Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1703 OF 2011
(Arising out of SLP (Criminal) No. 723 of 2011)

Nitinbhai Saevatilal Shah & Another ... Appellant

Versus

Manubhai Manjibhai Panchal & Another ... Respondents

J U D G M E N T

J.M. PANCHAL, J.

Leave Granted.

2. This appeal by grant of special leave, is directed against judgment dated August 9, 2010, rendered by the learned Single Judge of High Court of Gujarat at Ahmedabad in Criminal Revision Application No. 529 of 2003, by which

the conviction of the appellants recorded by the learned Metropolitan Magistrate, Ahmedabad in Summary Case No. 2785 of 1998 under Section 138 of Negotiable Instruments Act, 1881 and confirmed by the learned Additional City Sessions Judge, Court No. 13, Ahmedabad is maintained but the sentence imposed upon the appellants for commission of said offence is set aside and matter is remanded to the learned Magistrate for passing appropriate order with regard to sentence and compensation, if any under Section 357 of Cr. P.C. within three months, after giving the parties reasonable opportunity of being heard.

3. The respondent No.1 herein is original complainant. He was doing business in the name of Navkar Steel Pvt. Ltd. The Complainant is known to the appellant No.1. The appellant No.1 is the Director of appellant No.2 which is a private limited company. It is the case of the complainant that the appellant No.1 had borrowed hand loan from him and in order to pay the legal dues, the

appellant No.1 had given a cheque dated October 13, 1998 for the sum of Rs.11,23,000/- drawn on the State Bank of India. The cheque was signed by the appellant No.1 on behalf of the appellant No.2. The complainant presented the cheque for realization in the Central Bank of India. The cheque was dishonoured and sent back to the complainant with a memorandum dated October 15, 1998 mentioning that the cheque was dishonoured because of insufficiency of funds. Thereupon, the complainant served a demand notice dated October 28, 1998 which was returned unserved as unclaimed on November 5, 1998. Therefore another notice was served by post under Postal Certificate. The appellants failed to pay the amount mentioned in the notice within 15 days from the date of receipt of notice. Therefore, the complainant filed complaint in the Court of learned Metropolitan Magistrate, Court No.2, Ahmedabad on December 15, 1998 and prayed to convict the appellants under Section 138 of the Act. On the basis of the complaint, Summary Case No. 2785 of 1998 was

registered and after recording verification, the learned Magistrate had issued process.

4. The complainant examined himself and his witnesses and also produced documentary evidence in support of his case set up in the complaint. The appellants did not lead any defence evidence. However, the appellant No.1 in his statement recorded under Section 313 of the Code stated that his signature was obtained on the blank paper by kidnapping him and writing was written on it and that false complaint was lodged by misusing the signed blank cheque.

5. After the evidence was recorded by the learned Metropolitan Magistrate as stated above, he came to be transferred and therefore, ceased to exercise jurisdiction in the case. He was succeeded by another learned Metropolitan Magistrate who had and who exercised such jurisdiction. On August 03, 2001, a pursis was filed before the learned Metropolitan Magistrate by the appellants as well as the original complainant i.e. the

respondent No.1 herein, declaring that the parties had no objection to proceed with the matter on the basis of evidence recorded by predecessor in office of the learned Metropolitan Magistrate in terms of Section 326 of the Code. On the basis of said pursis the learned Metropolitan Magistrate considered the evidence led by the complainant and heard the learned counsel for the parties.

6. The learned Metropolitan Magistrate by judgment dated February 13, 2003, delivered in Summary Case No. 2785 of 1998, convicted both the appellants under Section 138 of the Act and sentenced each of them to suffer simple imprisonment for three months with fine of Rs.3,000/- i/d simple imprisonment for 15 days.

7. Feeling aggrieved, the appellants preferred Criminal Appeal No.19 of 2003 in the Court of the learned Additional City Sessions Judge at Ahmedabad. The learned Judge found that conviction of the appellants recorded under Section 138 of the Act was perfectly just

but noticed that the appellant No. 2 is a private limited company and therefore, could not have been sentenced to simple imprisonment for three months. Therefore, the learned Additional City Sessions Judge, Court No.13, Ahmedabad by judgment dated October 16, 2003 dismissed the appeal but set aside sentence of simple imprisonment of three months imposed upon the appellant No.2 and maintained the full sentence imposed upon appellant No.1 as well as sentence of fine of Rs.3,000/- imposed upon the appellant No.2.

8. Dissatisfied with the judgment of the First Appellate Court, the appellants preferred Criminal Revision Application No.529 of 2003 in the High Court of Gujarat at Ahmedabad. The learned Single Judge by judgment dated August 09, 2010, maintained conviction of the appellants under Section 138 of Negotiable Instrument Act, but set aside final order of sentence imposed upon the appellants and remanded the matter to the learned Magistrate for passing appropriate order of sentence and

compensation, if any payable under Section 357 of the Code, within three months, after giving to the parties reasonable opportunity of being heard, which has given rise to the instant appeal.

9. This Court has heard the learned counsel for the parties and considered the documents forming part of the appeal.

10. Section 326 of the Code deals with the procedure to be followed when any Magistrate after having heard and recorded the whole or any part of the evidence in an enquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another Magistrate who exercises such jurisdiction. Section 326 of the Code reads as under :-

> **"326. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another:-** (1) Whenever any Judge or Magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another Judge or Magistrate who has and who exercises such jurisdiction, the Judge or Magistrate so succeeding may act on the evidence so recorded

by his predecessor, or partly recorded by his predecessor and partly recorded by himself :

Provided that if the succeeding Judge or Magistrate is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

(2) When a case is transferred under the provisions of this Code from one Judge to another Judge or from one Magistrate to another Magistrate, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub-section (1).

(3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under section 322 or in which proceedings have been submitted to a superior Magistrate under section 325."

11. Section 326 is part of general provisions as to inquiries and trials contained in Chapter XXIV of the Code. It is one of the important principles of criminal law that the Judge who hears and records the entire evidence must give judgment. Section 326 is an exception to the rule that only a person who has heard the evidence in the case is competent to decide whether the accused is innocent or guilty. The Section is intended to meet the

case of transfers of Magistrates from one place to another and to prevent the necessity of trying from the beginning all cases which may be part-heard at the time of such transfer. Section 326 empowers the succeeding Magistrate to pass sentence or to proceed with the case from the stage it was stopped by his preceding Magistrate. Under Section 326 (1), successor Magistrate can act on the evidence recorded by his predecessor either in whole or in part. If he is of the opinion that any further examination is required, he may recall that witness and examine him, but there is no need of re-trial. In fact Section 326 deals with part-heard cases, when one Magistrate who has partly heard the case is succeeded by another Magistrate either because the first Magistrate is transferred and is succeeded by another, or because the case is transferred from one Magistrate to another Magistrate. The rule mentioned in Section 326 is that second Magistrate need not re-hear the whole case and he can start from the stage the first Magistrate left it. However, a bare perusal of sub Section (3) of Section 326

makes it more than evident that sub Section (1) which authorizes the Magistrate who succeeds the Magistrate who had recorded the whole or any part of the evidence in a trial to act on the evidence so recorded by his predecessor, does not apply to summary trials. The prohibition contained in sub Section (3) of Section 326 of the Code is absolute and admits of no exception. Where a Magistrate is transferred from one station to another, his jurisdiction ceases in the former station when the transfer takes effect.

12. Provision for summary trials is made in chapter XXI of the Code. Section 260 of the Code confers power upon any Chief Judicial Magistrate or any Metropolitan Magistrate or any Magistrate of the First Class specially empowered in this behalf by the High Court to try in a summary way all or any of the offences enumerated therein. Section 262 lays down procedure for summary trial and sub Section (1) thereof inter alia prescribes that in summary trials the procedure specified in the Code for

the trial of summons-case shall be followed subject to condition that no sentence of imprisonment for a term exceeding three months is passed in case of any conviction under the chapter.

13. The manner in which record in summary trials is to be maintained is provided in Section 263 of the Code. Section 264 mentions that in every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of evidence and a judgment containing a brief statement of the reasons for the finding. Thus the Magistrate is not expected to record full evidence which he would have been, otherwise required to record in a regular trial and his judgment should also contain a brief statement of the reasons for the finding and not elaborate reasons which otherwise he would have been required to record in regular trials.

14. 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.

15. The High Court by the impugned judgment rejected the contention regarding proceedings having been vitiated under Section 461 of the Code, on the ground that parties had submitted pursis dated August 3, 2001 and in view of the provisions of Section 465 of the Code, the alleged irregularity cannot be regarded as having occasioned failure of justice and thus can be cured. The reliance placed by the High Court, on the pursis submitted by the appellants before the learned 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.

16. The cardinal principal of law in criminal trial is that it is a right of an accused that his case should be decided by a Judge who has heard the whole of it. It is so stated by this Court in the decision in **Payare Lal Vs. State of Punjab, AIR 1962 SC 690 : (1962 (1) Crl LJ 688).** This principle was being rigorously applied prior to the introduction of Section 350 in the Code of Criminal Procedure, 1898. Section 326 of the new Code deals with what was intended to be dealt with by Section 350 of the old Code.

From the language of Section 326(3) of the Code, it is plain that the provisions of Section 326(1) and 326(2) of the new Code are not applicable to summary trial. Therefore, except in regard to those cases which fall within the ambit of Section 326 of the Code, the Magistrate cannot proceed with the trial placing reliance on the evidence recorded by his predecessor. He has got to try the case de novo. In this view

of the matter, the High Court should have ordered de novo trial.

17. The next question that arises is as to from what stage the learned Metropolitan Magistrate Ahmedabad, should proceed with the trial de novo. As it has been seen that Section 326 of the new Code is an exception to the cardinal principle of trial of criminal cases, it is crystal clear that if that principle is violated by a particular Judge or a Magistrate, he would be doing something not being empowered by law in that behalf. Therefore, Section 461 of the new Code would be applicable. Section 461 of the new Code narrates irregularities which vitiate proceedings. The relevant provision is Clause (l). It reads as follows:-

> "461. Irregularities which vitiate proceedings:- If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely;
>
> x x x x x
>
> (l) tries an offender;
>
> x x x x x

his proceedings shall be void."

A plain reading of this provision shows that the proceedings held by a Magistrate, to the extent that he is not empowered by law, would be void and void proceedings cannot be validated under Section 465 of the Code. This defect is not a mere irregularity and the conviction of the appellants cannot, even if sustainable on the evidence, be upheld under Section 465 of the Code. In regard to Section 350 of the old Code, it was said by Privy Council in **Pulukuri Kotayya Vs. Emperor, AIR 1947 P.C. 67** that "when a trial is conducted in a manner different from that prescribed by the Code, the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed, but some irregularity occurs in the course of such conduct, the irregularity can be cured under Section 537".

18. This is not a case of irregularity but want of competency. Apart from Section 326 (1) and 326 (2) which are not applicable to the present case in view of Section 326 (3), the Code does not conceive of such a trial. Therefore, Section 465

of the Code has no application. It cannot be called in aid to make what was incompetent, competent. There has been no proper trial of the case and there should be one.

19. For the foregoing reasons the appeal succeeds. The judgment dated August 09, 2010 rendered by the learned Single Judge of the High Court of Gujarat at Ahmedabad in Criminal Revision Application No. 529 of 2003 upholding conviction of the appellants for the offence under Section 138 of the Act is hereby set aside. The matter is remanded to the learned Metropolitan Magistrate for retrial in accordance with law. The record shows that the appellant No.1 has resorted to dilatory tactics to delay the trial. The appellant No.1 is directed to remain present before the learned Metropolitan Magistrate when required without fail. If the appellant No. 1 fails to remain present before the learned Metropolitan Magistrate, it would be open to the learned Metropolitan Magistrate to take necessary steps including issuance of non-bailable warrant for securing his presence. Having regard to the facts of the case the learned Metropolitan Magistrate is

directed to complete the trial of the case as early as possible and preferably within five months from the date of receipt of the writ from this Court. Subject to above mentioned observations the appeal stands disposed of.

…..……..J.
(J.M. PANCHAL)

…..……..J.
(H.L. GOKHALE)

NEW DELHI
SEPTEMBER 01, 2011.