

(1970) 03 BOM CK 0019

In the Bombay High Court

Case No : Criminal Reference No. 48 of 1969

The State of Maharashtra

APPELLANT

Vs

Kalabai Nathuji Rajurkar

RESPONDENT

Date of Decision : 03-03-1970

Acts Referred:

Criminal Procedure Code, 1808 — Section 145

Citation : (1970) 72 BOMLR 899

Hon'ble Judges : Bhole, J

Bench : Single Bench

Judgement

Bhole, J.—This is a reference by the Additional District Magistrate, Akola, recommending that the order of the Sub-Divisional Magistrate in Section 145, Criminal Procedure Code proceedings is vitiated by non-consideration of the affidavit evidence and that he misdirected himself to come to a conclusion on the basis of evidence not legally tendered.

2. There was a dispute between the two parties in village Risod, district Akola. The subject-matter of the dispute was pardi land adjoining this village admeasuring 1 acre, 19 gunthas with a well. Irrigation crops were grown on this land. This land is owned by one Vithalrao Deshmukh. It was leased out to one Nathuji who was in possession till August 18, 1967 when he died. He left his wife Kalabai and his son Rambhau as his successors. They were in possession after the death of Nathuji. A quarrel was started by one Sambhaji who is party No. 2 by claiming possession of this pardi land. His claim is that he was in possession from a date prior to 1967-68 as a lessee of the owner Vithalrao Deshmukh and that his possession has been an exclusive and a peaceful possession.

3. Because of the apprehension of breach of peace, the matter went up to the Sub-Divisional Magistrate. The proceedings were started u/s 145, Criminal Procedure Code. A preliminary order was passed on July 15, 1968. Affidavits and documents were filed by both the parties. The learned Sub-Divisional Magistrate considered the documents filed by party No. 2 Sambhaji but did not consider

either the affidavit filed by Rambhau or Kalabai party No. 1 or the affidavits of their witnesses. It appears that he has also not considered the crop-statement filed by party No. 1. On the other hand, he considered only the affidavits of party No. 2 Sambhaji as well as his witnesses and came to the conclusion that Sambhaji party No. 2 was in possession of this pardi land for the last two years before the order. The matter, therefore, went up before the Additional District Magistrate in revision and it was heard by Mr. V.M. Indurkar, Additional District Magistrate, Akola.

4. The learned Additional District Magistrate after considering the arguments and the record came to the conclusion that the order passed by the Sub-Divisional Magistrate was vitiated because the learned Magistrate did not consider the affidavit evidence of party No. 1 or the affidavit evidence of their witnesses. The learned Additional District Magistrate was also of the view that some inadmissible evidence, viz. the police statements of party No. 1 were also admitted in evidence. But from the record it appears that that evidence was not admitted in evidence by the Sub-Divisional Magistrate, He has discarded those statements probably because they were not proved properly. The learned Additional District Magistrate was also of the view that the possession even if there was one of Sambhaji was not legal because Nathuji was a protected lessee and Sambhaji could not come into possession without any valid surrender by the protected lessee. Accordingly, therefore, the learned Additional District Magistrate has referred the matter here to quash the order passed by the Sub-Divisional Magistrate, The learned Sub-Divisional Magistrate, of course, is concerned only with the fact of possession.

5. The learned advocate for party No. 1 has argued that party No. 1 did file affidavits of Rambhau, Kalabai and Tatyrao (a neighbour on the adjoining field) and one Sakharam (who was a vegetable vendor who was purchasing vegetables from the disputed fields). The learned advocate therefore says that because that evidence was not considered, therefore, the order passed by the learned Sub-Divisional Magistrate is vitiated. On the other hand, the learned advocate for party No. 2 contends here that the Sub-Divisional Magistrate must have considered not only the affidavits of party No. 1 but also the affidavits of their witnesses and then only came to the conclusion that party No. 2 was in possession. According to him, we should not be too technical and try to notice in the order as to how the learned Sub-Divisional Magistrate has referred or assessed the affidavits of party No. 1. I cannot accept this contention because the order clearly shows that he neither perused nor discussed the affidavits of party No. 1 and his witnesses. It is the duty of the Magistrate not only to peruse all the evidence led by both parties but also assess its value by proper application of mind and then come to a finding as regards the possession. The order shows to the contrary., Therefore his order is vitiated. I am, therefore, inclined to agree with the learned advocate for party No. 1 that the matter should go back to the trial Court for inquiry according to law.

6. In so far as statements of Kalabai and Rambhau (party No. 1) before the police are concerned, these statements appear to have been merely produced without examining the police officer who had recorded those statements and putting them to party No. 1 by calling them as witnesses in the witness-box. The learned advocate for party No. 2, however, contends here that u/s 145(4), Criminal Procedure Code it is not necessary to observe any rule of evidence for the purpose of bringing on record the statements and documents. According to him, without observing any rules of evidence under the Indian Evidence Act, such statement as police statements which were recorded before, could be admitted in evidence. According to him, this evidence also should be considered by the trial Court. It is, however, difficult for me to agree with the learned advocate for party No. 2. There is nothing in Section 145(4) to show that the Magistrate ought to peruse the statements, documents and affidavits without observing any rules of evidence. The learned advocate invites my attention to the old Section 145(4) of the Criminal Procedure Code and says that the new Section 145(4) which was substituted by Act No. 26 of 1955 shows that the Magistrate need not follow any rules of evidence for the purpose of perusing the statements, documents and affidavits to come to a finding regarding the possession of the subject-matter of the inquiry. I cannot accept this contention for the obvious reason that neither there was any provision in the previous Section 145(4) that rules of evidence should not be followed nor there is any provision in the substituted provision of Section 145(4) to show that the rules of evidence should not be followed. Whenever, therefore, any statements, affidavits or documents are brought on record and whenever a party wants them to be considered as evidence, the party will have to bring that evidence on record according to the rules of evidence under the Indian Evidence Act. I am reinforced in my view by the view of the Madhya Pradesh High Court in *The State of M.P. v. Swami Prasad* [1963] M.P. 360. That High Court also was of the view that the amendment introduced in Section 145, Criminal Procedure Code does not abrogate the law of evidence except that after the amendment affidavits filed have to be read as evidence. According to the M. P. High Court, it would be preposterous to think that the documents tendered by a party with his written statements become entitled to be acted upon without being required to be proved in the absence of anything being said in Section 145 of the Code of Criminal Procedure suggesting this conclusion. I cannot, therefore, accept the contention of the learned advocate for party No. 2 that the documents, viz. the statements of party No. 1 recorded by the police, can be considered without his observing the rules of evidence to bring them on record. If he chooses to bring them on record, he may be allowed to do so according to the rules of evidence.

7. In the above view of the matter, therefore, the order passed by the learned Sub-Divisional Magistrate is illegal and improper. I, therefore, accept the reference of the learned Additional District Magistrate, set aside the order of the learned Sub-Divisional Magistrate and send back the record and proceedings to him for inquiry according to law and to find out the possession of the parties

concerned.