

Nikita

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**WRIT PETITION NO.632 OF 2016
WITH
WRIT PETITION NO.633 OF 2016**

Runwal Developers Pvt. Ltd.

... Petitioner

V/s.

Yogesh Mehta and Anr.

... Respondents

Mr. Hrishikesh Mundargi a/w Ms. Komal Joshi, Mr. Pushkraj Deshpande, Mr. Ashwin Hirulkar i/b ALMT Legal for the petitioner.

Mr. A.K.Chauhan a/w Rahul Chauhan for Respondent No.1.

Mr. A.R. Patil, APP for the State/Respondent No.2.

CORAM : AMIT BORKAR, J.

DATED : APRIL 6, 2023

P.C.:

1. Since the facts and issues involved in both these petitions are common, except the amount of cheque and facts leading to the dishonour of the cheque, both the petitions are being disposed of by common judgment. The relevant facts for adjudication of the issue involved are as under:

2. The petitioner is a complainant in proceedings under Section 138 of the Negotiable Instruments Act 1881. The Magistrate, after recording evidence of the parties, conducted a trial of respondent No.1 and convicted and sentenced the accused for an offence

under section 138 of the Negotiable Instruments Act.

3. Aggrieved thereby, the accused filed a criminal appeal before the Sessions Judge. The Sessions Judge, by the impugned order dated 20th October 2015, set aside the judgment of the learned Magistrate and remitted back the proceedings mainly on the ground that the accused did not get a chance to argue the matter before the learned Magistrate at the time of final arguments as well as the point of the sentence.

4. The petitioner takes exception to the said judgment in the present writ petition. The learned advocate for the petitioner submitted that the impugned judgment is in ignorance of Section 353(7) and (8) of the Code of Criminal Procedure. According to him, the accused's appearance on earlier dates and his conduct constrained the Magistrate to pronounce judgment on the scheduled date. Despite several opportunities granted to the accused, he chose not to remain present during arguments and on the date of judgment. In the absence of any party to the trial, the Magistrate is not powerless to pronounce the judgment in view of Sub-section(7) of Section 353 of Code of Criminal Procedure, 1973. Therefore, the Appellate Court was not justified in remitting the matter back to the learned Magistrate.

5. Per contra, the learned advocate for respondent No.1 accused submitted that the accused could not remain present due to his ill health as he had been suffering from Brain Tumor since 2009. According to him, the Trial Court should have issued a warrant against the accused to secure his presence. He submitted

that the defect of noncompliance with Section 353(6) of Code of Criminal Procedure is incurable. The accused had not delayed the proceedings. Such conviction affects the fundamental right of the accused. He, therefore, submitted that the judgment of the Appellate Court is in accordance with the law.

6. Considering the submissions on behalf of both sides, in my opinion, the following questions arise for consideration:

- (i) What is the correct interpretation of Section 353(7) (8) of Code of Criminal Procedure, 1973?
- (ii) Up to what extent Section 465 of Code of Criminal Procedure, 1973 pressed into service?

7. To answer the questions framed, it is necessary to note that there is no serious dispute on facts that before the delivery of judgment by the Magistrate, the accused remained absent at least on five occasions. The Magistrate adjourned the delivery of judgment on three occasions. On perusal of the Roznama, it appears that accused No.1 remained absent consistently during the trial; however, the relevant dates for the adjudication of points for consideration are stated below.

- (i) After the conclusion of the evidence, on 26th August 2011, the accused filed an application for adjournment. The learned Magistrate adjourned the complaint for arguments.
- (ii) On 19th September 2011, the accused applied for an adjournment, which was rejected, and the learned

Magistrate passed an order of enforcement "*no argument*" against the accused. The matter was fixed for judgment on 3rd October 2011.

(iii) On 3rd October 2011, the accused filed an exemption application which the learned Magistrate granted.

(iv) On 11th October 2011, the accused applied for exemption which was allowed by the Magistrate and the matter was fixed for judgment.

(v) On 4th November 2011, the accused and his advocate were absent. The learned Magistrate, therefore, adjourned the complaint for judgment on 8th November 2011.

(vii) On 8th November 2011, the accused was absent. The learned Magistrate again adjourned the complaint for judgment. Finally, on 9th November 2011, since the accused was absent, the learned Magistrate pronounced the judgment in open Court.

8. At this stage, it is necessary to consider relevant provisions of the Act, which are as under.

“Section 353. Judgment -

(1) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court by the presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders:

(i) By delivering out the whole of the judgment; or

(ii) By reading out the whole of the judgment; or

(iii) By reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

(2) Where the judgment is delivered under clause (a) of sub-section (1), the presiding officer shall cause it to be taken down in short-hand, sign the transcript and every page thereof as soon as it is made ready, and write on it the date of delivery of the judgment in open Court.

(3) Where the judgment or the operative part thereof is read out under clause (b) or clause (c) of sub-section (1), as the case may be, it shall be dated and signed by the presiding officer in open Court, and if it is not written with his own hand, every page of the judgment shall be signed by him.

(4) Where the judgment is pronounced in the manner specified in clause (c) of sub-section (1), the whole judgment or a copy thereof shall be immediately made available for the perusal of the parties or their pleaders free of cost.

(5) If the accused is in custody, he shall be brought up to hear the judgment pronounced.

(6) If the accused is not in custody, he shall be required by the Court to attend to hear the judgment pronounced, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted.

Provided that, where there are no accused than one, and one or more of them do not attend the Court on the date on which the judgment is to be pronounced, the presiding officer may, in order to avoid undue delay in the disposal of the case, pronounce the judgment notwithstanding their absence.

(7) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any

party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders, or any of them, the notice of such day and place.

(8) Nothing in this Section shall be construed to limit in any way the extent of the provisions of section 465.

Section 465.

Finding or sentence when reversible by reason of error, omission or irregularity-

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.”

9. Careful reading of Section 353 of Code of Criminal Procedure makes it clear that the provision contained in Chapter XXVII of Code of Criminal Procedure prescribes the procedure to be followed by the Trial Courts at the time of delivery of judgment. In the facts of the case, I am not concerned with Sub-section 1 to 5. Sub-section 6 deals with the contingency where the accused is not in custody; it mandates that the Court calls upon the accused to attend a hearing when the judgment is being pronounced.

However, the proviso to said sub-section creates an exception to the said provisions, which dispenses with the presence of the accused in a situation where there is more than one accused and to prevent undue delay in the disposal of the case. Accordingly, the Trial Court is permitted to pronounce the judgment notwithstanding the absence of the accused.

10. Sub-section 7 of Section 353 protects the Trial Court's acts to pronounce a judgment in the absence of any party or pleader. Sub-section (7), in clear terms, states that the judgment delivered by the Criminal Court in the absence of a party shall not be invalid by reason of the absence of the party.

11. Generally, it is true that the presence of the accused at the time of delivery of judgment under the Code of Criminal Procedure is necessary because of the Principle of Natural Justice that no person should be condemned unheard. However, when such a person is regulated by procedural statute, the Court is bound by the procedure prescribed by statute. Moreover, another purpose of the presence of the accused at the time of delivery of judgment is to ensure that the judgment is carried out effectively; if the accused is absent at the time of delivery of judgment, it may create difficulties in executing the judgment.

12. Sub-section 8 of Section 353 makes provisions of Section 465 applicable to the delivery of judgment under Section 353 of the Code of Criminal Procedure. Section 465 applies the cases where something irregular occurs during the regular trial. It is not applied to a Trial which is illegal from its beginning till its finish.

There are always chances of honest errors, humblest omissions, or innocent irregularities. The expression 'failure of justice' applies in cases where there is disobedience of express provisions as to the mode of trial. It is well settled that in case of breach of mandatory provisions of the procedural statute, 'failure of justice' may occur. When a trial is conducted differently from that prescribed by the procedural statute, there is no question of curing the irregularity. However, when the trial is conducted substantially in the manner provided by the statute, but some irregularities occur in the course of such conduct, it can be cured or can be termed as irregularity. The mere erroneous decision does not amount to a failure of justice. The object of Code of Criminal Procedure is to ensure that an accused person gets a full and fair trial. After all, procedural laws are designed to sub-serve the needs of justice and not to custody them. The test to be applied is whether the accused had a fair trial despite the transgression of the prescribed rule of procedure. While deciding the question of prejudice, the Court can consider it from a broad vision and look at the substance, not technicalities. One of the relevant questions is whether the accused was given a full and fair chance to defend himself.

13. The object and purpose of the statute under which the accused is being tried are also relevant factors while interpreting Sub-section (7) (8) of Section 353 and Section 465. With the introduction of Sections 143 A and 148 of the Negotiable Instruments Act 1881, the legislature has made it clear that the trial in the cases of dishonour of cheques is to ensure that the faith of ordinary citizens dealing with Negotiable Instruments is

strengthened. The endeavour of the legislature, while amending the provisions of the Negotiable Instruments Act, is to ensure expeditious disposal of a complaint involving dishonour of cheque. Introduction to Section 143(a), 148 is one of such steps taken by the legislature to ensure that the proceedings under Section 138 of Negotiable Instruments Act, 1881, are tried expeditiously and effectively. While interpreting Section 353(7)(8) of the Code of Criminal Procedure, the Court cannot forget that it deals with complaints under Section 138 of the Negotiable Instruments Act 1881.

14. The Apex Court, in the case of **K.S. Panduranga Vs. State of Karnataka** reported in (2013) 3 SCC 721 was considering a case where the High Court decided the appeal arising out of conviction under the Prevention of Corruption Act, 1947 on merits in the absence of an advocate of the accused. On the other hand, the Apex Court distinguishing the judgment in the case of **Bani Singh Vs. State of U.P** reported in (1996) 4 SCC 720, held that the Appellate Court could decide a criminal appeal in the absence of counsel for the accused if the counsel remains absent deliberately or shows negligence in appearing.

15. In the facts of the present case, it appears from the undisputed facts and material on record that the accused was consistently absent during the trial and at the stage of making oral submissions. The learned Magistrate granted the fair opportunity to the accused by adjourning the delivery of judgment on three occasions. If the accused is not remaining present, there is no law which mandates that the Magistrate enforce the presence of the

accused by adopting coercive means. Sub-section (7) of Section 353 protects the learned Magistrate from requiring the presence of the accused at the time of delivery of judgment, particularly in the proceedings arising out of Section 138 of the Negotiable Instruments Act, 1881. Therefore, in my opinion, the absence of the accused at the time of delivery of judgment in the facts of the case has not resulted in a failure of justice, and in view of Sub-section (7) of Section 353 of the Code of Criminal Procedure which protects judgment delivered by the Criminal Court in the absence of any party or its pleader, the Appellate Court was not justified in setting aside the order of conviction and sentence imposed by the learned Magistrate.

16. For the reasons stated above, I pass the following order.

- i.** The impugned judgment and order passed by the Additional Sessions Judge Greater Mumbai dated 20th October 2015, in Criminal Appeal No.765 of 2012 and 764 of 2012, is quashed and set aside.
- ii.** The proceeding should be remitted back to the Appellate Court for a decision on merits.
- iii.** Considering the pendency of the present writ petition, the Appellate Court is directed to decide the appeal within four months from the date of appearance of the parties. Accordingly, parties shall appear before the Appellate Court on **24th April 2023.**

(AMIT BORKAR, J.)