



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 398 OF 2024

Nilkantha Nivrutti Khedkar

....Applicant

VERSUS

Vitthal Bhausahab Ajbe

.....Respondent

.....

Mr. N.B. Garje, Advocate for applicant.

Mr. N.L. Jadhav, Advocate for respondent.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 1st APRIL, 2024

ORDER :

1. By this application filed under section 482 of Code of Criminal Procedure, applicant challenges the order dated 29.12.2023, passed by learned Judicial Magistrate First Class, Ashti, below Exhibit-64 in Summary Criminal Case No. 546/2017.

2. On 05.12.2017 complaint filed by respondent/complainant under section 138 of Negotiable Instruments Act, was registered and numbered as S.C.C. No. 546/2017, on the same day process was issued. Plea of applicant was recorded on 19.08.2017. Complainant then filed his evidence affidavit on 11.03.2022 and he was cross examined on 19.11.2022, evidence of Bank Manager and Postman was recorded. Thereafter, the

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matter was transferred to the Court of Judicial Magistrate First Class, Ashti. After transfer, applicant's statement under section 313 of Cr.P.C. was recorded on 22.06.2023. Thereafter, applicant filed application Exhibit-64 contending that since proceeding under section 138 of Negotiable Instruments Act is a summary proceeding, evidence earlier recorded be discarded and fresh evidence be recorded as the matter is transferred to the present Court. There will be serious prejudice to accused and it would be difficult for the succeeding Magistrate to decide the matter effectively and to do substantial justice. Hence, the evidence recorded earlier be discarded and fresh evidence be recorded. Trial Court has rejected this application. Hence, the present petition.

3. Heard learned advocate for applicant and learned advocate for respondent. Perused the memo of application, annexures thereto and the impugned order.

4. Learned advocate for applicant by relying on *Prithviraj Ambalal Patel vs. State of Maharashtra & Ors.*, 2003 ALL MR (Cri) 1252 and *Bharatkumar Keshavlal Shah vs. State of Gujarat*, LAWS(GJH)-2012-2-467 contends that procedure under section 326(3) of Cr.P.C. is mandatory and since matter is

transferred to the present Court, evidence recorded by the earlier Court needs to be discarded and fresh evidence needs to be recorded before the present Court. It is submitted that the Court which recorded the evidence had an occasion to observe demeanor of witnesses, which has bearing on the appreciation of evidence and decision of matter. Therefore, it is necessary to discard the evidence recorded earlier and direct the Trial Court to record the evidence *de novo*.

5. Learned advocate for respondent by supporting the impugned order opposed the application.

6. Perusal of record indicates that earlier Court before whom the evidence of witnesses was recorded, has recorded complete evidence and not substance of their evidence. Therefore, it is clear that the case is tried as summons case and not as summary case. After transfer of the case, present Court has recorded applicant's statement under section 313 of Cr.P.C. At that time, no objection was raised by applicant that case was tried as summary case and therefore *de novo* evidence is required to be recorded.

7. In the light of the fact that complete evidence is

recorded by the earlier Court and case is tried as summons case, there is no substance in the contention of applicant that the case is tried as summary case and therefore, *de novo* evidence needs to be recorded.

8. Trial Court while rejecting the application filed by applicant has rightly observed that "*Thus, when there is complete evidence on record and the trial is not conducted summarily, if other aspects are taken into consideration i.e. the case being more than 5 years old, complete evidence being placed on record, statement of accused under section 313 of Cr.P.C. being recorded at length and final argument of complainant being concluded before the Court and delay caused to the complainant due to accused, it does not appear just to this Court to denovo the trial in view of Section 326(3) of Cr.P.C. While deciding hardship it appears to this Court that, no prejudice would be caused to the accused if trial is proceeded on the basis of evidence on record. But if trial is conducted afresh it would cause great prejudice to the complainant.*"

9. In Bharatkumar Shah (supra), decision in ***Nitinbhai Saevatilal Shah vs. Manubhai Manjibhai Panchal***, (2011) 9 SCC 638 is referred, in which it is held:

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"17 The mandatory language in which Section 326 (3) 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 predecessor. In summary proceedings, the successor Judge or Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it. The reason why the provisions of sub-Section (1) and (2) of Section 326 of the Code have not been made applicable to summary trials is that in summary trials only substance of evidence has to be recorded. The Court does not record the entire statement of witness. 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. Section 326 (3) of the Code does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor, the obvious reason being that if succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and indeed, it would be difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice."

10. In Prithviraj Patel (supra) Division Bench of this Court held that, *"complaint under section 138 is required to be tried summarily and endeavour shall be made to terminate the trial within six months from the date of filing of complaint and trial of cases are to be conducted from day to day."*

11. Coming to the facts of the present case, since complete evidence is recorded in the present case and case is tried as summons case, aforesaid ratio is of no assistance to the

case of applicant. It appears that applicant has raised objection with a view to prolong the trial. No case is made out by applicant to interfere in the well reasoned order passed by Trial Court. Application being devoid of merit is dismissed.

[NITIN B. SURYAWANSHI, J.]