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Court : Kerala

Decided On : Nov-16-2015

Judge : K. Ramakrishnan

Appeal No. : Crl.M.C.No. 6086 of 2015

Appellant : Abraham Thomas

Respondent : State of Kerala and Another

Advocate for Pet/Ap. : Shri. M.T. Suresh Kumar. Heard

Judgement :

1. This is an application filed by the counter petitioner in proceedings No.2915/2014-B3 of Sub Divisional Magistrate, Thiruvalla and revision petitioner in Crl.R.P. No.4/2015 on the file of the Sessions Court, Pathanamthitta challenging the impugned order of both courts below under Section 482 of the Code of Criminal Procedure (hereinafter called as the Code).

2. It is alleged in the petition that petitioner is the counter petitioner in proceedings No.2915/14-B of Sub Divisional Magistrate, Thiruvalla initiated under Section 133 of the Code on the basis of a complaint filed by the 2nd respondent alleging that the petitioner had constructed a rubble retaining wall encroaching a portion of drainage-stream that runs between the properties of the petitioner and the 2nd respondent. On account of the same, during the rainy season, obstruction caused to the free flow of water causing flood in the property affecting the stability of

electricity posts causing danger to the public. So he filed a petition before the Sub Divisional Magistrate to initiate proceedings against the petitioner and directing the petitioner to remove the retention wall and restore the stream-drainage to its original position.

3. On the basis of the complaint, after getting a report from the Village Officer, the Sub Divisional Magistrate passed Annexure-A1 conditional order under Section 133(1) of the Code directing the petitioner to remove the retention wall or submit a show cause as to why the order should not be made absolute within seven days. Otherwise it will be deemed that he had no objection for the same and the order will be made absolute. The petitioner appeared and filed Annexure A2 objection denying the allegations and also denying the existence of any public right or causing of any public nuisance as claimed by the petitioner. According to the petitioner, the learned Sub Divisional Magistrate without complying with the formalities, passed Annexure-A3 order confirming the conditional order passed. The petitioner filed Annexure-A4 revision before the Sessions Court, Pathanamthitta against Annexure-A3 order as CrI.R.P.4/2015. The learned Sessions Judge by impugned Annexure-A5 order dismissed the revision. Aggrieved by the same, the present petition has been filed by the petitioner challenging both the orders.

4. Respondent appeared through Advocate Shri. M.T. Suresh Kumar. Heard the counsel for the petitioner Shri.Manu Ramachandran and counsel for the 2nd respondent Shri. M.T. Sureshkumar and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the State.

5. The counsel for the petitioner submitted that there was no evidence adduced on the side of the 2nd respondent to prove the allegations in the petition. The objection raised by the petitioner has not been properly considered either by the Sub Divisional Magistrate or by the Sessions Judge. Further as per the principles laid down in the precedents, if once the respondent appeared and filed objection denying the existence of public right, then there is a duty cast on the Sub Divisional Magistrate to conduct enquiry under Section 137 of the Code as to whether the denial of public right is bonafide or not and if it is found that the denial

is not bonafide, then enquiry will have to be conducted under Section 138 of the Code directing the parties to adduce evidence on the dispute. Such a procedure has not been followed by the Sub Divisional Magistrate but passed the impugned Annexure-A3 order relying the report of the Village Officer, which is unsustainable in law and illegal. The Sessions judge also did not go into the matter but simply relied under Section 133 of the Code alone and came to the conclusion that Sub Divisional Magistrate is having power to issue such orders and dismissed the revision without going into the illegality in the procedure followed by the Sub Divisional Magistrate in passing the impugned order. So he prayed for allowing the application.

6. The counsel for the 2nd respondent submitted that the Sub Divisional Magistrate, only after hearing both sides, passed the impugned order and procedural irregularity now raised by the petitioner has not been raised before the Sessions Judge and as such he is not entitled to raise the same before this Court in this proceedings. There is no illegality committed by the courts below according to the counsel for the 2nd respondent.

7. Heard the Public Prosecutor also.

8. It is an admitted fact that the petitioner and second respondent are having properties adjacent to each other and according to the 2nd respondent, there was a stream in between the properties of the petitioner and the 2nd respondent and that was encroached by the petitioner and he constructed a compound wall and thereby caused obstruction to the free flow of rain water during the rainy season which resulted in flood in the locality causing danger to the electric posts and other things standing in between the properties of the petitioner and 2nd respondent causing danger to the life of public.

9. It is also seen from the order that when the complaint was received by the Sub Divisional Magistrate, he called for a report from the Village Officer, and on the basis of a report of the Village Officer, he had decided to issue conditional order under Section 133(I) of the Code and passed Annexure-A1 conditional order directing the petitioner herein to remove the compound wall within seven days or to file objection within seven days and if no objection was filed, it would be

deemed that there was no objection for the same and final orders would be passed in the same line. It is seen from the documents produced that 2nd respondent appeared and filed Annexure-A2 objection to the complaint denying the existence of any stream or encroachment as alleged. He had also denied the existence of any public right and according to him, even if there was any dispute which is only purely civil dispute and no proceedings under Section 133 of the Code can be initiated. But it is seen from Annexure-A3 order that no enquiry as contemplated under Section 137 of the Code has been conducted and it is not clear from the order as to whether the Magistrate conducted enquiry under Sections 137 and 138 of the Code before passing the impugned Annexure A3 order. Though the petitioner filed revision before the Sessions court, the Sessions Judge also, without going into the illegality committed by the Sub Divisional Magistrate in passing the order, dismissed the revision.

10. Before going to the merits of the case, it is necessary to consider the provisions dealing with the issue viz., Sections 133, 137 and 138 of the Code which read as follows:

133. Conditional order for removal of nuisance-

(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers-

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed confined or otherwise disposed of,

Such Magistrate may make conditional order requiring the persons causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order-

(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation -A 'Public place' includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or re-creative purposes.

137. Procedure where existence of public right is denied-

(1) Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under Section 138, inquire into the matter.

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court; and, if he finds that there is no such evidence, he shall proceed as laid down in section 138.

(3) A person who has, on being questioned by the Magistrate under sub-section (1) failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial.

138. Procedure where he appears to show cause -

(1) If the person against whom an order under section 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case.

(2) If the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.

(3) If the Magistrate is not so satisfied, no further proceedings shall be taken in the case.

11. It is clear from the above provisions that once the respondent appeared and filed objection denying the existence of public right, there is a duty cast on the Sub Divisional Magistrate to conduct enquiry under Section 137 of the Code and record a finding as to whether the denial of public right is bonafide or not and if the Sub Divisional Magistrate is satisfied that the denial is bonafide and dispute has to be considered by approaching the civil court, then the Sub Divisional Magistrate has to pass orders dropping the proceedings and relegating the parties to get their right declared through competent civil court. But if the Sub Divisional Magistrate is satisfied that the denial is not bonafide, then he will have to proceed under Section 138 of the Code giving opportunity to the petitioner before the court below to adduce evidence as though it is a summons case and it is on the basis of evidence that the Sub Divisional Magistrate has to consider as to whether the conditional order has to be confirmed or to be modified or the proceedings will have to be dropped.

12. In the decision reported in *Sujatha v Prema* [2005 (3) KLT 458], this Court has held that the Sub Divisional Magistrate is bound to follow the procedure provided under Section 254 of the Code when the respondent appeared and filed objection showing cause as to why the conditional order has to be vacated. The same view has been reiterated in the decision reported in *Madukkani v Kunjukochu* [1981 KLT 692]. In the decision reported in *Bhaskaran Nair v Samuel* [1974 KLT 591], this court has held that when person against whom proceedings are initiated filing objection, court is bound to take evidence. Neither the reports of Tahasildar nor police papers relating to the case nor evidence produced while passing order under Section 133 are substitute for taking the evidence under Section 137 of the Code. In these cases, it has been observed that, if the procedure has not been

followed, then the order passed by the authority is vitiated. The same view has been reiterated in the decision reported in *Rajan v State of Kerala* [2014 (3) KHC 470] and *Annakkodi v State of Kerala and Others* [2015 (4) KHC 892].

13. The submissions made by the counsel for the 2nd respondent that these objection were not raised by the petitioner before the court below and as such he cannot raise the same before this Court is without any basis. When a revision has been filed against the impugned order, then it is for the revisional court to consider as to whether the order passed by the court below suffers any irregularity either procedural or legal. Even if there is any procedural irregularity or illegality which goes to the root of the matter, then that has to be considered by the revisional court, even if those things are not pointed out by the parties but inferred from the documents available from the records of authority below. In this case the Sessions Court has not considered the procedural irregularities committed by the court below which goes to the root of the matter. Court below only relied on Section 133 of the Code and assumed that when there is public nuisance, Sub Divisional Magistrate has power to pass orders. Court below has not considered even the objection raised by the petitioner herein and whether the Sub Divisional Magistrate had applied his mind before passing the final order under Section 138 of the Code while confirming the order passed by the Sub Divisional Magistrate etc. So non-consideration of any of the precedents on this aspect on procedural irregularity committed by the Sub Divisional Magistrate and confirming the order passed by the Sub Divisional Magistrate by the revisional court is unsustainable in law and as such, the same is liable to be set aside. Since the Sub Divisional Magistrate also did not follow the procedure under Sections 137 and 138 of the Code before passing the impugned Annexure A3 order, the same also will not sustain and the same has to be set aside and the matter has to be remitted to the court below for fresh disposal in accordance with law. So the petition is allowed and the impugned Annexure A3 order passed by the Sub Divisional Magistrate in proceedings No.2915/14-B3 dated 22.12.2015, confirmed by the Sessions Court Pathanamthitta in Crl.R.P.No.4/2015 by Annexure A5 order are hereby set aside and the matter is remitted to the Sub Divisional Magistrate, Thiruvalla for fresh disposal in accordance with law. Sub Divisional Magistrate is directed to take the case on file and after considering the legal principles laid down in this decision and

also after complying with the procedure under Sections 137 and 138 of the Code giving opportunity to the parties to adduce evidence in support of the case, pass appropriate orders in the proceedings in accordance with law. Parties are directed to appear before the court below on 23.12.2015. The Sub Divisional Magistrate is directed to consider and dispose of the case as expeditiously possible, at any rate, within four months from 23.12.2015, the date on which the case is posed for appearance of the parties by this Court or on receipt of the order of this Court which ever is later.

Office is directed to communicate this order to the concerned court immediately.

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