

Queen-empress Vs. Subbarayar

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Court : Chennai

Decided On : Aug-21-1895

Reported in : (1896)ILR19Mad3

Judge : Shephard and ;Best, JJ.

Appellant : Queen-empress

Respondent : Subbarayar

Judgement :

1. The only point argued on behalf of the petitioner was that any proceeding under the 88th Section of the Criminal Procedure Code was vitiated by the fact that the proclamation had not been published in due accordance with the provisions of the previous section. The 87th Section authorizes the issuing of a proclamation requiring the absconding person 'to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.' The section then proceeds:

The proclamation shall be published as follows:

(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town

or village; and

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house.

2. The proclamation requiring the petitioner to appear on the 11th December was issued on the 6th November and on that day affixed to the Court-house. It was not published in the village in which the petitioner resides till the 15th November.

3. Clearly therefore there was a failure to comply with the provisions of the section. The minimum allowance of thirty days was not allowed to the petitioner as from the date of the proclamation in the village.

4. Apart from the provisions of the 537th section of the Code which were invoked by the Magistrate, there can be no question that the proclamation was vitiated by the defect.

5. Section 87 prescribes certain rules with regard to time and with regard to place. In respect of these matters the section is imperative and the neglect of the rule with regard to time is no more excusable than would be the neglect of the rule requiring publication in two places. Suppose that the petitioner had, in consequence of his failure to attend in obedience to the proclamation, been charged under the 174th Section of the Indian Penal Code, could it be said that he was legally bound to attend in obedience to the proclamation, when it appeared that the proclamation had not been duly made and published under the 87th Section of the Procedure Code? Clearly not.

6. In the ordinary case of a summons it is necessary in order to establish a charge under the 174th Section of the Penal Code to prove that the summons was duly served on the person charged. In the case of a proclamation personal service being impracticable, other modes of bringing the order to the notice of the person addressed are prescribed. It appears to us that whether personal service or substituted service has to be proved, equally strict proof should be demanded in order to establish a charge under the 174th Section of the Penal Code. If a charge under that section had been brought against the petitioner, it could never have been suggested that the provisions of the 537th Section of the Criminal Procedure

Code should be used to supplement the deficiency of proof, nor can we understand how the Magistrate could imagine that he had any right to utilize that section in the actual proceedings. He was not sitting as a Court of appeal or revision, but as a Magistrate enforcing the penal consequences of alleged disobedience to a proclamation.

7. It may be suggested that, although the Magistrate was not at liberty to refer to the 537th section, it was competent to the Sessions Judge on the appeal or is competent to this Court to consider whether the provisions of that section should be applied. It was contended that the defect in the proclamation was an error, omission or irregularity within the meaning of the section. If it were necessary to decide the point we should hesitate to accede to this contention. But the present case is peculiar. The Magistrate had to consider whether a legal proclamation had been legally published. It was his duty in considering this to have regard to the actual facts as they appeared before him. Instead of confining himself to the facts he exercises a dispensing power which he does not possess, and by the aid of it holds that the proclamation was a legal one. In our opinion the proceedings of the Magistrate was wholly illegal.

8. There was no legal proclamation. The petitioner could not have been convicted on a charge of disobedience to the proclamation and for the same reason the other penal consequences of disobedience cannot be visited on the petitioner.

9. The order of the Sessions Judge who adopts the reasoning of the Magistrate is wrong and must be set aside, as also that of the Joint Magistrate and the attachment declared void.