courtkutchehry.com
Company : Sol Infotech Pvt. Ltd.
Website : www.courtkutchehry.com
Printed For :
Date : 24/08/2025

Flori Rodriques Vs Maxie Jerome Daniel Cabral

Court: Bombay High Court

Date of Decision: Feb. 16, 1978

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 145, 146

Citation: (1978) 80 BOMLR 150 : (1978) MhLj 627

Hon'ble Judges: Naik, J

Bench: Single Bench

Judgement

Naik, J.
This revision application raises an interesting question of law about the recent changes made in the provisions of Section 145 of

the Code of Criminal Procedure, 1973.

2. The question arises under the following circumstances : It appears that Maxine-respondent No. 1 and Daniel-respondent No. 3 are brothers

and Mrs. Florid-petitioner No. 1 is their sister. House No. 94, Azad Road, Vile Parle, Bombay-57 is the subject-matter of dispute. Jerome Daniel

Cabral was the father of Maxie, Daniel and Flori. It is the case of Maxie that the entire building was constructed by him from his own funds

sometime in 1969 and that he was residing there with his parents and his mother died in 1970 and father in 1975.

3. On May 8, 1975, Maxie made an application to the Executive Magistrate, Greater Bombay, u/s 145 of the Criminal Procedure Code, 1973

against his sister Flori, brother Daniel and Flori''s two sons Conrad and Farrel. He complained that on April 19, 1975, Flori''s. two sons had

broken open the lock and taken forcible possession of the first floor. A preliminary order was passed by the Magistrate on May 20, 1975. The

disputed portion came to be attached u/s 146(1) of the Criminal Procedure Code, 1973 on June 20, 1975. In support of his contention that he is

the exclusive owner of the building and in exclusive possession of the disputed premises Maxie filed besides his own affidavit, the affidavits of one

Pereira, Pradhan, Solkar, Cecilia Lawrence and Glen Lewis, the daughter and son respectively of Maxie''s maternal uncle Luis Lawrence. That

application was resisted by Flori by contending, inter alia, that she had also contributed about Rs. 10,000 for the construction of the building and

that she was in joint possession of the flat. In support of her contention besides her own affidavit she filed the affidavit of her maternal uncle Luis

Lawrence, Michael Cabral, one Krishna Patil and Victor Desilva. She also filed her bank pass book and letters received at the disputed address.

It may be mentioned that Maxine-the applicant also filed a declaration of his deceased father Jerome Cabral made on oath on October 24, 1972,

long before the matter in dispute arose, stating inter alia that the building was constructed exclusively from the earnings of Maxie.

4. The learned Magistrate after perusal of these documents preferred to accept the version of Maxie to that of his sister Flori. Among other

reasons for coming to that decision, he observed in para. 5 of his judgment that no doubt Luis Lawrence, the maternal uncle of the disputing

parties, an elderly gentleman had come to support Hori but he was not prepared to place any reliance on the affidavit of Luis Lawrence inasmuch

as he was contradicted by his son and daughter viz. Cecilia Luis Lawrence and Glen Lewis who had filed affidavits in support of Maxie. These two

deponents, it appears from para. 5 of the judgment of the learned Magistrate, had contended that Luis Lawrence was suffering from arthritis and

rheumatism and that he was totally disabled and that his brain was not functioning properly and that he was unable to understand the issues. The

learned Magistrate observed that it is therefore improbable that that man viz. Luis Lawrence would come to support Flori and he, therefore,

believed the contention of Maxie that the respondent No. 3 Daniel, had made him sign the affidavit taking advantage of his infirmity. That is how he

discarded the evidence of Luis Lawrence.

5. Having thus discarded the case of Flori, the learned Magistrate passed an order in favour of Maxie. That is why Flori has preferred this revision

application.

6. Mr. Rajani, learned advocate for the revision petitioners contended that the learned Magistrate was not justified in rejecting outright the sworn

testimony of Luis Lawrence favouring Flori without even seeing him or his mental condition and without testing his evidence or the evidence of his

daughter and son by cross-examination. He also submitted that having regard to the provisions of Sub-section (4) of Section 145, the procedure

adopted by the Magistrate in disposing of the proceedings on affidavits is illegal and must be set aside.

7. As against that Mr. Valand, learned advocate for the respondent No. 1 submitted that Flori never asked for an opportunity to cross-examine

any of the witnesses and since that was not done and much less was such a request rejected by the Magistrate, there is no substance in the

grievance of Mr. Rajani. He also submitted that notwithstanding the phraseology of Sub-section (4) of Section 145, if the parties do not choose to

lead any oral evidence there is nothing to prevent the Magistrate to decide the matter on affidavits, and, therefore, the procedure which was

followed by the Magistrate cannot be said to be illegal or improper.

8. The short question which I have therefore to consider is as to whether the procedure which was followed by the Magistrate in disposing of the

matter on affidavits is proper. That leads me to a study of the provisions of Section 145 of the Code of Criminal Procedure, 1898 in juxtaposition

with the provisions of Section 145 of the Code of Criminal Procedure, 1973, which shall be hereinafter referred to as the ""old Code"" and the ""new

Code"", respectively.

9. It may be mentioned that the portion in brackets under the old Code was added by Act 26 of 1955 and it is this provision which requires the

parties 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.

Prior to this amendment there was no such provision.

10. It may mentioned that the reference to the affidavits in Sub-section (4) of Section 145 of the old Code, was also made by the self-same

amendment Act 26 of 1955. A perusal of the two Sub-sections in juxtaposition would show that under Sub-section (4) of the new Code, the

expression ""documents and affidavits, if any, so put in"" occurring in Sub-section (4) of the old Code, have been deleted. On the other hand, in that

Sub-section we have the expression ""receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks

necessary."" It would, therefore ,appear reading both the provisions of Sub-sections (1) and (4) of Section 145 of the old Code in juxtaposition

with Sub-sections (1) and (4) of Section 145 of the new Code, that the Legislature has deliberately done away with the amendment concerning the

affidavits which was made by Section 18(a) and (b) of the Criminal Procedure Amendment Act 26 of 1955, thereby dispensing with the affidavits

altogether and restoring the provisions to the position which existed prior to the amendment of the Code by Act 26 of 1955. Not only that but the

Legislature has specifically provided in Sub-section (4) of Section 145 of the new Code that the Court shall receive all such evidence as may be

produced by the parties and take such further evidence if any as it thinks necessary. When deliberate changes have been made by the Legislature,

by the Legislature having deleted the amendments which were made by the amending Act 26 of 1955 while enacting the Code of Criminal

Procedure, 1973, so as to do away with affidavits and there is a reference in Sub-section (4), only to the evidence, it would appear that it is no

longer permissible for a Magistrate to decide proceedings u/s 145, on the basis of affidavits. Since that appears to be the clear intention of the

Legislature, the procedure adopted by the Magistrate in disposing of the matter is not warranted by the amended Code of Criminal Procedure,

1973.

11. In this connection I may refer to the observations of the Law Commission. The Law Commission has observed as under:

The revised procedure (referring to the amendment made in 1955 to subsections (1) and (4) of Section 145 of the old Code by the amendment

Act 26 of 1955) does not appear to have worked satisfactorily in practice. It is said that stereotyped affidavits prepared by lawyers on the same

lines as the written statements are put in by both sides and these do not help the Magistrate very much in reaching a sound decision. Examination of

witnesses under the first proviso cannot in most cases be avoided and consequently there is no saving of the Court''s time. The main object of the

amendment, which is to get inquiry completed rapidly, has not been achieved. On principle also, it is better that the Magistrate is required to decide

the important fact of possession on the basis of oral evidence given before him and tested by cross-examination in the presence of parties. We

therefore recommend that the procedure as it existed before 1955 should be restored.

12. It is evident that it is on the basis of this recommendation of the Law Commission that the changes which were made by the Amendment Act of

1955 in Sub-sections (1) and (4) of Section 145 of the old Code have been deleted and there are also consequent amendments in Sub-section

(4), and it is therefore clear that it is no longer open to the Magistrate to dispose of proceedings u/s 145 of the Criminal Procedure Code, on the

basis of affidavits. This very case is an illustration as, to how it is essential for a Magistrate to see the witnesses for himself inasmuch as in this case

the Magistrate has observed without even seeing Flori''s witness, Luis Lawrence that he is a disabled man and incapable 6f giving evidence.

13. In the result, although no grievance might have been made in the lower Court by Flori''s advocate as is submitted by Mr. Valand, since the

Magistrate has not followed the prescribed procedure and it was his duty to follow the prescribed procedure, the whole enquiry has been vitiated

and, therefore, the order must be quashed and the proceedings must be sent back for disposal according to law in the light of this judgment. Rule

absolute. Stay vacated.