

Chhotan Prasad Singh and Others

Vs

Hari Dusadh and Others

Criminal Appeal No. 316 of 1971

(P.N. Bhagwati, A.C. Gupta, P.N. Shinghal JJ)

24.11.1976

JUDGMENT

SHINGHAL, J. –

1. The point for consideration in these appeals by special leave is whether affidavits sworn or affirmed before magistrates who are not in seisin of the case under Section 145 of the Code of Criminal Procedure, hereinafter referred to as the Code, could be read in evidence under that section ? The High Court has held such affidavits to be inadmissible in evidence, in its impugned judgments dated September 17, 1971 and October 7, 1971, and that is why the present appeals by special leave have arisen at the instance of the aggrieved parties.
2. It is not in controversy that in the absence of any specific provisions of the contrary in the Code, the affidavits have to be sworn or affirmed in accordance with the provisions of the Oaths Act, 1873. It is also not in controversy that the Oaths Act of 1969 has no application to the controversy.
3. Sub-section (1) of Section 145 of the Code provides, inter alia, that the magistrate making an order under it shall require the parties concerned in the dispute to attend his court in person or by pleader and to put in such documents, or to adduce, "by putting in affidavits, the evidence of such persons" as they rely upon in support of their claims. The affidavits contemplated by the sub-section are therefore evidence for purposes of the proceedings before the magistrate concerned even though the Evidence Act does not apply to them by virtue of the express provision of Section 1 of that Act.
4. Chapter XLVI of the Code deals with miscellaneous matters including the affidavits referred to in Sections 539, 539-A and 539-AA. Section 539 deals with courts and persons before whom affidavits and affirmations to be used before any High Court or any officer of such court may be sworn and affirmed. Section 539-A relates to affidavits in proof of conduct of public servants, while Section 539-AA relates to the authorities before whom affidavits to be used under Section 510-A or 539-A may be sworn or affirmed. An affidavit under Section 145 is now however of a formal character because it is meant to prove or disprove the competing claims of the parties as respects the fact of actual possession of the subject of dispute. There is thus no provision in the Code specifying the courts or persons before whom the affidavits referred to in Section 145 have to be sworn and affirmed. This is therefore to be done according to the general provisions relating to affidavits.
5. The definition of "affidavit" in Section 3(3) of the General Clauses Act (Act X of 1897) only states that it shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing. But it is an essential characteristic of an affidavit that it should be made on oath or affirmation before a person having authority to administer the oath or affirmation.

It is here that Section 4 of the Oaths Act comes into operation which provides as follows :

4. The following Courts and persons are authorised to administer by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law :

(a) all Courts and person shaving by law or consent of parties authority of receive evidence;

Then follow clause (b) and a proviso, with which we are not concerned.

6. It is therefore clear that all courts and persons having by law or consent of parties authority to receive evidence are authorised to administer oaths and affirmations, but they can do so only where they are otherwise acting "in the discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law". So the court or person mentioned in clause (a) of Section 4 of the Oaths Act can administer oath or affirmation to the deponent in an affidavit only if the court or person is acting the "discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law". In the present cases, the magistrates concerned with the proceeding under Section 145 of the Code were discharging the duties imposed and exercising the powers conferred by the Code, and they alone could administer the oaths and affirmations to the persons who made the affidavits, and not the magistrates who were not discharging any such duty or exercising any such power. As the affidavits in the cases before us were admittedly not sworn or affirmed before magistrates who were dealing with the disputes under Section 145 of the Code, they were not proper affidavits and did not constitute evidence for purpose of Section 145. A similar view has been taken in *Nandalal Ghose v. Emperor* [AIR 1944 Cal 283 : 45 Cri LJ 748]; *Hemdan v. State of Rajasthan* [AIR 1966 Raj 5 : 1966 Cri LJ 60 : ILR (1965) 15 Raj 1013]; *Govind v. State* [AIR 1969 All 405 : 1969 Cri LJ 963]; *Krishna Chandra Naik v. Sk. Makbul* [AIR 1970 Ori 209 : 1970 Cri LJ 1580 : ILR 1970 Cut 131]; *Mahesh Thakur v. Lakshman Prasad Thakur* [(1971) 19 Bihar LJ 727] and *State of Madhya Pradesh v. Triveni Prasad* [(1971) 16 MP LJ 1059] on which reliance has been placed by counsel for the respondents.

7. We have gone through *Ahmad Din v. Abdul Salem* [AIR 1966 Punj 528 : 1966 Cri LJ 1479], which has been cited with approval in *Shambhu Nath Chopra v. State* [AIR 1970 Del 210 : 1970 Cri LJ 1439], on which reliance has been placed by counsel for the appellants. We find however that in *Ahmad Din's* case the Punjab High Court did not take proper notice of the requirement of Section 4 of the Oaths Act that the courts and persons mentioned in clause (a) could administer oaths only "in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law". We have also examined the reasoning in *Shambhu Nath Chopra's* case, but the Delhi High Court there went wrong in holding that the evidence on affidavits referred to in Section 145 of the Code was of a formal character within the meaning of Section 510-A so as to attract Section 539-AA.

8. As the High Court has rightly held in the two impugned judgment that the affidavits were inadmissible in evidence as they were sworn before magistrates who were never in seisin of the case, we find no force in these appeals and they are hereby dismissed.

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