

(2005) 07 BOM CK 0131

In the Bombay High Court

Case No : Criminal W.P. No. 1274 of 2005

M/s Indo International Ltd. and Another

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 25-07-2005

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2005) 07 BOM CK 0131

Hon'ble Judges : Abhay S. Oka, J

Bench : Single Bench

Advocate : Kavin Gulati, with Mr. Uday Warunjikar, Mr. D.M. Galani, for the Appellant; Ravi Kadam, Advocate General with Ms. Rajashree Gadhavi, APP, Ms. M.H. Mhatre, for the Respondent

Judgement

Abhay S. Oka, J.—On July 6,2005,1 had taken up this petition for final disposal at admission stage with the consent of the parties. On that day, I heard the submission of the learned Senior Counsel appearing on behalf of the Petitioners in all these petitions. On that day, I have extensively heard the Judgment and fixed these matters on 25th July 2005 for pronouncement of Judgment. Thereafter, the learned Public Prosecutor mentioned these petitions before me. The learned Public Prosecutor requested me to give an opportunity to the learned Advocate General to make his submission. Accordingly on 15th July 2005, I have heard submissions of the learned Advocate General. The learned Senior Counsel appearing for the petitioners replied to the submissions made by the learned Advocate General. I had the benefit of perusing the written submissions filed by the Learned Counsel on behalf of the petitioners and the submissions in writing filed by the Respondent No.2 appearing in person who is the original complainant.

2. These petitions can be disposed of by a common Judgement and order as the facts and the questions involved are identical in all these petitions. For the sake of convenience reference is made to the facts of the case in Criminal Writ Petition No. 1274 of 205. The Petitioners are original accused and the Respondent No.2 is

the original complainant. A private complaint has been filed by the respondent No.2 in the Court of learned Metropolitan Magistrate, 23rd Court, Ballard Estate, Mumbai alleging commission of offence punishable u/s 138 read with Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the said Act of 1881"). Considering the controversy involved to the various assertions made in the complaint, as I am not called upon to adjudicate upon the merits of the complaint.

3. On 24th May 2004, the Respondent No.2 who is the original Complainant filed his affidavit of examination-in-chief by taking recourse to the provisions of Section 145(1) of the said Act of 1881. An application was made by the learned Magistrate. The prayer made in the said application was for requesting the learned Magistrate to exercise his powers under sub-section (2) of Section 145 of the said Act of 1881 and pass suitable orders for summoning and examining the Respondent No.2/complainant as a witness. The contention raised in the application in short is that once an Application is made under sub-section (2) of Section 145 by the Petitioner-Accused, the Court was bound to call the Respondent No.2 for the purpose of recording his examination-in-chief. Another contention raised was that the examination-in-chief which is referred to in sub-section (2) of Section 145 is not restricted to the cross-examination of the Respondent No.2 who had filed an affidavit of examination-in-chief. Reliance was placed on the decision of the learned Single Judge of this Court in Criminal Writ Petition No.26 of 2004. Relying upon the said decision, the submissions were made in an Application. The said application was opposed by the Respondent No.2 appearing in person by filing his reply. The respondent No.2 opposed the Bench of this Court in Criminal Writ Petition No. 1228 of 2004 and other connected matters. The said decision was pronounced on 1st February 2005 (reported in KSL and Industries Ltd., (formerly known as Krishna Texport Industries Ltd.) Vs. Mannalal Khandelwal and The State of Maharashtra,). The learned Metropolitan Magistrate rejected the Application made by the Petitioners by holding that merely because the Petitioner-accused filed Application u/s 145(2) of the said Act of 1881 it was not necessary to call the Respondent No.2 for recording examination-in-chief.

4. Before referring to the submission of the Learned Counsel appearing for the Petitioners, it will be necessary to refer to order dated 8th October 2004 passed by the learned Single Judge of this Court in Writ Petition in 1228 of 2004. While passing the said order, the learned Single Judge recorded his prima facie disagreement with the view taken by another learned Single Judge of this Court in his Judgment dated 2nd September, 2004 in Criminal Writ Petition No.26 of 2004 in the case of Raminder Singh Sahani v. Japfa Oberoi Agro Ltd. & Anr. (hereinafter referred to as Raminder Singh's case). By the said order dated 18th October 2004, the learned Single Judge made a reference to the Division Bench for considering the following question:

"(i). Whether in spite of mandate of Section 145(1) of the said Act of 1881 the

Court is obliged to examine Complainant even in respect of the matters which have been treated as Examination-in-chief of the witnesses?"

5. Accordingly, Criminal Writ Petition No. 1228 of 2004 (KSL & Industries Ltd. v. Mannalal Khandelwal & Anr.) along with connected matters were placed before the Division Bench of this Court. Apart from the another issue, the Division Bench observed that the following issues arises for its consideration: "Whether in spite of mandate of Section 145(1) of the Act, the Court is obliged to examine the complainant even in respect of matters which have been stated on affidavit?" The Division Bench decided the petition by Judgment and Order dated 1st February 2005. The case before the Division Bench will hereinafter be referred to as "KSL Industries case"

6. The learned Senior Counsel appearing for the Petitioners submitted by the learned Single Judge has decided Raminder Singh's case correctly and the said decision is not specifically upset by the Division Bench while deciding the case of KSL Industries. He submitted that the question which was referred to the Division Bench by the learned Single Judge by order dated 8th October 2004 has not at all been decided by the Division Bench. He submitted that the decision of the learned Single Judge in Raminder Singh's case is not overruled and, therefore, this Court is bound by the said decision. He submitted that a reference will have to be made to the larger Bench for deciding the question which was formulated by the learned Single Judge by his order dated 8th October, 2004. He placed reliance on various decisions, a reference to which will be made at a later stage. He asserted that if this Court was inclined to take a view, which was different from the view taken in Raminder Singh's case, a reference will have to be made to a larger Bench as the relevant question is not decided by the Division Bench in the case of KLS Industries. Without prejudice to the aforesaid submissions, he submitted that even assuming that the Division Bench has decided the issue, the decision of the Division Bench is contrary to law and requires reconsideration by a large Bench. On this aspect he replied upon various precedents. A reference will be made to those precedents in the later part of this Judgment.

7. The learned Advocate submitted that on a plain reading of the decision of the Division Bench, it is crystal clear that the relevant issue has been decided by the Division Bench. He submitted that the law laid down by the Division Bench is that once Complainant submits his affidavit of examination-in-chief, on an application made by the Accused under sub-section (2) of Section 145 of the said Act of 1881 the Court is obliged to call upon the complainant to enter the witness box only for the purpose of offering himself for cross-examination and re-examination, if any, and the complainant is not required to again depose to the facts which are already incorporated in the affidavit of examination-in-chief. He submitted that the law laid down by the Division Bench is consistent with the objects of the provisions of the said Act of 1881. The Respondent No.2 appearing in person has submitted written submissions and he submitted that the Division

Bench has decided the issue and it is not open for the learned magistrate to direct that examination-in-chief of the Respondent No.2 should be recorded even after he has filed an affidavit of examination-in-chief.

8. I have carefully considered the submissions made by the parties. Before dealing with the said submissions, a reference will have to be made to the statutory provisions. Section 145 of the said Act of 1881 reads thus:

"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 of affidavit as to the facts contained therein."

It will not be out of place to mention here that this section was brought on the statute book by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 (hereinafter referred to as "the Amending Act")

9. In the light of the said statutory provision, a reference will have to be made to various decisions relied upon by the Learned Counsel appearing for the Petitioners, he has referred to the decision of learned Single Judge in the case of Raminder Singh. The learned Single Judge observed that sub-section (2) of Section 145 casts an obligation on the Court to summon and examine any person giving evidence on affidavit as to the facts contained therein on an application made either by the prosecution or by the accused. In paragraph 4 of the said decision, the learned Single Judge noted submissions made by the Advocates appearing before him. The order under challenge before the learned Single Judge was passed by the learned Additional Sessions Judge partly allowing the application made by the Petitioner-Accused to summon and examine the Complainant and therefore permit the Petitioner to cross-examine the Complainant. By the said order impugned, the learned Additional Sessions Judge allowed the Petitioner-accused only to cross-examine the Complainant on the basis of his affidavit-in-chief. The learned Single Judge while disposing of the petition observed in paragraph Nos.5 and 6 as under:

"5. Be that as it may, Sub-section (1) of Section 145 of the N.I.Act makes it obligatory on the Courts to summon and examine the complainant on the application made by the accused. In view thereof, petition allowed.

6. Learned J.M.F.C.Pune is directed to summon the complainant and record his examination-in-chief and thereafter, permit the accused-petitioner to cross-examine the complainant. The trial to be concluded within three months from the date of receipt of writ of this order."

10. The first submission of the Learned Counsel for the Petitioners is that another learned Single Judge (Khanwilkar J.) prima facie observed that the view taken by the learned Single Judge in the case of Raminder Singh requires reconsideration, the Division Bench has not answered the reference. Relying upon the decision of the Full Bench of the Andhra Pradesh High Court reported in K. Pamanna Vs. The State Transport and Appellate Tribunal, A.P., Hyderabad and others, , the Learned Counsel for the Petitioners rightly submitted that the view expressed in the order of reference to a larger Bench does not amount to a law declared by the Court. A submission was made by the Learned Counsel that the Division Bench in the case of KSL Industries has not framed the question with regard to the scope and ambit of sub-section (2) of Section 145. Though, in the two issues which are framed by the division Bench, there is no reference to sub-section (2), in my view, the second issue framed by the Division Bench squarely covers the question which was referred to the decision of the larger Bench by the learned Single Judge. The said issue No.2 reads thus:

"(ii) Whether in spite of mandate of Section 145(1) of the Act, the Court is obliged to examine the complainant even in respect of matters which have been stated on affidavit."

There is no substance in the submission that the relevant issue was not before the Division Bench for consideration.

11. Relying on the decisions of the Supreme Court and in particular decision reported in The State of Orissa Vs. Sudhansu Sekhar Misra and Others, , the Learned Counsel for the Petitioners submitted that a Judgment is an authority for what it decides and not what logically follows therefrom. His submission is that the Division bench has not decided the issue. Therefore, a reference will have to be made to the decision of the Division Bench in the case of KSL Industries. The Division Bench on the case of KSL Industries has considered the entire scheme of the relevant sections of the said Act of 1881. A perusal of the Judgment shows that the Division Bench has taken a note of the intention of the Legislature. Relevant portion of paragraph 36 of the Judgment of the Division Bench refers to the provisions of Section 145 relating to the evidence on affidavit. In paragraph 37 of the decision, the Division Bench referred to the statement of the objects and reasons of the Amending Act by which extensive amendment was carried out to the provisions of the said Act of 1881. Paragraphs 38 and 39 are very relevant for the purpose of this petition. The said paragraphs read thus:

"38. Sub-section (1) of Section 145 gives complete freedom to the complainant either to give his evidence by way of affidavit or by way of oral evidence. If this case is made on affidavit, the same has to be accepted and such affidavit is required to be kept on record by the Court. The second part of sub-section (1) provides that the complainant may give his evidence on affidavit and may, subject to all just exceptions, be read in evidence in any enquiry, trial or other proceedings. Thus, it is clear that once the evidence of the complainant is given on affidavit, it may be read in evidence in any enquiry, trial or other proceedings,

and it may be subject to all just exceptions.

39. We are clearly of the opinion that according to the language of Section 145 of the Act, the evidence (examination-in-chief) of the complainant can be given on affidavit, and therefore, if the accused so desires, he/she may request the Court to call the complainant for cross-examination." Paragraphs 38 and 39 will have to be read with the direction (b) issued by the Division Bench which reads thus:

"(b) The Court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be concluded within three months of assigning the case. The Court has option of accepting affidavits of the witness, instead of examining them in Court. Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court/" (Emphasis supplied).

The Division Bench held in paragraph 38 that once evidence of the complainant is given on affidavit, it may be read in any enquiry, trial or other proceedings. In paragraph 39, the Division Bench has held that the evidence of the complainant can be given on affidavit and thereafter if the accused so desires, he/she may request the Court to call the complainant for cross-examination. Direction (b) issued by the Division Bench refers to all the three categories of examination of witnesses, viz. examination-in-chief, cross-examination and re-examination. The direction records that the Court dealing with a complaint u/s 138 of the said Act of 1881 has option of accepting affidavits of the witnesses instead of examining the witnesses in Court. The Division Bench further directed that once affidavits of the accused by way of evidence are accepted, the witness and the accused must be made available for cross-examination by the rival party as and when there is a direction to that effect issued by the Court. Thus, the law laid down by the Division Bench in the decision of KSL. Industries can be summarized as under:

(a) The Court dealing with a complaint u/s 138 of the said Act of 1881 has an option to take evidence of the witness on the side of the prosecution as well as evidence of the accused and the defence witness, if any, on affidavit.

(b) If the evidence of a witness is taken on affidavit, after an application is made by the other party under sub-section (2) of Section 145, it is not necessary to again record examination-in-chief of the witness whose affidavit of examination-in-chief is already filed.

(c) If an affidavit is filed under sub-section (1) of Section 145 and an Application is made under sub-section (2) of Section 145 by the other party, the witnesses must be made available for cross-examination by the rival party.

In my view, the decision of the Division Bench clearly and unambiguously lays down the aforesaid propositions of law and the Division Bench has clearly answered the issue, which was referred to it by the learned Single Judge of this Court.

12. The submission made by the Learned Counsel for the petitioner that the

Division Bench has not decided the issue in question cannot be accepted. In this behalf, a reference will have to be made to the decision of the Apex Court reported in Smt. Kesar Devi Vs. Union of India (UOI) and Others, . The Apex Court held that a Judgment of a Court is not to be interpreted like a statute where every word as far as possible has to be given a literal meaning and no word is to be ignored. In another recent decision of the Apex Court reported in Mehboob Dawood Shaikh Vs. State of Maharashtra, , the Apex Court has dealt with the law laid down in respect of interpretation of the Judgment. The relevant part of the decision is in paragraph 12 thereof, which reads thus:-

".....It is neither desirable nor permissible" to pick out a word or a sentence from the judgment of this Court divorced from the context of the question under consideration and treat it to be complete law decided by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court (See CIT v. Sun Engg. Works (P) Ltd.)"

Applying the test adopted by the Apex Court, the said decision of the Division Bench will have to be read as a whole and the observations which are made by the Division Bench will have to be considered in the light of the questions which were before the Division Bench. The conjoint reading of paragraphs Nos.38, 39 and clause (b) of the paragraph No.40 of the Judgment of the Division Bench shows that the issue which was referred has been clearly decided. This leaves no doubt that the Division Bench has laid down the propositions of law which are summarized above in paragraph No. 11. The decision of the Division Bench is binding on this Court and effect will have to be given to the said decision.

13. Another submission of the Learned Counsel for the petitioners was that the decision of the Division Bench is contrary to law requires reconsideration by the larger Bench. The submission of the Learned Counsel for the Petitioners is that the use of the word "may" in the first part of sub-section (2) of Section 145 shows that the discretion is vested in the Magistrate to summon a person who has given evidence by way of affidavit. However, the use of the word "shall" in the later part of the sub-section shows that it is mandatory for the trial Court to summon a witness for examination in the event of an application by the Accused. There cannot be any dispute about the said proposition. Once an application is made by the Accused, a witness examined by the Complainant by filing an affidavit of examination-in-chief will have to be summoned. The Learned Counsel for the Petitioner placed reliance on the use of word "examination" in sub-section (2) of Section 145. According to him "examination" as defined in the Indian Evidence Act includes examination-in-chief, cross-examination and re-examination. He, therefore, submitted that once a witness is summoned under sub-section (2) of Section 145 his examination i.e. examination-in-chief, cross-examination and re-examination will have to be recorded. I find it difficult to accept the submission. When the statute has referred to word "examination", the said word will have to be given a meaning with reference to the context in which

it is used. The word "examination) has been obviously used in subsection (2) in the context of the right of cross-examination of the rival party in case evidence is led of a witness on affidavit. Thus, the mandatory provision of sub-section (2) is that the Court has to call the witness whose affidavit in examination-in-chief is filed for the cross-examination by the rival party when an Application under sub-section (2) of Section 145 is made. After completion of cross-examination, the learned Judge will have to permit re-examination, if necessary, in accordance with the law of evidence. Therefore, the submission of the Learned Counsel that the decision of the Division Bench is contrary to law cannot be accepted.

14. The Learned Counsel for the petitioner invited my attention to the decision of the Apex Court reported in *State of Punjab Vs. Naib Din*, wherein the Apex Court has considered the provisions of Section 296(2) of the said Code of 1973. It must be stated that sub-section (1) of Section 296 deals with permissibility of recording of evidence of formal nature by affidavit. Section 296 of the said Code reads thus:

"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 and such person as to the facts contained in his affidavit."

The language used in sub-section (1) of Section 145 is different. It starts with a non-obstante clause. The said provision carves out an exception to the provisions of the Code of Criminal Procedure, 1973. Therefore, the Petitioner cannot press into service the said decision of the Apex Court in the case of *State of Punjab (supra)*. In the statement of objects and reasons of the amending Act, it is stated that the amendment is aimed at early disposal of the cases. A reference will have to be made to the decision of the Apex Court in *M/s. Dalmia Cement (Bharat) Ltd. Vs. M/s. Galaxy Traders and Agencies Ltd.*, . In paragraph 4 of the said decision the Apex Court has noted that Section 138 of the said Act of 1881 makes civil transaction to be an offence by a fiction of law. Paragraph 3 of the said decision of the Supreme Court reads thus:

"3. The Act was enacted and Section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instrument, is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present-day world, are likely to be adversely affected as it is impracticable for the trading community to carry on

with it the bulk of the currency in force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily passable from one hand to another. To achieve the objective of the Act, the legislature has, in its wisdom, thought it proper to make such provisions to the mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged.

The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of the country."

Thus, what has been held by the Apex Court is that law relating to the Act of 1881 is required to be interpreted in the light of the objects intended to be achieved by it despite there being deviation from the general law and the procedure provided for the redressal of the grievance. As held by the Apex Court the efforts to defeat the objectives of law by resorting to innovative measures and methods must be discouraged. Therefore, submissions made by the Learned Counsel appearing for the Petitioners will have to be rejected. The Learned Counsel tried to submit that if in all cases examination-in-chief of the complainant is allowed to be recorded by an affidavit, it will deprive the Court of an opportunity of observing demeanour of the Complainant. The answer to this submission is in the aforesaid Judgement in the case of Dalmia Cement. The Apex Court has noted that the reason why special procedure has been laid down in the cases u/s 138 of the said Act of 1881.

15. Turning back to the facts of the case, it must be noted that the application made by the Petitioners was under sub-section (2) of Section 145 of the said Act of 1881 with the prayer for summoning the Respondent No.2. The learned judge by the impugned order has rejected the Application. In my view the Application could not have been rejected, as the Respondent No.2 who has filed affidavit of examination-in-chief will have to step into the witness box and offer himself for cross-examination by the petitioner-accused. There can be re-examination of the Respondent No.2, if permissible, in accordance with the law. Therefore, while rejecting the submissions made by the Learned Counsel appearing for the Petitioner, the impugned order will have to be modified to some extent.

16. Accordingly, the following order is passed in all the petitions:

i. The impugned order dated 2nd April, 2005 is modified by directing the Respondent No.2 to make himself available for cross-examination by the Petitioners or by the Advocate for the Petitioners.

ii. The Petitions are disposed of accordingly.

iii. The parties and the concerned Court to act on an authenticated copy of this order.