

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C. No.1522/2008**

% Date of Decision : 9.5.2008

Radhey Shyam Garg Petitioner
Through: Mr. Vijay Aggarwal, Advocate

versus

Sh. Naresh Kumar Gupta Respondent
Through: Mr. Pawan Sharma , APP
for the State

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

VIPIN SANGHI, J. (Oral)

Crl.M.A.No. 5674/2008 in Crl.M.C. No. 1522/2008

Allowed, subject to all just exceptions.

Crl.M.C. No. 1522/2008 & Crl.M.A. No. 5673/2008

1. The petitioner challenges the order dated 14.3.2008 passed by the learned Metropolitan Magistrate, Delhi whereby the learned Magistrate has dismissed the application under Section 145(2) of the Negotiable Instruments Act (the Act) filed by the petitioner/accused, praying that the complainant, who has filed his evidence on affidavit, may be summoned to examine him as to the

facts contained therein. Section 145 of the Act reads as follows:

“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.”

2. Learned Magistrate has rejected the application on the ground that the phrase “any person” mentioned in the subsection (2) of Section 145 does not include the complainant, because the complainant has been specifically mentioned in Subsection (1) thereof, but there is no such mention in subsection (2). His reasoning is that if the complainant is to be included in the phrase “any person” occurring in sub-Section (2) of Section 145 of the Act, then the purpose of allowing the complainant to file evidence on affidavit would be defeated. In each and every case, he observes, the accused will move an application to get the complainant examined just to delay the matter. Learned Magistrate has also referred to Section 296 of the Cr.P.C. (the Code) which employs some what similar language as is employed in Section 145 of the Act. The same reads as follow:

“296. Evidence of formal character on affidavit-(1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.”

3. The Magistrate refers to the decision of the Supreme Court in ***State of Punjab vs. Naib Din*** 2002 SCC (Cri) 33 and relies upon the same to arrive at his decision.

4. Submission of learned counsel for the petitioner is that the language employed in Section 145 (2) of the Act is very clear and leaves no manner of doubt that if the prosecution, or the accused moves an application that the deponent of the affidavit/witness be examined as to the facts contained in the affidavit, the Court has no option but to summon the deponent, whosoever he be. He emphasizes on the use of the expression '*shall*' in relation to the duty of the Court to summon the deponent of the affidavit who may be "*any person*", in contradistinction with the use of the expression "*may*" used in relation to the *suo moto* exercise of the power by the Court. He also submits that there is no basis for the learned Magistrate to conclude that the expression "*any person*" used in Section 145(2) of the Act would not include the complainant. He submits that both the sub-Sections have to be read together. If so read, the complainant cannot be excluded

from the meaning of the expression “*any person*” used in Section 145(2) of the Act. He submits that various Magistrates have understood Section 145(2) of the Act as covering within its ambit the complainant also, and have also recognized the undeniable right of the applicant to examine the witness who has deposed on an application being made under Section 145(2) of the Act.

5. Learned counsel for the petitioner further submits that generally the complainant swears the affidavit by way of evidence prepared by his counsel. However, it is possible that when he is examined in Court, he may not state all that he may have said on solemn affirmation in his affidavit, or say something different, which may not be enough to sustain his complaint, or may be self-defeating to his cause and may lead to acquittal of the accused. He submits that by virtue of Section 145 (1) of the Act, the Magistrate dispenses with the recording of evidence of the complainant in Court, and proceeds to examine the complaint at the pre-summoning stage on the evidence on affidavit tendered by the complainant, for the purpose of deciding whether or not to issue process. However, once the process has been issued and the accused makes his appearance, he gets a right under Section 145(2) to summon and examine any person giving evidence on affidavit as to the facts contained therein, and this includes the complainant. He also relies on the aforesaid decision of the Supreme Court in ***Naib Din*** (*supra*).

6. Having heard learned counsel for the petitioner, I am not inclined to agree with the submissions of the petitioner, and I am of the view that the learned Magistrate has rightly dismissed the petitioner's application under Section 145(2) of the Act, though my reasons are somewhat different from those given by the learned Magistrate.

7. Section 4 of the Code, inter alia, states that all offences under any other law (i.e. laws other than the IPC) shall be investigated, enquired into, tried and otherwise be dealt with according to the provisions of the Code, but subject to any enactment for the time being in force regulating, inter alia, the manner of trying or dealing with such offences. The Act is a law which regulates the manner in which the trial of the offence under Section 138 shall be conducted. The application of the procedure prescribed by the Code is, therefore, subject to the procedure prescribed by the Act, and the provisions of the Act would have an overriding effect. This intention of the legislature is also demonstrated by Section 5 of the Code, which saves the existing special and local laws, inter alia, prescribing special procedure, on the coming into force of the Code.

8. Section 145 of the Act begins with words "*Notwithstanding anything contained in the Code.....*". Therefore, Section 145 of the Act is an exception to the normal rule as envisaged in Section 200 of the Code, that the complainant would be required to

give his evidence by appearing in person and by making a statement on oath before the Court. Section 145 is located, in Chapter XVII of the Act which deals with *“Penalties in case of Dishonour of Certain Cheques for insufficiency of funds in the Accounts”*. By virtue of Section 143 of the Act, notwithstanding anything contained in the Code, offences under the said Chapter XVII of the Act are triable by a Judicial Magistrate of the First Class, or by a Metropolitan Magistrate and the procedure applicable to summary trials under the Code, contained in Sections 262 to 265, both inclusive, as far as may be, apply to such trials.

9. It is now well-recognised that Chapter XVII was introduced in the Act with a view to provide greater efficacy to transactions undertaken on the basis of cheques and to instill confidence in the minds of the people in the commercial world with regards to the workability of the system of payments made by cheques. The transactions, wherein consideration passes through cheques, cannot be lightly taken any longer by the drawers of the cheques, as the breach of such transactions as a result of the dishonour of the cheques issued by one of the parties, would result in penal consequences in certain situations. A reading of Chapter XVII of the Act also shows that the procedure prescribed has been made less cumbersome and more user friendly. Time is of essence in any commercial transaction, and it appears that being sensitive to this

aspect, the Parliament legislated the said Chapter in the Act. This is also clear from a reading of Sections 138, 139, 143, 144 and 146 of the Act. Section 138 creates the offence where the drawer fails to make payment of the amount of money covered by the cheque to the payee or the holder in due course, as the case may be, within 15 days of the receipt of the notice of dishonour, and the dishonour is for specified reasons. Section 139 raises a rebuttable presumption that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. Section 143 makes applicable the procedure of summary trials as prescribed in the Code. Section 143 (2) & (3) are very relevant and read as follows: -

“143. Power of Court to try cases summarily -

- (1)
- (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.”

10. Therefore, the dictate of the law is that the summary trial should normally be continued from day to day until its conclusion and the endeavour of the Court should be to conclude the trial within

six months from the date of filing of the complaint.

11. Section 145 of the Act has also to be read and understood, keeping in mind the orientation of the law contained in Chapter XVII of the Act. The complainant is normally the driving force behind the complaint, and the most important witness in any such complaint. In spite of this being the position, Section 145(1) of the Act carves out an exception to the normal rule, and provides that the complainant may give his evidence on affidavit which may, subject to just exceptions, be read in evidence in any enquiry, trial and other proceedings under the Code. This is an enabling provision, introduced presumably for the reason that a complaint of this nature is based on documentary evidence viz. the cheque, the dishonour memo, the notice and its acknowledgment. This exception is also structured to cut out the time that may be spent in recording the statement of the complainant if he is obliged to appear in person and make his statement before the Court. The purpose behind enacting Section 145 of the Act appears to be to expedite the disposal of complaints made under Section 138 of the Act, and to save the time of the court and the witness(s), and to save costs and inconvenience being caused to one or the other party.

12. The evidence led on affidavit by the complainant, by virtue of Section 145 of the Act, is good evidence in any enquiry, trial

and other proceedings under the Code. The pre-summoning stage is akin to the stage of enquiry. However, the evidence led on affidavit by the complainant can be read even at the stage of trial and other proceedings. Therefore, the submission of learned counsel for the petitioner that the evidence by way of affidavit can be considered as good evidence only at the pre-summoning stage, and not after the accused has been summoned and he has appeared, does not appear to be correct.

13. The expression "*the evidence of the complainant*" used in Section 145(1) of the Act, when read in the light of the words "*any person giving evidence on affidavit*", shows that the evidence of the complainant is not restricted to the evidence by way of affidavit of the complainant himself, but that it may include the evidence by way of affidavit of any other person, as a witness in support of the complaint. Section 145(1) cannot be read as carving out an exception only qua the complainant. In fact, once the complainant is permitted to lead his own evidence on affidavit, it does not stand to reason that the evidence of any other witness, whom the complainant may wish to call, should only be led by requiring the witness to personally appear in Court to make his statement on solemn affirmation. From the use of expression "*on the application of the prosecution or the accused*" used in Section 145(2) of the Act, and keeping in mind the overall object of speedy disposal of complaints under Section 138 by a summary trial

procedure, it follows that the accused and witnesses called by him, if any, in support of his defence are also entitled to lead their evidence on affidavit. By virtue of Section 262 of the Code, Chapter XX of the Code dealing with *“trial of summons cases by Magistrates”* is applicable for summary trials. Section 254 of the Code, which is placed in the said Chapter, states that if the Magistrate does not convict the accused under Section 252 and Section 253, he shall proceed to hear the prosecution and take such evidence as may be produced in support of the prosecution and also to hear the accused and take all such evidence as he produces in his defence.

14. Once the evidence of a witness, who has been called either by the complainant or the accused is led, whether on affidavit or otherwise, the adverse party, is entitled to require the Court to summon the witness, to face cross-examination. Unless a witness goes through the test of cross-examination, his evidence towards examination-in-chief normally cannot be read. There may be situations where the complainant or the accused may be entitled to apply to the Court to summon and examine the witness called by him, and whose evidence has been led on affidavit. Normally such applications would be moved to re-examine the witness within the limited scope for re-examination available under the law. A complainant or an accused, as the case may be, may also be entitled to examine a witness called by him, and whose evidence has been led

on affidavit, where he wishes to seek any clarification or elaboration on any aspect of the evidence led on affidavit by the witness. However, in my view, once the complainant and his witnesses have led their evidence on affidavit or otherwise, except in special circumstances, the only right that is available to the accused is to cross-examine the complainant and the witnesses called by him, and not to insist that the complainant and the witnesses called by him be examined in Court by ignoring the evidence on affidavit of the said witnesses. I may refer to Sections 137 and 138 of the Evidence Act in this regard. The same read as follows:

“137. Examination-in-chief.- The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.- The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.- The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

138. Order of examinations.- Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.- The re-examination shall be directed to the

explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”

15. The right of the accused conferred by Section 145(2) of the Act, in the context of evidence led on affidavit by the complainant and by any other witness whom he may call, or whose evidence i.e. examination-in-chief has been led on affidavit normally can only mean a right of cross-examination. The accused is, however, entitled to raise objections to the evidence on affidavit of the complainant, or of witnesses called by him, since Section 145(1) of the Act states that affidavit may be read in evidence “*subject to all just exceptions*”. Similar would be the position with regard to the rights of the complainant vis-a-vis the evidence by way of affidavit(s) by the accused and other witnesses called by the accused in support of his defence.

16. The right of the accused to cross-examine the complainant or any other witness called by the the complainant is preserved. Therefore, in my view, it would be open to the petitioner/accused to examine the complainant and witnesses called by him, on the evidence given on affidavits and as to the facts contained therein, at the time of cross-examination of the complainant or the witnesses called by him, as the case may be.

17. I find force in the reason given by the learned Magistrate that the purpose of enacting Chapter XVII in the Act would be defeated, and the accused and/or the complainant would be in a position to prolong the trial in every case requiring that the complainant/accused and the witnesses called by him as the case may be, should be summoned and examined in person as to the facts contained in his affidavit by way of evidence, irrespective of the fact that the witness has already tendered his evidence towards examination-in-chief on affidavits.

18. Such an interpretation to Section 145(2) of the Act would not only go contrary to the scheme of Chapter XVII of the Act, but also defeat the very object and purpose, for the attainment of which the said Chapter has been introduced i.e. to provide an effective and expeditious remedy to the drawee or the holder in due course of a cheque, which has been dishonoured upon presentation for the specific reasons stated in Section 138 of the Act.

19. I do not agree with the reasoning adopted by the learned Magistrate that the expression “any person” used in Section 145 (2) would not include the complainant. The expression “any person” is very wide and would include any person, who has tendered his evidence on affidavit, whether that person is the complainant or any other witness produced by the complainant, the accused, or any

other witness produced by the accused.

20. I also do not agree with the reasoning adopted by the learned Magistrate by placing reliance on Section 296 of the Code. While dealing Section 296 of the Code, the Supreme Court in ***Naib Din*** (*supra*) observed as follows: -

“7. The normal mode of giving evidence is by examining the witness in court. But that course involves, quite often, spending of time of the witness, the trouble to reach the court and wait till he is called by the court, besides all the strain in answering questions and cross-questions in open court. It also involves costs which on many occasions are not small. Should a person be troubled by compelling him to go to the court and depose if the evidence which he is to give is purely of a formal nature? The enabling provision of Section 296 is thus a departure from the usual mode of giving evidence. The object of providing such an exception is to help the court to gain the time and cost, besides relieving the witness of his troubles, when all that the said witness has to say in court relates only to some formal points.

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 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 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.”

21. The observations of the Supreme Court in relation to Section 296(2) to the effect that “*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 or cross-examined in Court” have to be meaningfully understood in the conduct of Section 145 of the Act. It is well settled that the words used in a judgment should not to be read and interpreted like the Statute. The words “*examined or cross-examined*” would normally not, in the context include the examination-in-chief of the witness whose examination-in-chief has already been tendered on affidavit. As I have already noticed, a blanket right to the accused, or the complainant, to apply to the Court to summon the witness whose evidence has been taken on affidavit, towards examination-in-chief, for the purpose of examining him as to the facts contained in his affidavit, (as distinct from the right to cross-examine/re-examine a witness), would defeat the very purpose of early disposal of complaints under Section 138 of the Act.

22. I also do not agree with the submission of learned counsel for the petitioner, that at the time of his examination in Court, the complainant or any of the witnesses he may call may, or may not, make the same statement on oath, which are to be found in his evidence on affidavit towards examination-in-chief and that for this reason, the accused is entitled to require that the complainant or the witness called by him to be summoned to again and to be examined by the Court in examination-in-chief. Firstly, the purpose of summoning any person who has given his evidence on affidavit is not to test

whether the witness remembers exactly what he has deposed in his affidavit. Secondly, it is always open to the accused to cross-examine the complainant or the witnesses called by him and who have tendered their evidence on affidavit, and vice-versa. The purpose of cross-examination is to test the veracity of the evidence tendered by the witness in his examination-in-chief. Therefore, by not requiring the complainant or any witness called by him, who have given their examination-in-chief on affidavit, to again parrot out the statements made in the affidavits causes no prejudice to the accused. Similar would be the position with regard to the evidence tendered on affidavit by the accused and the witnesses called by him.

23. Turning to the facts of this particular case, I find that in the application filed by the petitioner under Section 145(2) of the Act for examining the authorised representative of the complainant in person, the petitioner has given no justification except to say that because the proceedings under the Negotiable Instruments Act are criminal in nature ***“it becomes very necessary in the interest of justice, that the complainant must depose their evidences before this Hon'ble Court on oath in person, not by way of the affidavit”***. The application further states in relation to Section 145(2) that:

“..... the section itself clearly speaks as under *“The Court may, if it thinks fit, and*

shall, on an application of the prosecution or the accused summon and examine any person giving evidence on affidavit as to the facts contained therein", thus needless to mention here that the Court is bound to examine-in-person, the person deposing on affidavit, when an application is being moved by either of the parties to the trial."

24. Thus, the petitioner has not disclosed any grounds whatsoever to justify his request for summoning the witness/deponent of the affidavit so as to justify the summoning of the witness to again be examined towards examination-in-chief in the Court on solemn affirmation. His argument that the Court is bound to summon the witness on a mere application, in all circumstances, is not acceptable.

25. The petitioner has relied on the various rules of interpretation in support of his argument and has cited decisions from the Supreme Court in that respect. It is argued that where a power is given to do a certain thing in a certain way the thing must be done in that way or no at all. This age old rule of interpretation was noticed by the Supreme Court in **A.K. Roy & Anr. vs. State of Punjab & Ors.** AIR 1986 SC 2160. It is argued that since the power given to the Court under Section 145(2) of the Act, is coupled with the duty to summon any person who has given evidence on affidavit, if an application for that purpose is made either by the prosecution or the accused, that power coupled with the duty has to be strictly complied with and that the Court cannot refuse to summon the witness for his

examination, be it is in examination-in-chief, cross-examination or re-examination. I do not agree with this interpretation sought to be given by the petitioner. Words used in a statute have to be meaningfully construed keeping in view that the object with which the legislature has enacted the provision. An interpretation which would defeat the purpose of legislation has to be eschewed. Moreover, I do not agree that it is the duty of the Court, on the mere asking of the prosecution or the accused, to summon any witness who has given his evidence on affidavit towards examination-in-chief, for being again examined in examination-in-chief, unless some special reasons therefor exist. It is then argued that the courts can only interpret the law and cannot legislate it. Therefore, if a provision of law is misused and subjected to abuse of process of law, it is for the legislature to amend, modify or repeal it if deemed necessary. In this regard reference is made to the decision of the Supreme Court ***Sushil Kumar vs. Union of India & Ors.***, (2005) 6 SCC 281. This argument ignores the fact that it is the duty and the prerogative of the Court to interpret the law. As aforesaid, while interpreting a provision the court has to give a meaningful interpretation to the words used in the statute so as to advance the purpose behind the statute. However, at the same time the interpretation should not do violence to the language used by the legislature. In the present case, it cannot be said that by restricting the right of the petitioner to examine the

complainant or any witness called by him, who has tendered his evidence on affidavit, the Court is legislating. It is also argued that when the words of statute are clear and unambiguous, i.e., they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of what has not been said. For this purpose learned counsel for the petitioner has relied on ***State of Jharkhand & Anr. vs. Govind Singh***, 2005 (10) SCC 437. In my view the aforesaid proposition also does not advance the case of the petitioner, since on a meaningful interpretation, it cannot be said that Section 145(2) is reasonably susceptible to only one meaning, which is advanced by the petitioner.

26. Ultimately the petitioner relied on the decision of the Division Bench of the Bombay High Court in ***Maharaja Developers & Anr. v. Udaysingh Pratapsinghrao Bhonsle & Anr.*** 2007 Cri.L.J. 2207 to contend that the non obstante clause in Section 142 or 145 of the Act does not override the provisions of Section 200 of the Code and that it is mandatory for the magistrate to examine the complainant who has filed the same under Section 138 of the Act with an affirmation as regards truthfulness of the contents of the complaint, and that the magistrate is obliged and duty bound to examine upon oath the complainant and his witnesses before issuance of process under Section 204 of the Code.

27. The decision in ***Maharaja Developers*** (supra) is also not of much avail to the petitioner since that was a case wherein the Division Bench of the Bombay High Court was considering the issue whether it is mandatory for the magistrate to examine the complainant who has filed a complaint under Section 138 of the Act with affirmation regards the truthfulness of the facts in the complaint, before issue of process under Section 200 of the Code. It is pertinent to note that another Division Bench of the Bombay High Court in ***KSL and Industries Ltd. vs. Mannalal Khandelwal***, 2005 Cri.L.J. 1201 followed by a single judge decision of the same High Court in the ***Peacock Industries Ltd. & Ors. vs. Budhrani Finance Ltd. & Ors.*** IV (2006) BC 302 have specifically dealt with the issue with which I am confronted in the present case. The decision in ***Peacock Industries Ltd.*** (supra) is extremely exhaustive and well considered decisions which fully supports the view taken by me. The Bombay High Court in ***Maharaja Developers*** (supra) did not adversely comment upon its earlier Division Bench decisions in ***KSL and Industries Ltd.*** (supra) or the single bench decision in ***Peacock Industries Ltd.*** (supra) and the said decisions were merely distinguished by observing that in these decisions the Court did not deal with the aspect of examination of the complainant and his witnesses by the magistrate on oath before issuance of process under Section 200 Cr.P.C and that they dealt with the aspect of examination

of any person who has tendered his evidence on affidavit being summoned for examination by the Court at the instance of either the prosecution or the accused. Learned single Judge of the Bombay High Court in ***Peacock Industries Ltd.*** (supra) has gone into very great depth while examining the issue raised before me and I am, therefore, not required to once again examine the same particularly since I am in respectful agreement with the said decision. For the reasons aforesaid the present petition is dismissed.

May 09, 2008
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VIPIN SANGHI, J.