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Court : Allahabad

Decided On : Aug-11-1930

Reported in : AIR1931All14

Appellant : Todar Mal and anr.

Respondent : Emperor

Judgement :

Bennet, J.

1. This is a reference by the learned Sessions Judge of Benares recommending that the order passed under Section 147, Criminal P.C. by a Magistrate should be set aside. The learned Sessions Judge gives three grounds under which he considers the order was invalid. The first ground was that no service of a copy of the preliminary order was made on the applicants in revision. The magistrate in his explanation points out that a copy of the preliminary order was served on the two applicants in revision and it is admitted by the learned Counsel for the applicants that this is correct. The second ground is that the Magistrate relied on a police report without having that report proved by the police officer who made it. The learned Sessions Judge is apparently unaware of the procedure under Section 147, Criminal P.C. Section 147 (1) lays down that whenever a Magistrate is satisfied from a police report or from information that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water

etc., he makes an order in writing and requires the parties to put in written statements and thereafter he holds an inquiry. The only use that the Magistrate has made of the police report is the use contemplated by this section and accordingly it was not necessary for him to call on the police officer to give evidence in record to the correctness of his report.

2. The third ground on which the learned Sessions Judge relies is that although the Magistrate made a local inspection he did not make a memorandum of that local inspection as required by Section 539 (b), Criminal P.C. This the Magistrate admits but he points out that all that he saw on his local inspection was that there was a pond on a certain number and that matter is hardly a matter requiring a memorandum. The order of the Magistrate extends to eight pages and there are only seven lines in which he referred to what he saw on his local inspection. Accordingly it is clear that the order of the Magistrate was based on evidence in the case and not on what he saw on his local inspection. The learned Sessions Judge refers to a ruling in Hirday Govind v. Emperor A.I.R. 1924 Cal. l035 in which it was held that a memorandum of a local inspection was mandatory but it has been held in the later ruling of the Calcutta High Court Forbes v. Md. Ali Haidar : AIR1925 Cal1246 and also in A.I.R. 1929 Cal. 353 and in Khushal Jeram v. Emperor : AIR1926 Bom534 and in A.I.R. 1926 Bang. 193. p. 193 that non-compliance with the direction in Section 539 (b), Criminal P.C., to make a memorandum of an inspection does not vitiate the trial. In the ruling of this High Court mentioned by the learned Sessions Judge Tirkha v. Nanak : AIR1927 All350 , it was merely held that the section required a memorandum to be made but it was not held that the mere absence of a memorandum would vitiate the trial or inquiry. Accordingly I consider that the absence of a memorandum of a local inspection did not render a trial or inquiry illegal. Two other points were urged by the learned Sessions Judge for the applicant in revision. Firstly, that unless it is shown that the breach of the peace is imminent and that the opposite party has not sufficient time to go to the proper Court, action under Chap. 12, Criminal P. C, is not justified. There is nothing in Chap. 12 or in Section 146 which states that the danger of a breach of the peace should be imminent. In fact no case could ever be made legal under that chapter if it was necessary that it should be impossible to have sufficient time to go to the proper Court because obviously it is always as

easy to file a plaint in a civil Court as to file a complaint in a criminal Court. The provisions of Chap. 12 are intended to provide a speedy remedy in cases of disputes with which that chapter deals in order that the matter may be settled temporarily while more lengthy civil proceedings take place. The remaining ground urged by the learned Counsel was that there was no finding of the Magistrate under Section 146, proviso (2). Irrigation from this tank is a matter which is exercisable at particular seasons and therefore the section requires that an order should not be passed unless the right has been exercised on the last season preceding the date of institution. I find that the first witness for the applicant to the Magistrate states that from all time irrigation has gone on from this tank and other witnesses give similar evidence. The Magistrate on this evidence in his order states':

that water accumulates in this tank No. 410 and this water is used for irrigating a number of fields in the village.

3. This shows that the. case before the Magistrate was that the tank was used in previous seasons by the applicants and that those applicants in the present season were prevented from making a similar use of the tank for irrigation by the opposite party. I consider that there is nothing in any of these grounds for reference or revision. Accordingly I refuse the reference and uphold the order of the Magistrate.

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