
(2009) 10 MAD CK 0238

Madras High Court

Case No: Criminal R.C. No"s. 576 of 2009

Lakshmanan

APPELLANT

Vs

Sangeetha

RESPONDENT

Date of Decision: Oct. 12, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 18 Rule 4
- Criminal Procedure Code, 1973 (CrPC) - Section 12, 145, 145(1), 18, 19
- Evidence Act, 1872 - Section 60
- Protection of Women From Domestic Violence Act, 2005 - Section 12, 12(5), 23(2), 28, 28(2)

Hon'ble Judges: T. Sudanthiram, J

Bench: Single Bench

Advocate: V. Ayyadurai, for the Appellant; R. Gururaj, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

T. Sudanthiram, J.

The revision petitioner herein is the respondent in proceedings in M.C. No. 11 of 2008, on the file of the Judicial Magistrate-I, Panruti, and the respondent herein filed an application before the learned Magistrate u/s 12 of the Protection of Women from Domestic Violence Act, 2005, seeking certain reliefs.

2. In the proceedings, the respondent herein to examine herself as P.W.1 by way of giving evidence, filed a proof of affidavit. At that stage, the petitioner herein filed a memo of objection stating that there is no provision either in the Criminal Procedure Code or in the Indian Evidence Act to file an affidavit as a substitute for the oral evidence. The objection memo was dismissed by the learned Judicial Magistrate-I, Panruti. Aggrieved by the said order, the petitioner herein has

preferred this criminal revision petition.

3. The learned Counsel appearing for the petitioner submitted that as per Section 60 of the Indian Evidence Act, the oral evidence must be direct and there is no specific provision like the Negotiable Instruments Act to let in evidence by way of filing proof of affidavit. The learned Counsel for the petitioner further submitted that the evidence includes Chief examination and Cross examination. The Chief examination should be by way of oral evidence and, if any deviation from the said procedure, a prejudice would be caused to the parties.

4. Per contra, the learned Counsel appearing for the respondent submitted that the remedy is provided under the Protection of Women from Domestic Violence Act, is only a civil remedy, but at the same time, the Act provides for speedy disposal and as per Section 12(5) of the Protection of Women from Domestic Violence Act, the application should be disposed of within a period of sixty days from the date of its first hearing.

5. The learned Counsel for the respondent further submitted that as per Section 28 of the Protection of Women from Domestic Violence Act, 2005, the normal procedure to be adopted is governed by the provisions of Code of Criminal Procedure, but u/s 28(2) of the Act, the Court can lay down its own procedure for disposal of an application u/s 12 or under Sub-section (2) Section 23 of the Act. The right to give evidence on affidavit had been introduced even in the CPC in the year 2002 itself.

6. This Court considered the submissions made by both parties and perused the records. The procedure to be adopted as per Section 28 of the said Act is as follows:

28. Procedure: (1) Save as otherwise provided in this Act, all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and offences u/s 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) Nothing in Sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application u/s 12 or under Sub-section (2) of Section 23.

This clause provides that proceedings under the proposed legislation relating to application and orders for reliefs and offence of breach of protection order or interim protection order by the respondent shall be governed by the provisions of the Code of Criminal Procedure, 1973. Sub-clause (2) envisages that the Court may lay down its own procedure for disposal of applications for any relief or for ex parte order.

7. It is true that as per Section 60 of the Indian Evidence Act, the oral evidence has to be let in directly in all cases. The right to give evidence on affidavit was introduced in the CPC also and Order XVIII Rule 4 of the Code reads as follows:

[1][4. Recording of evidence

(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court, shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit.

8. An amendment was also brought with regard to the procedures in the Negotiable Instruments Act u/s 145 of the Act which is 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.

9. The Division Bench of this Honourable High Court in the decision of [P. Janakumar Vs. G. Pandiyaraj](#), while dealing with the provision u/s 145 of Negotiable Instruments Act has observed as follows:

7. Evidence on affidavit is not unknown to criminal jurisprudence and similar provisions are found in Section 295 and Section 296 of the Code of Criminal Procedure. Therefore, the evidence of witnesses is, as a rule, recorded in open court in the presence of the presiding officer, as seen from Section 274, Section 275 and Section 276 of the Code. In fact, Section 273 stipulates that except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or when his personal attendance is dispensed with, in the presence of his pleader. Therefore, the rule is that evidence shall be recorded in open court. Clearly, the provisions in the Code of Criminal Procedure permitting evidence by affidavit are exceptions. When any application containing allegations against any public servant is made during the course of trial, the Court may direct the applicant to give evidence by affidavit. Evidence of a formal character also may be given by affidavit. The scheme of the Code of Criminal

Procedure also shows that this rule that every witness should be examined on oath in open court in the presence of the accused is applicable to private complaint cases also. The prosecution that follows pursuant to a complaint u/s 138 of the Act is a private complaint case. So, Section 145(1) of the Code is a departure from the norm. The complainant would otherwise have been bound to give his chief-examination on oath, but he is given the option to decide whether he would enter the witness box for his chief-examination or whether he would give his evidence on affidavit. This provision has been introduced only to reduce the time factor, considering the pile-up of cheque cases.

19. Section 145 of the Code was introduced to reduce the time taken to complete the trial in these cases. So, our construction must advance the object, without violating the language. The chief-examination of the complainant can be furnished by affidavit. The court shall permit him to do so. The chief-examination of all other witnesses, including the accused if he chooses to be a witness, can be furnished in the form of an affidavit. Any person who gives evidence on affidavit, and it includes the accused, may be examined by the court if it thinks fit, and shall be summoned to give his evidence in cross-examination or re-examination, on application by the prosecution or the accused, as the case may be.

10. Though like Negotiable Instruments Act, in the Protection of Women from Domestic Violence Act, 2005, it is not specifically stated that the evidence may be given by the witness on affidavit, Section 28(2) provides for the deviation from the normal procedures as contemplated under the Code of Criminal Procedure, 1973.

11. As observed by this Honourable High Court in the decision cited supra, Section 145 of the Negotiable Instruments Act was introduced to reduce the time taken to complete the trial, wherein under this Act, as per Section 12(5) of the Protection of Women from Domestic Violence Act, the Magistrate shall endeavour to dispose of the application made under Sub-section (1) within a period of sixty days from the date of its first hearing. As such, it is open to the Court in order to reduce the time of consumption for the proceedings, the Court may allow the chief examination of the witnesses to be furnished by affidavit, which is permissible as per Section 28(2) of the said Act.

12. For the above said reasons, this Court does not find any infirmity in the order passed by the learned Magistrate permitting the respondent herein to let in evidence by way of filing proof of affidavit. The Criminal Revision Petition is dismissed. Consequently, M.P. No. 1 of 2009 is closed.