
(1995) 11 KL CK 0046
In the High Court Of Kerala
Case No : O.P. No. 3219 Of 1990

Thankappan

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 10-11-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 3(3), 3(3)(a), 3(4), 3(4)(b)

Citation : (1995) 11 KL CK 0046

Hon'ble Judges : K.G. Balakrishnan, J

Bench : Single Bench

Advocate : M.R. Rajendran Nair, for the Appellant; K.C. John (Senior Advocate) and Government Pleader, for the Respondent

Judgement

K.G. Balakrishnan, J.—The third respondent is in possession of some paddy field in Sy.No.232/11 of Tripperunthara village. He submitted an application before the Sub-Divisional Magistrate, Chengannur alleging that in the property situated on the eastern side of this property there are various trees and the branches of these trees cast shadow to the petitioner's property and the petitioner is unable to do paddy cultivation in his property. The third respondent filed an application under S.8 of the Travancore Cochin Public Safety Measures Act. The Sub Divisional Magistrate caused an enquiry through the Village Officer and obtained the report, and he also personally inspected the property. He passed Ext.P4 order directing the petitioner herein to cut and remove the branches of the trees which are casting shadow on the property of the third respondent. Aggrieved by this order the petitioner filed an appeal before the Government of Kerala under S.21 of Act. The Government initially stayed Ext.P4 order but ultimately dismissed the appeal. The present O.P. is directed against that order. I heard the petitioner's counsel and the counsel for the third respondent. The petitioner's counsel raised two contentions. The first contention was that the petitioner was not given an opportunity to submit his argument before the appellate forum and the dismissal of the appeal without hearing the petitioner violated the principle of natural justice. It is true that the petitioner filed a statutory appeal as provided in the

Act. It is not necessary that in all such appeals, the appellate forum should hear the petitioner. It is enough that the appellate authority considered all aspects and passed an order. If the petitioner is not prejudiced, it cannot be held that merely because the petitioner was not given an opportunity of being heard, there was violation of principles of natural justice. The original order was passed after hearing the petitioner and in this case I do not think that the petitioner is in any way prejudiced by the impugned order.

2. Another contention raised by the petitioner's counsel is that under the provisions of the Travancore Cochin Public Safety Measures Act, the powers conferred under S.8 of the Act are to be discharged by a First Class Magistrate and going by the definition of First Class Magistrate as given in S.3(3)(a) of Cr.P.C. a Magistrate of First Class shall be construed as a Judicial Magistrate of First Class. The relevant clause in S.3(3)(a) of the Code of Criminal Procedure reads as follows:

Construction of References:

S.3(3): Unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code -

(a) to a Magistrate of the first class, shall be construed as a reference to a Judicial Magistrate of the first class;

On the basis of the above contention, it is submitted by the petitioner that a Sub-Divisional Magistrate had no authority to pass the impugned order. This contention is not correct. Section 3(4) of the Code of Criminal Procedure is also relevant. It is stated that,

Where under any law, other than this Code, the functions exercisable by a Magistrate relate to matters -

(a) which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate.

3. Section 3(4)(b) says that in the case of functions exercisable by a magistrate which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of licence, sanctioning a prosecution or withdrawing from a prosecution, they shall subject as aforesaid, be exercisable by an Executive Magistrate.

4. So going by the provisions contained in the Code, it is clear that administrative matters are to be dealt with by Executive Magistrates and not by Judicial Magistrate. The counsel for the petitioner contends that in case of violation of an order passed under S.8 of the Travancore Cochin Public Safety Measures Act, there would be punishment of imprisonment and fine, and

therefore those provisions are punitive in nature and hence to be dealt with by a Judicial Magistrate. This contention is not correct. Powers under S.8 of the Act only enables a Magistrate to direct the cutting of the branches of any trees which are causing nuisance or annoyance to the neighbouring property owners. It is further stated in to pay the fees and therefore, (sic) the section that the Magistrate can act either on application by the party or on a report made by a police officer, or on such enquiry as he deems fit, he shall pass an order. So the procedure culminates in passing of an order under S.8, and that is purely of an executive nature. Hence, as per S.3(4)(b) of Code of Criminal Procedure it is to be dealt with by an Executive Magistrate and not by a Judicial Magistrate. By the impugned order the Magistrate has only directed the petitioner to cut the branches of his trees which are actually projecting to the property of the third respondent.

5. It may be noticed that even otherwise the third respondent is entitled to see that the branches of the trees standing on the neighbouring property are not projecting to his property. The ownership and possession of land bring with them the ownership and possession of the column of space above the surface ad-infinitum. The owner of the land has in private law the right to use for his own purposes, to the exclusion of other persons the air space above it. It has been held as early as in *Lemmon v. Webb* (1895 A.C.1) that the owner of the land may cut the over hanging branches of a tree growing in his neighbour's land whether they do him harm or not. In this case the finding of the Sub-Divisional Magistrate is only to the effect that the branches of the petitioner's trees which project to the property of the third respondent and cause nuisance to him be cut and removed. I find no reason to interfere with the impugned order. It is made clear that pursuant to the order, the branches of the petitioner's trees which are projecting to the third respondent's property shall alone be cut and removed.

The O.P. is disposed of as above.