

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.M.C. 433/2006 & CRL.M.A. 693/2006

Reserved on : 13th February 2009

Decision on : 8th April 2009

BRIJ PAL SINGH

..... Petitioner

Through Mr. S.S. Jain, Advocate.

versus

STATE NCT OF DELHI & ORS.

..... Respondents

Through Mr. Jaideep Malik, APP

Mr. V.K. Chaturvedi, brother of R-2
on her behalf.

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT

Dr. S. MURALIDHAR, J.

1. This petition under Section 482 Cr.P.C. challenges an order dated 3.8.2005 passed by the learned Additional Sessions Judge (ASJ) in Criminal Revision Petition No. 41/2005. By the said order, the learned ASJ upheld the orders dated 2.4.2004 and 23.3.2005 passed by the learned Chief Metropolitan Magistrate (CMM) in Complaint Case No. 13/1/85 titled "*Sh. V.K. Chaturvedi v. Shri Mukul Kumar Chaturvedi & Others*".

2. The facts leading to the filing of the present petition are that Smt.

Neelam Chaturvedi filed a complaint through her brother Shri. V.K. Chaturvedi in the Court of the learned MM under Sections 500/193/34 IPC against Shri Mukul Kumar Chaturvedi, Shri Yatish Chander Chaturvedi and the petitioner Shri Brij Pal Singh. In the complaint it was stated that Smt. Neelam Chaturvedi had been turned out of her matrimonial home by accused Shri Mukul Kumar Chaturvedi and Shri Yatish Chander Chaturvedi. On 31.3.1980 she filed a petition being Suit No. 117 of 1990 under Section 9 of the Hindu Marriage Act, 1955 ('HMA') against her husband Mukul Kumar Chaturvedi seeking restitution of conjugal rights. When notice in this petition was issued, the husband Shri Mukul Kumar Chaturvedi engaged Shri Yatish Chander Chaturvedi, who happens to be his father and also an advocate, to defend him in the said petition. It was alleged that accused No. 3 Shri Brij Pal Singh (the petitioner herein) was known to both the accused since Accused No. 2 Shri Yatish Chander Chaturvedi had sold his land to Shri Brij Pal Singh. It was alleged that Shri Brij Pal Singh in connivance with the other two accused got typed and published a false affidavit dated 8.12.1990 in Suit No. 117 of 1990 making scandalous, defamatory allegations against Smt. Neelam Chaturvedi. It was alleged that the three accused published the said affidavit which was sworn before an Oath Commissioner on 8.12.1990 and the Oath Commissioner also certified/attested the said affidavit after accused No. 3 was identified by accused Nos. 1 and 2. The said affidavit was filed in Suit No. 117 of 1990 on 8.12.1990. It was read by not only the presiding Judge but her Reader, her Stenographer and her Ahlmad.

3. In the criminal complaint the learned MM declined to summon accused Nos. 1 and 2 even while the petitioner herein was summoned to face trial for the offence under Section 500 IPC. Aggrieved by the aforementioned order of the learned MM, Smt. Neelam Chaturvedi filed a petition in this Court under Section 482 CrPC. By a judgment dated 19.12.1983, ***Neelam Chaturvedi vs. Mukul Kumar Chaturvedi and Anr., 25 (1984) DLT 177***, the petition was allowed and accused Nos.1 and 2 were directed to be summoned for the offence under Section 500 read with Section 109 IPC.

4. It appears that an application was filed by the complainant on 5.8.2003 in the court of the learned MM seeking permission to exhibit certain documents. The complainant sought to invoke Section 80 of the Evidence Act, 1872 which states that a Court shall presume the genuineness of a document in certain circumstances. Among the first documents sought to be exhibited was the affidavit of the petitioner Shri Brij Pal Singh in Suit No. 117 of 1980.

5. On 2.4.2004, the learned MM considered the said application. The Power of Attorney of the complainant was present in person. It was noted that both the accused were on bail. There was no reference to the presence of either the petitioner or his counsel. It was held that “as regards the affidavit of accused Brij Pal Singh since the same was produced during judicial proceedings by co-accused and as per Evidence Act, the court may presume fact. In the circumstances, it is presumed by

the court that the affidavit is under the signature of accused Brij Pal Singh and it is for the accused persons to rebut the same”.

6. On 27.4.2004, an application was filed on behalf of the two other accused for recalling the said order dated 2.4.2004. It was pointed out that the complainant had only sought permission for exhibiting of the document, and not for drawing any presumption as to its genuineness. On 23.3.2005, the following order was passed on the said application by learned CMM:

“Heard on present exemption of accused Brij Pal Singh. He is exempted for today. Having heard the argument of both the sides on the recall of order dated 2.4.2004, in my considered new application of both accused person are liable to be dismissed as there is no provisions in Cr.P.C. for recall of its earlier order by the court. The order of Hon’ble Judge Shri H.L. Anand in this case against accused persons including Brijpal repeated in 25 (1984) DT, 177 (Delhi High Court) titled “Neelam Chaturvedi vs. Mukul Kumar Chaturvedi & Ors.” may be adverted to in this regard since affidavit was filed by taken on law Y.C. Chaturvedi of sister of complainant herein of Brij Pal Accused in this case, during the judicial proceedings, it is within the knowledge of accused persons as to who is the author of affidavit so onus is on them to rebut that it is not under the signature of Brij Pal the contention of Brij Pal that co-accused Y.C. Chaturvedi had forged it is a defense plea and can be proved by co-accused Brij Pal by leading negative evidence of handwriting expert.

However, to assist the accused Brij Pal in this regard and to curb delay (as it will take some time to get report of opinion

expert of handwriting/signature), he is at liberty to give his handwriting and signature in the court even during complainant's evidence, which would be sent to FSL and if he does so now during the complainant evidence stage and by next date, the expenses incurred on this court shall be shared by complainant & accused Brij Pal equally otherwise, accused Brij Pal will have to bear expenses himself for rebuttal evidence with these observations, application is disposed off. Adjourned for complainant evidence on 17.05.2005.”

7. Aggrieved by the aforementioned two orders, the petitioner filed Criminal Revision Petition No. 41 of 2005 in the court of the learned ASJ. Among the grounds urged was that the learned CMM misinterpreted Section 80 of the Evidence Act which did not exempt the prosecution/complainant from discharging the onus to prove the case against the accused. If the impugned orders were to be sustained then the burden would be on the petitioner, who is an accused, to dispute that the signature was not his. Further, the petitioner could not be compelled to give his signature for verification to the Forensic Science Laboratory ('FSL') as that would be self incriminating.

8. The learned ASJ noted that the petitioner had no objection to giving his specimen handwriting and signatures for verification by the FSL, Rohini. He however objected to the observation of the learned CMM in the order dated 2.4.2004 that the Court “shall presume the affidavit is under the signature of the petitioner Brij Pal Singh and now it is for the accused to rebut the same”. It was clarified by the learned ASJ that the

learned CMM “has not given its judicial verdict to the issue and has rather stated that if a document is filed in a judicial proceeding, its correctness is presumed unless and until the parties affected by it proves otherwise”. It was held that since it was ordered that the petitioner’s signatures could be examined by the FSL, Rohini, the petitioner should not have any grievance.

9. The prayer in the present petition is that since the petitioner was not a party in the suit under Section 9 of HMA, and at best was a witness in the said case, no presumption could be drawn against him in the criminal complaint under Section 500 IPC. The petitioner also submitted that the burden of proving that the signature on the affidavit could not be shifted to the petitioner in this manner. The petitioner had not moved any application for his specimen signatures to be obtained for being sent to the FSL. It was accordingly prayed that the aforementioned order of the learned CMM as well as the impugned order dated 3.8.2005 of the learned ASJ be set aside.

10. This Court by an order dated 14.3.2006 directed that the trial court will not pass a final order in the case. Later, when order dated 6.8.2008, the proceedings in the trial court were directed to remain stayed.

11. Counsel for the petitioner as well as the power of attorney holder of Smt. Neelam Chaturvedi, Shri V.K. Chaturvedi have been heard. It is contended by Shri V.K. Chaturvedi that the observations made by this

Court in a judgment dated 19.12.1983 while allowing the petition filed by Smt. Neelam Chaturvedi, show that there was no doubt about the fact that the petitioner herein filed an affidavit in the suit under Section 9 HMA. It was noticed by this Court in para 4 of the said judgment that respondent No. 2 “made good to tell this Court in an apparent attempt to save his son from embarrassment that the affidavit was filed on his behalf without instructions or reference from the son”. It is submitted that in view of the said observations, it is not open even to the petitioner to question the genuineness of the affidavit filed by him in the said proceedings.

12. Section 80 of the Evidence Act reads as under:

“80. Presumption as to documents produced as record of evidence—Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceedings or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such office as aforesaid, the Court shall presume—

That the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true; and that such evidence, statement or confession was duly taken.”

13. A reading of the above provision indicates that the documents produced before a court, which in this case is the affidavit of the

petitioner produced in the court of the learned ADJ where the suit under Section 9 HMA was pending, the court shall presume that the document is genuine and that “such evidence, statement or confession were duly taken”. What has to be shown is, however, that the maker of the affidavit was a witness in the said judicial proceeding. He need not be a party thereto. The contention of the counsel for petitioner that the affidavit could not be presumed to be genuine since the petitioner was not a party in the suit under Section 9 is, therefore, without merit.

14. The presumption drawn under Section 80 is certainly a rebuttable presumption. It will have to be shown by the person against whom such evidence is used that he was not the person who made the affidavit or statement contained in the affidavit. In the instant case, the petitioner nowhere denies that he has signed the said affidavit dated 8.12.1990. His only defence is that he was “neither a party nor filed the affidavit dated 8.12.1990”. According to him, the complainant has to prove by leading evidence that the affidavit was executed, signed and filed intentionally by or with the knowledge or consent of the petitioner. It is sought to be contended that “the affidavit dated 8.12.1980 is not executed, signed and delivered by the petitioner either himself in the court or through the other co-accused with the consent/intention to file the same in the mentioned court”.

15. The question that arises is whether the learned MM was right in invoking Section 80 to draw a presumption that the affidavit of the

petitioner filed in the suit under Section 9 HMA should be presumed to be under the signatures of the petitioner. In the considered view of this Court, the learned ASJ was right in observing that since the petitioner had, as noted by the learned MM in the order dated 23.3.2005, expressed no objection to giving his signatures to the FSL, Rohini, it would be for him to show that the report of the FSL, when it is made available, does not prove the case of the complainant. One method of proving the signature of the petitioner on the affidavit in question is to have it compared with his admitted signatures. That is what is sought to be done in the impugned order of the learned MM dated 23.3.2005, as affirmed by the order of the learned ASJ dated 3.10.2005. Such a procedure cannot obviously prejudice the accused and is in consonance with Section 80 of the Evidence Act. Consequently, there is no infirmity in the impugned order dated 23.3.2005 of the learned MM and the order dated 3.8.2005 passed by the learned ASJ.

16. The petition and application are dismissed. No order as to costs.

S. MURALIDHAR, J.

APRIL 8, 2009

“dg”