
(1971) 12 PAT CK 0005
In the Patna High Court

Bhagwan Gope and Another

APPELLANT

Vs

Kameshwar Sharma

RESPONDENT

Date of Decision : 21-12-1971

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145, 435, 439
Oaths Act, 1969 — Section 4, 7

Citation : (1973) CriLJ 715

Hon'ble Judges : B.D. Singh, J

Bench : Single Bench

Judgement

B.D. Singh, J.—This application by the two petitioners u/s 435 and 439 of the Code of Criminal Procedure (hereinafter referred to as the Code) is directed against the final order dated the 18th November, 1968 passed by the Magistrate in a proceeding u/s 145 of the Code. The petitioners were the members of the first party whereas the opposite party was the member of the second party in the said proceeding.

2. Mr. Braj Kishore Prasad learned Counsel, appearing on behalf of the petitioners, has drawn my attention to paragraph 2 of the supplementary affidavit dated 13.12.1971 filed in this Court. wherein it is stated that out of eleven affidavits which were filed on behalf of the opposite party nine were sworn before another magistrate who was never in seisin of the proceeding and in that view of the matter those affidavits were inadmissible. On the other hand learned Counsel appearing on behalf of the opposite party fairly conceded that fact, and he added that in fact twelve affidavits were filed on behalf of the opposite party. Out of those twelve affidavits, ten were sworn before another magistrate who was not in seisin of the proceedings. Only the remaining two affidavits were sworn before Shri R.K. Sinha, who had passed the impugned order.

3. On the basis of the said facts. Mr. Prasad urged that the case has to be sent back for giving opportunity to the parties to reaffirm those affidavits before the magistrate who would try the proceeding. In order to substantiate his contention

he relied on a Bench decision of this Court in Mahesh Thakur & S. v. Lakshman Pd. Thakur 1971 Pat LJR 317. where M.P. Verma and A.N. Mukhariee JJ. while dealing with the provisions u/s 145 of the Code held that the affidavits which are to be put in before the Magistrate who is dealing with the proceeding u/s 145 of the Code must be sworn before him. In view of the above pronouncement in my opinion his contention is well founded.

4. However, Mr. Kailash Roy, learned Counsel for the opposite party submitted that their Lordships in 1971 Pat LJR 317 (Supra) have failed to notice Section 7 of the Oaths Act, 1969 (Indian Parliament Act 44 of 1969) which reads as:

No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the administration of any oath of affirmation or in the form in which it is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

According to learned Counsel the above provisions made it abundantly clear that the irregularity in the administration of any oath shall not invalidate any proceeding or render inadmissible any evidence whatever, which clearly distinguishes the provisions of Section 13 of the Indian Oaths Act (Act X of 1873) which their Lordships had in view. Section 13 of the Old Act provides-

No omission to take any oath or make any affirmation no substitution of. any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, took place, or shall affect the obligation of a witness to state the truth.

He contended that in the said judgment their Lordships had in fact referred only to Section 4 of the Old Act. In that view of the matter, he submitted that the judgment of their Lordships was per incuriam as the new Act was not taken into consideration at all. Therefore it requires consideration by a Larger Bench.

5. In my opinion, there is no merit in the contention of Mr. Roy as it may be noticed that their Lordships were considering a proceeding u/s 145 of the Code which related to the year 1967-68. In the instant case also the proceeding related to the year 1968 whereas the Oaths Act of 1969 received assent of the President on the 26th December, 1969 and was published in the Gazette of India dated December 26, 1969. Obviously, therefore, the Oaths Act, 1969 was not at all applicable in those cases which their Lordships were considering in proceedings reported in 1971 Pat LJR 317 supra nor it is applicable in the instant case. In that view of the matter, it is needless to give finding on the point as to what changes have been brought about in Section 7 of the new Act vis-a-vis Section 13 of the old Act.

6. Mr. Roy further contended that Section 145(1) of the Code provides that the

parties are required to put in such documents or to adduce, by putting in affidavits, the evidence of such persons as they rely upon. The legislature has not placed any restriction u/s 145(1) of the Code that those affidavits should not be sworn before a Magistrate, who was not in seisin of the proceeding at any stage.

In my view, this contention of the learned Counsel is also not available now. It may be noticed that Mr. Roy had similarly argued that matter in Mahendru Prasad Sinha v. Bhagirath Lal 1971 Pat LJR 157. wherein B.P. Sinha. J. overruled his contention. The said judgment was also approved by their Lordships in 1971 Pat LJR 317 supra.

7. Mr. Prasad has also drawn my attention to another irregularity committed by the Magistrate, which according to him has caused prejudice to the petitioners. The Magistrate had fixed 20th June. 1968 as the last date for filing affidavits by the parties. However, he extended the date to 29.6.1968, on which date the opposite party, namely, the second party filed twelve affidavits whereas on behalf of the petitioners only three affidavits could be filed on 29.6.1968. On 16.7.1968. which was the date fixed for filing the documents, an application was filed on behalf of the petitioners praying to allow them to file five more affidavits which was rejected by the Magistrate on the ground that the last date of filing the affidavits was over on 29.6.1968.

8. Mr. Prasad urged that while dealing with the Section 145 proceeding a Magistrate is not empowered to fix a time limit for filing affidavits by the parties. He invited my attention to Clause (4) of Section 145 of the Code which reads as

(4) The Magistrate shall then, without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute, peruse the statements, documents 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.

With reference to the above provision Mr. Prasad contended that the Magistrate has to peruse affidavits if filed by the parties and after hearing the parties, he is to conclude the enquiry. No restriction is imposed on the parties for filing their affidavits by the legislature. The only requirement is that the affidavits should be filed before hearing of the proceeding commences. Mr. Prasad submitted that in the instant case the arguments on behalf of the parties were heard on 14.11.1968, hence the Magistrate erred in not entertaining the five affidavits which were filed by the petitioners much earlier on 16.7.1968. On the other hand, Mr. Kailash Roy, drew my attention to Clause (1) of Section 145 of the Code which is to this effect:

(1) Whenever a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied from a police report or other information that a dispute

likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their" respective claims as respects the fact of actual possession of the subject of dispute and further requiring them 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 claims.

On the basis of the above provisions, Mr. Roy advocated that the Magistrate has ample jurisdiction to fix a time within which the parties have to appear in his Court and within the time so fixed they have to file affidavits, if required.

9. In my opinion, the contention of Mr. Roy cannot be accpeted. The words "within a time to be fixed by such Magistrate" exclusively refers to the direction of the Court to the parties to attend the Court either in person or by) pleader. In other words the time limit can be fixed only with regard to their attendance in the Court. If the intention of the legislature was that the Magistrate should fix also time limit with regard to the filing of the affidavits or documents, then the words "within the time to be fixed by such Magistrate" should have occurred at the end of the Clause (1) of Section 145 of the Code, where "affidavits" is mentioned. In that view of the matter, in my opinion, the learned Magistrate has erred in not entertaining the five affidavits which the petitioners filed on 16.7.1968. Reference may be made to the case Rajdeo Singh Vs. Emperor through Sadloo and Others, where Agarwala, J. while dealing with the provisions contained in Section 145(1) of the Code held that there is no provision in the Code for a complaint u/s 145 of the Code to be dismissed even on the ground of absence of the complainant on the date fixed in the notice. Similar views were taken in Bhavrao Ganpatrao Vs. Bhimrao Tukaramji and Others, and Kamini Kumar Das Vs. Bhim Kanta Keot and Another, . In the instant case, it may be recalled that the parties were heard on 14.11.1968. Therefore, no prejudice could have been caused to the second party if those five affidavits of the first party, namely the petitioners were entertained by the Magistrate on 16.7.1968.

10. In the result, the application is allowed, the impugned order is set aside and the case is sent back to the Magistrate for fresh decision after hearing the parties in accordance with law and in the light of the observations made above, i.e. all the affidavits which are to be used by the Magistrate must be sworn or reaffirmed by the parties before him. The Magistrate will give opportunities to the parties to get the affidavits either sworn or reaffirmed before him. He will also entertain those five affidavits which were filed on behalf of the first party.