

ORISSA HIGH COURT

Krishna Chandra Naik

Vs

Sk. Makbul

Criminal Reference No. 30 of 1967 and Criminal Revn. No. 241 of 1967

(G.K. Misra, C.J. and S.K. Ray, J.)

09.01.1970

JUDGMENT

S.K. Ray, J.

1. The Criminal Reference has been referred to a Division Bench by our learned brother R. N. Misra, J., for an authoritative decision on the question as to whether affidavits for utilisation in a proceeding under Section 145, Criminal Procedure Code should be sworn before the Magistrate before whom the proceeding is pending, or another Magistrate as authorized by the trying Magistrate, and affidavits which are not sworn to before these authorities are not available to be looked into in such proceeding. In the proceeding under Section 145, out of which this reference arose, the parties swore some of their affidavits before the officer-in-charge of the current duties of the S. D. O. in whose Court the Section 145 proceeding was pending during the latter's absence and before another first class Magistrate who had no seisin over the proceeding. The S. D. O. relied upon these affidavits along with others in disposing of the case under Section 145, Criminal Procedure Code before him. The Additional Sessions Judge, Balasore, thereupon made a reference to the High Court for setting aside the order of the S. D. O. on the ground that the affidavits which were not sworn to before the S. D. O. who had actual seisin of the matter to which the affidavits related, should have been discarded from consideration.

2. The Criminal Revision was also referred to the Division Bench by our learned brother, Patra, J., for an authoritative pronouncement on the point whether an affidavit sworn before a Magistrate other than the Magistrate before whom a proceeding under Section 145, Criminal Procedure Code was pending can be utilised for deciding the dispute in the said proceeding.

3. The amplitude of the questions posed by Misra, J., is larger than the question posed by Patra, J. Misra, J., posed two questions, viz., (i) whether the affidavit sworn to before a Magistrate other than the trying Magistrate can be utilised in the Section 145 proceeding as evidence, and (ii) whether affidavits filed before another Magistrate who is authorized by the trying Magistrate to take such affidavits can be utilised in the Section 145, proceeding. The first question is common both to the Reference and the Revision. The second question posed by Misra, J., does not strictly arise out of the reference before him, because, in that case the S. D. O. before whom the Section

145 proceeding was pending never authorized any other Magistrate to take affidavits and that the impugned affidavits were not sworn to before any Magistrate so authorized. This part of the question may be disposed of at once. There does not appear to be any provision in the Criminal Procedure Code which empowers a Magistrate having seisin over a proceeding under Section 145, Criminal Procedure Code to authorize any other Magistrate to take affidavits which may be utilized in the proceeding. Section 539, Criminal Procedure Code deals with the subject-matter of user of affidavits before a High Court and permit swearing of such affidavits and affirmations before such Court and other persons and authorities enumerated therein including any person appointed by the High Court. The power to authorize another person to take affidavits is conferred expressly on the High Court by this section. Apart from this provision, there are no other sections in the Code which vest a Magistrate with the power to authorize another Magistrate to take affidavits in relation to a matter pending before him. Section 4 of the Indian Oaths Act authorizes all Courts having by law authority to receive evidence either to administer oaths themselves or empower any officer to administer such oaths. In pursuance of this section the Magistrate can empower an officer obviously of his Court and subordinate to him, to administer oath. This cannot be construed as authorizing a Magistrate to empower another Magistrate, which is also a Court, to administer oaths and affirmations, which is his primary functions in relation to a matter pending before it. The power of delegation of the authority to administer oaths and affirmations conferred under this section must be strictly observed and can only be exercised in favor of an officer as distinguished from a Magistrate which is a Criminal Court as defined in Section 6 of the Code of Criminal Procedure. Thus, the second question posed by Misra, J., must be answered in the negative, viz., that since the Magistrate trying a proceeding under Section 145, Criminal Procedure Code has no power to authorize another Magistrate to take affidavits intended to be used before him, such affidavits cannot obviously be treated as evidence in this case, because, the Magistrate so authorized would not be a person who can be deemed to have been validly authorized to administer oaths and affirmations which are quite unrelated to any matter pending before him.

4. The only common question now left for determination is whether affidavits sworn before Magistrates other than the concerned Magistrate before whom a proceeding under Section 145 is pending, can or cannot be entertained as evidence and perused by the trying Magistrate under Section 145 (4), Criminal Procedure Code. Judicial opinion is divided on this issue. According to the decisions reported in *Wahid v. State*¹; *Hemdan v. State of Rajasthan*², and *Govind v. State*³, affidavits to be used in a proceeding under Section 145, Criminal Procedure Code which are of substantive nature, must be sworn to before the Magistrate holding an enquiry into the question of possession in a proceeding under Section 145, Criminal Procedure Code or by an officer empowered by him in this behalf and not by any other Magistrate. Indirect support has been derived from a decision of the Calcutta High Court reported in *Nandlal Ghosh v. Emperor*⁴ even though question of the present nature did not directly arise there. Contrary view has been laid down in two cases, one reported in *Ahmad Din v. Abdul Salem*⁵ and the second reported in *Leitanthem Bidhu Singh v. Khangirakpam Ibohi Singh*⁶. This Manipur case has adopted the Punjab High Court view.

5. There are some provisions in the Code of Criminal Procedure which provide for filing of affidavits in certain cases. They are contained in Sections 74, 145 (1), 499 (3), 510-A, 526 (4) and 539-A. Under Section 74, an affidavit in proof of service of summons is required to be made where a summons issued by a Court is served outside the local limits of its jurisdiction and the

serving officer is not present in the Court at the hearing of the case. Such an affidavit may be made before "a Magistrate". This section, therefore, authorises every Magistrate to take affidavits of the kind specified therein and to administer oath. Section 145 (1), Criminal Procedure Code requires the parties concerned in the dispute likely to cause breach of peace to adduce evidence of such persons on whom they rely in support of their claims by putting in their affidavits but it does not expressly indicate as to before which Court or person such affidavits are to be sworn. Section 499 (3) permits a Court to accept affidavits in proof of facts contained therein relating to the sufficiency of sureties but is silent as to before whom the affidavit is to be made. Section 510-A provides that the evidence of any person whose evidence is of a formal character may be given by affidavit and that such affidavit may be read in evidence in any inquiry, trial, or other proceeding under the Criminal Procedure Code. Under Section 526 (4) every application for exercise of power conferred by this section may be made by motion, which shall, except when the applicant is the Advocate-General, be supported by affidavit or affirmation. Section 539-A allows affidavit evidence of the allegations respecting any public servant to be given in any inquiry, trial or other proceeding under the Criminal Procedure Code. Sections 539 and 539-AA, Criminal Procedure Code are the two provisions which lay down the authorities before whom certain classes of affidavits may be sworn. Section 539 provides that the affidavits of all kinds to be used before any High Court or any officer of such Court may be sworn before the authorities or Courts specified therein. Section 539-AA lays down that affidavits 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. It is significant to note that this Section 539-AA does not refer to affidavits under Section 145 while it refers to affidavits under Section 510-A or Section 539. It thus transpires that the Criminal Procedure Code has enacted specific provisions as to the Courts or authorities before whom affidavits under Sections 74, 510-A, 539-A are to be sworn and does not specifically provide for the mode of swearing of an affidavit under Section 145, Criminal Procedure Code. When evidence of a person is of a formal character and is not of a substantive nature, it may be given by affidavit sworn to before any Magistrate other than the Magistrate before whom Section 145 proceeding is pending. That is so because of the specific provisions contained in Section 510-A and Section 539-AA, Criminal Procedure Code. But where the evidence is of substantive character, the question for determination cannot be solved with reference to anything in the Code. Reliance in this connection has to be placed on the provisions of the Indian Oaths Act.

6. Section 4 of the Indian Oaths Act enumerates the Courts and persons who are authorized thereunder to administer oath. It runs as follows:

"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 powers imposed or conferred upon them respectively by law:

- (a) all Courts and persons having by law or consent of the 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 limit of the station, an

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

Section 5 (a) of the Indian Oaths Act runs as follows:-

"5 - Oaths or affirmations shall be made by the following persons;

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence."

7. Section 4 speaks of the authority who can administer oath whereas Section 5 speaks of persons who shall make such oath. Both are interrelated and must be conjunctively read and construed. Reading these two sections together, it is quite clear that certain preconditions must be fulfilled before a Court or a person can administer oath. Those conditions, so far as are relevant for the present purpose, are that the Court must have authority to receive evidence and the witnesses who are to swear affidavits before him, must be those who may be lawfully examined by that Court or may give or be required to give evidence before such Court and that such Court must be discharging his duties or exercising his powers conferred upon him by law, in course of which the oath is to be administered. In other words, there must be a nexus between the administration of oath and discharge of duties or exercise of powers imposed or conferred upon the Court by law and that such Court must have authority to receive the evidence of the person who is being administered oath, may lawfully examine him or require him to give evidence before him. A Court which has no connection with the matter to which the affidavits relate and is not discharging its duty or exercising its power in connection therewith, cannot administer any oath. If it were not so, then the expression "in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law" in Section 4 of the Oaths Act would appear to be redundant and a meaningless surplusage. That expression would have relevancy and meaning if Section 4 is interpreted to mean that it refers to "Courts and persons" who, while administering oaths or affirmations must be discharging their duties or exercising their powers in connection with the matter to which the affidavit relates and would be acting in that connection. This view is further fortified by Section 539-AA, Criminal Procedure Code. This section, as already stated, provides for swearing or affirmation of affidavits before any Magistrate when it is intended to be used in any Court other than the High Court under Section 510-A or 539-A. This is a special provision which specially empowers swearing of affidavit before a Magistrate who has no connection with the matter to which the affidavit relates. This provision would be needless, if Sections 4 and 5 of the Oaths Act could be so interpreted as to permit affidavits before any Magistrate to be used before any other Magistrate in all circumstances whatsoever. A scrutiny already made, of the various sections of the Code of Criminal Procedure where affidavits are permitted to be used, shows that where the legislature intended that an affidavit sworn before any Magistrate could be used before any other Magistrate, the Code had expressly stated so. Where such express indication is wanting, the Section 4 of the Oaths Act would operate, in which case the Court where the affidavit is to be used is the Court before whom it is to be sworn. Section 74, Criminal Procedure Code permits affidavits referred to therein, to be made before 'a Magistrate'. But none of Sections 499 (3), 510-A, 526 (4), 539-A indicates that the affidavits referred to therein can be sworn before any Magistrate other than the Court where such affidavits have to be used. There are two sections in the Code of Criminal Procedure,

namely, Sections 539 and 539-AA which permit swearing of affidavits before Courts and authorities other than the Court where the affidavits are to be used. The obvious inference is that but for those two special provisions affidavits intended to be used in any court must be sworn to before that authority or Court. As already seen Section 539-AA, Criminal Procedure Code does not cover affidavits in Section 145, Criminal Procedure Code. This provision therefore proves the rule that affidavits in proof of possession shall be sworn to before the Magistrate who is holding the inquiry under Section 145, Criminal Procedure Code since Section 539-AA does not authorise swearing of such affidavits before any Magistrate as it does in respect of affidavits under Section 510-A, Criminal Procedure Code. Section 539-AA being an exception to the Rule proves it.

8. Sub-section (1) of Section 145, enacts that the Magistrates as enumerated therein may, after initiating the proceeding, require the parties concerned "to put in such documents or to adduce, by putting in affidavits, the evidence of such persons as they rely upon in support of such claim." This clearly shows that evidence by way of affidavits has to be adduced before the Magistrate who has seisin of the proceeding. "Evidence" has been defined in Section 3 of the Indian Evidence Act. It means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry which is called 'oral evidence' and all documents produced for inspection of the Court, are called 'documentary evidence'. The affidavits contemplated under Section 145, Criminal Procedure Code must be evidence as defined in the Evidence Act, and it can only be such if the witness makes a statement by way of affidavit before the very Court who is sitting upon the inquiry and if it is in relation to the subject-matter of inquiry. Affidavit is a declaration of facts made in writing and sworn before a person having an authority to administer oath. Such affidavits would be evidence if the statement is made before the Magistrate holding the inquiry and relates to the subject-matter of that inquiry. From this the indication is quite clear that the affidavits which are to be filed before a Magistrate initiating the proceedings under Section 145, or a Magistrate to whom such a proceeding is transferred and who is to hold the inquiry, must be sworn before him in order to be evidence.

9. For all these reasons, we are clearly of the opinion that the affidavits which are to be used in a proceeding under Section 145, Criminal Procedure Code must be sworn to before the Magistrate before whom such proceeding is pending, unless the evidence of a person is of a formal character in which case that evidence may be given by affidavits sworn to before any other Magistrate. We are, therefore, in respectful agreement with the view expressed in AIR 1963 Allahabad 256; AIR 1966 Rajasthan 5 and AIR 1969 Allahabad 405, and dissent from that expressed in AIR 1966 Punjab 528, and AIR 1969 Manipur 3.

10. The affidavits in the two 145 proceeding sworn to before another Magistrate who had no concern with the proceedings are not proper affidavits and must be rejected. The parties must not be allowed to suffer on account of this decision, as the point decided was not free from doubt, and the parties were likely to be misled as they have been misled. The reference, therefore, is accepted and the revision is also allowed. The order dated 16-3-1967 passed by Sri N. M. Mohanty, S. D. O., and the Magistrate, 1st Class Bhadrak in Misc. Case No. 10/1/66 and the order dated 13-3-1967 passed by Sri K. M. Ram, Magistrate, 1st Class, Athgarh, in Cri. Misc. Case No. 62/65 are set aside. The cases are sent back to the respective Magistrates who shall give the parties concerned opportunity to file proper affidavits afresh, rehear the cases and then to dispose of them in accordance with law.

G.K. Misra, C.J.

11. I agree.

Order accordingly.

Cases Referred.

¹ AIR 1963 All 256

² AIR 1966 Raj 5

³ AIR 1969 All 405

⁴ AIR 1944 Cal 283

⁵ AIR 1966 Pun 528

⁶ AIR 1969 Man 3