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

CRIMINAL WRIT PETITION NO.170/2015

Shri Sukhdeo Ganeshram Tardeja,
aged about 70 years, Occ. Business,
Shop at Khatri Complex, Amravati,
Tq. Dist. Amravati. **.....PETITIONER**

...V E R S U S...

1. Shri Rajesh Dayaram Sadhwani,
aged Adult, Occ. Business,
r/o c/o Shri Sairam, Shop No.K-3,
Katri Complex, Amravati, Tq. Dist.
Amravati.

Present Shop Address
Shri Sai Sons C-48, Busy Land Complex,
Nandgaon Peth, Amravati.
Present Residential Address:
Opp. Shitaldas Sadhwani, House Galli
No.5, Rampuri Camp, Amravati.

2. State of Maharashtra, through
G.P. Nagpur. **...RESPONDENTS**

Mr. S. S. Alaspurkar, Advocate for petitioner.
Mr. N. M. Shukla, Advocate for respondent no.1.
Mrs. K. R. Deshpande, A.P.P. for respondent no.2-State.

CORAM:- A. B. CHAUDHARI, J.
DATED :- 09.07.2015

ORAL JUDGMENT

1. Rule. Rule returnable forthwith. Heard finally by consent of the parties.

2. By the present petition, the petitioner has put to challenge the revisional order dated 13.02.2014 passed by Sessions Judge, Amravati by which he confirmed the order dated 20.12.2011 passed by Judicial Magistrate First Class, Court No.1, Amravati ordering *de novo* trial for an offence punishable under Section 138 of the Negotiable Instruments Act. In support of the petition, learned counsel for the petitioner invited my attention to the evidence, that was recorded before the trial Judge so also the judgment that, in fact, the trial that was held was a summons trial and not a summary trial. He submitted that complaint under Section 138 of the Negotiable Instruments Act was filed in the Court on 24.06.2009. Thereafter, the evidence commenced in July-2010 and the cross-examination was conducted by counsel for the respondent on 13.08.2010 and 15.10.2010. Another witness was examined as CW2-Satyanarayan Mohanlal Chhangani on 29.11.2010, who was cross-examined and on the same day, the complainant closed his case. Thereafter, statement of accused was recorded and the case was posted further. Learned counsel submitted that the trial as well as the appellate court committed error in not finding distinguishing features in the case at hand while considering the judgment in ***Nitinbhai Shah ..vs..***

Manubhai Manjibhai Panchal (2011) 9 SCC 638 and invited my attention to another judgment of the Supreme Court in the case of ***J. V. Baharuni and another ..vs.. State of Gujarat and another; (2014) 10 SCC 494***. He then submitted that the detailed cross-examination was made and the evidence was adduced like summons case and not as a summary trial. The courts below erred in ordering de novo trial by applying judgment in the case of **Nitinbhai** *(supra)*.

3. Per contra, Mr. Shukla, learned counsel for respondent no.1, submitted that the case of ***Nitinbhai*** is squarely applicable in the instant case at hand since the Magistrate has used summary form for explaining the particulars and evidence was recorded only in English and not in Marathi, which shows that it was summary trial and not summons trial. He, therefore, prayed for dismissal of the writ petition.

4. I have heard learned counsel for the rival parties. Perused the judgment in the case of ***Nitinbhai*** (supra) as well as **J.V.Baharuni** (supra). Here, it is necessary to consider the observations of the apex Court in **J. V. Baharuni** *(supra)* wherein

judgment in the case of **Nitinbhai** (supra) has also been considered. The relevant observations are 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 (Crl) 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 24.02.2005 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 12.09.2005. 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 (Crl.) 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(Crl) 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(Crl) 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.v.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. v. 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 re-examination 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."*

5. Now, let me examine the present matter in the light of the aforesaid observations of the apex Court.

I have seen the evidence that was adduced before the court in respect of two witnesses examined by complainant and their cross-examination. The proceedings were completed in four days and perusal of the cross-examination of both these witnesses shows that the detailed cross-examination was made by counsel for the respondent, so also affidavit on evidence was also in detail and in fact tenor of the evidence adduced by the complainant and the cross-examination clearly shows that the case was tried as summons trial. In my opinion, merely because summary form was used for explaining the particulars and evidence was recorded only

in English and not in Marathi, one cannot come to the conclusion that the format used in recording of the evidence in English could decide whether a case was summary trial or summons trial. The substance of the evidence must be seen. The evidence of two witnesses for the complainant was recorded so also cross-examination was also done on four various dates. Perusal of the cross-examination shows that full dress trial was held and it is with that understanding, both the parties joined the trial even till statement under section 313 of Cr. P. C. also recorded.

6. I have perused the record and I find that the evidence was recorded, cross-examination was conducted and complete trial was held. Perusal of the record nowhere shows that, in fact, summary trial was held. In view of above, following order is passed.

ORDER

(i) Criminal Writ Petition No. 170/2015 is allowed.

(ii) Rule is made absolute in terms of prayer clause (2) of the order.

JUDGE

kahale