Bombay High Court Shivaji Sampat Jagtap vs Rajan Hiralal Arora And The State ... on 11 August, 2006 Equivalent citations: 2007 CriLJ 122 Author: D Bhosale Bench: D Bhosale JUDGMENT D.B. Bhosale, J. Page 2692 1. Heard learned Counsel for the petitioner and learned A.P.P. for the State. 2. Rule, returnable forthwith. By consent of the parties taken up for final hearing. The learned Counsel for the respondents waive service. 3. The question of considerable significance, raised in this writ petition, is that whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in a case under Section 138 of the Negotiable Instruments Act, 1881 (for short "the Act") ceases to exercise jurisdiction therein, either on account of his transfer or retirement, and is succeeded by another Magistrate, whether in view of the provisions contained in Section 143 of the Act, the succeeding Magistrate requires to hold a denovo trial as contemplated Page 2693 under Section 326(3) of the Code of Criminal Procedure (for short "the Code") ? or can act on the evidence so recorded by his predecessor and proceed further from the stage at which he takes over and decide the case as contemplated under Section 326(1) of the Code. 4. In the present case, the Sessions Court in appeal against the judgment and order of conviction under Section 138 of the Act, has upheld the objection raised by the respondent-accused under Section 326(3) of the Code seeking denovo trial on the ground that the evidence was recorded by one Magistrate and the judgment was delivered by another. The factual matrix of the present case would be narrated little latter. 5. The Division Bench presided over by the Chief Justice had an occasion to deal with the reference made by the learned Single Judge in Criminal Writ Petition No. 1228 of 2004 in KSL and Industries Ltd. v. Mannalal Khandelwal and Anr. The reference was decided by the judgment and order dated 1.2.2005, reported in 2005 All MR (Cri.) 1105. While disposing of the said writ petition the Division Bench gave certain directions for speedy disposal of the cases under Section 138 of the Act. A specific direction to the Registrar General to appoint judicial officers in various cities of Maharashtra to deal with the cases under Section 138 of the Act was given. The Chief Secretary of the State was also directed to ensure that 100 additional posts of Civil Judges, Junior Division and their supporting staff are created forthwith and in any event, within two months from the date of the judgment. In pursuance of those directions the Registrar General of High Court had addressed a letter dated 2nd February, 2005 to the Principal Secretary, Law and Judiciary Department, Mantralaya, Mumbai requesting to create 100 posts of Civil Judges, Junior Division and the supporting staff exclusively for dealing the cases under Section 138 of the Act. Similarly, a letter of very same date was addressed to the District and Sessions Judges in the State of Maharashtra and Goa directing them to assign exclusively the cases under Section 138 to particular Magistrate/s at district places and transfer the cases under Section 138 pending before other Magistrates, before the Magistrate/s to whom said cases are assigned exclusively. As a part of this exercise, in Mumbai, 22 Magistrates were assigned exclusively the cases under Section 138 of the Act. I am informed, insofar the city of Mumbai is concerned, as on 30.6.2006 the total pendency of the cases under Section 138 of the Act was 1,14,382 and all these cases are be-

ing dealt with by 22 Magistrates exclusively. The huge number of cases at the relevant time pending before all the Magistrates in the City of Mumbai were transferred to those 22 Magistrates irrespective of the stage at which they were pending at the relevant time. Similar was the position outside Mumbai also. That was all, apparently, done in pursuance of the directions given by the Division Bench of this Court in KSL and Industries Ltd. (supra). Keeping that in view and considering the impugned view taken by the learned Sessions Judge in the present case, in my opinion, its ramifications would be very serious and may be disastrous and, therefore, the aforesaid question assumes great importance. 6. The background facts, in the present revision that would be relevant and necessary against which the aforesaid question is raised, briefly stated, Page 2694 are that the petitioner-complainant had filed a complaint in 1999 under Section 138 of the Act since the cheque dated 6.8.1999 issued by the respondent-accused was dishonoured and returned with the remarks "funds expected". The process was issued by the Magistrate and after the summons on the accused was served, his plea came to be recorded on 16.9.2000. The complainant's examination-in-chief was recorded on affidavit and after he was cross examined by the accused, he closed his evidence in October, 2003. The statement of the accused under Section 313 of the Code was recorded on 3.12.2003. Thereafter the accused examined himself as a witness after making an application to that effect under Section 315 of the Code and his evidence was also concluded on 2nd April, 2004. That was all done by and before the Metropolitan Magistrate, 17th Court, Mazgaon presided over by Mr. M.J.Jamadar. However, before Mr. Jamadar could deliver the judgment he ceased to exercise the jurisdiction and was succeeded by another learned Magistrate Mr. M.L. Shaikh. Mr. Shaikh, after taking over, delivered a judgment on 6.12.2004 on the basis of the evidence recorded by his predecessor Mr. Jamadar and convicted the accused of the offence punishable under Section 138 of the Act and sentenced him to suffer R.I. for six months. The accused was also ordered to pay compensation of Rs. 15,00,000/- under Section 357(3) of the Code to the complainant on or before 17.1.2005. In appeal, the judgment and order of conviction was challenged mainly on the ground that Mr. Shaikh, who succeeded Mr. Jamadar, the learned Magistrate, who had heard the case as summary trial and recorded the whole of evidence, ought to have conducted a denovo trial as contemplated under Section 326(3) of the Code and since that had not been done, the entire proceeding vitiates and the accused deserves to be acquitted. The Sessions Court by its judgment and order dated 14.7.2005 allowed the appeal, quashed and set aside the judgment of conviction rendered by the Metropolitan Magistrate, 17th Court dated 6.12.2004 and remanded the case for holding a denovo trial. It is this judgment which is impugned in the instant writ petition. 7. In this revision application initially Mr. Prakash Naik, learned Counsel had filed his Vakalatnama for respondent No. 1. However, when the revision was called out for hearing, Mr. Naik informed me that respondent No. 1 has engaged some other advocate and he has no instructions to appear in this case though his power on record continues. No other advocate was present when the matter was called out for final disposal, as indicated earlier, at the stage of admission. In the circumstances I requested

Mr. Naik to assist the Court for and on behalf of respondent No. 1. He readily agreed and made his submissions in support of the impugned judgment and order dated 14.7.2005 rendered by the Sessions Court in Criminal Appeal No. 2 of 2005. 8. Mr. Marwadi, learned Counsel for the petitioner at the outset submitted that though Section 143 of the Act mandates that the trial in the case filed under Section 138 of the Act should be tried in summary manner, if the proceedings taken in the court indicate that it was not tried in summary way and was in fact tried as regular summons case the provisions contained in Page 2695 Sub-section (3) of Section 326 would not be attracted. He invited my attention to the facts of the present case and submitted that by no stretch of imagination it could be said that scanty provisions of Section 263 and 264 were fully and strictly complied with. On the contrary, it is clear that the learned Magistrate tried the case as regular summons case. He, therefore, submitted that there is no need for conducting denovo trial as directed by the Sessions Court in this case and the matter be remanded to the appeal Court to decide it on merits in accordance with law. Mr. Marwadi in support of his submissions placed heavy reliance upon the following judgments: (i) Mukesh v. State of Rajasthan 1998 CRI. L.J. 2439 (Rajasthan High Court); (ii) Dilip Kulkarni and Ors. v. Bahadurmal Chowdary and Sons (Andhra Pradesh High Court); (iii) K. Jayachandran v. Nargeese and Anr. 1987 Cri. L.J. 1997 (Kerala High Court); (iv) Ranbir Yadav v. State of Bihar (Patna High Court). 9. On the other hand Mr. Prakash Naik, learned Counsel submitted that the trial in the case under Section 138 of the Act should be summary in nature as contemplated under Section 143 of the Act and, therefore, in any case the successor Magistrate cannot pass the conviction order against the accused on the basis of the evidence recorded by his predecessor. The only option left open to the Successor Magistrate is to conduct denovo trial. Sub-section (1) of Section 326 has no application to the summary trial cases and, therefore, the trial has to be conducted denovo in the event of transfer or retirement of the Magistrate, who has recorded the evidence. Mr. Naik in support of his arguments placed reliance upon the following judgments: 1989 Cri.L.J. 2077 Chandana Surya Rao v. State (Andhra Pradesh High Court; State of Rajasthan v. Rajesh Agarwal and Ors. 1996 Cri. L.J. 1057 (Rajasthan High Court) and Prafulla Pradhan v. State of Bihar 1998(1) Crimes 295 (Patna High Court). 10. Before I address the question, formulated as above, it would be, I think, useful to briefly refer to the legislative background and the circumstances against which the provisions contained in Section 143 came to be inserted in the Act. The Banking, Public Financial Institutions and the Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988) had inserted Chapter XVII comprising of Sections 138 to 142 with effect from 1.4.1989. It was inserted with a view to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reasons that it exceeds the arrangements made by the drawer, with adequate safe-guards to prevent harassment of honest drawers. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The provisions of Sections 138

to 142, however, were found deficient in dealing with dishonour of cheques. It was found that the punishment provided, has proved to be inadequate, the Page 2696 procedure prescribed for the Courts to deal with such matters cumbersome and that the Courts were unable to dispose of such cases expeditiously in a time-bound manner in view of the procedure contained therein. A large number of cases were reported to be pending under Sections 138 in various Courts in the country. 11. Keeping that in view, a Working Group was constituted to review Section 138 of the Negotiable Instruments Act, 1881 and to make recommendations as to what changes were needed to effectively achieve the purpose of that section. The Working Group along with other representations from various institutions and organisations made recommendations which were examined by the Government in consultation with the Reserve Bank of India and other legal experts, and a Bill, namely, the Negotiable Instruments (Amendment) Bill, 2001 was introduced in the Lok Sabha on 24.7.2001. 12. The Bill was referred to the Standing Committee on Finance which made certain recommendations in its report submitted to Lok Sabha in November, 2001. Keeping the recommendations of the Standing Committee on Finance in view the Parliament decided to bring out, inter alia, the following amendments insofar as Chapter XVII of the Negotiable Instruments Act, 1881, is concerned namely:-to increase the punishment as prescribed under the Act from one year to two years; to increase the period for issue of notice by the payee to the drawer from 15 days to 30 days; to provide discretion to the Court to waive the period of one month, which has been prescribed for taking cognizance of the case under the Act; to prescribe procedure for dispensing with preliminary evidence of the complainant; to prescribe procedure for servicing of summons to the accused or witness by the Court through speed post or empanelled private couriers; to provide for summary trial of the cases under the Act with a view to speeding up disposal of cases; to make the offences under the Act compoundable; to exempt those directors from prosecution under Section 141 of the Act who are nominated as directors of a company by virtue of their holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government, or the State Government, as the case may be; and to provide that the Magistrate trying an offence shall have power to pass sentence of imprisonment for a term exceeding one year and amount of fine exceeding five thousand rupees. The proposed amendments were aimed at early disposal of cases relating to dishonour of cheques; enhancing punishment for offenders, introducing electronic image of a truncated cheque and a cheque in the electronic form as well as exempting an official nominee director from prosecution under the Negotiable Instruments Act, 1881. 13. Accordingly, the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 was passed by the Parliament and it received the assent Page 2697 of the President on 17.12.2002 by which the amendments to Sections 138, 141, 142 in Chapter XVII were made and the provisions of Sections 143 to 147 were newly inserted in the said Chapter. The amendments were also made to some other provisions in the Negotiable Instruments Act, to which in the instant group of the writ petitions we are not concerned and hence reference to those amend-

ments is avoided. All this background and circumstances will have to be taken into consideration while appreciating the arguments advanced by the learned Counsel for the parties. It is well settled that when one has to look at the intention of the Legislature, one has to look at the circumstances under which law was enacted, the preamble of law, the mischief which was intended to be remedied by the enactment of the statute. 14. Before I proceed further it would be relevant to make short reference, to the provisions to which specific reference was made in the course of arguments. The arguments advanced by the learned Counsel for the parties were centered around the provisions contained in Section 143 of the Act. It would be advantageous to reproduce Section 143 for addressing the question and to know the exact purport of the said provision. Section 143 reads thus: 143. Power of the Court to try cases summarily:-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropoltian Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials. Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees. Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in manner provided by the said Code. (2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing. (3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint. A bare look at this section would show that the trial in a case filed under Section 138 of the Act shall be tried in a summary manner. Though it begins with non obstante clause carving out an exception to the provisions of the Code, Sub-section (1) thereof clearly provides that all the offences under Page 2698 Chapter XVII of the Act shall be tried by a Judicial Magistrate of the First Class or by a Metropolitan Magistrate and the provisions of Section 262 to 265 of the Code, as far as may be, applied to such trials. It empowers the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine not exceeding five thousand rupees. It also provides that if it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed, he can do so after hearing the parties and recalling any witness who may have been examined and to proceed hearing or re-hearing the case in the manner provided in the Code. Under this provision so far as practicable,

the Magistrate is expected to conduct the trial on day to day basis until its conclusion and conclude the trial within six months from the date of filing of the complaint. It is clear from the bare look at this provision that the Legislature intended to speed up the procedure in disposing of the cases under Section 138 of the Act. Section 2(w) and 2(x) of the Code define summons case and warrant case respectively. Summons case means a case relating to an offence and not being a warrant case. Whereas, a warrant case means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Chapter XIX and XX of the Code deal with the trial of warrant cases and trial of summons cases by Magistrates respectively. Chapter XXI consists of Sections 260 to 265, deal with the procedure to be followed when the case is being tried summarily. Section 260 speaks of power to try a case summarily. It has enlisted the offences which could be tried in a summary way. Section 261 deals with summary trial by Magistrate of the second class. Where a Magistrate of the second class is empowered to try summarily any offence which is punishable only with fine or with imprisonment for a term not exceeding six months with or without fine. Section 262 provides for procedure for summary trial. Sub-section (1) thereof states that in trials under Chapter XXI, the procedure specified in the Code for the trial of summons-case shall be followed except as mentioned in Sub-section (2) thereof. Sub-section (2) states that no sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under Chapter XXI. Section 263 speaks of the record in summary trial and it gives the particulars of the record to be maintained in a case which the Magistrate tries summarily. Section 264 deals with the judgment in cases tried summarily. It states that in every case tried summarily, in which 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. Section 265 provides for the language of record and judgment. The next is Section 326 of the code and in particular Sub-section (3) thereof. It would be advantageous to reproduce Section 326 of the Code, which reads thus: Section 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 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 Page 2699 exercises such jurisdiction, the Judge or Magistrate so succeeding may act on the evidence so 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. A plain reading of Sub-section (1) of Section 326 of the Code would show that successor Magistrate can act on the evidence recorded by his predecessor either in whole or in part and if he is of the opinion that further examination is required he may recall that witness and examine him. In short, it states that there is no need to conduct the retrial or denovo trial, where the cases were conducted as summons or warrant cases. Sub-section (2) provides that when there is transfer of case from one Magistrate to another, 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). Sub-section (3) of Section 326 of the Code makes it explicitly clear that nothing in Sub-section (1) and Sub-section (2) would apply to summary trials or to cases in which proceedings have been stayed under Section 322 or in which the proceedings have been submitted to a superior Magistrate under Section 325 which makes it explicitly clear. 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 Page 2700 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 re-hear 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. 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 re-hear 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 Page 2701 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. 19. I am fortified in the aforesaid view by the decisions relied upon by Mr. Marwadi, of the High Courts of Rajasthan, Andhra Pradesh and Kerala (supra). All these High Courts while interpreting the provisions contained in Chapter XXI of the Code and Section 326 thereof as also the provisions of Section 143 of the Act and analogous provision in the Essential Commodities Act, 1955 have taken the similar view. In the circumstances, the judgments relied upon by Mr. Naik, learned Counsel for the respondent-accused, in my opinion, are of no avail to the respondent-accused. 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.