

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

WEDNESDAY, THE 1ST DAY OF APRIL 2015/11TH CHAITHRA, 1937

Crl.Rev.Pet.No. 426 of 2015 ()

AGAINST THE ORDER IN MC 371/10/M of COURT OF SUB DIVISIONAL
MAGISTRATE (I/C),FORT KOCHI DATED 02-06-2014

REVISION PETITIONER/2ND RESPONDENT:

MANI, S/O.LATE KRISHNAN NAIR,
PUTHENVEETIL, ERUMATHALA
ASOKAPURAM, ALUVA - 683 107.

BY ADVS.SRI.S.EASWARAN
SRI.P.MURALEEDHARAN (IRIMPANAM)
SRI.M.A.AUGUSTINE

RESPONDENTS/STATE & PETITIONERS:

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1. STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM, KOCHI - 682 031.
 2. BABU
CHIRAKKAL HOUSE, ERUMATHALA, ASOKAPURAM P.O.
ALUVA WEST VILLAGE, ALUVA - 683 107.
 3. THANKMANI
WIFE OF BABU, CHIRAKKAL HOUSE, ERUMATHALA
ASOKAPURAM P.O., ALUVA WEST VILLAGE, ALUVA - 683 107.

R1 BY PUBLIC PROSECUTOR SRI.N.SURESH

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION
ON 01-04-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

ANNEXURE A1: ORDER DATED 2ND JUNE, 2014 IN M.C.NO.371 OF 2010M ISSUED BY THE SUB DIVISIONAL MAGISTRATE, FORT KOCHI.

ANNEXURE A2: COPY OF PETITION DATED 20TH JANUARY, 2009 SUBMITTED BY RESPONDENTS 2 AND 3 BEFORE THE 1ST RESPONDENT.

ANNEXURE A3: COPY OF THE JUDGMENT DATED 23RD DECEMBER, 2011 IN W.P. (C)NO.14832 OF 2011.

ANNEXURE A4: COPY OF THE JUDGMENT DATED 28.11.2012 IN W.P.(C)NO.27430 OF 2012.

ANNEXURE A5: COPY OF ORDER DATED 22.11.2012 ISSUED BY THE ST RESPONDENT.

ANNEXURE A6: COPY OF ORDER DATED 11TH MARCH, 2013 IN CRL.R.P.NO.20 OF 2013

ANNEXURE A7: COPY OF ARGUMENT NOTE DATED 6TH NOVEMBER, 2013 SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT ON 6TH DECEMBER, 2013.

ANNEXURE A8: COPY OF THE COMMUNICATION DATED 5.6.09 ISSUED BY THE SECRETARY CHOORNIKKARA PANCHAYAT.

ANNEXURE A9: COPY OF DOCUMENT NO.2477 OF 1993 OF THE SUB REGISTRY OFFICE, ALUVA OF THE RESPONDENTS 2 AND 3.

ANNEXURE A10: COPY OF DOCUMENT NO.3127/1/2007 OF THE SUB REGISTRY OFFICE, ALUVA OF THE PETITIONER.

ANNEXURE A11: COPY OF JUDGMENT AND DECREE DATED 27.5.2004 IN O.S.NO.572 OF 1999 OF THE COURT OF MUNSIF, ALUVA.

ANNEXURE A12: COPY OF JUDGMENT AND DECREE DATED 17.2.2009 IN A.S.NO.101 OF 2004 OF THE COURT OF THE SUBORDINATE JUDGE, NORTH PARUR.

ANNEXURE A13: COPY OF COURT AFFIDAVIT DATED 3RD aUGUST, 2011 IN 2.P. (C)NO.14832 OF 2011.

ANNEXURE A14: COPY OF REPLY LETTER DATED 12.9.2011 ISSUED BY THE SECRETARY, CHOORNIKKARA GRAMA PANCHAYAT.

ANNEXURE A15: COPY OF REPLY DATED 7.11.2012 ISSUED TO THE PETITIONER BY THE VILLAGE OFFICE, ALUVA WEST VILLAGE.

ANNEXURE A16: COPY OF LOCATION SKETCH ISSUED TO THE PETITIONER BY THE VILLAGE OFFICER, ALUVA WEST VILLAGE.

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ANNEXURE A17: COPY OF DEPOSITION OF THE 3RD RESPONDENT IN O.S.NO.572 OF 1999.

ANNEXURE A18: COPY OF RELEVANT EXTRACT OF THE THANDAPER REGISTER.

ANNEXURE A19: COPY OF DECISION OF THE DIVISION BENCH REPORTED IN 2011(1) KHC 77(DB).

ANNEXURE A20: COPY OF ORDER DATED 26.9.2014 OF THE 1ST RESPONDENT.

// TRUE COPY //

TKS

P.S. TO JUDGE

C.T.RAVIKUMAR, J.

Crl.R.P.No.426 of 2015

Dated 1st April, 2015

ORDER

This Revision Petition was in fact, sought to be registered against the order dated 02.06.2014 in M.C.No.371/10M of the Court of the Sub Divisional Magistrate, Fort Kochi. The Registry noted an objection to the effect that the impugned order is not in the proper form. The revision petitioner made a reply to the same stating that he obtained the same under the Right to Information Act. Consequently, the learned counsel appearing for the revision petitioner sought for posting the matter before the Bench and accordingly, at the instance of the learned counsel for the revision petitioner, the case was posted before the Bench. In this context, it is to be noted that at least on four previous occasions, in respect of the subject matter involved in this case, the revision petitioner had to approach this court and by virtue of the orders the learned Magistrate was to pass an order under Section 137(2) Cr.P.C. in the pending petition filed under Section 133 of the Code of Criminal Procedure by the 2nd and 3rd respondents. During the arguments, the learned counsel brought to the notice of this court that virtually no order was passed under Section 137(2) Cr.P.C. by the learned Magistrate despite the specific direction

issued by this court in that regard and it was without passing such an order that the order sought to be challenged was passed. Thereupon, the learned Public Prosecutor was directed to get instructions in view of the aforesaid submissions. In the meanwhile, in M.C.No.371/10M an order was passed by the Sub Divisional Magistrate on 12.03.2015, a copy of the same was produced by the learned Public Prosecutor along with a memo. A perusal of the same would reveal that it is essentially an order passed by the learned Magistrate under Section 137(2) Cr.P.C. In the said circumstances, the Registry was directed to number the revision petition and post it for admission and that is how, the matter came up today for consideration. In the light of the said subsequent developments, I am of the view that the grievance of the revision petitioner against Annexure-A1 pales into insignificance and in such circumstances, I think this revision petition can be disposed of considering the order dated 12.03.2015.

2. I have heard the learned counsel for the revision petitioner and the learned Public Prosecutor.

3. It is not disputed before me that in view of the earlier orders passed by this court the learned Magistrate was under an

obligation to pass an order under section 137(2) Cr.P.C. Evidently, it is in compliance with the earlier directions that the order which was produced along with the memo by the learned Public Prosecutor viz., the order dated 12.03.2015 was passed. The operative portion of the said order reads thus:-

“As per the enquiry conducted u/s.137 Cr.P.C it is found that public rights existed and as per Cr.P.C.137(2) it finds that the Cr. Petition failed to deny the existence of public right, stayed the proceedings until the matter of the existence of such public right has been decided by a Competent Court”.

4. Before considering the correctness of the aforesaid order it is only apposite to refer to the provisions under Sections 137(1) and (2) Cr.P.C. which read thus:-

“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."

A conjoint reading of the sub-sections (1) and (2) of Section 137 would reveal that when an order is made under Section 133, the Magistrate concerned shall, on appearance of the party against whom such an order was made, question him as to whether he denies the existence of any public right in the use of any way, river, channel or place involved in the case and if he denies the existence of a public right, the Magistrate, before proceeding under section 138, shall inquire into the matter. If in such an 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. At the same time, if the Magistrate finds that there is no such evidence he can proceed with the case in accordance with the provisions under Section 138 Cr.P.C.. The order produced along with the memo would reveal that a preliminary order under section 133 was passed in this case as early as on 6.10.2010 whereby the revision petitioner herein was directed to remove the obstruction allegedly made on a purambokku pathway. It would also reveal that subsequently both the parties appeared before

the learned Magistrate. The various writ petitions filed by the parties, in between, were also specifically referred to in the order. It would also reveal that the revision petitioner herein/the counter petitioner therein, denied the existence of a right of public pathway through the property in question. In the order dated 12.3.2015 it is stated that no reliable evidence was produced by the revision petitioner in support of the denial. This cannot be taken as the true position for twin reasons. Indisputably, Annexure-A11 judgment and decree in O.S.No.572 of 1999 filed by the petitioners were produced before the learned Magistrate. Annexure A12 judgment of the Court of Principal Sub Judge, North Parur in A.S.101 of 2004 was also produced before the learned Magistrate. In fact, the suit was filed by the petitioners before the learned Magistrate and their suit was one for fixation of boundary and consequential injunction. The plaint scheduled property therein is the very same property which is the subject matter of the dispute before the learned Magistrate. It would reveal that the suit was dismissed with costs to the defendant including the revision petitioner herein. The appeal which ultimately culminated in Annexure-12 was filed by the petitioners before the learned Magistrate. It also entered in dismissal. The specific case of the revision petitioner is that those documents were produced before the learned Magistrate. Before

dealing with the said aspect any further, it is relevant to refer to the order passed by the learned Magistrate. It would reveal that the learned Magistrate stayed all further proceedings until the matter of existence of such a public right has been finally decided by a competent court. The provisions under section 137 (2), Cr.P.C. as extracted above would reveal that in a case where an order under section 133 was passed, the Magistrate is bound to stay the proceedings before proceeding under section 138 Cr.P.C. only in a case where, the person against whom such an order was passed, denied the existence of any public right and produced any reliable evidence in support of such denial. In such circumstances, when once it is found that before proceeding with the matter under section 138 Cr.P.C. a stay of all proceedings was granted it could be construed that reliable evidence in support of such denial was produced by the person concerned against whom the order was passed. Hence, in this case, an order staying the proceedings in MC.No.371/10M would not have been passed by the learned Magistrate but for his satisfaction regarding reliable evidence in support of such denial. It could not be believed that after obtaining Annexures 11 & 12 judgements such documents were not produced by the revision petitioner in support of his claim. If such documents were not actually produced before the

learned Magistrate what are the other materials which constrained the learned Magistrate to pass an order staying all further proceedings in the M.C.? In this context, it is relevant to refer to Annexure-A3 judgment of this Court in W.P.(C)No.14832 of 2011. Paragraph 10 of Annexure-A3 would reveal that taking note of the fact that such decrees were produced before the learned Magistrate this court made an observation that the learned Magistrate was bound to consider the decrees of the Civil Court before arriving at any conclusion regarding the existence of a public right by the revision petitioner and in fact, the writ petition was disposed of with a direction to consider the complaint filed by the petitioners before the learned Magistrate/respondents 2 and 3 herein in the light of the objections or denial raised by the revision petitioner herein and also on the basis of the Civil Court decrees produced and to arrive at a specific finding as contemplated under section 137(2), Cr.P.C. Evidently, the order dated 12.3.2015 produced along with the memo by the learned Public Prosecutor was passed pursuant to such direction. In such circumstances, it cannot be said that the Civil Court decrees were not produced before the learned Magistrate. The observation in the order that the revision petitioner/counter petitioner failed to produce any reliable evidence in support of his case cannot be the true position. Evidently, in this case,

the civil court decrees in respect of the property which is the subject matter before the learned Magistrate were already produced before the learned Magistrate and in fact, the learned Magistrate was directed to consider and pass appropriate orders in terms of the provisions under Section 137(2) Cr.P.C., after taking into consideration of the objection raised by the revision petitioner herein and also the Civil Court decrees. In such circumstances, the learned counsel cannot be heard to say that the learned Magistrate passed such an order without perusing the Civil Court decrees. Evidently, the Civil Court decrees, in this case are Annexures A11 and A12. In those cases viz., O.S.No.572 of 1999 and A.S. No.101 of 2004, specifically the right claimed by the petitioners before the learned Magistrate was decided against them. It is true that the said matter is now pending in a second appeal before this court. In such circumstances, the order passed by the learned Magistrate could be understood as an order staying further proceedings until a decision in the second appeal is made by this court. In the light of the provisions under Section 137(2), Cr.P.C. the learned Magistrate was right in staying all further proceedings in M.C.371/10M but, at the same time, I am of the view that the observation in the order regarding the existence of public right and further observation that the revision petitioner had failed to deny the existence of public

right cannot be said to be the correct position. In such circumstances, it is made clear that those observations shall not cause any prejudice to the revision petitioner in further proceedings to be taken by the learned Magistrate under section 138 Cr.P.C. after the culmination of the civil case.

With the above observation this revision petition is disposed of.

Sd/-
C.T. RAVIKUMAR
Judge

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