

DELHI HIGH COURT

Shambhu Nath

Vs.

State (Delhi)

Criminal Revn. No. 28 of 1970.

(S. Rangarajan, J.)

11.3.1970

ORDER

S. Rangarajan, J.

1. An interesting question of procedure, viz., whether affidavits in proceedings under Section 145 of Criminal Procedure Code should be attested by the very Magistrate trying those proceedings or by some other Magistrate, arises for consideration in this reference, which has been made by the learned Additional Sessions Judge in the following circumstances :-

2. The admitted facts are that the affidavits filed by the first party in the proceedings before the First Class Magistrate (Mr. B.N. Chaturvedi) were attested by Magistrate, First Class, Delhi other than Sri B.N. Chaturvedi, who was trying the proceedings under Section 145 of the Criminal Procedure Code. He, therefore, left them out of consideration to reach the conclusion that he did regarding the possession of the disputed properties. The learned Additional Sessions Judge has persuaded himself to refer the matter to this Court because, in his view, the affidavits filed by the first party were in compliance with law and had to be taken into consideration.

3. In the first place, it is necessary to notice that it was only by way of an amendment to Section 145 of Criminal Procedure Code, that the Magistrate was permitted to consider evidence in the shape of affidavits. The former sub-section (4) of Section 145 of Criminal Procedure Code did not enable him to receive evidence by way of affidavits; but he was so permitted by amending Act XXVI of 1955 which substituted sub-section (4) of Section 145, Criminal Procedure Code, which reads as follows :-

"(4) Inquiry as to possession - The Magistrate shall then, without reference to the merits or the claims of any such parties to a right to possess the subject of dispute, peruse the statements, document and affidavits, if any, so put in, hear the parties and conclude the inquiry, as far as may be practicable, within a period of two months from the date of the appearance of the parties before him and, if possible, decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject."

Section 145 of Criminal Procedure Code does not indicate the manner in which the affidavits have to be sworn. Section 4 of the Indian oaths Act, 1873, reads as under:

"4. Authority to administer oaths and affirmations :- The following Courts and persons are authorized 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 persons having by law or consent of parties authority to receive evidence;

(b) The Commanding Officer of any Military, Naval or Air Force Station or ship occupied by troops in the service of Government:

Provided -

(1) That the oath or affirmation be administered within the limits of the station and

(2) That the oath or affirmation be such as a Justice of the Peace is competent to administer."

4. By Amending Act XXVI of 1955, Sections 510A and 539AA were also placed on the Statute Book, which read as under -

"510A. Evidence on affidavits - (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 proceedings 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." (Emphasis (here in ' ') added).

"539AA. 'Authorities before whom affidavits may be sworn' :

(1) An affidavit to be used before any Court other than a High Court under Section 510A or Section 539AA may be sworn or affirmed in the manner prescribed in Section 539 'or before any Magistrate.'

(2) The Court may order any scandalous and irrelevant matter in the affidavit to be struck out or amended."

(Emphasis (here in ' ') added).

5. The question posed in this case has to be answered by reference to the ambit of Section 510A, reference to which has been made in Section 539AA, whether evidence by way of affidavits regarding possession, in proceedings under Section 145, Criminal Procedure Code, is evidence of a formal nature or not. C.B. Bhargava, J. took the view in *Hemdan v. State of Rajasthan*,¹ that evidence on affidavits concerning possession, which falls for decision in proceedings under Section 145 of Code of Criminal Procedure, is not evidence of a formal character. If this view were correct, then it will lead to the necessity of Magistrates seized of disputes under Section 145 of Criminal Procedure Code having themselves to attest affidavits filed before them in the course of such inquiry. It would be needless to add that the most obvious consequence of this would be that persons living in distant places would also have to appear before the very Magistrate who tries the proceedings under Section 145 of Criminal Procedure Code merely for the purpose of subscribing to affidavits to be filed before such Magistrate in the course of such an inquiry in order that the concerned Magistrate would be in a position to attest such affidavits. It does not take much thought to say that the very object in providing for a speedy inquiry under Section 145 of Criminal Procedure Code would not be served if this restricted view of the expression 'formal' employed in Section 510A of the Criminal Procedure Code were adopted.

6. In construing any expression it is always good to remember that the expression takes color from its context. In the context in which these amendments were made to the Criminal Procedure Code, some of which have been referred to earlier, it would be pertinent to notice that in these amendments, evidence by way of affidavits was allowed to be led in order to secure the speedier disposal of cases. If it is remembered, in this context, that affidavits were enabled to be received in proceedings under Section 145 of Criminal Procedure Code by the very amending statute, namely, Act XXVI of 1955, which itself provides for affidavits being attested by Magistrates other than the Magistrate trying the proceedings, the conclusion, to my mind, is irresistible that affidavits before Magistrates trying cases under Section 145 of Criminal Procedure Code could receive affidavits in evidence attested by other Magistrates as well.

7. I am happy to find that Justice Narula of the Punjab High Court has come to the same conclusion, which I have reached, in *Ahmad Din v. Abdul Salem*,² Narula, J. not

only dissented from the decision of Bhargava, J. in AIR 1966 Rajasthan 5 but also that of Kailash Prasad, J. in AIR 1963 Allahabad 256, whom Justice Bhargava followed.

8. My attention has also been drawn to a decision of the Judicial Commissioner, C. Jagannadhacharyulu in *Leitanthem Bidhu Singh v. Khanigirakpam Ibobi Singh*,³ Jagannadhacharyulu, J.C. has referred to the amendment of sub-section (4) of Section 145 and Section 510A of the Criminal Procedure Code in understanding the expression 'formal'. He has also referred to the various meanings given to the same in the Chamber's Twentieth Century Dictionary, such as, "according to form or established mode", "relating to form", "ceremonious, punctilious, methodical", "having the form only", "having the power of making a thing what it is", "essential", and "proper". I can find no impediment at all in the matter of reading the expression "formal" in such a manner as it would sub serve the main purpose of the amendment which was brought into the Statute Book by Act XXVI of 1955. The reference is, therefore, accordingly accepted and proceedings will be remitted back to the trying Magistrate for disposal according to law. Both the parties will appear before the learned Magistrate on 30th March, 1970.

Reference accepted.

Cases Referred.

1. AIR 1966 Rajasthan 5,
2. AIR 1966 Punjab 528.
3. AIR 1969 Manipur 3.