ALLAHABAD HIGH COURT

Govind

Vs.

State

Criminal Revn. No. 1182 of 1966. against order of Addl. S. J. Etawah,
(S.D. Singh, J.)

11.04.1966. 20.12.1967

ORDER

S.D. Singh, J.

1. This application in revision has arisen out of proceedings under section 145 Criminal Procedure Code in the court of sub-Divisional Magistrate, Bharthana in the district of Etawah. The dispute was in respect of some land which originally belonged to one Shri Ram, who died on 13th November, 1959. During his lifetime he made a gift of this land in favour of Arya Pratinidhi Sabha under a document which is dated 31st July, 1946 but which was registered on 26th September, 1946. After the death of Shri Ram, differences arose as to the ownership of this land and the Arya Pratinidhi Sabha claimed it on the basis of the gift deed in its favour. The present applicant Govind claimed it as the nearest heir of Shri Ram, being his nephew.

2. A case under section 145 is to be decided on the basis of possession of dates relevant for purposes of the inquiry under that section. Both the parties filed affidavits in support of their respective contentions and relied upon documentary evidence as well. It was on a consideration of this evidence that the Magistrate recorded a finding that the Arya Pratinidhi Sabha was in possession over the land in dispute as also over the attached crop on the date of the preliminary order and also two months prior to the same and this finding has been affirmed by the Sessions Judge.

3. Normally a finding of fact recorded by a Magistrate in proceedings under section 145 of the Code of Criminal Procedure is not interfered with in revision as the accused party has a remedy under sub-section (6) of section 145, Criminal Procedure Code. In this particular case, however, it appears that the Magistrate has relied upon evidence

which could not be admitted in evidence as such, and it was urged that the finding recorded by the Magistrate is vitiated on that account. The contention was that Shri Arya Bhasker filed an affidavit on behalf of the opposite party, which affidavit was verified by an Oath Commissioner, and that an affidavit verified by an Oath Commissioner could not be received in evidence under Section 145, Criminal Procedure Code and reliance for this purpose was placed upon *Wahid v. State,* [1] In that case an affidavit was verified by an Oath Commissioner who was appointed by the High Court under section 539 of the Code of Criminal Procedure, and it was held that affidavit could not be taken in evidence in proceedings under Section 145, Criminal Procedure Code. In this case the affidavit has not been verified by an Oath Commissioner appointed by the High Court under Section 539, but by an Oath Commissioner at Etawah, who must in all probability have been appointed by the District Judge there. The question for consideration in this case, therefore, is whether the affidavit which was not verified by the Magistrate himself but by an Oath Commissioner, could be received in evidence.

4. Section 539-AA, sub-section (1), provides that an affidavit to be used in any court other than a High Court either 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 539-A refers to an affidavit in proof of the conduct of public servants in certain inquiries, and hence, it has no bearing on the facts of the present case. We are then left with affidavit to which reference is made under sub-section (1) of section 510-A of the Code. It reads:

> "(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."

An affidavit verified by an Oath Commissioner could, in my view, be read in evidence in proceedings under Section 145 of the Code in which evidence by affidavit is permissible, even though the affidavit is verified by an Oath Commissioner, but in order that the section may apply, the evidence should be merely "of a formal character". It is only in such cases, that is, where the evidence which is required to be led in a case is of a formal character, that evidence may, in respect of the same, be given on affidavit, and it is only then that under sub-section (1) of Section 539-AA the affidavit may be verified by an Oath Commissioner appointed under the provisions of

Section 539 of the Code of Criminal Procedure; but if the evidence is not that of a formal character, Section 510-A will not apply, and the affidavit will have, under the circumstances, to be verified by the Magistrate himself under sub-section (1) of Section 539-AA.

5. The evidence which is produced in a proceeding under Section 145 in the form of an affidavit would mostly relate to the question of possession over the disputed immoveable property or on facts which are relevant in connection with the determination of the question of possession. In some cases evidence even under Section 145, Criminal Procedure Code may be of a formal character, for example, when a particular document is required to be proved and that proof is furnished in the form of an affidavit; but if a witness has to depose about the main facts in the case, namely the question of possession and other important questions directly concerned with the question of possession, then that evidence will not be evidence of a formal character, and if the evidence is not of a formal character, the affidavit will have to be verified by a Magistrate as aforesaid.

6. The entire controversy in this case centres round the affidavit of Sri Arya Bhasker, whose affidavit was verified by an Oath Commissioner. It is unfortunate that this question was not raised before the Magistrate himself. If such an objection were raised at the proper time, the affidavit might have been rejected by him and the opposite parties might have filed another affidavit duly verified by the Magistrate and the final decision in this litigation would not have consequently been unnecessarily put off, but being as it is, the affidavit of Arya Bhasker cannot by any stretch of imagination be said to be an affidavit of a formal character. He has deposed in this affidavit on facts which were very relevant in the consideration of the question of possession and as was pointed out by the learned counsel for the applicant, the entire evidence produced on behalf of the applicant in the form of affidavits was brushed aside by the Magistrate on the basis of the affidavit of Arya Bhasker. The Magistrate refers to the affidavits filed on behalf of the applicant Govind Pathak and then says that those persons who filed the affidavits were unreliable for one reason or the other, "as has been clearly mentioned in the affidavit of Sri Arya Bhasker filed on 6-11-64 and hence the testimony of these witnesses of Sri Govind Pathak is not at all reliable". It is true that in the very next sentence of the Magistrate goes on to say "Moreover, the testimony of these witnesses is also against the document on record, and hence, no reliance can be placed on the same." But one does not know in what way the mind of the Magistrate would have been influenced, if the affidavit of Arya Bhasker were not there. This

disregard of the entire evidence has certainly created an illegality in the disposal of the case by the Magistrate.

7. The affidavit of Arya Bhasker has been used by the Magistrate even elsewhere in the consideration of the documentary evidence produced in the case. On page 5 of the judgment he says:

> "It has been clearly asserted in the affidavit of Sri Arya Bhasker that plot no. 2970. . . ."

It will thus be dear that Sri Arya Bhasker's affidavit has gone a long way in influencing the mind of the Magistrate and since the affidavit itself was not receivable in evidence, the entire proceedings in the case stand vitiated on that account.

8. I would agree with the learned counsel for the opposite parties that the Magistrate has discussed the entire documentary evidence in the case at length and I would not interfere with the findings recorded by the Magistrate on a consideration of this evidence merely because the finding was not quite correct. But, as I have said earlier, the proceedings are vitiated because of the admission of evidence which was legally inadmissible. From that point of view, therefore, it becomes necessary to set aside the order of the Magistrate dated 30th November, 1965 and to direct a rehearing of the case. It also appears desirable in the interest of justice that the party concerned be given a fresh opportunity of filing another affidavit of Sri Arya Bhasker which is properly verified.

9. Before I conclude I might mention the desirability of the Magistrate marking every document which is relied upon by the parties with an exhibit mark and then to refer to them in his judgment with reference to the exhibit marks which the documents bear.

10. If the same officer presides over the court of the Sub-Divisional Magistrate, Bharthana even now, the case may be heard by any other Magistrate competent to hear the same.

11. The revision is allowed and the case under Section 145, Criminal Procedure Code is remanded for rehearing, in the light of the observations above.

Revision allowed.

Cases Referred.

1. AIR 1963 All 256