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RADHEY SHYAM GARG
V.
NARESH KUMAR GUPTA
Criminal Appeal No. 912 of 2009

MAY 5, 2009

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(S.B. SINHA AND DR. MUKUNDAKAM SHARMA, JJ.)

Negotiable Instruments Act, 1881:

Sections 138, 145(2) – Evidence – Witness – Whether a C *witness can again be summoned for his examination in chief despite affirming affidavits in that behalf –* ***Held:*** *No – Evidence Act, 1872, Sections 137, 138 – Code of Criminal Procedure, 1973, Section 61.*

The question involved in the appeal was whether a D **witness can again be summoned for his examination in chief in the court despite affirming affidavits in that behalf.**

Dismissing the appeal, the Court

HELD: 1. Examination in terms of the provisions of E **the Indian Evidence Act envisages examination in chief, cross-examination and re-examination, as would appear from Sections 137 and 138 thereof. A person whose evidence has been taken by way of an examination in chief by way of affidavit, keeping in view the statutory scheme** F **noticed both in the Code of Civil Procedure as also in the Code of Criminal Procedure, there cannot be any doubt whatsoever that a person intends to summon a witness who had filed his affidavit would be only for the purpose of his cross-examination. It is, however, possible that a** G **party examining his own witnesses including the complainant may not affirm an affidavit or would like to examine himself in court. Sub-section (2) of Section 145 as also sub-section (2) of Section 296 of the Code of**

Criminal Procedure, should be interpreted in that manner. [Para 13] [514-B-E]

2. If affidavit in terms of the provisions of Section 145 of the Act is to be considered to be an evidence, it is difficult to comprehend as to why the court will ask the deponent of the said affidavit to examine himself with regard to the contents thereof once over again. He may be cross-examined and upon completion of his evidence, he may be re-examined. Thus, the words "examine any person giving evidence on affidavit as to the facts contained therein, in the event, the deponent is summoned by the court in terms of sub-section (2) of Section 145 of the Act", would mean for the purpose of cross-examination. The provision seeks to attend a salutary purpose. [Para 15] [516-B-D]

Sushil Kumar Sharma v. Union of India & Ors. (2005) 6 SCC 281 – held inapplicable.

State of Jharkhand & Anr. v. Govind Singh (2005) 10 SCC 437 – distinguished.

3. The object of enactment of the said provision is for the purpose of expedition of the trial. A criminal trial even otherwise is required to be expeditiously held. There is no justification for arriving at a finding that a witness can again be summoned for his examination in chief in the court despite affirming affidavit in that behalf. Section 61 Cr.P.C., has no application to the facts and circumstances of this case. [Paras 16,17,18] [516-G-H; 517-A-C]

Case Law Reference

(2005) 6 SCC 281	**held inapplicable**	**Para 14**
(2005) 10 SCC 437	**distinguished**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 912 of 2009

From the Judgement and Order dated 14.03.2008 of the Metropolitan Magistrate, Delhi

Vishal Aggarwal, Vishal Garg (for S.S. Jauhar), for the Appellant.

Naresh K. Gupta-in-person, for the Respondent.

The Judgement of the Court was delivered by

S.B. SINHA, J.

1. Leave granted.

2. Appellant is before us aggrieved by and dissatisfied with a judgment and order dated 9.5.2008 passed by a learned Single Judge of the High Court of Delhi at New Delhi in Criminal M.C. No.1522 of 2008.

3. Respondent filed a complaint petition in the Court of Chief Metropolitan Magistrate, Delhi on or about 7.6.2004 which was marked as Criminal Complaint Case No.882/1 of 2004 for commission of an alleged offence under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the Act'). Pre-summoning evidence by the complainant was recorded by way of an affidavit. Cognizance of the offence was taken and summons was directed to be issued by an order dated 9.6.2004. Post-summoning evidence was also adduced by the complainant on 26.3.2007 by way of an affidavit.

4. It now appears that respondent examined himself and was cross-examined at length. His cross-examination started 12.9.2008. It runs into nine typed pages. Indisputably, prior to offering himself for cross-examination, appellant proved his affidavits which were marked as Exhibits CW1/A to CW1/1. A large number of questions were asked to the deponent on the contents of the affidavits.

5. It, however, appears that an application purported to be under Section 145(2) of the Act was filed by the appellant on 7.3.2008 which by reason of an order dated 14.3.2008 was

dismissed. Appellant filed an application before the High Court purported to be under Section 482 of the Code of Criminal Procedure for setting aside the said order.

By reason of the impugned judgment, the same has been dismissed.

6. Mr. Vishal Aggarwal, learned counsel appearing on behalf of the appellant, would contend that on a plain reading of Section 145 of the Act, it would be evident that the same is imperative in character. By reason of the said provision, it was urged, the court has no other option but to examine a witness including the complainant who had affirmed an affidavit in support of his statement. Drawing our attention to the provisions of sub-section (2) of Section 296 of the Code of Criminal Procedure, the learned counsel would urge that the same being in pari materia with Section 145 of the Act, the learned Trial Judge as also the High Court must be held to have committed a serious error in passing the impugned judgment.

7. Respondent who, however, has appeared in person drew our attention to some disturbing facts, namely, the signatures of the appellant appearing at the end of the verification portion which is at page 39 of the paper book as also his signatures appearing in the affidavit affirmed in support of the application for stay to contend that even with a naked eye, the same would appear to be different. Our attention was furthermore drawn to the fact that although in the affidavit affirmed by the appellant in support of the application for stay is dated 31.7.2008, the same appears to have been drafted on 16.9.2008 and filed on 19.9.2008. We may, however, notice that in our copy, the said application was said to have been drawn on 30.7.2008 and filed on 31.7.2008.

8. Before, however, we advert thereto, we may place on record that the respondent herein in his affidavit has stated as under :

"4. That cross-examination of the respondent in trial Court

A in complaint No.882/1 of 2004 (presently numbered as 521/07) had already been completed on 12th September, 2009 before filing of the abovementioned petition on 19.09.2008. A certified copy of the cross-examination of the respondent is enclosed-Annexure R-1.

B 5. That while applying for stay this material fact of respondent's examination already being over was not brought to the notice of this Hon'ble Court and was hidden from this Hon'ble Court. The petitioner has got opportunity to examine the respondent and has already availed the C same on the point sought to be considered in Special Leave Petition No.7487 of 2008 filed by the petitioner.

6. That the respondent has also been examined by the counsel of the accused on 16.07.2008 and 30.08.2008 in D another Civil Suit No.325/06 filed by the respondent for the same matter in the Court of Additional District Judge at Tis Hazari Courts. A certified copy of the same is enclosed-Annexure R-2.

7. That even petitioner has been examined partly in the E said Civil Suit No.325/06 on 19.02.2008 in the Court of Additional District Judge at Tis Hazari Courts. A certified copy of the same is enclosed-Annexure R-3.

8. After 19.02.2008, the appellant had not been attending the proceedings for more than 6 months resulting into F imposition of costs and closure of his right of cross examination on 10.09.2008. A certified copy of the same is enclosed – Annexure R-4.

9. The petitioner has not been presenting himself even G after the ex parte order in the aforesaid civil suit and seeking adjournment on frivolous grounds."

9. No rejoinder thereto has been filed by the appellant. The contents thereof even otherwise are matter of record.

H 10. Evidence by way of affidavit, thus, was filed both in the

civil proceedings as also in the criminal proceedings. We have noticed hereinbefore, the cross-examination is also over. It has not been shown nor do we find that the appellant has been prejudiced in any manner whatsoever. Section 145 of the Act reads as under :

> "**145.—Evidence on affidavit.**—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.
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> (2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

It contains a non-obstante clause. The provisions of the Code of Criminal Procedure, 1973 are, thus, not attracted. The Court, subject to just exceptions, may allow the complainant to give evidence by way of affidavit. Such an evidence by way of affidavit had been made admissible in evidence in any enquiry, trial or other proceedings under the Code. Whereas sub-section (1) of Section 145 uses the term 'may', sub-section (2) thereof uses the term 'shall'. The first part of the aforementioned provision must be read with sub-section (1) of Section 145. It, therefore, merely points out to the discretionary power of the court conferred upon it by reason thereof.

The Court, however, has no other option but to summon and examine any person who has given evidence on affidavit as to the facts contained therein if an application is filed either by the prosecution or the accused. Section 145 must be read reasonably. Section 296 of the Code of Criminal Procedure although refers to an evidence of a formal character, no doubt contains a pari materia provision.

We may also notice the relevant provisions of the Code of Civil Procedure.

A 11. Order XIX, Rule 1 of the Code Procedure reads as under :

"1. Power to order any point to be proved by affidavit— Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

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Provided that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit."

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The relevant portion of Order XVIII Rule 4 reads as under :

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"**4. Recording of evidence**—(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

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(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:

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A Three Judge Bench of this Court in *Ameer Trading Corporation Ltd. v. Shapoorji Data Processing Ltd.* [(2004) 1 SCC 702], held as under :

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"**13.** The other sub-rules of Rule 4 of Order 18 provide for other and further procedures as regards examination of witness.

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14. Rule 5 refers to the evidence which is required to be taken in cases where the appeal is allowed in contradistinction with the cases where appeal is not allowed as envisaged in Rule 13 of Order 18 of the Code of Civil Procedure. Rule 5, therefore, envisages a situation where the court is required to take down an evidence in the manner laid down therein which would mean that where cross-examination or re-examination of the witness is to take place in the court.

15. The examination of a witness would include evidence-in-chief, cross-examination or re-examination. Rule 4 of Order 18 speaks of examination-in-chief. The unamended rule provided for the manner in which "evidence" is to be taken. Such examination-in-chief of a witness in every case shall be on affidavit.

16. The aforementioned provision has been made to curtail the time taken by the court in examining a witness-in-chief. Sub-rule (2) of Rule 4 of Order 18 of the Code of Civil Procedure provides for cross-examination and re-examination of a witness which shall be taken by the court or the Commissioner appointed by it.

17. We may notice that Rule 4 of Order 18 as amended with effect from 1-7-2002 specifically provided thereunder that the examination-in-chief in every case shall be on affidavit. Rule 5 of Order 18 had been incorporated even prior to the said amendment."

12. Mr. Aggarwal, however, has drawn our attention to a decision of this Court in *State of Punjab v. Naib Din* [(2001) 8 SCC 578], wherein it has been held :

"8. What is meant by an evidence of a formal character? It depends upon the facts of the case. Quite often different steps adopted by police officers during the investigation might relate to formalities prescribed by law. Evidence, if necessary on those formalities, should normally be

A tendered by affidavits and not by examining all such policemen in court. If any party to a lis wishes to examine the deponent of the affidavit it is open to him to make an application before the Court that he requires the deponent to be examined or cross-examined in Court. This is B provided in sub-section (2) of Section 296 of the Code. When any such application is made it is the duty of the Court to call such person to the court for the purpose of being examined."

13. Examination in terms of the provisions of the Indian C Evidence Act envisages examination in chief, cross-examination and re-examination, as would appear from Sections 137 and 138 thereof. A person whose evidence has been taken by way of an examination in chief by way of affidavit, keeping in view the statutory scheme noticed both in the Code D of Civil Procedure as also in the Code of Criminal Procedure, there cannot be any doubt whatsoever that a person intends to summon a witness who had filed his affidavit would be only for the purpose of his cross-examination. It is, however, possible that a party examining his own witnesses including the E complainant may not affirm an affidavit or would like to examine himself in court. Sub-section (2) of Section 145 as also sub-section (2) of Section 296 of the Code of Criminal Procedure, in our opinion, should be interpreted in that manner.

14. Our attention has furthermore been drawn to a decision F of this Court in *Sushil Kumar Sharma v. Union of India & Ors.* [(2005) 6 SCC 281], wherein this Court held as under :

"**16.** As observed in Maulavi Hussein Haji Abraham Umarji v. State of Gujarat, Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corpn. and Padma Sundara Rao v. State G of T.N. while interpreting a provision, the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary."

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There is no dispute with regard to the aforementioned proposition of law. However, while interpreting a provision, the Court must be able to assign a meaning thereto. A plain meaning or literal interpretation should not lead to absurdity or an anomalous situation.

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The Court therein was dealing with an offence. The said word used having regard to the contentions raised therein that Section 498A of the Indian Penal Code was possible to be misused. It was in the aforementioned context, the Court observed :

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"**12.** It is well settled that mere possibility of abuse of a provision of law does not per se invalidate a legislation. It must be presumed, unless the contrary is proved, that administration and application of a particular law would be done "not with an evil eye and unequal hand". (See *A. Thangal Kunju Musaliar* v. *M. Venkatichalam Potti.*)

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14. From the decided cases in India as well as in the United States of America, the principle appears to be well settled that if a statutory provision is otherwise intra vires, constitutional and valid, mere possibility of abuse of power in a given case would not make it objectionable, ultra vires or unconstitutional. In such cases, "action" and not the "section" may be vulnerable. If it is so, the court by upholding the provision of law, may still set aside the action, order or decision and grant appropriate relief to the person aggrieved."

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The said decision, therefore, in our opinion, has no application at all.

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Reliance has also been placed on *State of Jharkhand & Anr. v. Govind Singh* [(2005) 10 SCC 437], wherein it was stated :

"**12.** It is said that a statute is an edict of the legislature.

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A The elementary principle of interpreting or construing a statute is to gather the mens or sentential legis or the legislature."

The said rule, however, would apply only where the language is clear.

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15. If affidavit in terms of the provisions of Section 145 of the Act is to be considered to be an evidence, it is difficult to comprehend as to why the court will ask the deponent of the said affidavit to examine himself with regard to the contents thereof once over again. He may be cross-examined and upon C completion of his evidence, he may be re-examined. Thus, the words "examine any person giving evidence on affidavit as to the facts contained therein, in the event, the deponent is summoned by the court in terms of sub-section (2) of Section 145 of the Act', in our opinion, would mean for the purpose of D cross-examination. The provision seeks to attend a salutory purpose.

The statements of objects and reasons for enacting the said provision, inter alia read, inter alia, as under :

E "Keeping in view of the recommendations of the Standing Committee on Finance and other representations, it has been decided to bring out, inter alia, the following amendments in the Negotiable Instruments Act, 1881, namely:—

F (i) to (iii)...

(iv) to prescribe procedure for dispensing with preliminary evidence of the complainant;

(v) ...

G (vi) to provide for summary trial of the cases under the Act with a view to speeding up disposal of cases;"

16. The object of enactment of the said provision is for the purpose of expedition of the trial. A criminal trial even otherwise H is required to be expeditiously held.

17. We, therefore, do not find any justification for arriving at a finding that a witness can again be summoned for his examination in chief in the court despite affirming affidavit in that behalf. A

18. Respondent would however, submit that having regard to the provisions of Section 61 of the Code of Criminal Procedure and furthermore in view of the fact that a complainant is required to be present throughout and, thus, unless exempted, question of summoning him does not arise. Section 61 of the Code, however, in our opinion, has no application to the facts and circumstances of this case. B C

19. We do not find any merit in this appeal. It is dismissed accordingly. However, keeping in view the fact that there appears to be an apparent dissimilarity in the signatures of the deponent appearing at pages 39 and 61, we are of the opinion that there exists a necessity for conducting an enquiry in this behalf. We, therefore, direct the Registrar (Judicial) to conduct an enquiry in terms of Section 340 of the Code of Criminal Procedure and submit a report to this Court. We, however, make it clear that trial of the matter shall go on before the court below. D E

20. The appeal is dismissed with costs. Counsel's fee assessed at Rs.25,000/-.

G.N. Appeal dismissed.