

Pushkar Damle Vs. State of Maharashtra and Another

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Court : Mumbai

Decided On : Aug-27-2013

Judge : A.H. Joshi

Appeal No. : Criminal Writ Petitiion No. 3689 of 2012

Appellant : Pushkar Damle

Respondent : State of Maharashtra and Another

Judgement :

1. Rule. Rule is made returnable and heard finally with consent.
2. In regular criminal trial for the offences punishable under Sections 211, 499 and 588 of the Indian Penal Code, the Petitioner-Applicant desires to lead evidence by way of affidavit of examination-in-chief. For that purpose, he filed application Exhibit-63, copy whereof is at page nos.18 and 19.
3. The application has been rejected by the learned Judicial Magistrate First Class by order dated 28th February 2012. The said order is impugned in this Petition.
4. The learned Magistrate has observed that the prayer for recording evidence of the witness on affidavit cannot be granted since in summons trial since if examination-in-chief is recorded on an affidavit, the court would be deprived of the facility of watching and noticing the personality and demeanour of the witness which would be exhibited when the examination-in-chief is recorded extempore

and by appearance in person.

5. Argument advanced in support of this petition, read thus:-

a) The witness was bound to come before the court for the purpose of cross examination.

b) During the cross examination, the court is bound to have the opportunity to watch the personality and demeanour of the witness.

c) Therefore, no prejudice would ensue if recording of the examination-in-chief on affidavit is allowed.

6. This court has given peaceful and curious consideration to the submission.

7. The fact that the examination-in-chief on affidavit is a document which has received treatment at the hands of a Lawyer/Advocate cannot be lost sight. In any case an affidavit of evidence does not stand on par with oral/extempore statement on oath while in the witness is in the box after administration of oath or affirmation by the Judge himself.

8. In summary case, Judges records summary of evidence. However, when lawyer drafts an affidavit, he does it to his own discretion and view. Permitting an affidavit would mean alienating the power of court to record summary of evidence.

9. It has to be kept in mind that the examination viva-voce is a device of unique nature. Moreover, court cannot oblivious to Law that so far, Law has not adopted the course of examination-in-chief on affidavit as a rule in all criminal cases.

10. Magistrate has to formulate his formulation or subjective and moral opinion about the worthiness of version of the witness as an individual deposing truth before the court, based on whatever Magistrate objectively gathers from the total effect of posture, behaviour, mode of revealing the information and the personality of witness. However when the witness has tendered his own affidavit as examination-in-chief, and when he appears for cross-examination, what court observes the demeanour of the witness at the time of cross-examination only but not during entire testimony.

11. Therefore, examination-in-chief extempore and viva-voce is imperative, unless dispensed with by Law.

12. In this situation, the Petitioner has no case for any interference whatsoever, and the Petition is dismissed. Rule is discharged. No costs.

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