REVISIONAL CIVIL

Before Bhandari, C.J.

RUP CHAND,—*Petitioner*

versus

SHRI MAHABIR PERSHAD,—*Respondent.*

Civil Revision Application No. 400-D of 1955

1956

May, 15th

Evidence Act (I of 1872)—Sections 145, 155(3)—Evidence furnished by device for electro-telephonic communications—Whether admissible.

A conversation recorded in a tape-recorder is admissible in evidence.

Petition under Section 44 of Act IX of 1919, Punjab Courts Act, for reversal of the order of Shri Jasmer Singh, Sub-Judge, 1st Class, Delhi, dated the 30th August, 1955, allowing defdt. No. 1, to cross-examine the witness A. L Sethi and to produce the tape and the transcription and to examine Mahesh Chand, if necessary.

Claim.—Suit for recovery of Rs. 8,728-10-8.

Claim in Revision: –To set aside the order of the trial Court.

A. N. GROVER and J. L. BHATIA, *for Petitioner.*

K. K. RAIZADA, for Respondent.

JUDGMENT

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BHANDARI, C. J. This petition raises a question which is as novel as it is new, namely, whether the record of a conversation which has appeared on a tape-recorder can be admitted under the provisions of the Indian Evidence Act.

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In answer to a suit for the recovery of a certain sum of money on the basis of a pronote, the defendant put forward the plea that the original pronote containing certain endorsements had been destroyed and been replaced by another pronote bearing the same date. He endeavoured to substantiate this plea by the oral testimony of one A. L. Sethi, a broker of Delhi, but the latter declined to support him and the defendant accordingly requested the Court to permit him to confront the witness with a conversation which had taken place between himself and Sethi in regard to the destruction of the earlier pronote and which had been faithfully recorded on a tape-recorder. The plaintiff objected to the admissibility of evidence by tape-recorder but the trial Court overruled the objection and the plaintiff has come to this Court in revision.

The only two sections which appear to have any bearing on the matter in controversy between the parties are sections 145 and 155 (3) of the Indian Evidence Act. Section 145 provides that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved, but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The record of a conversation appearing on a tape-recorder can by no stretch of meaning be regarded as a statement "in writing or reduced into writing", for section 3 (58) of the General Clauses Act declares that expressions referring to "writing" shall be construed as including references to printing,

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lithography, photography and other modes of representing or reproducing words in a visible form and the record which appears on a tape-recorder cannot fall within the ambit of this definition. The expression "writing" appearing in section 145 refers to the tangible object that appeals to the sense of sight and that which is susceptible of being reproduced by printing, lithography, photography etc. It is not wide enough to include a statement appearing on a tape which can be reproduced through the mechanism of a tape-recorder.

The other provision on which reliance has been placed is section 155 (3) of the Evidence Act. This section provides that the credit of a witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. If the witness in the present case made a statement to the defendant before the commencement of this case which is at variance with the statement made by him on a later date, there can be no doubt that it can be proved by the defendant going into the witness-box and deposing that the statement was in fact made to him. The correctness of this proposition is not in dispute. Difficulty has, however, been presented by the question whether a record of that statement as prepared by a scientific instrument can be produced in evidence in Court.

The answer is in my opinion clearly in the affirmative. Legal evidence consists of the oral testimony of witnesses and of documents produced in the case, but it is open to a person giving evidence in Court to produce instruments or devices used in the commission of a crime and to

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exhibit maps, charts, diagrams, models, photographs and X-ray pictures, when properly authenticated, of some fact in issue. A witness testifying to a murder he has seen with his own eyes may well produce a bloodstained dagger he has snatched from the hands of the assassin and this dagger may speak more eloquently than the witness himself. Proof which is addressed directly to the senses is a most convincing and satisfactory class of proof. I am aware of no rule of evidence which prevents a defendant who is endeavouring to shake the credit of a witness by proof of former inconsistent statements, from deposing that while he was engaged in conversation with the witness a tape-recorder was in operation, or from producing the said tape-recorder in support of the assertion that a certain statement was made in his presence. This proposition is fully supported by a number of American decisions in which the admissibility of evidence furnished by devices for electro-telephonic communication has been fully considered. Evidence based on conversations on telephone is admissible provided the identity of the person with whom the witness spoke or the person whom he heard speak is satisfactorily established *Andrews* v. *United States*, (1). The phonographic reproduction of sound is generally admissible in evidence upon the trial by showing the manner and the circumstances under which it was secured. A person who objected to a rail road company laying its track upon a certain street was permitted to operate a phonograph in presence of the jury to produce sounds claimed to have been made by the operation of trains in proximity to his hotel. The Supreme Court of Michigan held that there was no error in the admission of this

(1) 105 American Law Reports 322

testimony particularly as it was established that the instrument was a substantially accurate and trustworthy reproducer of sounds actually made. In the course of his order Blair, J. observed as follows :—

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> "Communications conducted through the medium of telephone are held to be admissible, at least in cases where there is testimony that the voice was recognized * * *. The ground for receiving the testimony of the phonograph would seem to be stronger, since in its case there is not only proof by the human witness of the making of the sounds to be reproduced, but a reproduction by the mechanical witness of the sounds themselves." (*Boyne City. G. and A. R. Company* v. *Anderson* (1).

Similarly, testimony as to a conversation heard by the witness through a "detectophone" is admissible; and where evidence obtained through a dictograph is received it is open to the State to produce the dictograph in evidence and to have the operator thereof explain the instrument and demonstrate the principles on which it operates. *Brindley* v. *State* (2). The only English case to which my attention has been invited is that of *Buxton* v. *Cumming* (3). in which Swift, J. is reported to have raised the question whether a dictaphone record has ever been accepted in evidence by the Courts and upon counsel replying that he did not think so said that he saw no reason why such a record as the one which the witness said he had made should not be put in evidence.

(1) 117 American State Reports 642
(2) 193 Ala. 43; Annotated Cases 1916 E 177
(3) 71 Solicitors Journal 232

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For these reasons, I entertain no doubt in my mind that the trial Court was justified in overruling the plaintiff's objection to the admissibility of evidence furnished by the tape-recorder. The order of the trial Court must be upheld and the petition dismissed with costs. Ordered accordingly.