

Wahid and anr. Vs. State

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Court : Allahabad

Decided On : Feb-22-1962

Reported in : AIR1963All256; 1963CriLJ722

Judge : Kailash Prasad, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 145(4), 539 and 539AA; Oaths Act, 1873 - Sections 4

Appeal No. : Criminal Revn. No. 219 of 1961

Appellant : Wahid and anr.

Respondent : State

Advocate for Def. : S.N. Upadhya, Adv. and ;Asst. Govt. Adv.

Advocate for Pet/Ap. : Yashodanandan, Adv.

Disposition : Reference Rejected

Judgement :

Kailash Prasad, J.

1. This reference by the Civil and Sessions Judge, Gyanpur arises from proceedings under Section 145 of the Cri P. C. The proceedings originated on the application of one Mahangi (first party) alleging that he was in possession of a plot

of land surrounded by a boundary wall behind the house of Wahid and Zahid (Second Party). Both the parties claimed to be in possession of the enclosure in dispute. The Sub-Divisional magistrate, after considering the affidavits put in by the parties and inspecting the locality, found that Mahangi (first party) was in possession of the disputed property. He accordingly ordered the property to be released in favour of Mahangi and directed Wahid and Zahid (second party) not to interfere with the peaceful possession of Mahangi until he is evicted by a competent Court of law.

2. Dissatisfied with this order, Wahid and Zahid (second party) filed a revision before the Sessions Judge. It appears that the Sub-divisional magistrate, who inspected the locality, did not record a memorandum of the facts observed by him at the inspection as required by Section 539A, Cri. P. C. The observation of the Sessions Judge on this omission on the part of the magistrate is that the magistrate acted in a very unsatisfactory manner. The Sessions Judge further observed that the Magistrate used the facts observed by him at the time of inspection as substantive piece of evidence without giving an opportunity to the parties to file objections thereto and consequently the magistrate acted with illegality and material irregularity sufficient to vitiate the judgment.

The Sessions Judge also found that the affidavits filed on behalf of Mahangi (first party) were not properly sworn and could not, therefore, be taken into consideration. If the affidavit filed by the first party in support of his claim were taken out there was no evidence to prove that the first party was in possession of the disputed enclosure. Another finding given by the learned Sessions Judge is that the magistrate did not discuss the evidence of the parties as required by law. For these reasons the learned Sessions Judge has made a recommendation that the order of the magistrate be set aside and he be directed to proceed with the case in accordance with law after giving opportunities to the parties to file further properly verified affidavit.

3. The first point that arises for consideration, therefore, is whether the affidavits filed by the parties were properly sworn and could be considered as proper evidence in the case. Under the provisions of Section 145, Cri. P. C., a party to the

proceeding can adduce evidence of such persons as the party relies upon in support of his claim by putting in affidavits of those persons. The affidavits that were put in by Mahangi (first party) were verified and taken before an oath commissioner appointed by the High Court under Section 539, Cri. P. C. On the back of those affidavits there is a note of attestation. That note does not show on its face as to who is the attesting authority, because the designation of the person attesting is not written under the signatures. Under the signature of the authority attesting those affidavits we find only the date and another small initials. The signatures of the magistrate, who tried the case, are on various other papers on the record. A comparison of the admitted signatures of the magistrate with the signatures on affidavits under the word 'attested' clearly shows that the affidavits were attested by that very magistrate. The small initials' under the date appear to be of the reader or other official of the magistrate's Court who wrote the word 'attested'.

Some of the affidavits filed by Wahid and Zahid(second patty) appear to have been taken before a special magistrate. The view taken by the Sessions Judge is that the High Court has not appointed any commissioner or oath officer before whom an affidavit which is proposed to be filed before a magistrate can be sworn or affirmed. This view appears to be correct. The only provision in the Cri. P. C. regarding the mode of swearing affidavits and affirmations is to be found in Section 539. That section says that affidavits and affirmations which are to be used before any High Court must be sworn and affirmed before such Court..... or before any commissioner or other person appointed by the High Court for that purpose.... Section 539AA lays down that affidavits to be used before any Court other than a High Court under Section 510A or Section 539A may be sworn or affirmed in the manner prescribed in Section 539 or before any magistrate. A perusal of Sections 539 and 539AA clearly shows that a commissioner or oath officer appointed by the High Court can have only such affidavits sworn before him as are to be used before the High Court or in the case of other Courts only those affidavits as are under Section 510A or 539A.

It is significant to note that in Section 539AA there is no mention of affidavits under Section 145. This clearly implies that an affidavit under Section 145 can not be

sworn or affirmed before a commissioner or oath officer appointed by the High Court. An examination of the provisions of various sections of the Cri. P. C. shows that affidavits are required to be filed under Sections 145, 510A, 526 and 539A. Section 526 provides for the transfer of a case by the High Court. An application for the exercise of the powers of transfer under Section 526 has, therefore, to be made in the High Court. Such an application is required to be supported by an affidavit under the provisions of Sub-section (4) of Section 526. The affidavit referred to in that section has, therefore, to be filed before the High Court and can be sworn in the manner laid down in Section 539. Section 539A speaks of an affidavit in support of an application containing allegations against any public servant and Section 510A speaks of affidavits with respect to evidence of a formal character.

Proceedings requiring an affidavit under Sections 510A and 539A can be a Court other than a High Court. In view of Section 539AA such affidavits can be sworn in the manner prescribed in Section 539. In other words, such affidavits can be sworn before an oath commissioner or oath officer appointed by the High Court. If the legislature had intended that affidavits under Section 145 were also to be sworn in the manner prescribed in Section 539, a provision similar to the provision relating to affidavits under Sections 510A and 539A would have been enacted by adding Section 145 in Section 539AA. The affidavits put in by Mahangi (first party) are, therefore, not proper affidavits in so far as they are sworn before an oath commissioner.

4. The next question to be considered in this connection is that as to how an affidavit for purposes of proceedings under Section 145 is to be sworn. Section 145 only mentions 'affidavits' and the Cri. P. C. does not contain any provision relating to the mode of swearing of an affidavit under Section 145. Now it is to be seen what an affidavit is. An affidavit is a declaration as to facts made in writing and sworn before a person having an authority to administer oath. The provisions of the Indian Oaths Act indicate the persons having an authority to administer oath. Section 4 of the Act runs thus:

'4. The following Courts and persons are authorised to administer by themselves or by an officer empowered by them in this behalf, oaths and affirmation in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law:

(a) all Courts and persons having by law or consent of parties authority to receive evidence. (b)

5. The magistrate before whom the proceedings were pending had a duty to decide the dispute between the parties with regard to the possession of the enclosure and it cannot be doubted for a moment that for the proper discharge of his duty the magistrate had an authority to receive evidence in the proceedings. He was, therefore, a person authorised to administer oath either by himself or by an official empowered by him in this behalf. The affidavits that were to be filed in the proceedings could, therefore, be sworn by the magistrate before whom the proceedings were pending decision.

6. The dictionary meaning of the word 'attested' is to testify, certify, put a person on oath or solemn affirmation. On the affidavit the word 'attested' above the signature of the magistrate, therefore, signifies that it was sworn before the magistrate. It may be that the magistrate might not have administered the oath himself to the person making the affidavit, but it is a well recognised practice that presiding officers of the Courts empower an official of their Court to administer oath and this they are entitled to do under the provisions of Section 4 of the Indian Oaths Act. The small initials under the date appear to be of an official of the magistrate's Court who was empowered to administer the oath. Affidavits for purposes of proceedings under Section 145 can be sworn before the magistrate in whose Court proceedings are pending;

It is not necessary that the magistrate should write in so many words 'affidavit sworn in my presence'. Mere attestation by the magistrate is sufficient to signify that the affidavit was sworn, before him. As the affidavits put in by Mahangi (first party) were attested by the magistrate before whom the proceedings were pending, these affidavits were properly sworn and can be taken into evidence. The affidavits put in by the second party were sworn before another magistrate. That

magistrate had no concern with these proceedings. The affidavits put in by the second party were not proper affidavits and could not be taken into evidence. The Sessions Judge was in error in considering the affidavits filed by Mahangi which were attested by the magistrate, to be inadmissible in evidence. In view of the above discussion the affidavits put in by Mahangi (first party) are admissible and the affidavits put in by Wahid and Zahid (second party) are inadmissible as they were not properly sworn.

7. There is no doubt that the magistrate in not recording a memorandum of the facts observed by him at the time of inspection committed an irregularity in as much as he failed to comply with the mandatory directions contained in Section 539B in that behalf. The words in the section are 'shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection'. The result of not recording a memorandum of the facts observed at the inspection is that those facts cannot be relied upon in deciding the dispute between the parties. Excluding the evidence of the facts observed by the magistrate at the time of inspection and the affidavits put in by the second party, the only evidence that remains on record are the affidavits put in by Mahangi (first party). Those affidavits include affidavits of such responsible persons as Gram Sabhapati, Sarpanch and secretary of Nayaya Panchayat. Those affidavits show that it was Mahangi (first party) who was in possession of the disputed enclosure. The order of the magistrate declaring Mahangi (first party) to be in possession, therefore, appears to be correct.

8. The reference is rejected and the order of the magistrate is affirmed.

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