

(1972) 08 OHC CK 0005

In the Orissa High Court

Case No : Civil Revision No. 393 of 1970

Bhajaram Swain and Another

APPELLANT

Vs

Krushna Chandra Panigrahi and Others

RESPONDENT

Date of Decision : 04-08-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 1, Order 16 Rule 16, 141, 24, 6

Citation : (1972) 38 CLT 1037

Hon'ble Judges : S.K. Ray, Acting C.J.

Bench : Single Bench

Advocate : R.C. Patnaik and P.K. Misra, for the Appellant; R.K. Patra, for the Respondent

Judgement

S.K. Ray, A.C.J.

1. The Petitioners are the members of the first Party in a proceeding u/s 145, Code of Criminal Procedure. That proceeding was in respect of 15.55 acres of land and was initiated in the Court of Sub-divisional Officer, Bhanjanagar and numbered as M.C. No. 150/64.

2. Both the parties to the proceeding filed their affidavits and documents before the Magistrate who referred the matter u/s 146(1), Code of Criminal Procedure to the Munsif, Aska for recording a finding as to which of the party was in possession on the date of the preliminary order.

3. The proceeding before the Munsif was numbered as M.J.C. No. 123/69. The Petitioners filed a petition on 20.12.1969 before him for summoning some of the witnesses, who had sworn their affidavits for the opposite parties, for being examined in Court. That petition is still pending.

Some affidavits of some persons had been filed before the S.D.O. while the proceeding was pending before him, but those, not having been sworn to before the Magistrate having seisin of the 145 proceeding, were not acceptable, on the authority of the decision of this Court reported in *Krushna Chandra Naik v. Sk.*

Makbul and Anr. 1970 C.L.T. 250. Therefore, fresh affidavits from those persons were sworn to before the Munsif, and a petition was filed on 15.5.1970 for acceptance of those affidavits on behalf of the Petitioners.

The Petitioners again filed an application on 16.5.1970 for summoning certain documents, relevant for their purpose in the case, from the office of the Tahasildar, Aska, as the latter authority had refused to grant them certified copies of those documents.

4. By the impugned order under revision the Munsif rejected both the applications. Further, he held that he had no jurisdiction to summon the documents from the office of the Tahasildar, Aska, inasmuch as his powers were the same as those of a Magistrate u/s 145, Code of Criminal Procedure, and he could not be expected to exercise the powers of a Civil Court. Secondly, he was of the opinion that when Section 146(1-A) enjoined upon him to peruse the evidence on record and to take such further evidence as may be produced by the parties, he was not expected to assist or aid a party in calling for the documents. It was the lookout of the parties to produce the documents.

He also refused to accept fresh affidavits of the witnesses filed before him on the ground that those affidavits had not been sworn to before Magistrate who was in seisin of the matter, but were sworn to in his Court, and that they bore the description at the top for the Court of the Munsif Magistrate, 1st. Class, Aska instead of the description "In the Court of the Munsif, Aska."

5. The first question mooted is, whether the Civil Court acting u/s 146, Code of Criminal Procedure, can be moved for summoning the documents which a party wanted to use as evidence in the proceeding before him.

Sub-section 1-A, of Section 146, Code of Criminal Procedure runs as follows:

On receipt of any such reference, the Civil Court shall peruse the evidence on record and take such further evidence as may be produced by the parties respectively, consider the effect of all such evidence and after hearing the parties, decide the question of possession so referred to it.

Sub-section 1-B, of Section 146 makes it quite clear that the decision rendered u/s 146, on a reference by a Magistrate, is a decision of the Civil Court. The proceeding before the Civil Court u/s 146 is clearly a civil proceeding and all the provisions of the Code of Civil Procedure, by reason of Section 141 thereof would apply to these proceedings. Section 141, CPC is in the following terms:

The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

"All proceedings" referred to in this section would include a proceeding u/s 146, of the Code of Criminal Procedure. Logically, therefore, it stands to common sense that the procedure relating to summoning of documents may also be adopted and the Civil Court is bound to act according to those provisions. To

refuse to do so, would amount to a refusal to exercise the jurisdiction vested in him by law.

6. In the case of Rama Chandra Agarwal v. State of Uttar Pradesh 1967 S.C.D. 173 it has been said:

The provisions of the CPC would apply generally to a proceeding before a civil Court arising out of a reference to it by Magistrate u/s 146(1) of the Code of Criminal Procedure.

Their Lordships reached this conclusion by holding that the proceeding before a civil Court, arising out of a reference u/s 146(1), Code of Criminal Procedure, is a civil proceeding as contemplated in Section 141, Code of Civil Procedure, and said that a proceeding u/s 146(1), Code of Criminal Procedure pending in a civil Court could be transferred by the District Court u/s 24 of the Code of Civil Procedure.

Following the Supreme Court decision, this Court in the case of Binayak Boxi v. Harihar Boxi 34 C.L.T. 43; has also held that proceeding before a Civil Court arising out of a reference u/s 146(1), Code of Criminal Procedure is a civil proceeding as contemplated u/s 141, Code of Civil Procedure.

For identical reason, Rules 1 and 6 of Rule 16, CPC could be invoked in the present proceeding before the Munsif which has arisen out of a reference to him by the Magistrate u/s 146(1), Code of Criminal Procedure. So, the Petitioners could summon the witnesses to produce documents as they did.

For the foregoing reasons, the first contention must succeed. The Munsif, Aska, was wrong in holding that he lacked jurisdiction in calling for the documents from the Tahasildar, Aska.

7. The next contention is that the Munsif was wrong in refusing to accept the affidavits sworn to in his Court. Sub. Section 1-A, of Section 146, Code of Criminal Procedure empowers the Munsif to take such further evidence as may be produced by the parties. Order 19 of the CPC empowers the Civil Court to permit any particular fact or facts to be proved by an affidavit. The affidavit referred to in Order 19 amounts to a class of evidence which was tendered to the Munsif and it would constitute evidence in the proceeding as soon as the Munsif accepted the same. As already shown in the foregoing paragraphs, all the provisions of the Code of Civil Procedure, as far as practicable, would apply to a proceeding u/s 146. Therefore, the affidavits were receivable as evidence under Order 19, Code of Civil Procedure.

Learned Counsel for the Petitioners has cited two cases of the Allahabad High Court on the point. The first is the case of Kailash Nath Agarwal Vs. Amar Nath Agarwal and Others, . There it is said:

The proceedings arising on a reference u/s 146(1) of the Code being proceeding in the Civil Court u/s 141 of the Code of Civil Procedure, the provisions of Order

19 of that Code, at least in so far as the taking of further evidence produced by the parties is concerned, will also be applicable. Therefore, if further evidence is given by a party filing affidavits the other party or parties cannot be denied the right, as available under Order 19 itself to cross examine the deponents of those affidavits.

It has also been held in another part of the judgment that Section 146(1-A) of the Code of Criminal Procedure has to be read and construed not in isolation, but must, necessarily be read and construed in the setting in which it has been placed by the Legislature.

In the case of *Ghanashaim Das v. Sub-Divisional Magistrate Muzaffarnagar* AIR 1965A 11.442 it has been held to quote the headnote:

There is no legal bar on the part of the Civil Court to take evidence on affidavits for deciding the limit question of possession only u/s 146 (1-A) of the Code of Criminal Procedure. The proceedings before the Civil Court under this section are not in the nature of a suit as contemplated by Section 6 of the Code of Civil Procedure. They are on the other hand, a continuation of proceedings u/s 145, Code of Criminal Procedure wherein specific provision has been made for leading evidence on affidavits with certain safeguards. There is no reason why the Civil Court while deciding a part of that proceeding should not have the power in law to take the evidence on affidavits.

Even if the proceedings u/s 146(1-A) are held to partake the nature of civil proceedings, there is no legal bar for the Civil Court to entertain evidence by affidavits on any particular fact. Order 19 of the CPC invested a Civil Court with a power to order any particular fact or facts to be proved by affidavit and authorises the Court at the instance of either party to order the attendance for cross-examination of the deponent.

The first part of the reasoning in the extract may not be in accord with the decision of the Supreme Court cited above, but the second part of the reasoning is.

8. Thus, as at present advised, I am of the opinion that the Civil Court has power to call for the documents in accordance with the provisions of Order 16, Code of Civil Procedure, and the Munsif, in the instant case, was wrong in rejecting the application for calling for the documents from the Tahasildar, Aska. He should have permitted the affidavits sworn to in his Court to be received as evidence in this case subject to the right of the opposite parties to cross-examine the deponents. One of the grounds for rejecting the affidavits, viz., that at the top of those documents the description was "In the Court of the Munsif Magistrate, Aska" was very trite. The fact is that there is one Munsif's Court at Aska and the mere description of "Munsif Magistrate" would not indicate any other Court but his own. He should have, therefore, accepted those affidavits.

9. In the result, therefore, the order of the Munsif is set aside, and he is directly

to take steps under Order 16, CPC for summoning the documents from the office of the Tahasildar, Aska, as are enumerated in the application of the Petitioners dated 16-5-1970., He is also directed to accept the affidavits filed in his Court, and thereafter, to proceed in the matter in accordance with law.

10. The Civil Revision is accordingly allowed with costs. Hearing fee assessed at Re. Thirty-two.