

Thomas Varkey Vs. Idicula John

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Court : Kerala

Decided On : Nov-22-1950

Reported in : 1951CriLJ1250

Judge : Koshi, J.

Appellant : Thomas Varkey

Respondent : idicula John

Judgement :

ORDER

Koshi, J.

1. The revn. is directed against an order of the Division First Class Mag. of Kottayam, making absolute a conditional order passed Under Section 130, Travancore Cr. P.C. The order was challenged on. the ground that the Mag. had not in making the first order final conformed to the procedure prescribed by the provisions in chap, 10.

2. On receipt of the preliminary order the present petnr, appeared before the Ct. & filed a written statement denying the existence of the public right of way claimed by the petnr. before that Ct. Thereafter the case was posted for the evidence from the side of the latter & ultimately on 6-5-1950 the Ct. passed the final order after declaring the present petnr. who was absent ex parte & recording the evidence of

the petnr in the Ct. below. The learned Mag. would seem to have omitted to notice Section 187 (139A under Cr. P.C.) altogether, Under that section when a person against whom the preliminary order is made appeared before the Ct. the Mag had to question him as to whether he denied the existence of the right claimed & if he denied such right an enquiry has to be held as to whether there is any reliable evidence in support of such denial. Farther procedure to be adopted in the case will depend upon the result of such enquiry. No enquiry as contemplated by the section was held at all in this case. Decided cases go to show that when the party against whom the right is claimed denies it in his written statement to call upon the party who claims the right, to lead evidence Under Section 134 (187) would be without jurisdiction & that the subsequent proceeding would all be void. See Dhananjay Pal v. Nagendra A.I.R. (17) 1980 Gal. 144 : 31 Cr. L.J. 767 & Manohar Lal v. Emperor A.I.R. (18) 1931 Lah. 62 : 32 Cr. L.J. 621.

3. Assuming that what enquiry the Mag. held in this case was that contemplated by Section 137 he was not entitled to pass the final order at the conclusion of that enquiry. The section contemplates two stages in the enquiry so much so the Mag. was after finding that there was no reliable evidence in support of the denial of the right claimed, bound to proceed to hold the enquiry Under Section 134 or 135 as the case may be. Notwithstanding the absence of the present petnr. on the day on which the final order was passed the Ct. had to give him an opportunity to lead evidence in the enquiry contemplated by Section 134 or 135 The order passed contrary to those provisions cannot be sustained, and the curative provisions of the Code are of no avail to validate it. See Ghavgu v. Surajpal A.I.R. (35) 1948 Oudh 19 : 48 Cr. L. J 666 & Lal Behori v. Jatindra Chandra A.I.R. (86) 1949 Cal, 67 : 49 Cr. L.J. 608.

4. The lower Ct.'s order has therefore to be vacated & I order accordingly. The case must go back to the learned Mag. in order that he may try it again according to law. During the course of the arguments the petnr's Counsel stated that the reap, here had already filed a civil a lit to establish the right he claimed in this proceeding. That fact was not admitted by the resp's. Counsel, Before he recommences the enquiry the learned Mag. will ascertain whether there is such a suit. If there is one, he will do well to consider whether it is necessary for him to

proceed with this case. The revn. petn. is allowed & the, case remitted back as indicated above.

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