

Ambi Vs. State of Kerala

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Court : Kerala

Decided On : Jul-17-1961

Reported in : 1962CriLJ426

Judge : Anna Chandy, J.

Appellant : Ambi

Respondent : State of Kerala

Judgement :

ORDER

Anna Chandy, J.

1. This is a reference made by the Sessions Judge of Emakulam in Criminal R. P. No. 59 Of 1960 on his file.

2. The revision petitioner was the counter-petitioner in a miscellaneous case on the file of the Executive First Class Magistrate, Fort Cochin. On the report of the police that a jack tree belonging to the petitioner and standing adjacent to the compound wall of a Convent building is in such a dangerous condition that it is likely to fall and cause injury to the persons living in the neighbourhood the Magistrate made a condition of order Under Section 133, Criminal Procedure Code and notice was issued to the counter-petitioner to cut and remove the tree within seven days or to show cause why the order should not be enforced.

The counter-petitioner entered appearance and filed a statement to the effect that the tree is not in such a condition as to fall and cause injury to the persons in the neighbourhood and that he had cut the over-hanging branches. He added that these facts could be ascertained by a local inspection. Thereupon the Magistrate inspected the site and on the strength of the impression he gathered on inspecting the locality the very next day he made the order absolute.

3. The counter-petitioner challenged the correctness of the order in the revision before the Sessions Judge and contended that the order was vitiated by his failure to follow the mandatory provisions of Section 137, Cr. P.C. The contention found favour with the learned Sessions Judge who has reported the case to this Court Under Section 438, Criminal Procedure Code with a recommendation that the order of the Magistrate be reversed'

4. Notice of this reference was served on both the State and the counter-petitioner who is the revision petitioner in the Sessions Court and both of them challenged the legality of the Order passed by the First Class Magistrate and supported the reference made by the learned Sessions Judge.

5. The reference has only to be accepted. Section 137 of the Criminal Procedure Code enjoins that if the counter-petitioner appears in pursuance of the notice of a conditional order passed Under Section 133, the Magistrate, shall take evidence in the matter as in a summons case. If the Magistrate is satisfied that the Order is not reasonable and proper no further proceedings shall be taken in the case and only if the Magistrate is not so satisfied, the order is to be made absolute.

The procedure to be followed in a summons case is prescribed in Chapter XX of the Code. Section 242 says that when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted. If the accused admits that he has committed the offence Section 243 enables the Magistrate, to convict him-But when he does not make any admission Section 244 enjoins that: . if the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution and also to hear the

accused and take all such evidence as he produces in his defence.

The provision in Clause (1) of Section 137 that the Magistrate shall take Evidence is mandatory and that is a condition precedent to the making of the conditional order absolute. The report or information received by the Magistrate before passing the conditional order is no evidence against the party. The conditional order cannot be made absolute without the party (complainant) being called upon to substantiate the allegation, which necessitated the passing of the conditional order, by producing legal evidence. The Court is not expected to base the decision solely upon information gathered from a personal inspection of the locality which can merely aid the Court in appreciating the evidence before it.

6. The reference is hence accepted and the case is sent back to- the- Magistrate for fresh disposal according to law and in the light of the observations made above.

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