

Kailash Nath Agarwal Vs. Amar Nath Agarwal and ors.

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Court : Allahabad

Decided On : Jan-05-1968

Reported in : AIR1969All82; 1969CriLJ139

Judge : A.K. Kirty, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 145, 145(1), 146, 146(1) and 146(1A); [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 and 141 - Order 19; [Evidence Act, 1872](#) - Sections 1

Appeal No. : Civil Revn. No. 306 of 1967

Appellant : Kailash Nath Agarwal

Respondent : Amar Nath Agarwal and ors.

Advocate for Def. : Gyan Prakash and ;G.P. Mathur, Advs.

Advocate for Pet/Ap. : S.S. Bhatnagar, Adv.

Disposition : Revision allowed

Judgement :

ORDER

A.K. Kirty, J.

1. This case arises out of proceedings under Section 145 of the Code of Criminal Procedure (hereinafter called the Code).

2. The Magistrate concerned made a reference to the Munsif, West Allahabad under Section 146(1) of the Code to decide the question whether any and which of the parties was in possession of the subject of dispute on the material date. After the parties had appeared before the Civil Court, an application was made by Kailash Nath Agarwal praying that the first party and other persons, whose affidavits had been filed before the Magistrate under Section 145(1) of the Code, be summoned for purposes of cross-examination. This application was opposed and was dismissed by the learned Munsif holding that it was not within his power to call upon the persons concerned to attend the court for subjecting themselves to cross-examination. Against this order Kailash Nath Agrawal has filed the present revision under Section 115 of the Code of Civil Procedure. It has been submitted on his behalf that the learned Munsif has, upon an erroneous and misconceived view of the law and upon a misinterpretation, of Section 146(1-A) of the Code, failed to exercise jurisdiction and power vested in the Civil Court by law. The question which falls for decision is whether the Civil Court, to which reference under Section 146(1) of the Code has been made, has any jurisdiction or is legally competent to require the person or persons whose affidavits were filed before the Magistrate under Section 145 (1) of the Code to attend the Court for purposes of cross-examination.

3. The learned counsel for the contesting opposite party supported the order of the Court below. He contended that the powers and duties of the Civil Court to which a reference is made under Section 146(1) of the Code are entirely circumscribed by Sub-section (1-A) of that section itself. Section 146(1-A), it was submitted, is exhaustive and provides a complete machinery for disposal of reference made to the Civil Court under Section 146 (1) of the Code. It was also submitted that outside Section 146(1-A) of the Code the Civil Court has no other power. The argument, if I may say so, is based on a mechanical paraphrasing and dogmatically rigid interpretation of Section 146(1-A) of the Code.

4. To resolve the controversial question involved in the case and to arrive at a proper decision thereon it would be necessary to examine the relevant provisions of Sections 145 and 146 of the Code.

Section 145(1) of the Code requires the Magistrate concerned, on being satisfied that a dispute likely to cause a breach of the peace exists concerning any land or water or boundaries thereof, to 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. After making the aforesaid order, which is commonly described as the preliminary order, the Magistrate is required to hold an inquiry as to possession under Section 145(4) of the Code, Section 145(4) of the Code reads :--

'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 :

Provided that the Magistrate may, if he so thinks fit, summon and examine any person whose affidavit has been put in as to the facts contained therein :

Provided further that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date :

Provided also that, if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.'

Sub-section (9) of Section 145 of the Code provides :--

'The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.'

Therefore Section 145 of the Code itself requires the Magistrate concerned to hold an enquiry as to possession before passing final order under Sub-section (6) thereof, and invests him with jurisdiction and power to summon and examine, if he so thinks fit, any person whose affidavit has been filed under Sub-section (1) and also to summon witnesses at any stage on the application of either party under Sub-section (9) of the section. Section 145 (6) of the Code which requires and empowers the Magistrate to pass final orders reads :

'If the Magistrate decides that one of the parties was or should under the (second proviso) to Sub-section (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction and when he proceeds under the (second proviso) to Sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.'

5. Under Section 145(4) of the Code the Magistrate is not only required to hold an enquiry but to decide, if possible, the question of actual possession. The making of a reference to the Civil Court under Section 146(1) of the Code is an exception, recourse to which can be had only when the Magistrate is unable to come to decision on the question of possession even after performing his duties under Section 145(4). The enquiry by the magistrate under Section 145 is summary but nonetheless, judicial. It has been held that the Magistrate's powers are not confined to the first proviso to Section 145(4) and Section 145(9) only. He can examine witnesses under Section 540 of the Code also. (See *Lalta Ram v. Dalip Singh*, AIR 1965 All 294; *Bahori v. Ghure*, AIR 1960 Raj 15; *Mirza Mohd. Aziz v. Safdar Husain*, AIR 1962 All 68; *Challamuthu Padayachi v. Rajavel*, AIR 1964 Mad 263. The statements, affidavits and documents filed by parties in pursuance of the preliminary order under Section 145(1) are required to be perused by the

Magistrate under Section 145(4). The word 'peruse' in Section 145(4) has been held to mean 'to go through critically; to read thoroughly or carefully'. It is an expression of wide import. It has a judicial significance. (See *Mt. Sarfi v. Mt. Sugo*, AIR 1962 Pat 253; *Sohan Mushar v. Kailash Singh*, AIR 1962 Pat 249; *Pulur Venkata Subba Reddy v. State of Andhra Pradesh*, AIR 1960 Andh Pra 500; *Arjun Singh v. Singeshwar Chau-dhary*, AIR 1960 Pat 513; *Rudra Singh v. Bimla Debi*, AIR 1960 Pat 505; *Jamulur Rahman v. Abdul Aziz*, AIR 1960 Pat 240; *Narayanan Kutty v. Sekhara Menon*, AIR 1964 Ker 308; *Naina Sah v. Ramrup Sah*, AIR 1965 Pat 104. The law having imposed this duty on the Magistrate has also provided him with necessary power to summon and examine any deponent whose affidavit has been filed so that, whenever he thinks fit, he may probe into and test the veracity of the assertions made in the affidavit. It is, however, difficult to understand or appreciate how the Magistrate can himself hit upon the deponent or deponents who should be summoned and examined. Evidently this can ordinarily and appropriately be done on the basis of information and material furnished by the parties themselves. Again, a person who has been summoned cannot be properly and effectively examined by the Magistrate all by himself. He will have necessarily to depend on information, particulars and materials furnished by parties.

Therefore, although a discretionary power has been given to the Magistrate under the first proviso to Section 145(4), the occasion or necessity for the exercise of this power, in practice, almost invariably will be found to have been furnished by the parties. If this be the real position and, in my opinion, it is, there does not appear to exist any cogent reason why the parties should have no right to apply to the Magistrate to summon a person whose affidavit has been filed to be examined by the Magistrate. The examination will obviously be in the nature of cross-examination and this can also be naturally done by the Magistrate with the assistance of the parties. If this be so, it is again difficult to find a cogent reason why the parties, subject to the permission and control of the Magistrate, cannot have a right to participate in the examination of the person. I am, therefore, of opinion that it would be open to a party to apply to the Magistrate to summon and examine a person under the first proviso to Section 145(4), and, if the Magistrate thinks it fit to do so, to seek permission to put some question or questions to the

person summoned. There is nothing in Section 145, Cr. P. C. which expressly or by necessary implication, would entail denial of this limited right to the parties. Under Section 145(9) ' the Magistrate has been given a discretionary power to issue a summons to any witness, on the application of either party, directing him to attend. To attend what for? Obviously to be examined and to be subjected to cross-examination, if so required. This would also lend support to the view expressed earlier that the first proviso to Section 145(4) cannot be held to preclude the parties from exercising even such limited rights as have been indicated above.

Having considered the powers and duties of the Magistrate under Section 145 and the rights of the parties, the provisions of Section 146 of the Code may now be examined. Section 146(1) of the Code which provides for reference to the Civil Court, omitting the proviso, reads as follows :--

'If the Magistrate is of opinion that none of the parties was then in such possession, or is unable to decide as to which of them was then in such possession, of the subject of dispute, he may attach it, and draw up a statement of the facts of the case and forward the record of the proceeding to a Civil Court of com-petent jurisdiction to decide the question whether any and which of the parties was in possession of the subject of dispute at the date of the order as explained in Sub-section (4) of Section 145; and he shall direct the parties to appear before the Civil Court on a date to be fixed by him.'

6. The question which is referred to the Civil Court under Section 146(1) of the Code is a pure question of fact which apparently the Magistrate concerned was unable to decide for himself even after holding an enquiry under Section 145. A judicial finding on this question is required to be given by the Civil Court to which a reference is made under Section 146(1) of the Code. Its duties and powers are to be found in the following sub-sections of that section :

'(1-A) 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.

(1-B) The Civil Court shall, as far as may be practicable, within a period of three months from the date of the appearance of the parties before it, conclude the enquiry and transmit its finding together with the record of the proceeding to the Magistrate by whom the reference was made; and the Magistrate shall, on receipt thereof proceed to dispose of the proceeding under Section 145 in conformity with the decision of the Civil Court.

(1-C) The costs, if any, consequent on a reference for the decision of the Civil Court shall be costs in the proceedings under this section.'

The finding given by the Civil Court must be given effect to by the Magistrate and the proceedings under Section 145 must be disposed of in conformity with the decision of the Civil Court. The finding, once given, can neither be appealed against, nor revised nor reviewed. The final order passed in the proceedings under Sec, 145 in conformity with the finding of the Civil Court has been made under Section 146(1-E) subject to subsequent decision of a Court of competent jurisdiction only. It is a finding of considerable importance and consequence for the parties. Obviously, therefore, the power of the Civil Court to hold and conduct the proceedings arising out of a reference under Section 146(1) of the Code must be comprehensive enough to include all legally permissible modes of holding and conducting a judicial proceeding for the purpose of recording a categorical finding on a question of fact. In the absence of any bar, imposed expressly or by necessary implication, nothing in Section 146(1-A) should be read or construed as being restrictive of the ordinary powers of the Civil Court exercisable when performing its judicial duty of giving finding on a disputed question of fact. By doing so the legislative purpose and intent of providing for reference to the Civil Court may be stultified. The proceeding arising on a reference under Section 146(1) to the Civil Court is a Civil proceeding within the meaning of Section 141 of the Code of Civil Procedure. This has been held by the Supreme Court in *Ram Chandra Aggarwal v. State of Uttar Pradesh*, AIR 1966 SC 1888.

7. The true import and effect of the words 'the Civil Court shall peruse the evidence on the record

inSection 146(1-A) of the Code on which the entire argument of the opposite party is based, in my opinion, is only this that the Civil

Court is not required to start the entire proceedings de novo. This will be clear from Sub-sections (1) and (1-A) of Section 146 of the Code itself. The proceedings which originated under Section 145(1) of the Code remains, so to say, in a state of animated suspension for the time being when a reference to the Civil Court is made under Section 146(1) by the Magistrate because of his inability to decide the question of possession. The proceeding in the Civil Court consequent upon the reference is not original. It is in reality a continuation of and complementary to the proceeding under Section 145 of the Code. The jurisdiction of the Civil Court commences on receipt of the reference and ceases with the transmission of its finding to the Magistrate together with the record of the proceeding. In exercise of its jurisdiction the Civil Court has to perform an important judicial duty of holding a limited enquiry and deciding objectively the question of possession referred to it. Does it stand to reason that the legislature while imposing a definite responsibility and an onerous duty on the Civil Court deprived it of its ordinary powers and denied to it even those powers which are exercisable by the Magistrate under Section 145 of the Code? After all it is only the inability of the Magistrate to come to a decision on the question of possession that occasions the reference to the Civil Court. Divorced from its context and literally read in isolation. Section 146(1-A) would ostensibly mean that if the parties do not produce any further evidence, the Civil Court shall have to peruse the evidence on record, hear the parties and decide the question of possession that very question which the Magistrate did not find it possible to decide after perusing the same evidence and hearing the parties. If the affidavits are evenly balanced and comprise the entire evidence, is the question of possession to be ultimately decided by the Civil Court by tossing a coin? Literally, the Civil Court cannot even be said to have the power 'to peruse' the statements filed by the parties under Section 145(1) of the Code and to consider whether and to what extent the affidavits filed and relied on by the parties as evidence are consistent with the statements. The Civil Court, on such interpretation of Section 146(1-A). will have no power to summon any deponent and to examine him even when after perusing the affidavits it might consider necessary and appropriate to do so for a proper decision of that very question which it has been called upon to decide. If the whole gamut of the powers of the Civil Court is to be literally confined to Section 146(1-A), one may wonder what is

the enquiry which the Civil Court is to hold and which it is required to conclude under Section 146(1-8) of the Code. In my opinion, Section 146(1-A) cannot, therefore, be read and construed in isolation but must necessarily be read and construed in the setting in which it has been placed by legislature. The setting consists of the provisions of Sections 145 and 146 of the Code and there is, to my mind, nothing in those sections which, either expressly or by necessary implication, so curtails or restricts the powers of the Civil Court as has been contended for; by the learned counsel for the opposite party. It must, therefore, be held that in a proceeding before the Civil Court arising on a reference under Section 146 (1) of the Code its powers and the rights of the parties respectively will, at least, be the same as those of the Magistrate and the parties in a proceeding under Section 145. I have already indicated what, in my opinion, these powers and rights are.

8. In one respect there is a difference in the language used in Section 145(4) and Section 146(1-A) of the Code. In the former it is provided : 'The Magistrate shall peruse the documents and affidavits'. whereas in the latter it is provided : '.....the Civil Court shall peruse the evidence on record..... Whether this difference has any special significance or whether in Section 146(1-A) the words 'the documents and affidavits' have been condensed into the expression 'evidence' is not easily discernible. Evidence under the Evidence Act means oral and documentary evidence and the provisions of this Act do not apply to affidavits. However, in the context and in the setting in which the expression 'evidence' has been used in Section 146(1-A) it can be reasonably held that it includes the affidavits which by virtue of the provisions of Section 145(1) of the Code form part of the evidence on record in the proceeding. Without being punctilious and importing a fiction, the affidavits on the record of the proceedings may perhaps also be placed by the Civil Court under the category of affidavits which under order 19 of the Code of Civil Procedure can be filed or read in evidence and cross-examination may also be permitted by the Civil Court accordingly. To my mind, the importation of such fiction will neither be arbitrary nor whimsical, but will be a conducive method by which a glaring anomaly and inconsistency between one set of evidence and another in the same proceeding and before the same Court can be eliminated. Section 146(1-A) of the Code itself makes it obligatory on the Civil

Court to 'take such further evidence as may be produced by the parties respectively'. When a party examines a witness under Section 146 (1-A) the provisions of the Evidence Act will be applicable and the other party or parties will have a right to cross-examine such witnesses. The proceeding arising on a reference under Section 146 (1) of the Code being a proceeding in the Civil Court, under Section 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. The evidence on record thus will consist of one set of affidavits of persons not amenable to cross-examination at all and of another set of affidavits or deposition of persons who have been or, at the instance of the party concerned, could have been subjected to cross-examination. I am unable to accept as correct any interpretation of Section 146(1-A) of the Code which will create such incongruity. Further, if persons whose affidavits have been filed in pursuance of notice under Section 145(1) of the Code are held to be immune from being subjected to cross-examination by any party to the proceedings either before the Magistrate or the Civil Court, testimony which might have been shown by proper cross-examination to be perjured, tainted or worthless, will pass as good and unimpeachable evidence.

9. The learned counsel for the opposite party contended that under Section 146 (1-A) of the Code itself it would be open to a party desiring to cross-examine a person whose affidavit has been filed as evidence against him, to summon that person as his witness, to get him declared to be hostile and to cross-examine him thereafter. This suggested device can neither be legally resorted to under Section 146(1-A) nor should be permitted to be resorted to by a court of law. Section 146(1-A) of the Code gives rights to the parties to produce further evidence.

A person whose affidavit has been filed as evidence against a party cannot certainly be summoned by him as his own witness to give further evidence on his behalf. The affidavit essentially partakes the nature of statement made during examination-in-chief and, therefore, the deponent cannot be called by the party

against whom he has already given his testimony as a witness for that party. He can only be cross-examined and also re-examined if necessary, in accordance with; law.

10. Cross-examination is one of the most effective and universally recognised means of probing into and testing the credibility of a witness and the veracity of his testimony. The right to cross-examine a witness whose evidence is sought to be used against a party is a very valuable right. In the absence of any express and absolute bar imposed by law I am not prepared to deny this right, to a party in a proceeding in the Civil Court arising on a reference under Section 146 (1) of the Code. I am, however, also not prepared to hold that any person whose affidavit had been filed under Section 145(1) of the Code can as of right be got summoned and cross-examined by the party against whom the affidavit is to be read in evidence. After all the proceeding is a summary one in which the rights and liabilities of the parties or their title to the property which is the subject of the dispute cannot be gone into. The enquiry has got to be concluded with expedition. Therefore, while holding that it would be open to a party to make an application in the Civil Court to summon the person or persons, whose affidavits are to be read in evidence against him, for cross-examination, the matter must be held to be within the judicial discretion of the Civil Court. It will be for the Civil Court, having regard to the facts and circumstances of each case and the reasons stated in such application to summon or not to summon any or all the persons sought to be summoned and to permit, subject to its control, the cross-examination of the person or persons summoned. In regard to summoning persons for cross-examination and their cross-examination in a proceeding arising on a reference under Section 146 (1) of the Code, the powers of the Civil Court, in my opinion, should be analogous to those which it can exercise under the provisions contained in Order 19 of the Code of Civil Procedure. Therefore, in my opinion, it can be reasonably held that in disposing of an application for summoning person or persons the Civil Court should act as if the affidavit or affidavits filed by them are affidavits filed under Order 19 of the Code of Civil Procedure.

11. There is just one thing which remains to be considered. The learned counsel for the opposite party had in the course of his arguments also submitted that the

order passed by the court below is not a case decided within the meaning of Section 115 of the Code of Civil Procedure. This argument is without force. The proceeding being a Civil proceeding in a court subordinate to the High Court, even some interlocutory orders may amount to cases decided so as to be re-visable under Section 115. The Civil Court by its order decided a disputed question arising in the proceeding. This decision directly affects its own jurisdiction and is likely to affect the ultimate finding which it is required to give on the question referred to it under Section 146(1) of the Code. In my opinion, the order passed by the learned Munsif in the instant case is revis-able under Section 115, Code of Civil Procedure.

12. The revision is allowed. The order of the court below is set aside and it is directed to consider the application filed by the applicant on merits and to pass such order thereon as it might think just and appropriate in the light of the observations made in this Judgment. The parties shall bear their own costs.

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