

RAJASTHAN HIGH COURT

Hemdan

Vs.

State of Rajasthan

Criminal Ref. No. 144 of 1964

(C.B. Bhargava, J.)

30.04.1965

ORDER

C.B. Bhargava, J

1. This reference by the learned District Magistrate, Jalore arises out of proceedings under Section 145 of the Code of Criminal Procedure.

2. On a report by the Station House Officer, Bagoru that a dispute regarding possession over Khasra Nos. 681, 675 and 688 in village Nadia between Party A and Party B was likely to cause a breach of the peace, the learned Sub Divisional Magistrate drew up a preliminary order on 22nd August, 1963. He called upon the parties to file their written statements and to produce evidence in support of their respective claims. Accordingly both parties filed documents and affidavits in support of their claims and the learned Sub Divisional Magistrate on its consideration declared party B in possession of the disputed land and forbade party A from interfering with the possession of party B unless so ordered by a competent court.

3. Aggrieved by this order Party A filed a revision application in the court of the District Magistrate, Jalore. Two points were urged in that court :

1. that the affidavits submitted by Party B were inadmissible as they were attested by a Third Class Magistrate.

2. that the Sub Divisional Magistrate was in error in deputing the Naib Tehsildar Bhinmal for site inspection and to treat his memo of inspection as evidence in the case.

4. The learned District Magistrate has agreed with both the contentions and has made a recommendation for setting aside the order of the Sub Divisional Magistrate, Bhinmal and to direct him to take fresh proceedings in the matter.

5. In this Court arguments have been directed mainly on the first contention. Learned counsel for party A has relied on a decision of the Allahabad High Court in *Wahid v. State*,¹ This has also been referred in the order of reference.

6. On the other hand learned counsel for Party B urges that the affidavits were properly sworn before the Third Class Magistrate, Bhinmal and were admissible in proceedings under Section 145 of the Code. His argument is twofold :

1. that the evidence given in proceedings under Section 145 of the Code by means of affidavits is of a formal character within the meaning of Section 510-A of the Criminal Procedure Code and as such affidavits sworn or affirmed before any Magistrate are admissible as provided in Section 539-AA of the Code.

2. that by virtue of Section 4 of the Indian Oaths Act (No. X of 1873) authority to administer oath and affirmation must be deemed to exist in every magistrate as being inherent in him.

7. Therefore the question to be considered is whether affidavits sworn before a third class magistrate are admissible in proceedings under Section 145 of the Code pending before a Sub Divisional Magistrate. The provision of adducing evidence by putting in affidavits in proceedings under Section 145 was introduced by Act No. XXVI of 1955 so that the enquiry may not be unduly delayed. By the same Act Section 510-A which permits giving of evidence of a formal character by affidavit was added. Section 539 of the Code prescribes the mode of swearing affidavits and affirmations which are to be used before any High Court. Section 539-AA which has also been newly added by Act No. XXVI of 1955 lays down that affidavits to be used before any court other than 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. This section makes no mention of Section 145 of the Code. It was urged on behalf of party B that omission of Section 145 by the legislature in Section 539-AA is not intentional but is inadvertent. It is urged that the legislature could not have failed to provide the mode of swearing

affidavits to be used in proceedings under Section 145 when it did so in the case of Sections 510-A and 539-A of the Code. But, whether the omission is intentional or inadvertent is no concern of the court and a casus omissus cannot be supplied by a court of law. In *Du Pont v. Mills*, 2 Crawford in Interpretation of Laws page 272) the court stated the general rules thus :

"While the court may interpret doubtful or obscure phrases and obscure language in a statute so as to give effect to the presumed intention of the legislature, and to carry out what appears to be the general policy of the law, it cannot, by construction, cure a casus omissus, however, just and desirable it may be to supply the omitted provision and it will make no difference if it appears that the omission on the part of the legislature was a mere oversight, and that, without doubt, the Act would have been drawn otherwise, if the attention of the legislature had been drawn to the oversight at the time the Act was under discussion."

8. It will, therefore, have to be taken that the Code does not provide any method of swearing affidavits to be used in proceedings under Section 145 of the Code. Obviously, Sections 539 and 539-A do not apply. Section 539 relates to affidavits and affirmations to be used before any High Court or any officer of such Court. Section 539-A deals with affidavits filed in the course of enquiry, trial or other proceeding under the Code relating to the conduct of any public servant. Section 510-A applies where evidence is of a formal character. But evidence to be adduced in proceedings under Section 145 regarding possession of immovable property cannot be said to be of formal character. On the other hand the evidence is of a substantive nature and thus to my mind Section 510-A cannot be invoked so as to make Section 539-AA applicable in the case of affidavits filed in proceedings under Section 145.

9. The next question is whether every magistrate can be deemed to have authority inherent in himself to administer oath and affirmation. Section 4 of the Oaths Act runs thus :

"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 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 the Government;

Provided -

(1) that the oath of 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."

Under this section all courts are authorized to administer oaths and affirmations in discharge of their duties or in exercise of the powers imposed or conferred upon them by law.

10. Learned counsel for party B suggests that the powers of the courts to administer oaths and affirmations are unrestricted and the condition that it should be in the discharge of the duties or in the exercise of the powers of the courts conferred upon them respectively by law, applies only in the case of persons having by law or consent of the parties authority to receive evidence.

11. In my opinion there is no room for such argument. All courts and persons having by law or consent of the parties authority to receive evidence are authorized by themselves or by any officer empowered by them in this behalf to administer oaths and affirmations in discharge of their duties or in exercise of the powers imposed or conferred upon them respectively. It is only in the discharge of the duty or in exercise of the powers imposed or conferred upon them respectively by law that courts as well as persons are authorized to administer oath and affirmation. It, therefore, follows that a Magistrate, who has no authority to receive evidence in any matter or upon whom no power is imposed or conferred by law has no authority to administer oath and affirmation. It is clear that the Third Class Magistrate, Bhinmal had no jurisdiction to receive evidence in this case and as such affidavits to be used before the Sub Divisional Magistrate in proceedings under Section 145 could not be sworn before him. It was the Sub Divisional Magistrate before whom the proceedings were pending,

who had a duty to decide the dispute and to receive evidence in the proceedings. The affidavits could therefore, be sworn by him or by an officer empowered by him in this behalf and not by any other Magistrate. The case relied upon by party A is a direct authority on the point. It was held in that case that :

"The magistrate before whom the proceedings were pending had a duty to decide the dispute between the parties with regard to the possession of the enclosure and it cannot be doubted for a moment that for the proper discharge of his duty the magistrate had an authority to receive evidence in the proceedings. He was, therefore, a person authorised to administer oath either by himself or by an official empowered by him in this behalf. The affidavits that were to be filed in the proceedings could, therefore, be sworn by the magistrate before whom the proceedings were pending decision."

"The affidavits put in by the second party which were' sworn before another magistrate who had no concern with the proceedings were not proper affidavits and could not be taken into evidence."

12. I respectfully agree with the above conclusion. I may also refer to a Bench decision of the Calcutta High Court in support of the same conclusion. In *Nandalal Ghose v. Emperor*,³ where the affidavit by the accused in a criminal proceeding was sworn before a First Class Magistrate who had no jurisdiction to take evidence in the matter in respect of which the accused was prosecuted. It was held that the accused cannot be prosecuted under Section s 193 and 199 for filing a false affidavit on oath because the First Class Magistrate before whom the affidavit was sworn had no authority under Section s 4 and 5 of the Oaths Act to administer oath in the matter. Therefore, under Section 4 of the Oaths Act also the Magistrate, Third Class, Bhinmal had no authority to administer oath to persons whose affidavits were filed before the Sub Divisional Magistrate Jalore in proceedings under Section 145 of the Code of Criminal Procedure.

13. If the affidavits filed on behalf of Party B are thus excluded from consideration then there is very little material left in support of the order passed by the Sub Divisional Magistrate in its favor. In view of the fact that up-till now there was no pronouncement of the High Court on this point and affidavits sworn before other Magistrates and even before the Oath Commissioners appointed by other courts were received in evidence in proceedings under Section 145 of the Code by Magistrates I

consider it proper to send the case back so that the parties may have a chance to submit proper affidavits.

14. The revision is therefore accepted and the order of the learned Sub Divisional Magistrate is set aside and the case is sent back to him to decide it afresh after proper affidavits are filed before him. It will also be open to party A to file further affidavits if it so chooses.

Revision allowed.

Cases Referred.

1. AIR 1963 All 256
2. (Dela - 196 At. 168
3. AIR 1944 Cal 283