
(1916) 07 CAL CK 0017
In the Calcutta High Court

Ram Sunder Gope Sikdar and Another	APPELLANT
Vs	
Haribala Dhubi and Others	RESPONDENT

Date of Decision : 18-07-1916

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145
Evidence Act, 1872 — Section 13, 63

Citation : 37 Ind. Cas. 911

Hon'ble Judges : Newbould, J;D. Chatterjee, J

Bench : Division Bench

Judgement

D. Chatterjee, J.—The question in this case is whether the plaintiff has a jote right in the disputed lands. The lower Appellate Court has held that he has and that would ordinarily conclude a second appeal. It is contended, however, that for arriving at that finding the lower Appellate Court has relied upon the recital of a previous statement of the defendants contained in Exhibit 7, a judgment in a case u/s 145 of the Criminal Procedure Code, whereas that recital is not admissible in evidence. Reliance is placed in support of this contention on the case of Denomoni Chowdhurani v. Brojo Muhini Chowhdrani 29 C. 187 : 29 I.A. 24 : 12 M.L.J. 83 : 4 Bom. L.R. 167 : 8 Sar. P.C.J. 224 : 6 C.W.N. 386, in which the Judicial Committee held that orders u/s 530 of the old Criminal Procedure " Code (corresponding with Section 145 of the present Code) are admissible on general principles as well as u/s 13 of the Evidence Act to show the fact that such orders were made: "This necessarily makes them evidence of the following facts all of which appear from the orders themselves, viz., who the parties to the dispute were : what the land in dispute was, and who was declared entitled to retain possession." For this purpose and to this extent such orders are admissible in evidence for and against every one when the fact of possession at the date of the orders has to be ascertained, this enumeration does not include the claims of the contending parties. The proceeding u/s 50 in that case was, however, not inter partes and the learned Vakil for the respondent has attempted to distinguish it on that ground from the present which is a case of an inter partes

order. There is authority for holding that a recital in a judgment not inter partes is not admissible in evidence *Basi Nath Pal v. Jagat Kisore Acharjee* 35 Ind. Cas. 298 : 23 C. L.J. 583 : 20 C.W.N. 643, The question raised in the present case is, however, as to the admissibility in evidence of a recital of the claim of one of the parties contained in a possessory order u/s 145 inter partes. I think it makes no difference so far as this point is concerned as to whether the proceeding is or is not inter partes: the recital of the claims of the contending parties is however a part of the proceeding terminating in the judgment or judicial opinion pronounced by the Judge and the primary evidence of these claims is the pleadings of the parties. The recital of the claims in the judgment is the statement of the Judge as to what the said claims were, and must, therefore, be admissible or not as such statements. There may be cases in which a judgment is the only proof of the assertions of the parties. But it may be objected that a claim is asserted or denied, in the pleadings, in the issues, or in the evidence given in support or denial of those issues. If these are available are not they the proper evidence of the claim made?" *Woodroffe and Ameer Ali on Evidence* u/s 13, page 182, Fifth Edition. I think the proper evidence of the claims would have been the written statements, if available, and there is nothing to show they are not But supposing that it were shown that the original written statement was not available, would the statement of the Judge or Magistrate as contained in the order be admissible as secondary evidence of the contents of the written statement. Section 63 of the Evidence Act makes oral accounts of the contents of a document given by some person who has himself seen it admissible as secondary evidence of the contents of the document. Even if we can take it for granted that the Magistrate had seen the written statement, the account is a written account and not an oral account. The distinction is important for an oral account must be given by a witness whose accuracy may be tested by cross-examination.

2. An attempt has been made in some cases to bring evidence of this kind u/s 35 of the Evidence Act as an entry in a public record.

3. In the case of *Parbutty Dassi v. Purno Chunder Singh* 9 C. 586 : 4 Ind. Dec. (N.S.) 1038, a recital in an old decree was held admissible u/s 35 as under the old practice the Courts were enjoined to set out the pleadings in detail. The authority of this case has been doubted in the case of *Sunder Das v. Fatim-ul-mssa Bagam* 1 C.W.N. 513, and even if it were good law, the order in this case is a very recent one and there is no law which directs the Magistrate in a case u/s 145 to set out the pleadings of the parties. The Madras High Court followed the case of *Sunder Dass* in *Thama v. Kondan* 15 M. 378 : 5 Ind. Dec. (N.S.) 616, but with great deference, I do not see my way to the same conclusion. In the case of *Isab Mandal v. Queen-Empress* 28 C. 348 : 5 C.W.N. 65 a written statement of a party recorded by a Police Officer who was examined as a witness to say that the statement had been made was held not to come within the description of a record within the meaning of Section 35. On principle also I think it would be very dangerous to allow such recitals to be used as evidence as the recital must

be a very partial one and the whole written statement if produced might bear a different complexion altogether. In this view of the matter, I do not think that the learned Judge was right in using the recital in Exhibit 7 as evidence against the appellant. As the learned Judge places a very great reliance on this recital in deciding the question of title, I would allow the appeal and send the case back to the lower Appellate Court to decide the question of title independently of the recital in Exhibit 7. Costs to abide the result.

Newbodd, J.

4. I agree.