Ulhas Vs. The State of Maharashtra

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Court : Mumbai Aurangabad

Decided On : Jun-17-2016

Judge : Ravindra V. Ghuge

Appeal No. : Criminal Writ Petition No. 216 of 2014

Appellant : Ulhas

Respondent : The State of Maharashtra

Judgement :

Oral Judgment:

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

2. The Petitioner is aggrieved by the order dated 26.11.2012 passed by the learned Judicial Magistrate First Class, Osmanabad by which the learned Magistrate has directed a denovo trial in Summary Criminal Case No.597/2008.

3. The Petitioner submits that by lodging of Crime No.117/2008 under Sections 143, 294, 341, 504 and 506 of the Indian Penal Code r/w Section 135 of the Bombay Police Act, the Petitioner is being tried in SCC No.597/2008. Though the case was to be tried as a summary case, the learned Magistrate Shri S.K.Karande had recorded the examination-in-chief of the first witness on behalf of the prosecution and the said witness was cross-examined at length by the Petitioner. Similarly, the prosecution had produced three witnesses, who were examined

followed by cross-examination by the Petitioner. The recording of oral evidence was concluded on 15.11.2011.

4. Shri Deshmukh, the learned Advocate for the Petitioner, submits that after recording of oral evidence in the form as is noted above, the learned Judge was transferred and a new Presiding Officer took charge. Consequentially, the application Exhibit-54 was moved by the prosecution seeking a denovo trial as the case is of a summary character. The Petitioner submitted his reply at Exhibit-55 and opposed the application on the ground that the same is unsustainable and deserves to be rejected. It was also pointed out that the matter was posted for advancing final arguments. The Petitioner/ accused will have to face a denovo trial and suffer rigours of litigation without any justifiable reason.

5. Shri Deshmukh submits that by the impugned order dated 26.11.2012, the application Exhibit-54 filed by the prosecution had been allowed primarily on the ground that the predecessor learned Judge has recorded the plea and evidence and the accused is to be tried summarily. Section 326(3) of the Code of Criminal Procedure would become applicable and hence, the case would have to be retried. The learned Magistrate, therefore, ordered issuance of summons to the witnesses who were already examined, for denovo trial.

6. Shri Deshmukh places reliance on the reported judgment of this Court in the matter of Shivaji Sampat Jagtap vs. Rajan Hiralal Arora, **2007 Cri.L.J. 122**, and submits that the ratio laid down in this judgment is practically tailor-made for this case and the same is squarely applicable. He specifically relies upon paragraphs 3 to 6, 10 to 12, 14 to 16 and 20 of the said judgment.

7. The learned APP has supported the impugned order contending that once the case is being tried as summary case, Section 326(3) of the Code of Criminal Procedure would have it s full applicability and hence, the impugned order passed by the learned Judge is sustainable.

8. I have considered the submissions of the learned Advocates.

9. Section 326 of the Code of Criminal Procedure reads as under:

326. Conviction or commitment on evidence partly recorded by one Judge or 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 witness whose evidence has already been recorded is necessary in the interests of justice, he may resummon 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.

10. It is, therefore, trite law that the conviction or commitment on evidence partly recorded by one judge and partly recorded by another judge, would not be affected by the change in the Judge/ Magistrate. However, the provisions under Section 326(1 and 2) would not be applicable to the summary cases or to the cases in which the proceedings have been stayed under Section 322 or have been submitted to a superior Magistrate under Section 325. Learned APP submits that in the event of summary trial in the case where the statement of the accused is recorded in a manner as is provided, it would be open to the Magistrate to order a denovo trial.

11. It, therefore, has to be seen as to whether, the trial being conducted in this matter was in fact a summary trial or not. The proviso below Section 143(1) of the Negotiable Instruments Act, 1881 in the case of summary trial would empower the Magistrate to pass sentence of imprisonment. The second proviso empowers the Magistrate to convert the summary case into full trial in the matter. This was the issue before this Court in Shivaji Sampat Jagtap judgment (supra) and as such, the conclusion of this Court in the said case could have limited applicability in this matter considering that Section 143 of the Negotiable Instruments Act, 1881 is not at issue.

12. In the instant case, though the case has been registered as a summary case, regular recording of oral evidence of the witnesses of the prosecution was done. The cross-examination was also conducted. All the witnesses of the prosecution were before the Court and had suffered cross-examination at the hands of the Petitioner/ accused. No provision or judicial pronouncement is cited to indicate that in a summary trial, the moment the Judge or Magistrate changes, retires or is transferred, the trial will have to be conducted denovo . This fact situation would have an impact on the result of this petition.

13. Insofar as the ratio laid down in Shivaji Sampat Jagtap (supra) is concerned, the facts set out in paragraphs 3 and 4 would indicate that the Magistrate was conducting the trial under Section 143 of the Negotiable Instruments Act, 1881. The objection was raised under Section 326(3) of the Code of Criminal Procedure seeking denovo trial on the ground that the evidence was recorded by one Magistrate and the judgment was delivered by another. This case was considered by the learned Sessions Court in appeal.

14. The conclusions drawn by this Court in Shivaji Sampat Jagtap (supra) were primarily based on the effect of Section 143 of the Negotiable Instruments Act, 1881. Nevertheless, considering the effect of Section 326 of the Code of Criminal Procedure in paragraph 14, this Court concluded in paragraphs 15 and 16 of the judgment that if the Magistrate records the evidence as is done in a regular summons case, the succeeding Magistrate can act on the evidence so recorded by his predecessor or partly recorded by his predecessor or partly recorded by

himself as is provided in Section 326(1) of the Code of Criminal Procedure. It would, therefore, be apposite to reproduce paragraphs 15 and 16 of Shivaji Sampat Jagtap (supra) as under:

15. Ordinarily, once the evidence within the meaning of Section 3 of the Indian Evidence Act is recorded by the Court having jurisdiction to do so, the deposition/statements made by the witness would not loose its character of being evidence in judicial proceedings and can be used for adjudication of the rights of the parties. Therefore, if the Magistrate, records the evidence, as is done in regular summons case the succeeding Magistrate can act on the evidence so recorded by his predecessor or partly recorded by his predecessor and partly recorded by himself as provided for in Sub-section (1) of Section 326 of the Code.

16. Broadly speaking, a summary trial is an abridged form of the regular trial and is resorted to in order to save time in trying "petty case". It is essentially a speedy trial dispensing with unnecessary formalities or delays and giving discretion to the Magistrate to try or not to try an offence, triable summarily, in a summary manner. Section 143 of the Act empowers court to try cases under Section 138 of the Act in a summary way. It starts with non-obstante clause carving out an exception to the provisions of the Code. Sub-section (1) thereof, however, empowers the Magistrate to follow the provisions of Section 262 to 265, as far as may be, for trying the cases under Section 138 of the Act. The phraseology "as far as may be" employed in Sub-section (1) gives an option to the Magistrate to depart from the procedure contemplated under Sections 262 to 265 of the Code. Thus, it is not mandatory for the Magistrate to follow the procedure contemplated under Sections 262 to 265 of the Code and it is left to the discretion of the Magistrate to follow the procedure of summary trial, contemplated under those provisions to the extent it is possible. The second proviso to Sub-section (1) of Section 143 further empowers the Magistrate in a case which is being tried in a summary way, if it appears to him, to recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the Code. This is an indicator that the choice is left to the Magistrate to either try the case strictly by following the procedure contemplated by sections 262 to 265 of the Code or to adopt the procedure provided by the Code.

15. Insofar as the issue as to whether, the Magistrate can consider the conversion of summary trial into regular trial is concerned, the said aspect was gone into by this Court in Shivaji Sampat Jagtap (supra). While upholding the powers of the Magistrate to recall any witness under Section 260(2) of the Code of Criminal Procedure, it was held that, that could happen if it appears to the Magistrate that the nature of the case is such that it was undesirable to try it summarily and proceed to conduct it in regular trial.

16. Section 260 of the Code of Criminal Procedure reads as under:

260. Power to try summarily:

(1) Notwithstanding anything contained in this Code

(a) Any Chief Judicial Magistrate;

(b) Any Metropolitan Magistrate;

(c) Any Magistrate of the first class specially empowered in this behalf by the High Court, may if he thinks fit, try in a summary way all or any of the following offences

(i) Offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

(ii) Theft under section 379, section 380 or section 381 of the Indian Penal Code (45 of 1860), where the value of the property stolen does not exceed two thousand rupees;

(iii) Receiving or retaining stolen property, under section 411 of the Indian Penal Code (45 of 1860), where the value of the property does not exceed two thousand rupees;

(iv) Assisting in the concealment or disposal of stolen property, under section 414 of the Indian Penal Code (45 of 1860) where the value of such property does not exceed two thousand rupees;

(v) Offences under sections 454 and 456 of the Indian Penal Code (45 of 1860);

(vi) Insult with intent to provoke a breach of the peace, under section 504 and [criminal intimidation punishable with imprisonment for a term which may extend to two years or with fine, or with both], under section 506 of the Indian Penal Code (45 of 1860);

(vii) Abetment of any of the foregoing offences;

(viii) An attempt to commit any of the foregoing offences, when such attempt is an offence;

(ix) Any offence constituted by an act in respect of which a complaint may be made under section 20 of the Cattle-Trespass Act, 1871 (1 of 1871).

(2) When, in the Course of a summary trial it appears to the Magistrate that the nature of the case is such that it is undesirable to try it summarily, the Magistrate shall recall any witnesses who may have been examined and proceed to rehear, the case in the manner provided by this Code.

17. In the instant case, going by the form in which the witnesses of the prosecution were examined and cross-examined by the Petitioner/accused, though the learned Advocates are unable to point out a formal order passed by the learned Magistrate to consider the case as a regular case and not by a summary trial, the effect of examination and cross-examination of the witnesses indicates that a full trial was undertaken by the learned Magistrate. As such, the observations of this Court in Shivaji Sampat Jagtap (supra) in paragraphs 17, 18 and 20 would be applicable to this case and which read thus:

17. Sub-section(2) of Section 260 empowers the Magistrate to recall any witness, in the course of summary trial, if it appears to him that the nature of the case is such that it is undesirable to try it summarily, and examine and proceed to rehear the case in the manner provided by the Code. This provision is analogous to Section 259 of the Code as also to the second proviso to Sub-section (1) of Section 143 of the Act. Section 259 of the Code empowers the Court to convert summons cases into warrant cases. Whereas the second proviso to Sub-section (1) of Section 143 of the Act empowers the Court to convert summary trial into

summons case. It is thus clear that the expression "as far as may be" employed in Sub-section (1) of Section 143 and the second proviso to Sub-section (1) of Section 143 confer sufficient powers on the Court, to try the case in the manner provided by the Code i.e. the procedure ordinarily followed for trying regular summons case. It is common experience that no case under Section 138 of the Act is conducted by the Court, strictly in summary way as provided for in Chapter XXI of the Code and that cannot be overlooked while dealing with each case where the question, that has been raised in this case, is raised by the accused.

18. Under Section 263 in Chapter XXI of the Code, in every case tried summarily, the Magistrate shall enter, in such form as the State Government may direct, is expected to "maintain the record" as mentioned in Clause (a) to (j) of that section. Section 264 provides that in every case tried summarily in which the accused does not plead guilty, the Magistrate shall record "the substance of the evidence" and a judgment containing "a brief statement of the reasons" for the finding. Thus, the indicator to know as to whether the case under Section 138 of the Act has been or is being tried summarily so as to attract the provisions contained in Sub-section (3) of Section 326 of the Code is the compliance of Section 263 and 264 of the Code. In other words, a case, which is triable as summarily, and in which the record of the proceedings has been prepared in accordance with the provisions of Section 263 and 264 of the Code could be stated to have been tried summarily for the purpose of Section 326(3) and in that case the evidence recorded by one Magistrate cannot be read in evidence by succeeding Magistrate. The succeeding Magistrate, however, in a case, where the procedure contemplated under Sections 263 and 264 of the Code in particular has not been followed, he need not hold a trial denovo. In short, if no record as per Sections 263 and 264 has been or is being maintained by the Magistrate and the case has been or is being tried as a regular summons case and not tried in a summary way as contemplated under Sections 262 to 265 of the Code, such case shall not be considered as tried in summary way, though triable summarily as provided for under Sub-section (1) of Section 143 of the Act, so as to attract the provisions of Section 326(3) of the Code. Therefore, the evidence recorded by one Magistrate in such a case may be legally read in evidence by his successor and no denovo trial shall be necessary. From the above discussion, the following principle broadly emerges: a case under

Section 138 of the Act, which requires to be tried in a summary way as contemplated under Section 143 of the Act, is in fact, was tried as regular summons case it would not come within the purview of Section 326(3) of the Code. In other words, if the case in substance was not tried in a summary way, though was triable summarily, and was tried as regular summons case, it need not be heard denovo and the succeeding Magistrate can follow the procedure contemplated under Section 326(1) of the Code. However, where a case is tried in a summary way by following the procedure contemplated by the provisions of Chapter XXI of the Code and in particular sections 263 and 264 therein, alone is intended to be excluded from the purview of Section 326(1) of the Code.

20. In the instant case the entire evidence was recorded by Mr. Jamadar, Metropolitan Magistrate, 17th Court, Mazgaon and the judgment was delivered by the learned Magistrate Mr. Shaikh. The record reveals that the petitioner-complainant gave evidence on affidavit as provided for in Sub-section (1) of Section 145 of the Act. All the documents referred to in the affidavit in examination-in-chief were exhibited by the learned Magistrate. If further appears that after the evidence of the complainant was closed the respondents-accused also adduced evidence in defence. The evidence recorded by the learned Magistrate was full fledged evidence led by the parties and admittedly, it was not in the form indicated in Section 264 of the Code. In other words, the evidence recorded in the present case clearly indicate that the case was not tried in summary way and was in fact tried as regular summons case though it was triable summarily under Section 143 of the Act. In the circumstances the impugned judgment deserves to be quashed and set aside. Order accordingly. The criminal appeal filed by the respondents-accused stand restored to file. The Sessions Court is directed to decide the appeal afresh as expeditiously as possible and preferably within a period of six months from the date of receipt of this judgment.

18. In the light of the above, I find that the impugned order is rendered unsustainable since the learned Judge failed to consider that the case was not being tried as a summary case, but was being tried as a regular case. Had this aspect been considered by the learned Magistrate, in my view, the impugned order would not have been passed in the light of the law laid down in Shivaji

Sampat Jagtap (supra).

19. In view of the above, this Criminal Writ Petition succeeds. The impugned order dated 26.11.2012 passed below Exhibit-54 is quashed and set aside. The application Exhibit-54 stands rejected. Exhibit-55 is, therefore, rendered infructuous and is disposed of.

20. It, however, be noted that in the event the learned Magistrate desires to exercise his powers for justifiable reasons under Section 260(2) of the Code of Criminal Procedure, he may do so in accordance with law.

21. Considering that the case is pending from 2008, I deem it proper to expedite the hearing of SCC No.597/2008. The learned Magistrate shall endeavour to decide the same as expeditiously as possible and preferably on or before 31st January, 2017.

22. Rule is, therefore, made absolute in the above terms.