

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2009 OF 2012

MR.GURURAJ DHIRENDRARAO KADIMDIWAN)
@ MR.G.D.K. DIWAN)...PETITIONER

V/s.

MR.RAJESH WADHWA AND ANR.)...RESPONDENTS

Mr.Mayur Sonawane Advocate for the Petitioner.

Smt.Pravina J. Kanani Advocate for the Respondent No.1.

Mr.S.S.Pednekar APP for the State / Respondent No.2.

CORAM: ABHAY M.THIPSAY, J.

DATE : 10th AUGUST, 2012.

ORAL ORDER :

Rule.

By consent, Rule made returnable forthwith.

By consent, heard finally.

2 The petitioner is the accused no.3 in
C.C.No.4654/SS/2005, pending before the Metropolitan Magistrate,
12th Court, Bandra, Mumbai. The said case is in respect of an offence
punishable under Section 138 of the Negotiable Instruments Act
(N.I.Act). The respondent no.1 is the complainant therein, on whose

complaint, the case has been instituted. The respondent no.1's (hereinafter referred to as the complainant) affidavit in lieu of the examination in chief was tendered in the court. He was thereafter, cross examined on behalf of the petitioner. After the cross examination of the complainant was over, the counsel for the complainant submitted that he wanted to re-examine the complainant for certain purposes and for producing and proving certain documents. The Magistrate therefore adjourned the case for hearing on the application of re-examination, which was opposed to by the petitioner herein. The Magistrate, however, by his order dated 21.3.2012, allowed the application in the following terms :

Application for permission to re-examine the complainant is allowed as prayed for.

The complainant is allowed to be re-examined in respect of the documents sought to be produced by complainant which are produced in the course of conducting his cross-examination in the interest of justice. No cost.

Matter is adjourned to 4th April 2012 at 11.00 p.m. for re-examination.

3 Being dissatisfied by that order, the petitioner approached the court of Sessions in revision, but the court of Sessions dismissed the revision. This is how, the petitioner has approached this court, by filing the present petition under Section 482 of the Code of Criminal Procedure (Cr.P.C.) and praying that the order dated 21.3.2012 passed by the Magistrate, be quashed and set aside.

4 I have heard Mr.Mayur Sonawane, the learned counsel for the petitioner, and Mrs.Pravina Kanani, the learned counsel for the original complainant.

5 Though the petitioner has challenged the permissibility of permitting the complainant to be re-examined, in the oral arguments advanced before me, this challenge is given up. What is submitted is that, *if at all the complainant is to be re-examined, he cannot be permitted to file an affidavit in lieu of the re-examination.* In view of this concession, I have not gone into the correctness or otherwise of the order, permitting the complainant to be re-examined.

6 Since the order passed by the Magistrate only mentions that “the complainant is allowed to be re-examined.....” it was not clear whether the Magistrate intended that the re-examination should be done in the normal way by putting the complainant in the witness box and by allowing him to be examined by his counsel. However, Mr.Sonawane, as well as Mrs.Kanani, both stated before me that *it was understood that the Magistrate would be accepting the affidavit of the complainant in lieu of re-examination, and the order passed by him permitting the complainant to be re-examined, is actually meant to be “an order permitting the complainant to file an affidavit in lieu of the re-examination.”*

7 Now, the only limited question that arises is whether the evidence of the complainant in re-examination can be given by an affidavit.

8 The only basis for claiming that it can be done, is the provision of Section 145 of the N.I.Act., which reads as under :

S.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.

(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.

9 Mrs.Kanani, the learned counsel for the complainant, submitted that since Section 145 of the N.I.Act speaks of “evidence” to be given on affidavit, it includes the re-examination as well. In support of this proposition, she placed reliance on the following two decisions of this court :

1 . M/s.Jagdale Mirch Masala Products (India) v/s. Kamal Foods and Another (2010 ALL MR (Cri) 1783)

2 . Rajesh Bhalchandra Chalke v/s. State of Maharashtra & Anr. (2011(1) Bom.C.R. (Cri.) 1)

With the assistance of the learned counsel, I have gone through both the reported judgments.

10 In M/s.Jagdale Mirch Masala Products (India) v/s. Kamal Foods and Another (2010 ALL MR (Cri) 1783), the question that arose before the court was different. There the basic objection that had been taken on behalf of the accused therein was *for permitting additional evidence to be given by the complainant*. The court, in that case, considered the powers of the court under Section 311 of the Cr.PC. and held that the court has to be liberal in permitting additional evidence to be given. It is true that at some places, a reference has been made to “additional affidavit in lieu of examination-in-chief” but it is clear on a reading of the judgment that the issue was whether additional evidence should be permitted or not; and a reference to the affidavit in lieu of examination-in-chief was only incidental. The question whether such additional evidence could be given by filing an affidavit or whether it was required to be given orally, was apparently not raised in that case. It was neither argued before the court, nor was it decided. This judgment cannot be construed as an authority for the proposition that “*in view of the provisions of Section 145 of the N.I.Act, the evidence of the complainant in re-examination can be given by filing an affidavit.*”

11 In Rajesh Bhalchandra Chalke v/s. State of Maharashtra & Anr. (2011(1) Bom.C.R. (Cri.)1) also, the question before the Full Bench was altogether different. It was specifically recorded in paragraph 2 of the reported judgment. It was held that the oral examination of the complainant as contemplated under Section 200 of the Code (popularly known as “verification”) could be dispensed with by the Magistrate, who had a discretion to rely on an affidavit of the complainant instead. Even this judgment, does not support the proposition that is being canvassed.

12 The argument that Section 145 speaks of “evidence” and that therefore, it would include “re-examination” also, does not impress me. **It is because, if this proposition is stretched, it would mean that even the evidence in cross-examination could be given by an affidavit**, which is an absurd proposition and cannot be advanced. It is therefore clear, that the word “evidence” appearing in Section 145 of the N.I.Act needs to be reasonably construed.

13 For deciding the question whether it would be proper to permit the complainant or his witness to file an affidavit in lieu of re-examination, one has to keep in mind that the stage of re-examination would come only after the cross-examination is over. The order of the examinations has been laid down by Section 138 of the Evidence Act :- viz., that the witnesses shall be first 'examined in chief', then “cross- examined' and then, if so desired by the party calling them, 're-examined.' The direction of re-examination has been laid down by same section, as to the explanation of matters referred to in the cross-examination. New matter can be introduced in re-examination only by the permission of the court.

14 It is evident that inspite of Section 145 of the N.I.Act, the cross-examination of the complainant or his witness could not be by way of an affidavit; and no one would even try to suggest it. The question then would be “whether after the complainant or his witness has been cross examined, and the complainant thinks that as the matter stands, the accused may derive some advantage, unless certain matters

are got clarified from the complainant / witness or some more facts are brought on record through him, whether the complainant should be permitted to file an affidavit, in “lieu of the re-examination,” to meet the object of the re-examination.

15 It has already been observed that I am not going into the question as to whether the decision to permit the complainant to be re-examined is proper or not, but only into the question, whether such re-examination can be done by permitting an affidavit of the complainant to be filed. In my opinion, it cannot be done. The oral examination of a witness takes place in the presence of the court. The court can see what question is asked, what answer is given, and above all, how it is given. It is obvious that when an affidavit of evidence is prepared, the complainant or the concerned witness would be guided by his legal advisor and even by other persons. He would be told as to what should be stated and / or what should not be stated. The scheme of the Evidence Act is not to permit decision to be arrived at on the basis of affidavits, and it is only because of special provisions made under Section 145 of the N.I.Act, that the evidence of the complainant and witnesses, is permitted to be given on affidavit. Thus, Section 145 is basically an exception to the general rule that all facts except the contents of documents, must be proved by oral evidence. This provision therefore, cannot be stretched to mean that, even after a person has been cross examined, he would be permitted to file simply an affidavit by way of re-examination.

16 Apart from this, Section 145 itself makes it clear that the court would have a discretion in the matter. Sub-Section (2) clearly states that even in cases of examination in chief, the court may, if it thinks fit, summon and examine any person, as to the facts stated by him in affidavit. Thus, even in case of examination in chief, the court has been given a discretion of requiring the presence of the complainant or the witness concerned, and can question him about the facts stated in the affidavit.

17 In my opinion, Section 145 of the N.I.Act, cannot be interpreted in a way, so as to mean that the evidence in re-examination can be given by the complainant by filing an affidavit. That would be contrary to the scheme of the provisions of Evidence Act and the concept of fairness.

18 The Petition, therefore, succeeds to this extent.

The order dated 21.3.2012, permitting re-examination of the complainant is maintained, with the clarification that such re-examination has to be as per the normal procedure i.e. by oral examination and not by filing any affidavit in lieu thereof.

Rule is made absolute in aforesaid terms.

(ABHAY M.THIPSAY, J.)