

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2313 OF 2012

NISHIKANT NARAYAN BHOJANE)...PETITIONER

V/s.

SUNIL HIRACHAND JAIN AND ANR.)...RESPONDENTS

Mr.Rupesh Lanjekar i/b. Mr.M.L.Patil, Advocate for the Petitioner.

Ms.N.S.Jain, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 20th SEPTEMBER 2017

P.C. :

1 By this petition, the petitioner / original accused is challenging the order dated 9th February 2012 ordering *de novo* trial of the criminal case with a reason that the case is tried as summary trial.

2 Heard the learned advocate appearing for the petitioner / accused. None appeared for respondent no.1, despite service.

3 The learned advocate appearing for the petitioner / original accused vehemently argued that for bringing home the guilt for the offence punishable under Section 138 of the Negotiable Instruments Act, respondent no.1/original complainant had examined in all three witnesses. The evidence of these three witnesses came to be adduced on affidavit. Relevant documents were exhibited in further chief-examination, and thereafter, all three witnesses came to be cross-examined at length by the petitioner / accused. Hence, thought the case was registered as summary criminal case, it was actually tried as a summons case. Therefore, the impugned order is unsustainable. The learned advocate appearing for the petitioner / accused placed reliance on judgments of this court in the matters of Shivaji Sampat Jagtap vs. Rajan Hiralal Arora and The State of Maharashtra¹, Mahendra vs. Vivek² Dinesh Thacker vs. State of Maharashtra & Anr.³ and Quazi Syed Salahuddin vs. The State of Maharashtra and Shaikh Nazim⁴.

1 MANU/MH/0465/2006

2 MANU/MH/1129/2014

3 Writ Petition No.3745 of 2011 decided on 12.12.2011

4 MANU/MH/0584/2014

4 I have also heard the learned APP appearing for respondent no.2 / State.

5 I have carefully considered the submissions so advanced and also perused record made available. The petitioner is being prosecuted for the offence punishable under Section 138 of the Negotiable Instruments Act at the instance of respondent no.1 Sunil Jain vide Summary Criminal Case No.2134 of 2003 pending on the file of the JMFC, Chiplun. It is seen from the record made available that evidence of in all three witnesses for complainant came to be recorded. Complainant Sunil Joshi is examined as PW1. It took about three sittings to complete his evidence. Then the evidence of PW2 Nandkumar Joshi came to be recorded and completed in about two sittings. Similarly, is the position of recording of evidence of PW3 Puransingh Thakur. I have carefully perused their testimony. Evidence of all these three witnesses is recorded elaborately. The learned Magistrate, it appears from the record, has conducted full fledge trial of the complainant's case though it is titled and registered as Summary

Criminal Case. Evidence is not recorded in the form indicated for trial of summary cases. After completion of evidence, even statement of accused / petitioner came to be recorded under Section 313 of the Code of Criminal Procedure. Thereafter, it appears that there was change in trial Magistrate because of transfer, which resulted in passing the following order by the successor in office :

“The evidence of complainant and his witness no.1 was recorded by my learned predecessor. As this case is tried as summary trial, complainant and his witness Nandkumar Joshi is recalled for recording evidence under Section 311 of the Code of Criminal Procedure.”

6 The same issue came to be examined by this court in the matter of Shivaji Jagtap (supra), Mahendra (supra), Dinesh Thacker (supra) and Quazi Salahuddin (supra) relied by the learned advocate for the petitioner/ accused. It is held by this court that when it is revealed that evidence is recorded in a full fledge manner and the case was not tried in a summary way, then, label or category of case by itself would not attract

provisions of Section 326(1) and (3) of the Code of Criminal Procedure. There shall not be mechanical *de novo* trial only because of change of Magistrate in a case which is categorized as summary case. If the evidence is recorded in detail by the Magistrate, then it can be followed by his successor. This ratio which can be culled out from the rulings cited by the learned advocate for the petitioner / accused makes it clear that the learned Magistrate ought to have applied his mind prior to passing the impugned order dated 9th February 2012 directing *de novo* trial. It appears that without examining the record, the impugned order is passed in a mechanical way. Therefore the order :

ORDER

- i) The impugned order dated 9th February 2012 passed below Exhibit 1 in Summary Criminal Case No.2134 of 2003 pending on file of the learned JMFC, Chiplun, is quashed and set aside.
- ii) The petition is disposed of accordingly.

(A. M. BADAR, J.)