

Prem Lata Vs. State and ors.

Prem Lata Vs. State and ors.

SooperKanoon Citation : sooperkanoon.com/956176

Court : Delhi

Decided On : Mar-15-2013

Judge : Pratibha Rani

Appellant : Prem Lata

Respondent : State and ors.

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision: March 15, 2013 + CRL.M.C.76/2012 PREM LATA Petitioner Through: Mr.Avadh Kaushik, Advocate. versus STATE & ORS. Respondents Through: Mr.Rikesh Singh and Mr.Rajesh Kumar, Advocates for R-2 & R-3. CORAM: HON'BLE MS. JUSTICE PRATIBHA RANI PRATIBHA RANI, J (Oral) 1. The petitioner has invoked the inherent jurisdiction of this Court under Section 482 Cr.P.C. praying for setting aside the judgment passed by the learned Addl. Sessions Judge in Crl. Revision Petition No.122/2011 as well as order of acquittal passed by learned Metropolitan Magistrate vide order dated 23.07.2011.

2. Notice of the petition was issued to the respondents who entered appearance through their counsel.

3. I have heard learned counsel for the parties. Perusal of the record shows that vide proceedings dated 23.07.2011, the learned M.M noticing the conduct of the petitioner, who is complainant in CC No.230/P/05, closed the post summoning evidence to be led by the complainant recording further that there was no post

summoning evidence on record, thus, no incriminating evidence available which could be put to the accused under Section 313 Cr.P.C. He proceeded to acquit the accused who are respondents No.2 & 3 before this Court.

4. Feeling aggrieved and may be ill-advised, the petitioner impugned the order of acquittal before the learned Addl. Sessions Judge by filing a revision petition. Although, the learned ASJ referred to the guidelines laid down by this Court in *Rajesh Agarwal Vs. State and Another* 171 (2010) DLT 51, but failed to take note of the fact that there was no requirement to lead any post summoning evidence in a case under Section 138 N.I.Act. The learned ASJ dismissed the revision petition observing as under:19. The aforesaid discussion and the number of adjournments sought on behalf of Petitioner repeatedly during the course of trial clearly indicate that Petitioner was herself not following her case diligently. She sought exemption on the ground of demise of her husband even in the year 2010 whereas her husband had expired sometime in the year 2008. Ld. Trial Court on various occasions accommodated the Complainant and granted several opportunities to her to lead her evidence despite which the needful was not done.

20. In view of the aforesaid, I find that impugned order suffers from no illegality or infirmity and does not call for any interference whatsoever. Ld. Trial Court has rightly observed the conduct of the Complainant over the years after the framing of notice under Section 251 Cr.P.C. and finally has rightly closed the opportunity of the Complainant to adduce evidence.

5. While supporting the impugned judgments passed by the learned Trial Court, learned counsel for the respondents No.2 & 3 urged that *Rajesh Agarwal's* case has no application to the present case and complainant was required to lead post summoning evidence for the reason the order passed by the learned M.M was prior to the decision of this Court in *Rajesh Agarwal's* case. When this Court questioned the learned counsel for the respondents No.2 & 3 as to whether the respondents have exercised their right under Section 145(2) of the Negotiable Instruments Act, he submitted that he has instructions to state that the matter may be disposed of on merit without going into this aspect.

6. During the course of hearing, noticing that the impugned orders were contrary to the legal position, respondents were questioned whether they have cross-examined the petitioner by filing application under Section 145(2) N.I. Act. On getting the response in negative, to curb further litigation on application under Section 145(2) N.I. Act being moved at belated stage, possibility was explored so as to obtain consent of the petitioner as well as the availability of the complainant for crossexamination before the trial court for the said purpose as and when such application is filed by the respondents. However, respondents insisted that the matter may be disposed of on merit.

7. Since the respondents appear to be not interested in availing the opportunity for cross-examination of the complainant despite legal position being explained repeatedly highlighting that not only Rajesh Agarwals case was decided much prior to the impugned order of the learned M.M, even otherwise the provisions like Section 251 Cr.P.C. and Section 145 N.I. Act which are referred to in Rajesh Agarwals case were pre-existing and in any case gross illegality has been committed by both the Courts below in dismissing the complaint and acquitting the respondents/accused for failure of the complainant to lead post summoning evidence.

8. In fact, the complainant was not required to lead any post summoning evidence. Rajesh Agarwal vs. State & Anr. was decided on 28.07.2010 whereas the impugned order was passed by the learned M.M on 23.07.2011. In paragraph-19 of Rajesh Agarwals case, this Court had directed that a copy of the judgment be sent to all District Judges for circulation amongst officers of DJS and DHJS. Thus, the contention of learned counsel for the petitioner that Rajesh Agarwals case was disposed of at a later date thus cannot have retrospective effect, is liable to be rejected. For the guidance of the judicial officers of the subordinate judiciary the judgment was ordered to be circulated by this Court, but it appears that the learned M.M failed to take note of the various issues dealt with by this Court and the procedure required to be followed in trial of cases under Section 138 N.I.Act. Hence, it becomes necessary to refer to the various stages where the learned M.M failed to follow the procedure prescribed.

9. In Rajesh Agarwals case, various steps required to be taken by learned M.M in trial of cases under Section 138 N.I. Act were dealt with in paragraphs 4 & 5 of the decision which are extracted as under:4. Section 143 of N.I. Act, as amended by Legislature in 2002, specifically provides that all offences under this chapter of N.I. Act are to be tried by Judicial Magistrate of First Class or MM in accordance with summary trial provisions of Sections 262 - 265 Cr.P.C. (both inclusive). It is provided that in case of conviction of the accused under Section 138 N.I. Act under summary trial, it shall be lawful for the Magistrate to pass a sentence of imprisonment up to one year and a fine exceeding Rs. 5000/-. Section 143 further provides that if at the commencement or during the course of summary trial, MM finds that nature of case was such that a sentence of imprisonment exceeding one year may have to be passed or for some other reason MM comes to conclusion that case should not be tried summarily, the Magistrate has to pass an order after hearing the parties, giving reasons as to why he would like to try the case not in a summarily manner but as a summon trial and he could recall witnesses who may have been examined and proceed with the case to hear it as a summon trial case.

5. In order to ensure that the cases under Section 138 N.I. Act are tried before the Court of MM/JM in an expeditious manner, Legislature provided for summary trial. Section 145 of N.I. Act provides that evidence of complainant may be given by him by way of affidavit and such affidavit shall be read in evidence in any inquiry, trial or other proceedings in the court. This also makes clear that a complainant is not required to examine himself twice i.e. one after filing the complaint and one after summoning of the accused. The affidavit and the documents filed by the complainant along with complaint for taking cognizance of the offence are good enough to be read in evidence at both the stages i.e. pre-summoning stage and the post summoning stage. The complainant is not required to be recalled and re-examined after summoning of accused unless the MM passes a specific order as to why the complainant is to be recalled. Such an order is to be passed on an application made by the accused or under Section 145(2) of N.I. Act suo moto by the Court.

10. At the stage of Section 251 Cr.P.C. after explaining the substance of accusations, the Court is required to question the accused whether he pleads

guilty or has any defence to make. The learned M.M, while passing the impugned order of acquittal recording pre-trial procedure, in paragraph-3 recorded has under:The notice U/s 251 Cr.P.C. for the offence U/s 138 NI Act was also served upon the accused no:-2 on behalf of both the accused on 07.06.2007 after hearing the contesting parties. Needless to say, the accused no:-2 pleaded not guilty and claimed trial for both the accused.

11. Thus, at the time of serving notice under Section 251 Cr.P.C., the respondents/accused were not questioned as to what they have to state in their defence. In paragraphs 4 & 5, the learned M.M has dealt with the failure of the complainant to lead post summoning evidence despite various opportunities being granted and closing the right of the complainant to lead post summoning evidence on 23.07.2011 and thereafter acquitting the respondents/accused without their examination recording that there was no incriminating evidence available to record their statements under Section 313 Cr.P.C.

12. It has been conceded by learned counsel for the respondents that no application was moved by the respondents/accused before the learned M.M under Section 145 (2) N.I. Act. Pre-summoning evidence had already been adduced by the complainant and only thereafter the respondents were ordered to be summoned as accused for commission of offence under Section 138 N.I. Act. Since the pre-summoning evidence which formed basis of taking cognizance of the offence was good enough to be read in evidence even at the post summoning stage, the complaint could not have been dismissed and accused acquitted on failure of the complainant to lead post summoning evidence as it was not required under law.

13. The various steps required to be taken by learned M.M. in trial of cases under Section 138 N.I. Act were summarized in para-17 of Rajesh Agarwals case (supra) which are extracted as under: 17. The summary trial procedure to be followed for offences under Section 138 N.I. Act would thus be as under: Step I : On the day complaint is presented, if the complaint is accompanied by affidavit of complainant, the concerned MM shall scrutinize the complaint & documents and if commission of offence is made out, take cognizance & direct issuance of

summons of accused, against whom case is made out. Step II : If the accused appears, the MM shall ask him to furnish bail bond to ensure his appearance during trial and ask him to take notice under Section 251 Cr.P.C. and enter his plea of defence and fix the case for defence evidence, unless an application is made by an accused under Section 145(2) of N.I. Act for recalling a witness for cross examination on plea of defence. Step III : If there is an application under Section 145(2) of N.I. Act for recalling a witness of complainant, the court shall decide the same, otherwise, it shall proceed to take defence evidence on record and allow cross examination of defence witnesses by complainant. Step IV : To hear arguments of both sides. Step V : To pass order/judgment.

14. Thus, it is clear that the learned M.M failed to follow the procedure prescribed for trial of offences under Section 138 N.I. Act and despite the evidence being available on record in the form of pre-summoning evidence which was never sought to be tested by recalling the complainant/complainants witnesses and subjecting them to crossexamination, dismissed the complaint and acquitted the respondents/accused which has caused grave injustice to the petitioner. The impugned orders have been passed contrary to provisions of law.

15. Since gross injustice has been caused to the complainant by dismissing his complaint and acquitting the respondents/accused despite the complainants evidence available on record and that too unchallenged, the circumstances of the case are such as to warrant interference by this Court in exercise of power under Section 482 Cr.P.C.

16. The circumstances under which the inherent jurisdiction can be exercised by this Court under Section 482 Cr.P.C. were envisaged by the Supreme Court in *Minu Kumari and Anr. vs. State of Bihar and Ors.* AIR 200.SC 193.as (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and (iii) to otherwise secure the ends of justice. It was further observed that Section 482 Cr.P.C does not confer any new power on the High Court and it only saves the inherent power which the Court possessed before the enactment of the Code.

JUDGMENT / ORDER

dated 23.07.2011 passed by the learned M.M as well as order dated 01.11.2011 passed by the learned ASJ in exercise of revisional jurisdiction, are liable to be quashed/set aside in exercise of inherent power vested in this Court under Section 482 Cr.P.C.

18. For the foregoing reasons, I am of the view that the impugned orders dated 01.11.2011 passed by the learned Addl. Sessions Judge dismissing the revision petition filed by the petitioner and 23.07.2011 passed by learned M.M. dismissing the complaint filed by the petitioner and acquitting the respondents/accused being illegal are quashed. Parties are directed to appear before the learned Trial Court on 04.04.2013. The Trial Court shall proceed with the matter and dispose of the same in accordance with law.

19. Copy of the order be given dasti to the parties and be also sent to the learned Trial Court for information and necessary compliance. (PRATIBHA RANI) JUDGE
MARCH 15 2013 dc

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com