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the Collector passed after the commencement of the Amending Act. It is a well-known principle of interpretation of statutes that the Legislature is not expected to have made any provision in an Act meaninglessly. There is no doubt that in the absence of sub-section (2) of section 9 of the Amending Act, all appeals pending before the Commissioner had to be disposed of and every decision of the Collector in a proceeding which had commenced with the Assistant Collector prior to November 30, 1973, would have been subject to the right of second appeal. The fact that the Legislature has made an express provision for saving two out of three possible sets of cases which could be heard and decided by the commissioners shows that the Haryana Legislature has by necessary intendment taken away by operation of sub-section (2) of section 9 of the Amending Act the right of second appeal which would otherwise have vested in a litigant against whom the Collector might have decided his pre-amendment case in appeal after November 30, 1973. I am unable to find any other explanation for the Legislature having enacted sub-section (2) of section 9. I, therefore, find force in the submission of Mr. Bali that by necessary intendment the Legislature has taken away the right of second appeal which had originally been provided by sub-section (4) of section 7 of the Principal Act from a litigant whose litigation had started prior to the coming into force of the Amending Act provided the Collector had not decided his appeal arising out of those proceedings before the commencement of the Amending Act. That being so, I am unable to interfere with any of the impugned orders passed by the Commissioner and consequently dismiss all the three revision petitions, though without any order as to costs.

N. K. S.

Before M. S. Gujral and B. S. Dhillon, JJ.

BANTA SINGH,—*Petitioner.*

versus

SOHAWA SINGH, ETC.,—*Respondents.*

Criminal Miscellaneous No. 2805 of 1974.

in

Criminal Miscellaneous No. 36-R of 1973.

February 20, 1976.

Code of Criminal Procedure (V of 1898)—Sections 133, 137 and 244—Proceedings under section 133—Parties offering to give evidence by affidavits—Recording of statements of witnesses in Court—Whether mandatory.

Held that in a case initiated under the provisions of section 133 of the Code of Criminal Procedure 1898, the procedure as prescribed under section 137 of the Code has to be followed and it is the procedure of trial of a summons case. The said procedure prescribes the recording of evidence of the party by the court and the court has been vested with the power to issue summons to the witnesses to be examined by the parties. Section 245 of the Code prescribes that if the Magistrate upon taking the evidence referred to in section 244 and such evidence (if any) as he may, of his own motion, cause to be produced, and, if he thinks fit, examining the accused, finds the accused not guilty, he shall record an order of acquittal. It is, therefore, clear that the evidence has to be taken by the Magistrate in accordance with the provisions of the Evidence Act, 1872. Wherever the Legislature thought that the evidence may be led by the parties by filing affidavits, specific provisions have been made in the Code in such cases. There is no such provision as regards proceedings initiated under section 133 of the Code and the procedure in such cases having been prescribed under section 137 to be that of summons cases, there is no option with the trial Magistrate to accept the affidavits of the parties to adjudicate the dispute under section 133 of the Code. Thus it is not permissible to adduce evidence by way of affidavits in proceedings under section 133 of the Code and it is mandatory for the Court to record the statements of witnesses.

(Paras 5, 6, 7 and 8).

Case referred by Hon'ble Mr. Justice B. S. Dhillon, dated 10th December, 1974 to a Division Bench for decision of an important question of law involved in the case. The Division Bench consisting of Hon'ble Justice B. S. Dhillon and Hon'ble Mr. Justice Man Mohan Singh Gujral, finally decided the case on 20th February, 1976.

Petition under Section 482 of the Code of Criminal Procedure, 1973. Corresponding to section 561-A of the old Criminal Procedure Code 1898, praying that the order passed by Hon'ble Mr. Justice Bhopinder Singh Dhillon, in Cr. R. 36-R of 1973 be reviewed to meet the ends of justice.

M. S. Sandhu, Advocate, for the Petitioner.

Roshan Lal Sharma, Advocate, for Respondent No. 1.

JUDGMENT.

B. S. Dhillon, J.—

(1) District Magistrate, Faridkot,—*vide* reference order, dated February 21, 1973, recommended for setting aside the order dated

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August 9, 1972, passed by the Sub-Divisional Magistrate, Muktsar, in proceedings initiated under section 133 of the Code of Criminal Procedure, 1898, (hereinafter referred to as the Code). The sole ground on which the recommendation was made by the learned District Magistrate, Faridkot, was that the Sub-Divisional Magistrate, Muktsar, did not comply with the provisions of section 137 of the Code inasmuch as no evidence was recorded and the case was decided on the affidavits filed by the parties. This reference was refused by me on September 13, 1974. I held that the parties having been given an opportunity to produce evidence and they having felt contented by filing the affidavits of the witnesses on whom they relied the reference was not well founded. On a petition having been filed on behalf of the party in whose favour the District Magistrate, Faridkot, had made the recommendation, I recalled my order, dated September 13, 1974. This was done as it was brought to my notice that in *Gian Chand v. Khushi Ram and others*, (1), a learned Single Judge of this Court had taken a view that evidence by way of affidavits in proceedings under section 133 of the Code, does not satisfy the provisions of section 137 of the Code, and, therefore, the evidence in such a case has to be recorded as is recorded in a summons case. Keeping in view the importance of the question of law involved in the case, I referred the following question of law to a larger Bench:—

“Whether keeping in view the provisions of section 133 and those of chapter XX (including section 244) of the Code of Criminal Procedure, and the relevant provisions of the Evidence Act, is it permissible for the Court acting in proceedings initiated under section 133 of the Code of Criminal Procedure to take evidence of the parties by way of affidavits or is it mandatory to record the statements of the witnesses in Court even if the parties offer to give evidence by way of affidavits ?”

Consequently this case has been listed before a Division Bench.

(2) Section 133 of the Code vests jurisdiction in a District Magistrate or a Sub-Divisional Magistrate or an Executive Magistrate of the first class to pass a conditional order for the removal of nuisance. After preliminary order is passed under this section and when a person against whom the said order has been passed, appears

(1) 1974 C.L.R. 462.

before the Magistrate to show cause against the order, the procedure to be followed by the Magistrate is prescribed under section 137 of the Code. The provisions of section 137 of the Code are as follows :—

- “137. (1) If he appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case.
- (2) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.
- (3) If the Magistrate is not so satisfied, the order shall be made absolute.”

Chapter XX of the Code contains the provisions regarding the trial of summons-cases by a Magistrate. Section 244(1) of the Code provides that if the Magistrate does not convict the accused under section 243 of the Code, the Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence, provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court. Sub-section (2) of this section provides that the Magistrate may, if he thinks fit, on the application of the complainant or accused, issue summons to any witness directing him to attend or to produce any document or other thing.

(3) Section 539 of the Code makes a provision as to the Courts and the persons before whom affidavits may be sworn. Similarly, section 539-A enumerates the authorities before whom the affidavits may be sworn. Sub-section (1) of this section provides that an affidavit to be used before any court other than a High Court under section 510-A or section 539-A may be sworn or affirmed in the manner prescribed in section 539 or before any Magistrate. Section 510-A is as follows :—

“510-A (1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may,

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

(4) Sub-section (1) of section 539-A provides that when any application is made to any court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the court may, if it thinks fit, order that evidence relating to such facts be so given. Similarly, under section 145 of the Code, in which the procedure where the dispute concerning land etc. likely to cause breach of peace has been prescribed it has been provided that the parties to whom the notice is given under sub-section (1), may put in such documents or adduce, by putting in affidavits, the evidence of such persons, as they rely upon in support of their respective claims as respects the fact of actual possession of the subject of dispute.

(5) From the provisions of the Code reference to which has been made in the preceding paragraphs, it is clear that in a case initiated under the provisions of section 133 of the Code, the procedure as prescribed under section 137 of the Code has to be followed. The said procedure is the procedure of trial of a summons case. The procedure to be followed in the trial of a summons case has been elaborately given in section 244 of the Code. The said procedure prescribes the recording of evidence of the parties by the court and the court has been vested with the power to issue summons to the witnesses to be examined by the parties. Section 245 of the Code further prescribes that if the Magistrate upon taking the evidence referred to in section 244 and such further evidence (if any), as he may, of his own motion, cause to be produced, and, if he thinks fit, examining the accused, finds the accused not guilty, he shall record an order of acquittal. It is thus clear that the evidence has to be taken by the Magistrate in accordance with the provisions of the Evidence Act, 1872.

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(6) It would further be seen that wherever the Legislature thought that the evidence may be led by the parties by filing affidavits,

specific provisions have been made in the Code in such cases. Reference in that connection may be made to the provisions of sections 510-A, 539-A and 145 of the Code. Section 510-A provides that 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. Sub-section (2) further provides that the court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit. Similarly, section 539-A permits the allegations made respecting any public servant during the course of any inquiry, trial or other proceedings under the Code to be substantiated by filing affidavits. Similarly, section 145 of the Code allows the parties to adduce evidence by putting in affidavits. Sections 539, and 539-AA of the code prescribe the authorities before whom the said affidavits may be sworn.

(7) From what has been stated above, it is clear that wherever the Legislature thought that the evidence may be adduced by way of affidavits, it permitted the parties to lead evidence by filing affidavits. There being no such provision as regards the proceedings initiated under section 133 of the Code, and the procedure in such cases having been prescribed under section 137 of the Code to be that of summons-cases, there is no option with the trial Magistrate to accept the affidavits of the parties to adjudicate the dispute. The Single Bench of this court in *Gian Chand's case* (*supra*) has also taken the same view.

(8) For the reasons recorded above, the question referred to stands answered accordingly, and it is held that it is not permissible to adduce evidence by way of affidavits in proceedings under section 133 of the Code, and the Magistrate is bound to record evidence in the same manner as is recorded in a summons-case. The reference made by the learned District Magistrate, Faridkot, is hereby accepted, and the order of the learned Sub-Divisional Magistrate, Muktsar, dated August 9, 1972 is hereby set aside.

Man Mohan Singh Gujral, J.—I agree.

H.S.B.