

**Samuel Vs. Chandrakumar and Another**

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**Court :** Kerala

**Decided On :** Jun-28-2012

**Reported in :** 2012(3)KLT501; 2012(3)KLJ452; 2012(3)ILR(Ker)873

**Judge :** C.T. Ravikumar

**Appeal No. :** Crl. Rev. Pet. No. 2985 of 2011 (C)

**Appellant :** Samuel

**Respondent :** Chandrakumar and Another

**Judgement :**

1. This criminal revision petition has been filed against the order dated 9-11-2011 of the learned Sub Divisional Magistrate, Thiruvananthapuram passed under Section 136 of the Code of Criminal Procedure. The 1st respondent herein/the petitioner before the Sub Divisional Magistrate in M.C. No. 18 of 2010 alleged sound pollution using speakers and boxes without any valid licence in the Assemblies of God Church and thereby causing public nuisance, on the revision petitioner/the counter petitioner. The complaint regarding the same was got enquired into through the Station House Officer of Parassala Police Station. On receipt of the report and other connected records a preliminary order was passed by the learned Sub Divisional Magistrate under Section 133 of the Code of Criminal Procedure directing the revision petitioner herein to stop operating the Public Address System through loud speakers and boxes or to appear before that

court on 17-2-2011 for showing cause as to why that order should not be enforced. The impugned order appears to have been passed by invoking the power under Section 136 of the Code of Criminal Procedure.

2. I have heard the learned Counsel appearing for the petitioner, the learned counsel appearing for the 1st respondent and also the learned public prosecutor.

3. The main contention of the learned counsel appearing for the petitioner is that passing of the impugned order under Section 136 itself is illegal since the revision petitioner herein had entered appearance and had shown cause pursuant to the receipt of the preliminary order under Section 133 of the Code of Criminal Procedure. To substantiate the said contention, the

petitioner produced Annexure-III, which is the copy of the detailed objection filed by the revision petitioner in M.C. No. 18/2010. The seal of the court of Sub Divisional Magistrate, Thiruvananthapuram is seen affixed thereon. The learned public prosecutor has produced the case records. The perusal of the same would reveal that the appearance of the counsel for the respondent was duly endorsed in the records. In such circumstances, it is not true to the records to say that on receipt of the copy of the preliminary order the revision petitioner herein had not entered appearance and shown cause before the learned Sub Divisional Magistrate. At the same time, a perusal of the impugned order would reveal that the Sub Divisional Magistrate proceeded with and passed orders in the M.C. under Section 136 of the Code of Criminal Procedure as if the petitioner had not entered appearance and shown cause pursuant to the receipt of the preliminary order. Section 136 is applicable only if a person who received the preliminary order passed under Section 133 fails to perform the act which is ordered to be done by him or fails to appear and show cause in response to the same. It is evident from a bare perusal of Section 136 Cr.P.C. which reads thus:-

"If such person does not perform such act or appear and show cause, he shall be liable to the penalty prescribed in that behalf in Section 188 of the Indian Penal Code (45 of 1860), and the order shall be made absolute".

4. There can be no doubt with respect to the position that when the parties appear before the Magistrate, it is not open to pass a final order under Section 136 Cr.P.C. In that context, it is relevant to refer to the section 138 of the Code of Criminal Procedure. It deals with the procedures where such a person entered appearance and shown cause. Going by the said provision if a person enters appearance pursuant to the receipt of the preliminary order under Section 133 and shows cause against the order, it is mandatory for the Magistrate to take evidence in the manner as in a summons case. Evidently, such a procedure has not been followed in this case. When it is evident, from the records, that pursuant to the receipt of the preliminary order (Annexure-II) passed by the learned Magistrate, the revision petitioner herein had entered appearance and shown cause through Annexure-III the learned Sub Divisional Magistrate should have proceeded with the case only in the manner prescribed under Section 138 of the Code of Criminal Procedure and certainly, passing of final order under Section 136 Cr.P.C. without having recourse to the procedures prescribed under Section 138 Cr.P.C. is illegal and unsustainable.

5. In that view of the matter, the order passed by the learned Sub Divisional Magistrate in M.C. 18/2010 dated 9-11-2011 is liable to be set aside. Accordingly it is set aside. The matter is remitted for fresh consideration after following the procedures contemplated under Section 138 of the Code of Criminal Procedure. It is made clear that the parties have to be afforded with opportunity to adduce evidence in terms of the provisions in Section 138 Cr.P.C. Taking into account the fact that the case is of the year 2010, it will only be appropriate for the learned Sub Divisional Magistrate to expedite the proceedings.

6. The Revision Petition is allowed to the above extent.

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