

PETITIONER:
CHHOTAN PRASAD SINGH & ORS.

Vs.

RESPONDENT:
HARI DUSADH & ORS.

DATE OF JUDGMENT 24/11/1976

BENCH:
SHINGAL, P.N.
BENCH:
SHINGAL, P.N.
BHAGWATI, P.N.
GUPTA, A.C.

CITATION:
1977 AIR 407 1977 SCR (2) 174
1977 SCC (1) 102

ACT:

Oaths Act 1873--Section 4---General Clauses Act 1897, sec. 3(3)--Meaning of affidavit--Criminal Procedure Code 1898--Section 145(1), whether affidavits before a Magistrate in 145(1) proceedings must be sworn before any other authority empowered to administer oath.

HEADNOTE:

Proceedings under section 145(1) of the Criminal Procedure Code 1898 were going on between the parties. The appellants filed affidavits before the Magistrate. The said affidavits were not sworn before the Magistrate who was in seisin of the case but were sworn before some other Magistrate. It was contended before the Magistrate by the respondents that the said affidavits were not admissible in evidence. The High Court held those affidavits to be inadmissible.

Dismissing the appeal by special leave,

HELD: (1) In the absence of any specific provision to the contrary in the Criminal Procedure Code the affidavits have to be sworn or affirmed in accordance with the provisions of the Oaths Act, 1873. Section 145(1) of the Code provides that the Magistrate making an order under it shall require the parties concerned in the dispute to attend his court in person or by pleader and to put in such documents or to adduce by putting in affidavits the evidence of such persons as they rely upon in support of their claim. The affidavits contemplated by the sub-section are, therefore, evidence for purposes of proceedings before the Magistrate concerned even though the Evidence Act does not apply to them. [175G-H]

(2) There is no provision in the Code specifying the courts before whom the affidavits referred to in section 145 have to be sworn and affirmed. The definition of affidavit in section 3(3) of the General Clauses Act 1897 only states that it shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing. Section 4 of the Oaths Act reads as under:

"4. 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;"

It is clear that all Courts and persons having by law or consent of parties authority to receive evidence are authorised to administer oaths and affirmations, but they can do so only where they are otherwise acting in the discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law. In the present case the Magistrate concerned with the proceedings under s. 145 of the Code was discharging the duties imposed and exercising the powers conferred by the Code and he alone could administer the oaths and affirmations to the persons who made affidavits and not Magistrates who were not discharging any such duty or exercising any such power. [176A-H]

Nandial Ghose v. Emperor AIR 1944 Cal. 283, Hemdan v. State of Rajasthan & Ors., AIR 1966 Raj. 5; Govind v. State and others AIR 1969 All. 405; Krishna Chandra Naik v. Sk. Makbul and others AIR 1970 Orissa 309; Mahesh Thakur and others v. Lakshman Prasad Thakur and another (1971) 19 Bihar Law Journal 727 and State of Madhya Pradesh v. Trivedi Prasad (1971) XVI H.R. Law journal 1059 approved.
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Ahmad Din v. Abdul Salem AIR 1966 Pb. 528 and Shambhu Nath Chopra v. State AIR 1970 Delhi 210, over-ruled.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 316 of 1971.

(Appeal by Special Leave from the Judgment and Order dated the 17th September, 1971 of the Patna High Court in Criminal Revision No. 2488 of 1971) and Criminal Appeal No. 317 of 1971.

(Appeal by Special Leave from the Judgment and Order dated the 7th October, 1971 of the Patna High Court in Criminal Revision No. 1491 of 1971.)

D. Goburdhan and D.P. Sharma for the appellants in both the appeals.

S.C. Agrawala and V.J. Francis for respondents in both the appeals.

The Judgment of the Court was delivered by

SHINGHAL, J.--The point for consideration in these appeals by special leave is whether affidavits, sworn or affirmed before magistrates who are not in seisin of the case under section 145 of the Code of Criminal Procedure, hereinafter referred to as the Code, could be read in evidence under that section? The High Court has held such affidavits to be inadmissible in evidence, in its impugned judgments dated September 17, 1971 and October 7, 1971, and that is why the present appeals by special leave have arisen at the instance of the aggrieved parties.

It is not in controversy that in the absence of any specific provision to the contrary in the Code, the affidavits have to be sworn or affirmed in accordance with the provisions of the Oaths Act, 1873. It is also not in controversy that the Oaths Act of 1969 has no application to the controversy.

Sub-section (1) of section 145 of the Code provides, inter alia, that the Magistrate making an order under it shall require the parties concerned in the dispute to attend his court in person or by pleader and to put in such documents, or to adduce, "by putting in affidavits, the evidence

of such persons" as they rely upon in support of their claims. The affidavits contemplated by the sub-section are therefore evidence for purposes of the proceedings before the Magistrate concerned even though the Evidence Act does not apply to them by virtue of the express provision of section 1 of that Act.

Chapter XLVI of the Code deals with miscellaneous matters including the affidavits referred to in sections 539, 539-A and 539-AA. Section 539 deals with courts and persons before whom affidavits and affirmations to be used before any High Court or any officer of such Court may be sworn and affirmed. Section 539-A relates to

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affidavits in proof of conduct of public servants, while section 539-AA relates to the authorities before whom affidavits to be used under section 510A or 539-A may be sworn or affirmed. An affidavit under section 145 is not however of a formal character because it is meant to prove or disprove the competing claim of the parties as respects the fact of actual possession of the subject or dispute. There is thus no provision in the Code specifying the courts or persons before whom the affidavits referred to in section 145 have to be sworn and affirmed. This has therefore to be done according to the general provisions relating to affidavits.

The definition of "affidavit" in section 3(3) of the General Clauses Act (Act X of 1897) only states that it shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing. But it is an essential characteristic of an affidavit that it should be made on oath or affirmation before a person having authority to administer the oath or affirmation. It is here that section 4 of the Oaths Act comes into operation which provides as follows:--

"4. 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;"

Then follow clause (b) and a proviso, with which we are not concerned.

It is therefore clear that all courts and persons having by law or consent of parties authority to receive evidence are authorised to administer oaths and affirmations, but they can do so only where they are otherwise acting" in the discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law." So the court or person mentioned in clause (a) of section 4 of the Oaths Act can administer oath or affirmation to the deponent in an affidavit only if the, court or person in acting in the "discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law." In the present cases, the Magistrates concerned with the proceeding under section 145 of the Code were discharging the duties imposed and exercising the powers conferred by the Code, and they alone could administer the oaths and affirmations to the persons who made the affidavits, and not the magistrates who were not discharging any such duty or exercising any such power. As the affidavits in the cases before us were admittedly not sworn or affirmed before Magistrates who were dealing with the disputes under section 145 of the Code, they were not proper affidavits and did not constitute evidence for purpose of section 145. A similar view

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has been taken in Nandial Ghost v. Emperor(1), Hemdan v. State Rajasthan and others(2), Govind v. State and others(3), Krishna Chandra Naik v. Sk. Makbul and others(4) Mahesh Thakur and others v. Lakshman Prasad Thakur and another(5) and State Madhya Pradesh v. Triveni Prasad(6) on which reliance has been placed by counsel for the respondents.

We have gone through Ahmad Din v. Abdul Selem,(7) which has been cited with approval in Shambhu Nath Chopra v. State,(8) on which reliance has been placed by counsel for the appellants. We find however that in Ahmad Din's case (supra) the Punjab High Court did not take proper notice of the requirement of section 4 of the Oaths Act that the courts and persons mentioned in clause (a) could administer oaths only "in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law." We have also examined the reasoning in Shambhu Nath Chopra's case (supra), but the Delhi High Court there went wrong in holding that the evidence on affidavits referred to in section 145 of the Code was of a formal character within the meaning of section 510A so as to attract section 539-AA.

At the High Court has rightly held in the two impugned judgments that the affidavits were inadmissible in evidence as they were sworn before Magistrates who were never in seisin of the case, we find no force in these appeals and they are hereby dismissed.

P.H.P.
missed.

Appeals dis-

(1) A.I.R. 1944 Cal. 283.

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

(3) A.I.R. 1969 All. 405.

(4) A.I.R. 1970 Orissa 209.

(5) (1971) 19 Bihar, Law
Journal 727.

(6) [1971] XVI M.P.L. J. 1059a

(7) A.I.R. 1966 Pb. 528.

(8) A.I.R. 1970 Delhi 210.

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STATE OF KERALA

v.

M.T. JOSEPH

November 25, 1976

[A. N. RAY, C.J., M.H. BEG AND JASWANT SINGH, JJ.]

Kerala Land Reforms Act 1963--Kerala Government Land Assignment Act 1960--Sec. 8---Whether after a person acquires title to Government land any further restrictions can be imposed.

The Government of Travancore sanctioned a scheme for the reclamation of the Vimbana Lake upon terms and conditions contained in at document dated 4-10-1963. The document provided that one Joseph his father on payment of Rs. 10/- per acre which was to be recovered in 10 equal instalments would be given possession of certain tracts of land which they undertook to reclaim. The said agreement was modified by an order dated 12-2-1941 and a fresh agreement was executed in July 1941. The said agreement provided that till the remittances of all amounts due to the Government by way of land value are paid the executant shall have no right of alienation in respect of the property in question and that till then the property shall remain with the Government as sole owner. It further provided that, until the entire land value is paid by the executant and until the assignment of the land and issue of Patta is completed, the executant undertook not to do any act which might reduce the value of the property. Joseph complied with the conditions laid down in the agreement and acquired full ownership rights

by fulfilling the said terms. In 1957, Joseph executed a deed of settlement of this land. Thereafter Kerala Land Reforms Act of 1963 was passed so that the State Land Board started proceedings for the surrender of the land. The question before the Land Board was whether the whole land should be treated as a single unit belonging to Joseph or whether it may be divided and treated as separate units of persons in whose favour Joseph made the settlement. If the children of Joseph had acquired rights under the settlement each of them could be treated as entitled to compensation for a separate unit. The State relied on section 8 of the Kerala Government Land Assignment Act 1960 which provides that all provisions, restrictions conditions and limitations contained in any Patta or other document evidencing an assignment of Government land shall be valid and take effect according to their tenure, any rule of law or usage to the contrary notwithstanding.

Dismissing the appeal,

HELD: The terms in the 1941 agreement operated as a restraint upon the alienation of the rights only so long as all the amounts due to the Government by way of land revenue were not paid up. Since, in the present case the entire amount had been paid by 10 yearly instalments before the year 1957 and since the Government had effected the mutation in its record acting upon the settlement of 1957 in favour of the children of Joseph, it could not be said that there was any patta or other documents containing any condition to which section 8 of the Act applied. The children derived rights under the deed of settlement and therefore, each of them is entitled to compensation for a separate unit. [180 C-E]

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 587-696 & 598-600 of 1976.

(Appeals by Special Leave from the Judgment and order dated 13th of July 1975 of the Kerala High Court in CRP Nos. 1188, 1227, 1250, 1272, 1278, 1279., 1284-1287, 1309, 1312 and 1386/73).

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M.M. Abdul Khader, Adv. Genl. and K.M.K. Nair, for the Appellants.

T.S. Krishnamoorthy Iyer and P.K. Pillai, for RR. excepting R. 8 in CA 587/76.

The Judgment of the Court was delivered by

BEG, J.--These appeals by special leave raise the question whether the Kerala High Court had correctly interpreted and applied Section 8 of the Kerala Govt. Land Assignment Act, 1960 (hereinafter referred to as 'the Act') to the cases before us. This provision reads as follows:

"8. All provisions, restrictions, conditions and limitations over, contained in any Patta or other document evidencing an assignment of Government land shall be valid and take effect according to their tenor, any rule of law or usage to the contrary notwithstanding".

The facts upon which the provision was sought to be applied are these: On 23 October, 1939, the Government of Travancore sanctioned a scheme for the reclamation of the Vimbang Lake upon terms and conditions which were set forth in a document dated 4 October, 1939. The agreement provided that one M. T. Joseph and his father, on payment of Rs. 10/- per acre, which were to be recovered in ten equal instalments, would be given possession of certain tracts of land which they undertook to reclaim. For the first two years after what is called the "Registry" of the names of the two

lessees no tax was to be levied. The "Registry" was liable to be cancelled if adequate progress was not made within these two years. It appears that the agreement was modified by an order dated 12 February, 1941 and a fresh agreement was executed in July 1941 by M.T. Joseph (now dead) who entered into possession of Keyal land, constructed the ring bunds at considerable expense, and brought the very large tracts of and to be reclaimed under paddy cultivation. In June 1957, M.T. Joseph executed a deed of settlement of all this land, after he had acquired full ownership rights by fulfilling the terms of the agreement. The Act which is sought to be now applied was then passed. After that, the Kerala Land Reforms Act of 1963. was passed so that the, "State Land Board" started proceedings for the surrender of these lands in accordance with the provisions of the Land Reforms Act.

The only question now before us is whether, by an application of section 8 of the Act, the whole land is to be treated as a single unit belonging to M.T. Joseph (since dead), on the dispositions made by M.T. Joseph, under the deed of settlement executed by him on 15th June, 1957, distributing the land among his children, resulted in separate units for the purposes of compensation for the land surrendered. If the children had acquired right under the deed of settlement each of them could be treated as entitled to compensation for a separate unit. If the deed was of no effect, the mere fact that the children were in possession, under an authority from their father could not change the ownership of the land in the constructive possession of the father.

We have been taken through the deed of agreement of July, 1941, with the Government. which contains the following term, the effect of which has to be determined:

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"Till the remittance of all amount due to. the Government by way tharavila (land value) etc. the executant shall have no right of alienation in respect of the schedule property and the property shall remain with the Government as sole owner. The executant shall remit the tax at the thirteenth thoram in the village office every year after the first two years of registry so long as no default is made in the payment of instalment and obtain receipt therefor. Until the entire tharavila (land value under this agreement as stated above is paid by the executant and until the assignment of the land and issue of patta is completed the executant undertakes not to do any act which may reduce the value of the property and if as stated above due to any reason the property is recovered. from the executant he shall not put forward any claim for improvements etc. and the property shall be surrendered to Government".

It is clear to us that this term in the agreement operated as a restraint upon the alienation of rights only so long as. all the amounts due to the Government as Tharavila had not been paid up. The whole amount had to be paid up in ten yearly instalments. It has been paid up before 1957. Furthermore, as the Kerala High Court found, the settlement of land on 15th June, 1957 had not merely been given effect to by a mutation in the relevant Government records but pattas had actually been given by the Government, acting upon the settlement of 1957, in favour of the children of

M.T. Joseph. Hence, it could not be said that there was any patta of other document containing any condition to which Section 8 of the Act could apply. We find, from the Judgment under appeal, that several questions, which have no real bearing on the rights of the parties, were: also. argued. One of these questions was whether land could be acquired by adverse possession by the alienees of the allottees of the land from the Government under the scheme for its reclamation. We fail to see how a question of adverse possession arises here when the Government itself recognises the rights of the children of M.T. Joseph in the pattas executed by it in their favour.

The High Court recorded the following findings about the Government acting on the terms of the settlement of 15th June, 1957, the correctness of which had not been challenged before us:

"This settlement deed has been recognised by the Government mutation has been effected in the names of the children and pattas have also. been issued to them. It has been further stated on behalf of the revision petitioners (the heirs of the said Joseph and those who took under the settlement deed dated 15.6.1957) that levy under the Kerala Rice and Paddy (Procurement by Levy) Order, 1966, has been collected from each of the shares under the deed of 1957, that land tax has been imposed on each of the shares separately and agricultural income-tax collected on the income of the properties of each of the sharers".

We do not think it is necessary to go into any other question. The High Court was of opinion that some facts had still to be as-

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certained when the case goes back to the Land Board for proceeding on the footing determined by the High Court. We think that we should make it clear that matters to. be still determined could not, in view of our finding, involve determination of any question of adverse possession of the claimants, the children of M.T. Joseph.

For the reasons given above, we dismiss these appeals. We make no order as to costs.

P.H.P,
missed.

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Appeals dis-