

Dwarka Dass and ors. Vs. State and ors.

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Court : Jammu and Kashmir

Decided On : Aug-31-1978

Reported in : 1979CriLJ550

Judge : A.S. Anand and; G.M. Mir, JJ.

Appellant : Dwarka Dass and ors.

Respondent : State and ors.

Judgement :

G.M. Mir J.

1. This revision petition under Section 439, Criminal Procedure Code is directed against a composite order dated 12-8-1977 passed by the City Magistrate, Jammu, in proceedings under Section 145 Code of Criminal Procedure between the parties whereunder the court below has rejected two applications viz:

(i) an application under first proviso to Sub-section (4) of Section 145, Cr.P.C. for resummoning one Bhola Bhagat, who as a witness had filed an affidavit in support of the contentions of the opposite party; and

(ii) a prayer for summoning certain persons for examination as witnesses under Sub-section (9) of Section 145, Cr.P.C. The facts that led to the present proceedings are in brief as follows:

2. The Police Paccadanga, Jammu, lodged proceedings under Section 145, Cr.P.C against the petitioner herein who consist one set of non-applicants, and against non-applicants 2 to 7 herein as comprising the second set of the non-applicants. The dispute was with regard to the possession of a building of Kashyap Rajput Sabha located in Moti Bazar, Jammu. The proceedings under Section 145, Cr.P.C. were in the first instance initiated before the judicial Magistrate (Munsiff) Jammu, from where these were later transferred to the court of the City Magistrate, Jammu, for disposal. The parties as directed adduced evidence through affidavits in the court of City Magistrate. The petitioners herein on perusal of the affidavits filed before the learned Magistrate by the opposite party prayed for summoning of and examination in the court of some of the de-ponants with regard to the particulars stated by them in their affidavits. The learned Magistrate summoned only one deponant namely Bhola Bhagat for examination in the court. Bhola Bhagat appeared and was examined by the court. The petitioners herein submitted that they be permitted to cross-examine the witness. The request was however, not granted by the learned Magistrate, who held that there was no provision in Section 145, Cr.P.C. under which the petitioners herein or any other party to the proceedings could be permitted to cross-examine a witness who was examined by the court under proviso (1) to Sub-section (4) of Section 145, Cr.P.C. The refusal of the trial court to permit the petitioners herein to cross-examine the witness is their first grievance in this petition. The second grievance is that the learned Magistrate without any justification arbitrarily rejected the prayer of the petitioner herein for summoning and examining a number of witnesses of the petitioner who were requested to be summoned under the provisions of Sub-section (9) of Section 145, Cr.P.C. The petitioners herein submitted before the learned Magistrate that the witnesses intended to be so summoned were Government Officials and as such it has not been possible for the petitioners herein to obtain their affidavits as they had refused to be identified with any party in dispute. The reasoning however, did not prevail with the learned Magistrate who in the impugned order held that the witnesses did not appear to him to be in any way conversant with the factum of actual possession. The petitioners herein have alleged that the rejection by the learned trial Magistrate under the circumstances was not founded on any rational basis and the reasoning given by the trial

Magistrate therefore, was nothing more than a bald surmise which was wholly improper and illegal.

3. When the matter came up for hearing before one of us on 12th Dec, 1977, the following order was passed:

After hearing the learned Counsel for the parties for some time, I feel that an important question of law so far as the interpretation of the word 'examine' occurring in proviso to Sub-section (4) of Section 145 of the Code of Criminal Procedure has arisen which may be decided by a larger bench.

It is, therefore, directed that the petition be placed before my Lord, the Hon'ble Chief Justice for constituting a larger Bench to hear this revision petition.

It is in view of this that the petition has been heard by us.

4. The first proviso to Sub-section (4) of Section 145, Cr.P.C. is as follows:

Provided that the Magistrate may if he so thinks fit summon and examine any person whose affidavit has been put in as to the facts contained therein.' The contention of the learned Counsel for the petitioners herein was that the expression 'examine' appearing in the proviso means an examination of the witness which includes examination-in-chief, cross-examination and re-examination. His submission was that the statement of the witness in examination in chief alone could not be read as evidence if the cross-examination of the witness was disallowed. He submitted that the evidence of a witness includes the statement made in cross-examination as well as in re-examination. On the other hand the contention of the learned Counsel appearing for the other side was that the expression 'examine' as used in first proviso to Sub-section (4) of Section 145, Cr.P.C. has a limited connotation and the witness could be summoned only for examination by the court and could not be permitted to be cross-examined by the opposite party to the proceedings. His contention was that keeping in view the amended form of Section 145, Cr.P.C. in general and Sub-section (4) of the section in particular, the only evidence that could be looked into by the Magistrate for determining the factum of actual possession on the date of the preliminary

order or two months before that, was the evidence adduced before it through affidavits and documents. It was according to him for the Magistrate to call a particular deponent for examination, and for his own satisfaction with regard to the facts put in the affidavit sworn by that particular deponent. He contended that the discretion was of the Magistrate himself and once he exercised the discretion in favour of the summoning of the witness he alone was entitled to put such questions to the witness as he thought fit for obtaining elucidation and explanation of any fact contained in the affidavit of that particular witness. He submitted that Section 145, Cr.P.C. was a self-contained provision of law which lays down special procedure for the Magistrate to follow to dispose of the matter before him on affidavits and documents submitted by the respective parties. He urged that a witness called by the court could not be subjected to cross-examination by any party to the proceedings.

5. Expressions 'examine' or 'examination' are nowhere defined either in the Evidence Act or in the Code of Criminal Procedure or in any other relevant enactment. Sections 137 and 138 of the Evidence Act may however be of help in determining the meaning of the expression 'examine' or 'examination' appearing in various enactments including the Code of Criminal Procedure. Under Section 137 of the Evidence Act the examination of a witness by a party who calls him is called his 'examination-in-chief', the examination of the witness by the adverse party is called his 'cross-examination', and the re-examination means the examination of a witness subsequent to the cross-examination by the party calling him. Section 138 of the Evidence Act gives the order of such examination. It says that witnesses shall be first examined-in-chief, then (if the adverse party so desired), cross-examined, then, (if the party calling him so desires) re-examined. Obviously Section 138 of the Evidence Act not only lays down the manner of examination of a particular witness but also impliedly confers on the parties right of examination-in-chief, cross-examination and re-examination. The section creates three distinct rights so far as the examination of a witness is concerned in different parties. The right of the calling party is to put questions to the witness in examination-in-chief and also put questions in re-examination after the cross-examination of the witness is over. The right of cross-examination in the opposite party is a distinct and independent right if such party desires to subject the witness to cross-

examination. He cannot be denied the opportunity to do so as Section 138 of the Evidence Act distinctly confers this right of cross-examination on the opposite party. The intention of the legislature to the effect that the examination of a witness consists of the three different stages enumerated in Section 138 of the Evidence Act is further apparent from the heading given to this section which is 'order of examination'. Manifestly therefore, the examination of a witness does not refer to his examination-in-chief only but it extends to and includes his examination in chief, cross-examination as well as his re-examination. The right to cross-examine could be exercised if the adverse party so desires, and similarly the right to re-examine arises if the calling party so desires subject to the limitations given in Section 138 of the Evidence Act. The examination of a witness therefore, will always include cross-examination unless the opposite party itself waives the right. The right of cross-examination is so fundamental and basic that we doubt whether the same could be taken away by a specific provision in that regard under an enactment. In special circumstances the court may have a discretion to allow or not to allow the cross-examination but the discretion has to be exercised judicially and in most cases than not it is exercised in favour of cross-examination. Even in circumstances referred to in Section 165, Evidence Act there is no absolute bar on cross-examination. It has been subjected to the permission of the court. The right to cross-examine however is recognized subject to this limitation. The right of cross-examination not only is referable to Evidence Act itself but one of the principles of natural justice is that the evidence may not be read against a party if the same has not been subjected to cross-examination or at least an opportunity has not been given for cross-examination. The rule of law in England is also the same. In para 8 of the Halsbury's Laws of England, 3rd Edition Vol. 15 the following appears :

No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination.' Section 138 of the Evidence Act impliedly lays down that the statement of a witness would be read as evidence against a party only if it was tested on the anvil of cross-examination or opportunity was afforded for the purpose. All witnesses are subject to cross-examination. The right of cross-examination could not be curtailed or circumscribed on one pretext or the other or in one way or the other, as shutting

up of cross examination would necessarily result in injustice to the cause and to the party against whom the statement is intended to be used. It is the right of every litigant unless he gives up the same to be afforded an opportunity of cross-examining the witness whose testimony may be used against him at the trial. On the parity of reasoning therefore, a witness called by the court also is liable to be cross-examined by the parties to the proceedings, if they desire to do so.

6. The provisions of Section 165 of the Evidence Act may also be gone into with profit in this regard. This provision empowers the Judge to put questions to a witness and interrogate him on matters which appear to him relevant to the matter in dispute. It however, specifically provides that the right of cross-examination with regard to the answers of the witness in reply to the questions put by the court is not an absolute one but could be exercised only subject to the permission of the court. The discretion is that of the court either to permit or refuse to permit the cross-examination in such a case, but the discretion here as well as in all cases where the discretion rests with the court, has to be exercised judicially and ordinarily, the principles of natural justice would demand that the discretion should be exercised in a manner that may not result in injustice. If the answers given in reply to the questions in examination by the court under Section 165 Evidence Act may or may not tend to adversely affect a party to the proceedings such a party may not be refused permission to cross-examine in exercise of the discretion. There is however nothing in Section 165 of the Evidence Act that would even remotely suggest that the cross-examination of a witness called by the court is barred under all circumstances. All that it appears to lay down is that a party to the proceedings may not as of right cross-examine the witness on the answers given by him to the questions put by the court.

7. Even though a contrary view has been expressed in some decisions of a few High Courts in India we respectfully disagree and are firmly of the opinion that a witness summoned, and examined under. Section 540, Cr.P.C. is also liable to be cross-examined by all parties to the proceedings in the manner as if he were a witness produced by a party to the proceedings. The provisions of Section 165, Evidence Act do not apply to the witness summoned and examined by the court under the provisions of Section 540, Cr.P.C. and the expression 'any witness'

appearing in the said section is not in our opinion referable to such a witness as it is clear from the section itself. The expression refers to the witness called originally by either party to the proceedings and in given circumstances specifically lays down a limitation to the right of cross-examination. No provision of law has however, been brought to our notice which specifically takes away the right of cross-examination of a witness appearing or summoned under the provisions of Section 145, Cr.P.C.

8. From the first proviso to Sub-section (4) of Section 145, Cr.P.C. it would appear that the Magistrate is given the power and authority to summon and examine any person as witness whose affidavit has been put in during the proceedings as to the facts contained in the affidavit. The discretion is of the Magistrate to summon or not to summon a particular deponent for such examination but once the Magistrate makes up his mind which of course is dependant on the judicial exercise of the discretion the examination of deponent is to be conducted in an appropriate manner keeping in view the rights of the parties for cross-examination of the witness and also in accordance with the principles of natural justice. The deponent summoned for examination under the first proviso to Sub-section (4) of Section 145, Cr.P.C Code does not cease to be a witness of the party who has filed his affidavit. He does not become a court witness but continues to be a witness for the party who produced his affidavit in support of the claim of the factum of actual possession at the relevant time. Whatever he deposes in his examination in the court will be read as evidence along with the affidavit sworn by him. His examination in the court would form part of evidence only if an opportunity to cross-examine him has been given to the party in the dispute whose rights may be adversely affected by such examination. Even the party in support of whose claim the witness has submitted an affidavit may with the permission of the court be permitted to put questions to the witness in the nature of cross-examination if the court is satisfied that the answers given by the witness in reply to the questions put by the court or the opposite party have in any way jeopardised or are likely to jeopardise the interests of that party. The duty of the court is to go to the root of the problem and to make all possible endeavours to arrive at the truth. The shutting up of cross-examination of a witness summoned in terms of the first proviso to Sub-section (4) of Section 145, Cr.P.C. would not be helpful or

conducive to the just performance of the duty cast on the court to make an endeavour to arrive at the truth which in most cases now-a-days appears to be a casualty. No restrictive meaning should therefore be entertained with regard to the expression 'examine' occurring in Sub-section (4) or elsewhere in Section 145, Cr.P.C. The right to cross-examine a deponent summoned and examined by the court with regard to the matters appearing in his affidavit therefore, could not and should not be denied. In this view of the matter we have drawn ample support from a decision of the Allahabad High Court reported in : AIR1956 All385 . While considering the import of Sections 137 and 138 of the Evidence Act, the learned Judges of the Allahabad High Court in Banwari Lal v. State laid down as follows (at pp. 845-846 of Cri LJ):.The examination of a witness means, as laid down in Section 137 his examination-in-chief, his cross-examination and his re-examination. It follows that the provisions that a witness shall be examined means not only that he shall be examined-in-chief, but also that he should be permitted to be cross-examined and re-examined.

No examination of a witness can be complete if the adverse party is illegally refused permission to cross-examine him or the party calling him is refused permission to re-examine him. It is not necessary for the legislature to provide expressly for the cross-examination or the re-examination of a witness; it is enough if it lays down that witness shall be examined....

X X X XWhether a party has a right to cross-examine the adverse party's witnesses or not has to be ascertained from the Evidence Act which is known to be exhaustive on the subject and not from the Code of Criminal Procedure which deals with the subject of evidence only incidentally.

9. There is no express repeal of the provisions of Sections 137 and 138 of the Evidence Act under Section 145, Criminal Procedure Code, and the presumption is against an implied repeal. The provisions of Section 138 of the Evidence Act are therefore applicable to the proceedings under Section 145, Cr.P.C. The intention of the legislature is also clear. Had the intention of the legislature been to bar the cross-examination there was no bar for it to enact a special provision in that regard in Section 145, Cr.P.C Code itself. It is the Evidence Act which deals with the

rights of the parties in matters of evidence in absence of any clear or implied provision of law providing otherwise.

10. Sub-sections (4) and (9) of Section 145, Cr.P.C. are mutually exclusive and independent of each other. While Sub-section (4) deals with persons who had submitted their affidavits, Sub-section (9), comes into operation in regard to such other persons who are alleged to be in the know of relevant facts with regard to the dispute between the parties but nevertheless have not filed affidavits for one reason or the other.

11. Sub-section (9) read? as under :

(9) The Magistrate may if he thinks fit at any stage of the proceedings under this section on the application of either party issue a summon to any witness directing him to attend or to produce any document or thing.

The discretion here again is that of the Magistrate to direct the attendance of a particular person in court or for production of a thing in a fit case. The discretion is to be exercised judicially and not arbitrarily which means that if it is shown that the person or persons could reasonably be expected to be aware of and therefore would be capable of deposing about the factum of actual possession at the relevant time i.e. on the date the preliminary order was drawn or two months next before that date, those persons may be summoned as witnesses in the proceedings and examined as any other witness in any other proceedings, provided it is shown to the satisfaction of the court that the affidavits of such persons could not be obtained and produced for reasons such as that these persons were in the employment of the State or for their own reasons would not like to be placed in a position to be identified as supporters of either party in the dispute or that their affidavits could not be obtained for any other just and reasonable cause. In a case decided by this Court and reported in AIR 1970 J & K 21 : 1970 Cri LJ 230 his Lordship S. M. F. Ali, Chief Justice as his Lordship then was, observed as follows (at p. 234 of Cri LJ):.It may not be possible for a party to obtain the affidavits of some persons either because they do not want to be identified with the party to the dispute or because they are public servants. At the same time such persons may be very competent to speak about the possession, A

party may in such a case request the Magistrate to ask such a person to swear an affidavit but the Magistrate has no power to compel such a person to do so. The only other alternative therefore, for the party is to request the Magistrate to summon such a person and examine him as a witness and this can be done only under Sub-section (9) of Section 145....

The Magistrate of course is not bound to comply with the request of the party but he has to exercise his discretion judicially and not arbitrarily.

12. On a perusal of the record especially the list of witnesses submitted by petitioners herein for summoning witnesses under Sub-section (9) of Section 145, Criminal P, C. for examination, we are constrained to observe that the learned Magistrate has not carefully gone through the contents of the application for summoning the witnesses as a result of which the exercise of discretion vested in him has become faulty. A list of five witnesses had been submitted. The list contained the names of two high officers of the Police as well as three other police officials. The petitioners requested that the two high police officers be summoned mainly to produce some letters which according to the petitioners would disclose the deteriorating law and order situation in the area where the disputed property is situated. The purpose behind the summoning of other three witnesses who also belong to the police was to examine them with regard to actual possession of the disputed property at the relevant time as the application in this regard submitted by the petitioners clearly stated that these three persons were on duty and were actually present at the time of their dispossession. The refusal by the Magistrate to summon and examine the two top police officers for production of letters mentioned in the application of the petitioners herein may be justified on general grounds but the refusal to summon the three remaining police officials could not be justified under law. All the three of them are alleged to have been present on spot at the relevant time. They are Govt. officials and were deputed on duty and in that capacity they are alleged to have been on the spot. They therefore, could' be good witnesses about the factum of actual possession. The summary rejection of the application for summoning these witnesses has resulted in injustice. The discretion obviously has not been exercised judicially.

13. Under the circumstances the revision petition is therefore, allowed and the order of the trial Magistrate dated Aug. 12, 1977 is set aside. It is directed that the witness whose part statement has been recorded under Sub-section (4) of Section 145 of the Code of Criminal Procedure should be resummoned and an opportunity afforded to the petitioners herein to cross-examine the said witness and if need be, to permit his re-examination also. It is further held that the refusal of the trial Magistrate to summon the three police officials whose particulars are given in the list presented by the petitioners herein was not justified and it is directed that these persons be summoned and examined in the light of the observations made above.

14. The parties are directed to appear in the trial court on 20th of Sept., 1978.

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