) No.2 of 2020**, decided on **16.04.2021**, also observed in paragraph no.24.1 that before converting a complaint case u/s 138 of the Act, 1881 from summary trial to summons case, the Magistrate has to record reasons and discuss the scheme of the Act, 1881 in para nos. 9 and 20 of the judgment. Paragraphs nos.9, 20, 24.1 of the judgement of **Expeditious Trial of Cases (supra)** are being mentioned as under:

"9. Section 143 of the Act has been introduced in the year 2002 as a step-in aid for quick disposal of complaints filed under Section 138 of the Act. At this stage, it is necessary to refer to Chapter XXI of the Code which deals with summary trials. In a case tried summarily in which the accused does not plead guilty, it is sufficient for the Magistrate to record the substance of the evidence and deliver a judgment, containing a brief statement of reasons for his findings. There is a restriction that the procedure for summary trials under Section 262 is not to be applied for any sentence of imprisonment exceeding three months. However, Sections 262 to 265 of the Code were made applicable "as far as may be" for trial of an offence under Chapter XVII of the Act, notwithstanding anything contained in the Code. It is only in a case where the Magistrate is of the opinion that it may be necessary to sentence the accused for a term exceeding one year that the complaint shall be tried as a summons trial. From the responses of various High Courts, it is clear that the conversion by the trial courts of complaints under Section 138 from summary trial to summons trial is being done mechanically without reasons being recorded. The result of such conversion of complaints under Section 138 from summary trial to summons trial has been contributing to the delay in disposal of the cases. Further, the second proviso to Section 143 mandates that the Magistrate has to record an order spelling out the reasons for such conversion. The object of Section 143 of the Act is quick disposal of the complaints under Section 138 by following the procedure prescribed for summary trial under the Code, to the extent possible. The discretion conferred on the Magistrate by the second proviso to Section 143 is to be exercised with due care and caution, after recording reasons for converting the trial of the complaint from summary trial to summons trial. Otherwise, the purpose for which Section 143 of the Act has been introduced would be defeated. We accept the suggestions made by the learned Amici Curiae in consultation with the High Courts. The High Courts may issue practice directions to the Magistrates to record reasons before converting trial of complaints under

Section 138 from summary trial to summons trial in exercise of power under the second proviso to Section 143 of the Act.

*20. Section 143 of the Act mandates that the provisions of summary trial of the Code shall apply "as far as may be" to trials of complaints under Section 138. Section 258 of the Code empowers the Magistrate to stop the proceedings at any stage for reasons to be recorded in writing and pronounce a judgment of acquittal in any summons case instituted otherwise than upon complaint. Section 258 of the Code is not applicable to a summons case instituted on a complaint. Therefore, Section 258 cannot come into play in respect of the complaints filed under Section 138 of the Act. The judgment of this Court in *Meters & Instruments [Meters & Instruments (P) Ltd. v. Kanchan Mehta, (2018) 1 SCC 560 : (2018) 1 SCC (Civ) 405 : (2018) 1 SCC (Cri) 477]* insofar as it conferred power on the trial court to discharge an accused is not good law. Support taken from the words "as far as may be" in Section 143 of the Act is inappropriate. The words "as far as may be" in Section 143 are used only in respect of applicability of Sections 262 to 265 of the Code and the summary procedure to be followed for trials under Chapter XVII. Conferring power on the court by reading certain words into provisions is impermissible. A Judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation [*J. Frankfurter, Of Law and Men : Papers and Addresses of Felix Frankfurter.*] . The Judge's duty is to interpret and apply the law, not to change it to meet the Judge's idea of what justice requires [*Duport Steels Ltd. v. Sirs, (1980) 1 WLR 142 : (1980) 1 All ER 529 (HL)*] . The court cannot add words to a statute or read words into it which are not there [*Union of India v. Deoki Nandan Aggarwal, 1992 Supp (1) SCC 323 : 1992 SCC (L&S) 248*] .*

24.1. The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial."

9. Therefore, it is clear from the above legal position that unless this case is converted from summary trial to summons trial by the specific order of the Magistrate, procedure of summons trial mentioned in Chapter XX of Cr.P.C. cannot be adopted while trying a case as summary trial. Therefore, if the case is being tried strictly as a summary trial as per the Chapter XXI of Cr.P.C., then the procedure mentioned in Chapter XX of Cr.P.C. from Sections 251 to 259 of Cr.P.C. would not be applicable.

10. Therefore, this Court is of the view if a complaint u/s 138 of the Act, 1881 is dismissed for want of prosecution, then the same cannot be deemed to be acquittal u/s 256(1) of

Cr.P.C. because Section 256(1) Cr.P.C. falls under the procedure of summons case, therefore, against the dismissal of the complaint, no appeal lies u/s 378(4) Cr.P.C. only the remedy against the rejection of a complaint, whether on merit or for want of prosecution, is filing a revision.

11. Apex Court in the case of **Expeditious Trial of Cases (supra)** also observed that proceeding under the Act, 1881 is a summary proceeding and complete the procedure has been provided under the Act, 1881, therefore all provisions of Cr.P.C. are not applicable. So far as the judgement relied upon by learned counsel for the applicant is concerned, in that case, it is observed that dismissal of the complaint in the absence of the complainant will amount to acquittal of accused u/s 256(1) Cr.P.C. and that order can be challenged only in appeal under section 378(4) Cr.P.C., is contrary to the observations of the Hon'ble Supreme Court as well as the scheme of the Act, 1881.

12. Therefore, this Court respectfully disagreed with the coordinate Bench's judgement in **Vinay Kumar's case (supra)**. Paragraph no.14 of the **Vinay Kumar's case (supra)** is being quoted as under:

"14) FROM the perusal of the aforesaid Section it is clear that if an order of acquittal has been passed a case instituted upon a complaint then on an application made before the High Court by the complainant the high Court can grant special leave to appeal from an order of acquittal. Thus in the present case against the dismissal of complaint which amounted to acquittal of accused complainant respondent No. 2 Sanjay kumar Dixit had got the right to file special leave to appeal under Section 378 (4) Cr. P. C. in this Court, which admittedly has not been done. Section 401 (4) Cr. P. C. provides that under the Code of Criminal Procedure if an appeal lies and no appeal is brought no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. The said sub-section is quoted below:

high Courts powers of revision. 401. (4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

13. In this view of the matter, judicial propriety demands that this matter be referred to a Larger Bench to decide these questions:

(i) Whether the dismissal of complaint u/s 138 of the Act, 1881 for want of prosecution will amount to acquittal u/s 256(1) Cr.P.C., and same can be challenged in appeal u/s 378(4) Cr.P.C., or is that order reviseable u/s 397 Cr.P.C.?

(ii) Whether the case of **Vinay Kumar (supra)** has been correctly decided by holding that against the dismissal of complaint u/s 138 of the Act, 1881, appeal lies u/s 378(4) Cr.P.C. ,not the revision?

14. The office is directed to place the record of this case before the Hon'ble Chief Justice for appropriate orders.

15. List this case after the decision of the Larger Bench.

16. In the meantime, the proceedings of the trial court shall remain stayed.

Order Date :- 13.3.2024

S.Chaurasia