

Budhan vs Sukhan And Ors. on 2 November, 1951

Equivalent citations: AIR1952ALL678, AIR 1952 ALLAHABAD 678

ORDER

Brij Mohan Lall, J.

1. This is a reference under Section 438, Criminal P. C., by the learned Temporary Sessions Judge of Bijnor recommending that an order passed by a learned Magistrate of that place under Section 145, Criminal P. C. be vacated.

2. It appears that one Budhan made a petition under Section 145, Criminal P. C. The opposite parties were Sukhan and his companions. At the time of arguments Budhan offered to be bound by whatever statement Sukhan would make by taking the oath of his son. Sukhan agreed to take this special form of oath. He was so examined and in that statement he stated as follows :

"I swear by my son that the disputed land is in my possession."

Accepting the statement the learned Magistrate held that possession was with Sukhan. On this finding the application presented by Budhan under Section 145, Criminal P. C. was rejected and he was forbidden to interfere with Sukhan's possession.

3. Dissatisfied with this order, Budhan went up in revision before the learned Sessions Judge. The learned Judge is of the opinion that Sections 8 to 11, Oaths Act (x [10] of 1873) do not apply to proceedings under Section 143, Criminal P. C. and further that the oath administered to Sukhan was repugnant to decency. He has, therefore, recommended that the learned Magistrate's order be set aside.

4. Sections 8 to 11 apply to "judicial proceeding". The expression "judicial proceeding" is not defined in the Oaths Act. This term is defined in Section 4 (m), Criminal P.C. as including "any proceeding in the course of which evidence is or may be legally taken on oath."

Strictly speaking the definition contained in the Code of Criminal Procedure cannot be relied upon in interpreting a term used in the Oaths Act.

5. In my opinion, the term "judicial proceeding" as used in Section 8, Oaths Act, means a proceeding in which the Court may record evidence and has to make a judicial pronouncement on the rights of the parties. Applying this test one would come to the conclusion that proceedings in a criminal case are also judicial proceedings.

6. But in order to apply Sections 8 to 11, it is necessary that a party must agree to abide by the special oath of any witness or the opposite party. If the opposite party or the witness takes the special oath the evidence so given becomes, under Section 11 of the Act, "conclusive proof of the matter stated against the party who offered to be bound by it." But before acting on a statement of a party, it is always necessary to obtain the consent of the opposite party also so that that party also may be bound by it. If consent of both parties is not taken a situation may arise in which the statement of the witness recorded on special oath may be conclusive against the party which offered to be bound by it but not against the opposite party. This will so happen if the witness taking the special oath makes a deposition in favour of the party which offered to be bound. It is, therefore, a rule of prudence that unless both parties agree to be bound by the special oath of a witness or a party the special oath is not to be administered.

7. When a person is prosecuted for a criminal offence one of the parties is the State. Even if the complaint starts at the instance of a private individual the State is the real prosecutor and it acts through the complainant. But the complainant i.e., the person making the complaint, does not become the prosecutor. Therefore in a criminal prosecution for any offence one of the parties is the accused and the other party is the State. Since the consent of the State cannot be taken and since generally the State does not agree to abide by the oath of any witness, Sections 8 to 11 do not apply to criminal proceedings.

8. But proceedings under Section 145, Criminal P. C., are proceedings between private individuals. State has no interest in it and is not a party to these proceedings. Nor is the State the prosecutor. In the circumstances there is no reason why Sections 8 to 11 should not apply to proceedings under Section 145, Criminal P. C. Special oath can therefore be administered in the proceedings under Section 145, Criminal P. C. provided both parties agree to abide by the statement of a particular witness or party.

9. While it is permissible to administer the special oath the special oath should comply with other requirements of Section 8, viz. it should not be "repugnant to justice or decency and should not purport to affect any third person". The learned Judge is of the opinion that swearing by son is opposed to decency. The parties are Chamars. In my view swearing by son is not opposed to decency among Chamars. But at the same time I am of the opinion that Sukhan could not be made to swear by his son because such an oath affected a third person. The idea behind taking an oath of one's son is that in the event of the oath being false some evil may befall the son. In such a case the son is a third party who is thus introduced in a dispute pending between two other parties. The idea of Legislature was that no third person should be involved where swearing takes place between two litigants. Therefore, making Sukhan swear by his son offended against the provisions of Section 8. I am fortified in this view by the case of *Ram Narain Singh v. Babu Singh*, 18 ALL. 46. That was a civil case in which the plaintiff had offered to be bound by the statement which the defendant might make on oath holding the arm of his son. It was held that this kind of oath should not be administered because it affected a third person. The result, therefore, is that the oath administered to Sukhan was one which the learned Magistrate was not competent to administer.

10. But it may also be pointed out that it is discretionary with this Court to interfere in references made under Section 438, Criminal P. C. No party can claim interference by this Court as a matter of right. Since Budhan has already made his opponent take a special oath and has thus put him to the infamy which sometimes attaches to such oath taking in Court, it is improper on his part to rely on a technical ground and to resile from a stand taken by him, simply because the evidence with which he offered to be bound turned out to be unfavourable to him. I am not prepared to exercise my discretion in favour of such a person.

11. In this view of the matter I refuse to interfere with the order passed by the learned Magistrate.

12. The reference is rejected.