

Lalta Ram and ors. Vs. Dalip Singh

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Court : Allahabad

Decided On : Apr-27-1964

Reported in : AIR1965All294; 1965CriLJ39

Judge : D.P. Uniyal and ;C.B. Capoor, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 145, 537 and 540;
Code of Criminal Procedure (CrPC) (Amendment) Act, 1955

Appeal No. : Criminal Ref. No. 398 of 1962

Appellant : Lalta Ram and ors.

Respondent : Dalip Singh

Advocate for Def. : Satya Narain Prasad and ;T. Rathore, Adv.

Advocate for Pet/Ap. : L.D. Joshi, Adv.

Judgement :

Capoor, J.

1. This reference has been made by the learned Sessions Judge of Kumaon recommending that the order of the learned Sub-Divisional Magistrate, Dharchule, dated 30th of December, 1961, made in proceeding under Section 145 Cr. P. C. be set aside and the case be remanded for fresh enquiry on the basis of the

affidavits which the parties should be called upon to file.

2. The case came up before our brother Mathur, J. and he was Inclined to the view that as no failure of Justice had been occasioned because of not requiring the parties to file affidavits the irregularity was curable under Section 537 Cr. P. C. the effect of which section was not considered in the case of Bhagwat Singh v. State : AIR1959 All763 , a decision on which the learned Sessions Judge had relied in making the recommendation under consideration. He accordingly directed the papers to be laid before the Hon'ble the Chief Justice for constituting a larger Bench for the disposal of the reference.

3. Dalip Singh, opposite party had filed an application under Section 145 Cr. P. C. The learned Magistrate, who made preliminary order did not direct the parties to file affidavits in support of their respective cases. He merely directed the parties to file their written statements. On the date fixed for hearing the parties adduced oral evidence and it was on a consideration of that evidence that the learned magistrate decided the application under Section 145 Cr, P. C. In favour of the opposite party. As against that order an application in revision was filed by the applicants before the learned Sessions Judge who made the present reference.

The relevant portions of Section 145 Cr. P. C. read as below:--

'(1) Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof within the local limits of his jurisdiction, he shall 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.

4. The Magistrate shall then, without reference to the merits or the claims of any such parties to a right to possess the 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.

9. 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 things.'

The aforesaid section was amended by the Criminal Procedure Code Amendment Act No. XXVI of 1955. Prior to the amendment of the section the parties had the right to examine witnesses in support of their respective cases. One of the changes effected by the Amendment Act, referred to above, was that provision was made for the filing of affidavits and the object underlying the aforesaid change was expedition in the disposal of cases and simplification of procedure. The aforesaid change was not brought about because the procedure of examining the witnesses was considered to be either illegal or faulty and we have no doubt that in introducing the aforesaid change expeditious disposal of the proceeding under Section 145 Cr. P. C. was in the contemplation of the Legislature.

4. Evidence according to Section 3 of the Indian Evidence Act means, Inter alia, all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry. There is nothing in Section 145 as it now stands, to indicate that the intent of the legislature was that the examination of witnesses would be illegal or that a court would be precluded from recording oral

statements of witnesses proposed to be examined by the parties even in cases in which the parties were not required to and did not file affidavits in support of their respective cases.

5. The relevant portion of Section 537 of Cr. P. C. reads as below:--

'Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Ch. XXVII or on appeal or revision on account-

(a) of any error, omission or irregularity in the complaint, summons, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code.unless such error, omission, irregularity, or misdirection has in fact occasioned the failure of justice.

Explanation:--In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.'

It would thus appear that if an error, omission or irregularity in the order, judgment or other proceedings has not occasioned failure of justice such error, omission or irregularity would be curable, and in determining the question as to whether failure of Justice has been occasioned the circumstances that no objection was raised on the score of the error, omission or irregularity during the pendency of the proceeding is a relevant consideration.

In the case of Willie (William) Slaney v. State of Madhya Pradesh : 1956 CriLJ291 each of the two accused persons was charged under Section 302 read with Section 34 of the Penal Code. None of them was charged under Sec. 302 of I. P. C. simpliciter. Courts found that one of the accused persons had inflicted the fatal blow and held him guilty under Section 302 of I. P. C. On a consideration of the facts of the case it was held by the Supreme Court that no prejudice was caused to the accused person who was found guilty of the offence under Section 302 of I. P. C., because of the omission of such a charge and the omission was held to be

curable under Section 537 Cr. P. C. On behalf of the applicants reliance was placed upon a ruling reported in *Tirkha v. Nanak* : AIR1927 All350 . In that case a magistrate had made an order under Section 133 Cr. P. C. absolute without recording evidence and simply on the basis of local inspection made by him and in that setting of facts Section 537 of Cr. P. C. was held to be inapplicable to cure the defect in the order.

In the case of *Zahir Uddin v. Emperor* AIR 1947 P. C. 75 it was held that Section 537 would not apply to a case in which the magistrate had refused to overlook an irregularity and had made an order of acquittal. It was further held in that case that the effect of a contravention of Section 162 (1) of Cr. P. C, depended on the prohibition which had been contravened. The aforesaid cases are, therefore, distinguishable from the facts of the instant case. In the present case the magistrate who drew the preliminary order did not direct the parties to file affidavits in support of their respective cases. NO objection was made either by the parties or by the court when the parties adduced oral evidence. In our opinion the applicants, were not prejudiced because of the recording of the statement of witnesses and the irregularity in the procedure was curable. It may further be mentioned that Section 540 of Cr. P. C. empowers the court at any stage of any enquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined and it enjoins upon the court to summon and examine or recall or re-examine any such person if his evidence appears to it essential to the Just decision of the case.

6. On an examination of the relevant provisions of the Code we are driven to the conclusion that it was within the competence of the learned magistrate to record the statements of witnesses whose affidavits had not been filed and that the irregularity in not requiring the parties to file affidavits and in recording the statements of witnesses proposed to be examined by the parties was, in the circumstances of the case, curable under Section 537 of Cr. P. C.

7. In : AIR1959 All763 case *Desai J.*, as our Lord the Chief Justice then was, held that under the amended Section 145 of Cr. P. C. only affidavits could be put in

evidence and that if any witnesses were to be examined they must be persons whose affidavits had already been put in. With great respect to him we find ourselves unable to agree with the general proposition laid down in that case. The aforesaid decision was followed by the Punjab High Court in the case of Jodh Singh v. Mahant Bhagambar Das AIR 1901 Punj. 187. A different view was taken in the case of Bahorl v. Ghure . In that case a patwarl was examined as a court witness and the question arose as to whether such examination was countenanced by provisions of the Code. It was held that proviso to Sub-section (4) of Section 145 was merely an enabling provision of law but it did not preclude the magistrate from calling as a witness any other person that he thought proper to examine.

8. Sections 537 and 540 of Cr. P. C. do not appear to have been considered in the : AIR 1959 All 763 case or in the case. The order of the learned Magistrate in our opinion, did not suffer from any such infirmity as would justify its vacation. We are thus unable to accept the recommendation made by the learned Sessions Judge.

9. The Reference is accordingly rejected.

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