

above and the analogy of *Zahur Din's case* to the facts of the present case is complete. A vested right cannot be lost in the manner in which it is said to have been lost in the present cases by the death of Teja. It can only be lost by legislation and, as stated, that is not the case here. In this approach the orders of the learned Financial Commissioner in the three cases cannot be maintained and are quashed.

The learned counsel for the landlords contends that there are other matters that the learned Financial Commissioner had to consider in the revision applications of the landlords or in the litigation between the parties before him. If this is so, and any matters after the decision of the above question still remain pending between the parties before the learned Financial Commissioner, the same will now be disposed of according to law. There is no order in regard to costs in these petitions.

A. N. GROVER, J.—I agree.

B. R. T.

REVISIONAL CRIMINAL

Before R. S. Narula, J.

ABDUL SALAM,—*Petitioner.*

versus

AHMAD DIN,—*Respondent.*

Criminal Revision No. 172-D of 1965.

May 19, 1966.

Code of Criminal Procedure (V of 1898)—S. 145—Proceedings under—Affidavits sworn by witnesses and parties before Oath Commissioner appointed under S. 139(b), Code of Civil Procedure—Whether can be received in evidence in such proceedings—Oath Act (X of 1873)—S. 4—Scope of—Affidavits for proceedings under S. 145 Cr. P.C.—Whether can be sworn before a third class Magistrate.

Held, that the affidavits, in order to be good evidence in proceedings under section 145 of the Code of Criminal Procedure have to be sworn before an authority which is otherwise competent under some law to administer oath. An

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Oath Commissioner appointed under section 139(b) of the Code of Civil Procedure is competent to allow affidavits being sworn before him in relation only to cases under the Code of Civil Procedure, i.e., civil cases. For all other cases the authorities competent to administer oaths would be the authorities named in section 4 of the Oaths Act. The Court of every Magistrate or other judicial Officer who is entitled to receive evidence is a competent authority under section 4 of the Oaths Act; but an Oath Commissioner appointed by the High Court under section 139(b) of the Code of the Civil Procedure would not have any such jurisdiction or authority as he is not entitled to receive evidence.

Held, that a third class Magistrate, who has no authority to receive evidence in a case under section 145 of the Code of Criminal Procedure, is all the same entitled to attest an affidavit or to administer an oath to the deponent of an affidavit for such proceedings. The words "having authority to receive evidence" in clause (a) of section 4 of the Oaths Act is not restricted to the authority of the Court to receive evidence in the particular case to which the evidence relates but refers to the jurisdiction and power of the Court to receive evidence in any case which jurisdiction or authority must be conferred on the Court either by law or by consent of the parties. If a third class magistrate has by law the authority to receive evidence, he is competent to administer oaths and affirmations to everyone under section 4 of the Oaths Act.

Case reported by the Additional Sessions Judge, Delhi (Shri Joginder Singh Mander), with his No. 63 of 65.

BIPEN BEHARI LAL, ADVOCATE, for the Petitioner.

G. S. CHATRATH, ADVOCATE, for the Respondent.

JUDGEMENT

NARULA, J.—The only question which calls for decision in this recommended revision petition is whether affidavits sworn by witnesses and/or parties to proceedings under section 145 of the Code of Criminal Procedure before a Commissioner for Oaths appointed under section 139(b) of the Code of Civil Procedure can be received as evidence by the competent Magistrate in whose Court the Section 145 proceedings are pending. A Court can only receive legal and admissible evidence in proceedings under section 145 of the Code of Criminal Procedure. Both sides in this case filed affidavits of witnesses before the trial Court which were attested by an Oaths Commissioner and not by any Court. The deponents did not appear before the Sub-Divisional Magistrate who was trying the case under section 145 of the Code. I am inclined to think that an Oaths Commissioner appointed under section 139(b) of the Code of Civil Procedure is competent to allow affidavits being sworn before him in

relation only to cases under the Code of Civil Procedure, i.e., civil cases. For all other cases the authorities competent to administer Oaths would be the authorities named in Section 4 of the Oaths Act which provision reads as follows:—

“4. *Authority to administer oaths and affirmations.*—

The following Courts and persons are authorised to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations 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) the Commanding Officer of any military, naval, or air force station or ship occupied by troops in the service of Government:

Provided—

- (1) that the oath or affirmation be administered within the limits of the station; and
- (2) that the oath or affirmation be such as a justice of the Peace is competent to administer.”

The Oaths Commissioner who has attested the disputed affidavits admittedly does not fall within any of the categories of Courts or persons mentioned in section 4 of the Oaths Act. I am, therefore, in agreement with the recommendation of the Additional Sessions Judge to the effect that the disputed affidavits sworn before the Oaths Commissioner could not be received by the learned Sub-Divisional Magistrate as evidence in the case and that since the order of the S.D.M., is based at least partially on what was not legal evidence before the Court, the said order has to be set aside and the learned Magistrate has to be directed to allow the parties to produce proper affidavits or other legal evidence and then to decide the case in accordance with law.

Mr. G. S. Chatrath, the learned counsel for the contesting respondent, has argued that affidavits are referred to in sections 74, 526(4), 510, 539, 539-A and 539-AA of the Code of Criminal Procedure and that the above-mentioned sections refer to the authorities before which the affidavits mentioned in those sections should be sworn. The

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argument is that for proceedings under section 145 of the Code of Criminal Procedure no particular authority, person or Court is specified by the Code of Criminal Procedure to be competent to get an affidavit sworn or attested. There is no doubt that this is correct. But the result of this situation is that an affidavit in order to be good evidence in a proceeding under section 145 of the Code of Criminal Procedure has to be sworn before an authority which is otherwise competent under some law to administer oath. In the light of the observations made by me in an earlier part of this judgment the Court of every Magistrate or other judicial officer who is entitled to receive evidence is such a competent authority under section 4 of the Oaths Act; but an Oaths Commissioner appointed by the High Court under section 139(b) of the Code of Civil Procedure would not have any such jurisdiction or authority as he is not entitled to receive evidence. Section 139(b) of the Code reads as follows:—

“139. In the case of any affidavit under this Code—

- (a) _____,
 - (b) any officer or other person whom a High Court may appoint in this behalf, or
 - (c) _____,
- may administer the oath to the deponent.”

The above provision shows that appointment of Commissioners for administering oaths and affirmations is made only for the purposes of the Code of Civil Procedure. Independent of the said statutory authority vested in Oaths Commissioners they have no other power to administer oaths or affirmations, or to do any notarial job.

The counsel for the contesting respondent then referred to paragraphs 15 and 16 contained in Chapter 12-B of Volume IV of the Rules and Orders of this Court. Those rules are among the instructions given to civil and criminal Courts by the High Court in the matter of swearing of affidavits. The very first rule in Chapter 12-B shows that the affidavits referred to therein are those under the Code of Civil Procedure. In any case none of the rules contained in that Chapter authorises an Oaths Commissioner to administer an oath to anyone in relation to a proceeding pending in a Criminal Court. In fact the paragraphs other than para 5 of Chapter 12-B of Volume IV of the High Court Rules and Orders have nothing to do with Oaths Commissioners. Those paragraphs contain instructions to Civil

and Criminal Courts in the matter of administering of oaths and affirmations. Paragraph 5 of the said Chapter, which reads as follows, relates to appointment of Oaths Commissioners:—

- “5. (i) Under section 139(b) of the Code of Civil Procedure approximately two to four legal practitioners at the Headquarters of each district and one at each station where there is a Subordinate Judge, are appointed as Commissioners for the purpose of administering oaths and affirmations with the previous approval of the High Court. Oath Commissioners may also be appointed at Headquarters of Tahsils where there are no Subordinate Judges. At each of the District Headquarters in Punjab and Delhi, one of the Oath Commissioners appointed should be a lady lawyer, if one is available for appointment.
- (ii) Such Commissioners are ordinarily appointed from among legal practitioners but not men in large practice. They will ordinarily be appointed for a period of three years in the first instance, but if their work is satisfactory, their appointment may be renewed from time to time for further periods of three years each, or until the further orders of the High Court, whichever is earlier.
- (iii) Commissioners may charge a remuneration of annas eight in cash for each affidavit and shall keep a register in the form prescribed in paragraph 7 *infra* in which all affidavits shall be entered. A written receipt for the amount paid shall be given by the Commissioner to the deponent. The receipt shall be in a printed form consisting of foil and counterfoil, the foil being handed over to the person paying the money and the counterfoil being kept by the Commissioner for purposes of inspection.

The above charge will be in addition to any stamp duty payable on the affidavit under the Indian Stamp Act, 1899, Schedule I, Article 4”.

The usual form in which notifications are issued by this Court in the matter of appointment of Oaths Commissioners is this:—

“In exercise of the powers vested in them by Section 139(b) of the Code of Civil Procedure (Act V of 1908), the Hon’ble the Chief Justice and Judges of the High Court of Punjab

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are pleased to appoint Sarvshri _____ and _____ as Commissioners for administering oaths and affirmations to deponents of affidavits under the said Code in accordance with the terms specified in paragraph 5 of Chapter 12-B, High Court Rules and Orders, Volume IV (for Circuit Court, New Delhi), for a period of two years each or until further orders of this Court, whichever is earlier.”

The provisions of section 139(b) of the Code of Civil Procedure, paragraph 5 of Chapter 12-B of the High Court Rules and Orders, Volume IV and the form in which the notifications appointing Oaths Commissioners are issued leave no doubt in my mind that the Oaths Commissioners are not authorised by this Court to administer oaths and affirmations other than those required under the Code of Civil Procedure or to do any other judicial act.

Mr. Bipan Behari Lal, the learned Advocate for the petitioner, who has appeared to support the recommendation of the learned Additional Sessions Judge, has invited my attention to the judgment, of the Allahabad High Court in *Wahid and another v. State* (1) wherein it was held that an affidavit under section 145 of the Code of Criminal Procedure cannot be sworn or affirmed before a Commissioner or Oath Officer appointed by the High Court. I am in full agreement with the judgment of the Allahabad High Court to that extent. Kailash Prasad, J., however, further proceeded to hold that affidavits which have to be filed in proceedings under section 145 can be sworn by the Magistrate before whom the proceedings are pending decision. This is no doubt true. But this does not debar any other competent Magistrate from allowing an affidavit being sworn before him. Indeed the Rajasthan High Court has gone to the length of holding in *Hemdan v. State of Rajasthan and others* (2), that affidavits for proceedings under section 145 of the Code of Criminal Procedure cannot be sworn even before a Third Class Magistrate because such a magistrate has no authority to himself receive evidence in a case under section 145 of the Code of Criminal Procedure. With great respect to the learned Judge, who decided *Hemdan's case*, I do not think that a third class Magistrate who is the proper authority under section 4 of the Oaths Act is not entitled to attest an affidavit or to administer an oath to the deponent of an affidavit merely because the case to which the affidavit relates cannot be tried by such magistrate himself. Such an

(1) A.I.R. 1963 All. 256.

(2) A.I.R. 1966 Rajasthan 5.

interpretation appears to me to nullify the very object of receiving evidence on affidavits. The witnesses who are out of station or cannot be conveniently called to a Court can give evidence on affidavits. If such witnesses have to appear in the Court itself to get their affidavits attested, the object of receiving evidence on affidavits would be completely flouted. The words "having authority to receive evidence" in clause (a) of section 4 of the Oaths Act does not appear to me to be restricted to the authority of the Court to receive evidence in the particular case to which the evidence relates but refers to the jurisdiction and power of the Court to receive evidence in any case which jurisdiction or authority must be conferred on the Court either by law or by consent of the parties. If a Third Class Magistrate has by law the authority to receive evidence he is competent to administer oaths and affirmations to every one under section 4 of the Oaths Act.

In the circumstances detailed above this revision petition is allowed, the order of the Sub-Divisional Magistrate is set aside and he is directed to allow the parties opportunity to file proper affidavits or to lead other evidence in place of the defective affidavits and then to decide the proceedings under section 145 of the Code on a consideration of legal evidence alone and on excluding the affidavits sworn before Oaths Commissioners and produced by either party. At the joint request of the learned counsel for the parties it is further directed that *status quo* as today regarding the actual physical possession of the property in dispute shall be maintained by the petitioner and the contesting respondent till the final disposal of the case by the learned Sub-Divisional Magistrate.

B.R.T.

REVISIONAL CIVIL

Before Inder Dev Dua, J.

KAMAL DEVI,—*Petitioner.*

versus

DEEP CHAND,—*Respondent.*

Civil Revision No. 235-D of 1966.

May 20, 1966.

Administration of Justice—Duties of judicial officers—Canons of judicial ethics—Bench and Bar—Relations between the two—Importance of, stressed.