



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 576 OF 2023

Bharat s/o Dinkar Panari ... **Petitioner**
Age 43 years, Occu: Mukadam
R/o Kadoli tq. Panhala Dist. Kolhapur

VERSUS

1. Vilas s/o Devidas Tonde ... **Respondent**
Age 36 years, Occu: Mukadam,
R/o Sonymoha Tq. Kille Dharur
Dist. Beed

Mr. V. M. Chate, Advocate for the Petitioner
Mr. Rakesh N. Jain, Advocate for the Respondent

CORAM : Y. G. KHOBRADE, J.

RESERVED ON : 08.10.2024

PRONOUNCED ON: 15.10.2024

JUDGMENT

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties at the stage of the admission.

2. By the present Petition under Article 226 and 227 of the Constitution of India read with Section 482 of the Criminal Procedure Code, the Petitioner impugned the order dated 21.03.2012 passed below Exh. 116 in SCC No. 133 of 2012 by the learned JMFC, Dharur, whereby the application filed by the present Petitioner/accused under section 326

of the Cr.P.C. for conducting de-novo trial rejected.

3. The learned counsel for the Petitioner canvassed that Respondent/ original complainant filed a SCC No. 133 of 2022 before the learned JMFC, Dhaur District Beed under section 138 of the Negotiable Instruments Act alleging that, he was working as sugarcane cutting labour supplier to M/s Sadashiv Sugars Limited, Nagrala for crushing season 2010-11 alongwith one Mr. Babaso Ramrao Jadhav. The said Sugar Factory paid Rs.8 lakhs to the Petitioner/accused. It is further alleged that the said sugar factory deducted Rs. 8 lakhs of the complainant which was due towards the said sugar factory against the work executed by the labour supplied by the complainant.

4. On 09.01.2012, the present Petitioner/accused issued cheque dated 09.01.2012 for an amount of Rs.9 lakhs drawn on Bank of India, Branch Porle Taraf, Thane, however, said cheque was not encashed due to insufficient fund. Therefore, on 01.03.2012, the Respondent allegedly issued legal notice and then filed a complaint SCC No. 133 of 2012, for the offence punishable under section 138 of the NI Act.

5. The learned counsel for the Petitioner canvassed that, after service of summons, the Petitioner/accused caused appearance in the said proceeding on 09.04.2013 and on the same day, plea of the

petitioner/accused came to be recorded. Thereafter, matter was posted for the evidence of the Respondent/complainant.

6. According to the learned counsel for the petitioner/accused, the concerned Judicial Magistrate recorded evidence of the complainant on 23.04.2023 and cross examination was conducted on behalf of the Accused. Thereafter, the complainant examined CW-2 Amol Baburao Kamble and CW-3 Hanumant Ningappa Yaldogi and after cross examination of both witnesses, the complainant filed evidence closing pursis on 06.12.2016. However, subsequently, the concerned Magistrate transferred and new Magistrate taken over the charge. Therefore, on 07.03.2019, the Petitioner/accused filed Exh. 116 an application under section 326 of the Cr.P.C. and prayed for conducting de-novo trial because the trial has been conducted as summary case and the Magistrate who recorded evidence requires to pronounce the final verdict but Magistrate who conducted the trial transferred. However, on 21.03.2023, the learned trial court passed the impugned order and rejected the application without considering the provisions of section 326 Cr.P.C. Therefore, the impugned order is contrary to the provisions of section 326(3) Cr.P.C., and entire trial vitiate.

7. To buttress his submissions, the learned counsel appearing for the Petitioner placed reliance on the case of *Nitinbhai Saevatilal Shah &*

another Vs. Manbhai Manjibhai Panchal & another, AIR 2011 SC 3076 and Shobhavathi Vs. Krishnoji Rao, (2014) All Cri.LR 819.

8. Per contra, Mr. Rakesh Jain, the learned counsel appearing for the Respondent/original complainant supported the findings of the trial court. He submits that the trial for the offence under section 138 of the N.I. Act required to be tried summarily, however, the predecessor of the Judicial Magistrate recorded entire evidence of witnesses but not in summary nature. The Petitioner already conducted the cross examination of all the witnesses including the Respondent/complainant and evidence was closed by filing pursis. Therefore, the Petitioner/accused availed all opportunity to challenge the evidence of the complainant and did not raise objection at any time before, till reaching the matter for argument. Therefore, there is no need for conducting de novo trial. Therefore, the impugned order is just and proper, hence prayed for dismissal of the Petition.

9. Chapter 21 of the Criminal Procedure Code, 1973 provides summary trial. Section 262 Cr.P.C. provides procedure in a specified case, for the trial of summons case, wherein the sentence of imprisonment for a term does not exceeding 3 months. Section 264 provides for passing of judgment in a case tried summarily.

10. No doubt, in the case in hand, the learned Judicial Magistrate

conducted the trial of the complaint for the offence punishable under section 138 of the NI Act summarily. The Petitioner/Accused has not disputed about granting him sufficient opportunity to defend the charge and he was granted all opportunity to cross examined the witness. Indeed, the Offence punishable under section 138 of the NI Act required to be tried summarily. After the cross examination is conducted on the part of the Petitioner/accused, the Respondent complainant filed pursis and closed evidence and thereafter, the matter is fixed for final argument.

11. In case of **Nitinbhai Saevatilal Shah (supra)** the Hon'ble Supreme Court held that, 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. The reliance placed by the High Court, on the pursis submitted by the appellants before the Metropolitan Magistrate declaring that they had no objection if matter was decided after taking into consideration the evidence recorded by his predecessor-in-office is misconceived. It is well settled that no amount of consent by the parties can confer jurisdiction where there exists none, on a Court of law

nor can they divest a Court of jurisdiction which it possesses under the law.

12. In case of **Shobhavathi (supra)**, the Karnataka High Court held in Paragraph Nos. 6 and 7 as under:

"6. The provisions of Section 143 of N.I. Act further declares that the Magistrate at the commencement of or in the course of summary trial, if it appears that sentence of imprisonment for a term exceeding one year may have to be passed or it is "for any other reason" undesirable to try the case summarily and after hearing the parties, record an order to that effect and can proceed to try the case as summons case.

7. There is heavy pendency of cases filed U/s.138 of N.I. Act in almost all the courts over the country. The service of summons itself consumes lot of time and some times more than a year. After appearance, the evidence would commence. In the normal administrative procedure, the Magistrate get transferred from one place to other after three years and also some times premature transfers would also takes place. It is always unlikely that the Magistrate has recorded evidence would render judgment in the case. In such given practical situation, the words "for any other reason" should be given liberal interpretation and should include the circumstance of the possibility of trial not being conclude within six months and the desirability to follow the procedure of summons cases. Keeping in view the nature of long drawn contest and also the punishment of imprisonment prescribed being two years, it is,

therefore, always desirable that the Magistrate should as far as possible and at the earliest, keeping in view the practical situations when the trial not likely to be concluded within six months should record his opinion that the trial of a case by summary procedure is not desirable and that the case to be tried as a summons case, in which event the legal hurdle U/s.326 of Cr. P. C. can be overcome. However, in this case there is no order passed by the Magistrate as required under proviso 2 to sub-section(1) of Section 143 of the N.I. Act. The matter is remanded to the Magistrate for de-novo trial."

13. Needless to say that, the trial against the present Petitioner/accused conducted as summarily for the offence punishable under section 138 of the N.I. Act and sufficient opportunity already been granted to Petitioner to challenge the evidence of the complainant and other witnesses. Thereafter, the matter was fixed for hearing. On perusal of the impugned order it appears that, the learned trial court recorded finding that the evidence was recorded by five Magistrates but the Petitioner/accused did not raise such objection prior to closing the evidence of the complainant's witnesses and when the matter ripped for final hearing. However, the Petitioner first time raised objection and sought de-novo trial. Further, While passing the impugned order, the learned trial court considered various case laws as cited in Paragraph Nos. 7 and 8 of the impugned order and concluded that, the evidence of the complainant as well as other

witness not been recorded in summary nature, therefore, there is no necessity to conduct de-novo trial as per the ratio laid down in the case of **Mahendra Sukhdeo Pethe vs. Vivek Ramrao Deshmukh, (2014) All MR (Cri) 2302.**

14. Therefore, considering that, the learned Magistrate has not recorded evidence of the complainant and other witness in summary nature, there is no necessity to conduct de-novo trial. In view of the above, I do not find that any prejudice is likely to cause to the Petitioner/accused by refusing de-novo trial. No substantial grounds set out to interfere with the findings recorded by the trial Court. Therefore, the present Writ Petition deserves to be dismissed. Accordingly, I proceed to pass the following order:

ORDER

- (1) Criminal Writ Petition No. 576 of 2023 is dismissed.
- (2) Rule is discharged.
- (3) No order as to costs.

(Y. G. KHOBRAGADE, J.)

JPChavan