

Thomas Varkey Vs Idicula John

Court: High Court Of Kerala

Date of Decision: Nov. 22, 1950

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€” Section 130

Citation: (1951) CriLJ 1250

Hon'ble Judges: Koshi, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

Koshi, J.

The revn. is directed against an order of the Division First Class Mag. of Kottayam, making absolute a conditional order passed

u/s 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 be 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 oases 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 u/s 134 (187) would be without jurisdiction & that the subsequent proceeding would all be void. See Dhananjoy

Pal v. Nagendra AIR 1980 Gal. 144 : 31 Cri. L.J. 767 & Manohar Lal v. Emperor AIR 1931 Lah. 62 : 32 Cri. 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 u/s 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. Ses AIR 1948 19 (Oudh) & Lal Behori v. Jatindra Chandra AIR 1949 Cal 67 : 49 Cir. 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 re-commences the enquiry the learned Mag.

will ascertain whether there is such a suit. If there is one, be 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.