Before Vinod S. Bhardwaj, J.

SUDERSHAN KUMAR MITTAL—*Petitioner*

versus

RAVINDER KUMAR MITTAL—*Respondent*

CRM-M No. 4299 of 2016

April 22, 2022

Code of Criminal Procedure, 1973— Ss.482,483and 461— Negotiable Instruments Act, 1881— Ss.138 and 143— Mere non-compliance of directive provided under Article 143 which contemplates affording of hearing to parties before directing a case to be tried as a summons case would not vitiate trial— Petition dismissed.

Held, that examining the case from another perspective, Section 461 CrPC deals with irregularities which vitiate proceedings. The order of the Magistrate to try the case as a summons case is not an irregularity that would vitiate the proceedings. Hence, even though the proviso to Section 143 contemplates affording of hearing to the parties before directing a case to be tried as summons case, however, non-compliance thereof does not vitiate the proceedings. Apparently the said proviso contemplates a situation where the order to try the case as summons case is passed by the Magistrate after commencement of the trial and where certain witnesses have been recorded.

(Para 16)

Anshul Mangla, Advocate, *for the petitioner.*

M.S. Kathuria, Advocatefor respondent.

VINOD S. BHARDWAJ. J.

(1) Instant petition has been filed under Section 482 read with Section483 of the CrPC for quashing of proceeding in Criminal Complaint No.4280 dated 23.08.2012 under Section 138 of the Negotiable Instrument Act, 1881 and is alleged to have been initiated in violation of the mandate of Section 143 of the Negotiable Instruments Act and being hit by the legal Maxim "*sublato fundamento cadit opus",* meaning thereby that once the foundation has been removed, the structure falls, by placing reliance on the judgment of Hon'ble Supreme Court in ***State of Punjab*** *versus* ***Devinder Pal***

Singh Bhullar & Ors etc.[1].

(2) A brief reference to the facts of the case would show that thecomplaint in question was filed by respondent-Ravinder Kumar Mittal against the petitioner alleging therein that cheque No.524360 dated 6.07.2012 drawn on Bank of India, New Delhi for a sum of Rs.1,29,74,692 had been issued by the petitioner towards existing part liability with an assurance that the cheque shall be encashed on its presentation in the bank. However, upon presentation thereof, the cheque was returned unpaid vide Nemo dated 17.07.2012 with remarks "funds insufficient" and "drawers signature differ". The same meant that not only the petitioner-accused did not have sufficient funds in his account but also the cheque did not match the specimen signatures available with the bank. A statutory notice under the Negotiable Instruments Act dated 21st July, 2012 was sent to the petitioner-accused, however, upon non-payment of the money, complaint in question was instituted and the petitioner-accused was summoned to face trial under Section 138 of the Negotiable Instrument Act vide order dated23rd August, 2012. Considering the huge amount of the cheque the Trial Court vide order dated 24th August, 2013 held that the case may warrant an imprisonment of more than one year and as such it is undesirable to try the casein a summary manner. Accordingly, the case was tried as a summons case. Notice of accusation was served upon the petitioner-accused on 29th November, 2013. The present petition was thus filed raising a challenge to the proceeding directing conducting of the case as summons case by urging that the order was in conflict with the mandate of Section 143 of the Negotiable Instrument Act, which relates to the power of a Court to try the cases summarily.

(3) Learned counsel appearing on behalf of the petitioner has arguedthat the order for trying the case as a summons case has been passed by the Trial Court prematurely and before the commencement of the trial. By placing reliance upon the judicial pronouncement in the matter of ***J.V. Baharuni & Another*** *versus* ***State of Gujarat & Anr***[2]**,** it has been submitted that the opinion to try the case as a summons case has to be formulated duringthe course of trial and as the trial has to commence after the notice of accusation, hence the order dated 24.08.2013 (Annexure P-4) is bad and liable to be set

[1] 2012 (1) RCR (Crl.) 126
[2] 2014(4) RCR (Crl.) 696

aside. The relevant extract of the judgment relied upon by the petitioner in the matter of ***J.V. Baharuni*** *(supra)* is reproduced hereinbelow:-

> 25. Sub-section (1) of Section 143 of the N.I. Act makes it clear that all offences under Chapter XVII of the N.I. Act shall be tried by the Magistrate 'summarily' applying, as far as may be, provisions of Sections 262 to 265 of Cr.P.C. It further provides that in case of conviction in a summary trial, theMagistrate may pass a sentence of imprisonment for a termnot exceeding one year and a fine exceeding Rs.5,000/-. Sub- section (1) of Section 143 of the N.I. Act further provides that during the course of a summary trial, if the Magistrate is ofthe opinion that the nature of the case requires a sentence fora term exceeding one year or for any other reason, it is undesirable to try the case summarily, the Magistrate shall, after hearing the parties, record an order to that effect and thereafter recall any witness whom he had examined, or proceed to rehear the case. Sub-section (2) mandates that so far as practicable, the trial has to be conducted on a day to day basis until its conclusion.

(4) Learned counsel has further relied upon the judgment of the Hon'ble Supreme Court in the matter of ***Indian Bank Association & Ors*** *versus* ***Union of India & Ors***[3]**.** The relevant extract reads thus:-

> Amendment Act, 2002 has to be given effect to in its letter and spirit. Section 143 of the Act, as already indicated, has been inserted by the said Act stipulating that notwithstanding anything contained in the Code of Criminal Procedure, all offences contained in Chapter XVII of the Negotiable Instruments Act dealing with dishonour of cheques for insufficiency of funds, etc. shall be tried by a Judicial Magistrate and the provisions of Sections 262 to 265 Cr.P.C. prescribing procedure for summary trials, shall apply to such trials and it shall be lawful for a Magistrate to pass sentenceof imprisonment for a term not exceeding one year and an amount of fine exceeding Rs.5,000/- and it is further provided that in the course of a summary trial, if it

[3] 2014(2) RCR (Crl.) 598

> appears to the Magistrate that the nature of the case requires passing of the sentence of imprisonment exceeding one year, the Magistrate, after hearing the parties, record an order to that effect and thereafter recall any witness and proceed to hear or rehearthe case in the manner provided in Criminal Procedure Code.

(5) Learned counsel has further placed reliance upon the judgment ofthe Hon'ble Supreme Court in the matter ***State of Punjab*** *versus* ***Devinder Pal Singh Bhullar & Ors***[4]. The relevant extract of the same is reproduced hereinbelow:-

> 72. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim "sublato fundamento cadit opus" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.

(6) It is further argued by the counsel appearing on behalf of petitionerthat the impugned order in question has been passed without affording any opportunity of hearing to the petitioner and that the said order being prejudicial, inasmuch as the petitioner can now also be punished for a sentence exceeding 01 year, hence, it was mandatory for the Court to have granted an opportunity of hearing to the petitioner-accused before treating the case as a summons case.

(7) *Per contra*, the submissions of the counsel for the petitioner were opposed by the counsel appearing for respondent. He has submitted that filing of the instant petition is an abuse of the process of law. It is pointed out that theorder in question was passed on 24th August 2013, whereas the petition beforethe High Court was filed on 3rd February 2016, after a delay of two and a halfyears. It is further submitted that the evidence of the complainant was closed in November 2014 and statement of the petitioner-accused under Section 313 CrPC was also recorded on 15th December, 2015. Hence the petition has been filedafter the trial has already come to an end.

(8) Counsel for the petitioner has explained the delay in approaching the Court by pleading that he was not aware of the

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[4] 2012(1) RCR (Crl.) 126

said order, which is howeverclearly falsified. It cannot be accepted that the petitioner was not aware of thesame especially when he had participated in the trial.

(9) Learned counsel for the respondent has further submitted that thejudgments relied upon by the petitioner are not applicable to the facts of the case and that no prejudice is caused to the petitioner by directing the case to be treatedas a summons case instead of trying it summarily. He submits that the accusedgets a better chance to prove his innocence and to confront the witnesses. Besides, an inordinate delay in raising a challenge, no prejudice caused to the petitioner has been established and a mere apprehension has been made a foundation of filing the instant petition.

(10) I have heard learned counsel for the parties and have gone to the pleadings as well as documents appended with the case and have also gone through the judgments relied upon by the learned counsel for the respective parties.

(11) Before delving further into the case, the relevant statutory provisions *viz*. Section 143 of the Negotiable Instruments Act is reproduced herein below:-

> 143. Power of Court to try cases summarily.—
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> (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 firstclass or by a Metropolitan 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:
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> 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 shallafter 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 the 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 ofthe complaint.

(12) A bare perusal of the said provision shows that as per the second proviso to Section 143(1) has used the expression "**at the commencement**" and"**or in the course of**". While it is well settled in law the that commencement of trial shall accrue on serving of notice of accusation, however, the use of thephrase **"or in the course of**" has to be assigned a meaning. The legislature having used two different phrases as alternates could not have intended them to carry one meaning. The phrase "in the course of a summary trial" invariably has a wider import and is attracted even prior to serving of notice of accusation. The word "in the course of summary trial" cannot be interpreted to mean "at the commencement" of a trial. Legislature does not use words only as a superfluous expression and intends to deploy the same with distinct expanse and meaning; Reading the same to mean the same would amount to doing violence to statute by rendering statutory intent nugatory and meaningless. "Course of trial", is plainly separate from "commencement of trial". While Legislature prescribed a definite stage in the expression "commencement of trial"; no such stage is circumscribed by the legislature while using "in the course of trial". The same is thus wider in its interpretation and applicability.

(13) Referring to the judgments relied upon by the counsel appearing for the petitioner, it is submitted that the judgments in question would not be applicable to the submission sought to be advanced. The incorporation of Section 143 Negotiable Instruments Act was within an object of speedy disposal of cases resulting in recommendation of simplified procedure of trial of the offence under the Negotiable Instruments Act i.e. summary trial. The incorporation of Section 143 to 147 was aimed at early disposal of cases in

simplified procedure and more particularly to do away the stages and process in a regular criminal trial that normally cause inordinate delay in its conclusion and to make a trial procedure as expeditious and possible without in any way compromising with the right of the accused for a fair trial. There is no straitjacket formula classifying a case to be tried as a summary trial or as a summons case in offences falling under the Negotiable Instruments Act. The law provided therefore is so flexible that it is upto the prudent judicial mind to try the case summarily or otherwise. It was held by the Hon'ble Supreme Court in the matter of J.V. Baharuni *(supra)* in Para 44 ,that no doubt the second proviso to Section 143 of of the Act specifies that in case a magistrate does not deem the case fit to try summarily, he shall record an order to that effect after hearing the parties. Just because this directive is not followed scrupulously by the Trial court would itself not vitiate the entire trial and the Appellate Court should not direct for a *de novo* trial merely on the ground that the Trial Court has not recorded the order for not trying the case summarily. It is further observed that *de novo* trial of entire matter should be ordered in exceptional and rare cases only when such course of fresh trial becomes indispensable to avert failure of justice.

(14) It was also held by the Hon'ble Supreme Court in the matter of ***Mehsana Nagrik Sahkari Bank Ltd.*** *versus* ***Shreeji Cab Co. & Ors Etc***[5], that where evidence in a case is recorded in full and not in a summary manner, it is not fit to direct a *de novo* trial on transfer of a Magistrate. The following directions were issued by the Hon'ble Supreme Court:-

> a. All the subordinate Courts must make an endeavour to expedite the hearing of cases in a time bound manner which in turn will restore the confidence of the common man in the justice delivery system. When law expects something to be done within prescribed time limit, some efforts are required to be made to obey the mandate of law.
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> b. The learned Magistrate has the discretion under Section 143 of the N.I. Act either to follow a summary trial or summons trial. In case the Magistrate wants to conduct a summons trial, he should record the reasons after hearing the parties and proceed with the trial in the manner

[5] 2014(3) RCR (Crl.) 367

provided under the second proviso to Section 143 of the N.I. Act. Such reasons should necessarily be recorded by the Trial Court so that further litigation arraigning the mode of trial can be avoided.

c. The learned Judicial Magistrate should make all possible attempts to encourage compounding of offence at an early stage of litigation. In a prosecution under the Negotiable Instruments Act, the compensatory aspect of remedy must be given priority over the punitive aspect.

d. All the subordinate Courts should follow the directives of the Supreme Court issued in several cases scrupulously for effective conduct of trials and speedy disposal of cases.

e. Remitting the matter for de novo trial should be exercisedas 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.

f. 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.

(15) Further, reliance on the judgment of ***Indian Bank Association*** *(supra)* is misplaced as the said judgment only contemplates that an order to try a case as summons case has to be passed after hearing the parties, which is also the plain and suggestive reading of the said proviso. The said judgment, however, does not hold that the same is a mandatory provision and that any non-compliance thereof shall vitiate the proceedings. Insofar as the

judgment of ***Stateof Punjab*** *versus* ***Devinder Pal Singh Bhullar & Ors*** is concerned, the said judgmentis again not applicable to the facts of the instant case. In order to apply the ratioof the said judgment, it must be established that the initial action is in conflict with law in order to mandate that all circumstantial and consequential proceedings should fall. The judgment of J.V. Baharuni *(supra)* itself dealt with the issue of the Court failing to comply with the directive contained in the second proviso and has specifically held that just because the directive contained in the second proviso to Section 143 of the Negotiable Instruments Act has not been followed scrupulously by the Trial Court, the same would itself not vitiate the entire trial. Hence, the doctrine of "*sublato fundamento cadit opus"* would not take away a foundation of the case to be tried as a summons case and vitiate the proceedings initiated in the case.

(16) Further, examining the case from another perspective, Section 461 CrPC deals with irregularities which vitiate proceedings. The order of the Magistrate to try the case as a summons case is not an irregularity that would vitiate the proceedings. Hence, even though the proviso to Section 143contemplates affording of hearing to the parties before directing a case to be tried as summons case, however, non-compliance thereof does not vitiate the proceedings. Apparently the said proviso contemplates a situation where the order to try the case as summons case is passed by the Magistrate after commencement of the trial and where certain witnesses have been recorded. Considering that witnesses shall have to be recalled and the proceeding have to be reconducted, hence, the necessity of affording a hearing to the parties was incorporated as it may have a bearing on an accused in the form of defeating his right to speedy justice. Such a provision does not come to effect with same degree of force when the trial is yet to commence and the said order is not likely to result in recall/re-examination of the witnesses or amount to re-hearing of the case. The rider to hear the parties and record an order preceeds recalling of any witness, who may have been examined.

(17) Besides, the object behind incorporation of Section 143 to 147 of the Negotiable Instruments Act was to expedite the process of trial by ignoring the procedural technicalities. The interpretation sought to be assigned by the petitioner is likely to run contrary to the object behind the statutory provision. Itis well settled proposition in law that a provision may be couched in mandatory terms but yet can be directory and used of word "shall", may not by itself, make

the clause mandatory. It is evident that non-compliance to the second proviso to the extent of failure to grant hearing does not prescribe any consequence and it is for the said reason that the Hon'ble Supreme Court has held that a mere non- compliance of the directive would not vitiate the trial.

(18) As has been pointed out by counsel for respondent, trial has advanced to an extent of being concluded inasmuch as, even the statement under Section 313 CrPC stands recorded. The delay on the part of the petitioner in approaching the Court has not been satisfactorily explained. Besides, apart from the apprehension that petitioner is likely to be sentenced for an imprisonment beyond one year, the same cannot be said to be a prejudice caused to an accused. The said discretion is yet to be exercised by judicial prudence and is not a judgment as regards conclusion of guilt of an accused. It does not thus amount to determination of any right of an individual or to have occasioned a prejudice to him. A prejudice has to be established and an apprehension of higher sentence is not a prejudice since sentencing or conviction are to be awarded after following the procedure prescribed in law and after affording opportunity of hearing to the respective parties.

(19) The inherent power vested in a High Court under Section 482 CrPC are to be exercised to prevent the abuse of the process of law and to secure the ends of justice. Such a power is to be exercised sparingly, with circumspection and in the rarest of rare cases. The very fact that statement under Section 313 CrPC had been recorded in the month of December 2015 would be sufficient to dismiss the present petition. It would rather be expedient that the trial in questionis concluded at the earliest.

(20) The instant petition is accordingly dismissed being without any merit and being an attempt to delay the proceedings at a highly belated stage when the trial was at its fag end and statement under Section 313 CrPC had already been recorded. However, the trial Court is directed to ensure expeditious decision of the main case itself.

Dr. Sumati Jund