IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL WRIT PETITION NO. 630 OF 2012

PETITIONER :- Sou. Kanta W/o. Harish Khandelwal, Aged about 48 years, Occ. Household, R/o. Nawahate Plot, Badnera Road, Amravati through Power of Attorney Shri Harish Shankarlal Khandelwal, R/o. Nawahate Plot, Badnera Road, Amravati, District Amravati.

...VERSUS...

RESPONDENT :- Mudatsar Ali Mujjafar Ali, Aged about 34 years, Occ. Business, R/o. Chilam-Chawani, Camp Amravati, Tq. And Distt. Amravati.

Mr.Amit Kukday, counsel for the petitioner.
None for the respondent.

CORAM : SMT. REVATI MOHITE-DERE, J.
DATED : 07.11.2017

O R A L J U D G M E N T

Heard learned counsel for the petitioner. None appeared for the respondent on 06/10/2017 as well as on 30/10/2017. Even today none appears for the respondent.

2. By this petition, the petitioner has impugned the judgment and order dated 05/11/2012 passed in Criminal Appeal No. 123 of 2008 by the learned Sessions Judge, Amravati, by which the judgment and order of conviction and sentence passed by the learned Judicial Magistrate First Class, Court No.6, Amravati in Summary Criminal Case No.1412 of 2007, dated 04/09/2008 was quashed and set aside and the matter was remanded back to the trial Court, for fresh trial.

3. Learned counsel for the petitioner submits that there was no justification for the Appellate Court to remit the matter back to the trial Court, for a *de novo* trial. He submits that the 138 case in substance was tried as a summons case and not as a summary case, and hence the question of a *de novo* trial did not arise. Learned counsel relied on the following judgments:-

J.V. Baharuni and another v. State of Gujarat and another reported in **2014(4) Mh.L.J. 192**; **Sukhdeo Ganeshram Tardeja v. Rajesh Dayaram Sadhwani and another** reported in **2016(2) Mh.L.J. 113**; **Shivaji Sampat Jagtap v. Rajan Hiralal Arora and anr.** reported in **2006 ALL MR (Cri) 2612;** and unreported judgments i.e. M/s. Indo Rama Synthetics (I) Ltd. v. M/s. HRK Infra & Oils and others) passed in Criminal Application (APL) No.671 of 2011 and (Dinesh Thacker v.

State of Maharashtra and another) passed in Writ Petition No.3745 of 2011, to substantiate his submissions.

4. Perused the papers and the impugned judgment and order dated 05/11/2012 with the assistance of the learned counsel for the petitioner. On 28/03/2007, the petitioner (original complainant) filed a complaint in the Court of the learned Judicial Magistrate First Class, Court No.6, Amravati, which was numbered as Summary Criminal case No.1412 of 2007. The learned Magistrate was pleased to issue process against the respondent, pursuant to which, the respondent appeared before the trial Court. The petitioner led the evidence of two witnesses and closed his evidence. Thereafter, the statement of the respondent-accused under section 313 of Criminal Procedure Code was recorded. The respondent-accused in his defence examined three witnesses, who were also cross-examined by the counsel for the petitioner. Thereafter, the petitioner (original complainant) examined another witness i.e. his third witness namely, Shri Harish Shankarlal Khandelwal. The said witness was also cross-examined by the counsel for the respondent-accused. It however appears, that no questions were put to the respondent-accused under section 313 of Criminal Procedure Code, after the said witness, Harish Khandelwal was examined by the petitioner-complainant. The said fact is also not disputed by the learned

counsel for the petitioner.

5. The submission advanced by the learned counsel for the petitioner that the Appellate Court had erred in remanding the matter back to the trial Court for a fresh trial/*de novo* trial will have to be accepted, in view of the settled position of law. A perusal of the impugned judgment and order dated 05/11/2012 passed by the learned Sessions Judge, Amravati, shows that reliance placed by the said Court on the judgment in the case of **Nitinbhai Saevatilal Shah and another v. Manubhai Manjibhai Panchal and another**, reported in **(2011) 3 SCC (Cri) 788** was clearly misconceived in the facts. In the case of Nitinbhai Saevatilal Shah (*supra*), the Apex Court was dealing with a case, which was tried 'summarily'.

6. It is pertinent to note, that the Apex Court subsequently in the case of ***J.V. Baharuni*** (supra) has observed as under :-

> *"30. In Nitinbhai we find that the entire case was tried 'summarily' and the Magistrate who issued process, was transferred after recording the evidence. The succeeding Magistrate delivered the judgment basing upon the memo filed by the parties declaring that they had no objection to proceed with the matter on the basis of evidence recorded by his predecessor. Ultimately, this Court remanded the matter to the Trial Court for de novo trial opining that no amount*

of consent by the parties can confer jurisdiction on a Court of law, where there exists none, nor can they divest a Court of jurisdiction which it possesses under the law.

31. Coming to the facts of the present cases, on scrutiny of record available in SLP (Cri) No. 5623 of 2012, we found that there has been in total 82 hearings spread over five years. Out of 82 hearings, 67 hearings were done by Jt. C.J. (J.D.) and J.M.F.C., Veraval. The Magistrate was transferred on 24-2-2005 and was replaced by J.M.F.C., Veraval who heard the case for 14 more times and delivered judgment on 15th hearing i.e. on 12-9-2005. Thus by any stretch of imagination, the trial which extended over five years and was decided in over 82 hearings with elaborate cross examination, deposition and all trappings of regular trial cannot simply be termed as "summary trial".

32. On perusal of record of other two cases (SLP (Cri.) Nos. 3332 of 2012 and 734 of 2013), we found the similar situation. The Complaint was taken up on 20th August, 2001 and the Trial Court decided the criminal case on 30th May, 2009 declaring the accused Appellants as innocent, after conducting about 132 hearings. It is also evident from the record that in SLP(Cri) No. 734 of 2013, the criminal proceedings under the N.I. Act were initiated in December, 1998 before the Trial Court which came to be concluded by the judgment of the Metropolitan Magistrate on 7th August, 2009. Thus, during the period of about 11 years a total of 103 hearings took place and a detailed trial procedure had

been followed. Going thereby, prima facie, it is difficult for us to accept that the case was tried summarily.

33. Moreover, these cases were decided by the same judge in the High Court and there seems to be a mechanical application of Nitinbhai without discerning the difference on facts of Nithinbhai and the present cases. In Nitinbhai, the case was established as being decided 'summarily' whereas in the present cases, no such independent inquiry has been undertaken by the High Court to arrive at a just conclusion whether the cases were tried "summarily" or in a "regular way".

34. Be that as it may, to satisfy ourselves we have carefully gone through the records of the Trial Court as well as the High Court in each matter before us. There is no doubt, as per the record, learned Magistrate has not specifically mentioned that the trial was conducted as summons case or summary case. Though in the record of SLP (Cri) No.734 of 2013, at some places the word 'summary' was mentioned as regards to the nature of proceedings of the case, having given our anxious and thorough consideration, we found that the word 'summary' used therein was with reference to Chapter XXII of Code of Criminal Procedure, 1882 and it does not relate to the 'summary trial' envisaged under section 143, of the N.I. Act. Pertinently, before the Trial Court the Suit No. 4457 of 2001 has been referred at some places as 'Summary Suit' and at some other places it has been referred as 'Civil Suit'. Similarly, the case number 5294 of 1998 has been

shown at some places as Summary Case and at some other places it was shown as Criminal Case. After a careful examination of the record, we came to the conclusion that the word 'summary' used at some places was with reference to summary trials prescribed under Code of Criminal Procedure Needless to say that the summary trial as preferred mode of trial in the matters related to negotiable instruments was inserted by the Amendment Act, 2002 only w.e.f. 6th February, 2003.

35 & 36 …

37. But where even in a case that can be tried summarily, the Court records the evidence elaborately and in verbatim and defence was given full scope to cross-examine, such procedure adopted is indicative that it was not summary procedure and therefore, succeeding Magistrate can rely upon the evidence on record and de novo enquiry need not be conducted [See A. Krishna Reddy vs. State and Anr . 1999(6) ALD 279].

38 to 56. …..

57. A de novo trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial. This is because the appellate Court has got the plenary powers to revaluate and reappraise the evidence and to take additional evidence on

record or to direct such additional evidence to be collected by the trial Court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings by bringing down all the persons to the Court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence the said course can be resorted to when it becomes imperative for the purpose of averting "failure of justice". The superior Court which orders a de novo trial cannot afford to overlook the realities and the serious impact on the pending cases in trial Courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the Court and deposed their versions in the very same case. The re-enactment of the whole labour might give the impression to the litigant and the common man that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation [See State of M.P. vs. Bhooraji (2001) 7 SCC 679].

58. Thus, in summation, we are of the considered opinion that the exercise of remitting the matter to Trial Court for de novo trial should be done only when the appellate Court is satisfied after thorough scrutiny of records and then recording reason for the same that the trial is not summons trial but summary trial. The non-exhaustive list which may indicate the difference between both modes of trial is framing of charges, recording of statement Under section 313 of the

Code, whether trial has been done in the manner prescribed under sections 262-265 of Code of Criminal Procedure, how elaborately evidence has been adduced and taken on record, the length of trial etc. In summary trial, the accused is summoned, his plea is recorded under section 263(g) of Code of Criminal Procedure and finding thereof is given by the Magistrate under section 263(h) of Code of Criminal Procedure of his examination.

59. ….

60 to 60.4…..

60.5 Remitting the matter for de novo trial should be exercised as a last resort and should be used sparingly when there is grave miscarriage of justice in the light of illegality, irregularity, incompetence or any other defect which cannot be cured at an appellate stage. The appellate Court should be very cautious and exercise the discretion judiciously while remanding the matter for de novo trial.

60.6. While examining the nature of the trial conducted by the Trial Court for the purpose of determining whether it was summary trial or summons trial, the primary and predominant test to be adopted by the Appellate Court should be whether it was only the substance of the evidence that was recorded or whether the complete record of the deposition of the witness in their chief examination, cross examination and reexamination in verbatim was faithfully placed on record. The Appellate Court has to go through each and every minute detail of the trial Court record and then

> *examine the same independently and thoroughly to reach at a just and reasonable conclusion.*"

7. It is pertinent to note, that in the present case the complainant examined two witnesses, who were cross-examined at length by the respondent's counsel. Thereafter, the statement of the respondent-accused under section 313 of Criminal Procedure Code was recorded, after which, the respondent-accused led the evidence of three witnesses, who were also cross-examined by the petitioner's counsel. It also appears that thereafter, the complainant examined another witness by the name Harish Khandelwal, who was also cross-examined by the respondent's counsel. It appears that the learned Magistrate however failed to record the statement of the respondent-accused under section 313 of Criminal Procedure Code again, after Harish Khandelwal was examined. The learned Magistrate thereafter heard the parties and vide judgment and order dated 04/09/2008 was pleased to convict the respondent-accused for the offence punishable under section 138 of Negotiable Instruments Act and sentenced him to suffer rigorous imprisonment for six months. The respondent-accused was also directed to pay compensation of Rs.1,25,000/- to the petitioner. The said judgment and order of conviction was challenged by the respondent-accused in appeal. The learned Sessions Judge, Amravati, after hearing

the parties was pleased to set aside the judgment and order of conviction passed by the trial Court and remanded the matter back to the trial Court for *de novo* trial, in view of the Apex Court judgment in *Nitinbhai's* case.

8. The learned Sessions Judge, Amravati failed to consider the manner in which evidence was recored in the present case i.e. it was like evidence recorded in a regular summons case and not as in a summary case. The present case had all the trappings of a regular case. In the light of what is discussed herein above, the finding of the Appellate Court directing *de novo* trial was unjustified.

9. However, it is a matter of record, that the trial Court had failed to record the statement of the respondent-accused under section 313 of the Code, after the evidence of Harish Khandelwal was recorded and the learned Judge after hearing the parties, proceeded to convict and sentence the respondent-accused as aforesaid. It appears that the said defect was brought to the notice of the Appellate Court, as a result of which the Appellate Court has also observed, that the mandatory provision was not complied with, and therefore also set aside the judgment and order of conviction and sentence on this count and remitted the matter to the trial Court. Admittedly, the statement of the

respondent-accused under section 313 of the Code was recorded after the first two witnesses of the complainant were examined and cross-examined. However, when the third witness i.e. Harish Khandelwal was examined by the petitioner-complainant, which was after recording of the evidence of respondent's three witnesses, admittedly, no questions were put by the trial Court to the respondent-accused, after Harish Khandelwal was examined, as mandated under section 313 of the Code. Thus, the impugned order, in so much as, it quashes and sets aside the judgment and order of conviction and sentence dated 04/09/2008 passed by the trial Court and remits the matter to the trial Court is upheld; whereas the direction to conduct *de novo* trial is quashed and set aside. It is made clear, that the learned Judicial Magistrate First Class, Court No.6, Amravati is not required to conduct the case afresh or conduct a *de novo* trial.

10. In this light of the matter, the petition is partly allowed on the following terms and conditions:-

(i) The judgment and order dated 05/11/2012 passed by the learned Sessions Judge, Amravati in Criminal Appeal No.123 of 2001 in so much as it directs *de novo* trial is quashed and set aside.

(ii) The learned Judicial Magistrate First Class, Court No.6, Amravati to record the statement of the respondent-accused under section 313 of Criminal Procedure Code, on the basis of the evidence of Harish Khandelwal and after recording the same, the trial Court shall rehear the parties and thereafter pass appropriate orders.

(iii) Both the parties shall appear before the trial Court on 30/11/2017 at 10.30 a.m.

(iv) The learned Magistrate shall complete the said process as expeditiously as possible and in any event within three months from 30/11/2017.

Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

11. All the parties to act on the authenticated copy of this judgment.

JUDGE

KHUNTE