

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

MONDAY, THE 14TH DAY OF SEPTEMBER 2015/23RD BHADRA, 1937

Crl.Rev.Pet.No. 458 of 2015 ()

AGAINST THE ORDER IN MC 25/2013/M(M-5196/12) of SUB
DIVISIONAL MAGISTRATE'S COURT,FORT COCHIN DATED 26-2-2015

REVISION PETITIONER(S):

MOHANDAS
S/O.AYYAPPAN, SITADEL PARAMBU, THONIPALAM VILLAGE
THIRURANGADI TALUK, ERNAKULAM.

BY ADVS.SRI.ASOK M.CHERIAN
SRI.T.R.RENJITH
SRI.R.ROHITH
SRI.K.JANARDHANA SHENOY
SRI.V.K.PRASAD

RESPONDENT(S):

1. STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM 31.

2. CHELLAPPAN
PULIKATHARA HOUSE, THEKKUMBHAGAM
EZHIKARA VILALGE,
PARAVOOR, ERNAKULAM - 683 542

R1 BY PUBLIC PROSECUTOR SRI.R.GITESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 14-09-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

B. SUDHEENDRA KUMAR, J.

.....
Crl.Revision Petition No. 458 of 2015
.....

Dated this the 14th day of September, 2015

ORDER

Revision Petitioner is the counter petitioner in MC No. 25/13/M(M-5196/12) on the files of the Court of the Sub Divisional Magistrate, Fort Kochi who in this revision petition challenges the order passed by the learned Magistrate under Section 138 of Cr.P.C.

2. Heard both sides.

3. The 2nd respondent herein filed a complaint before the Sub Divisional Magistrate, Fort Kochi alleging that the revision petitioner obstructed the free flow of water in the thodu passing through the property of the revision petitioner and as a consequence, there was water logging in the nearby area, causing nuisance to the petitioner and other public. On receipt

of the said complaint, the learned Magistrate conducted an enquiry through the Village Officer concerned and thereafter, passed a conditional order under Section 133 (1) Cr.P.C. directing the revision petitioner to remove the obstruction in the thodu and allow free flow of water within twenty days or to appear before the learned Sub Divisional Magistrate on 26-4-2013 and show cause why the conditional order should not be made absolute. The revision petitioner did not appear before the learned Magistrate as directed in the conditional order. The learned Magistrate, in the said circumstances made the conditional order absolute. That order was challenged before the Sessions Court, Ernakulam. As per order in R.P. No. 53 of 2013, the learned Sessions Judge set aside the order of the learned Magistrate with a direction to consider the matter afresh after serving notice on the revision petitioner. Thereafter, a conditional order was passed by the learned Magistrate directing the revision petitioner to remove the obstruction made on the

canal and allow free flow of water within 20 days or to appear before the learned Magistrate on 20-10-2014 at 11 a.m. and show cause why the conditional order should not be made absolute. The revision petitioner appeared before the learned Magistrate and filed objection.

4. The learned Magistrate, after hearing both sides and considering the objection filed by the petitioner, made the conditional order absolute stating that the revision petitioner did not comply with the conditional order. It has been argued by the learned counsel for the revision petitioner that since the revision petitioner appeared before the court below and filed objection to the conditional order, the learned Magistrate ought to have recorded the evidence in the matter as in a summons case as mandated under Section 138 (1) Cr.P.C. before making the conditional order absolute under Section 138 (2) Cr.P.C.

5. The procedure to be followed before making the conditional order absolute, when a party against whom the

conditional order is passed, appears and files objection, is provided under Section 138 Cr.P.C, which is profitably extracted hereunder:

“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 he 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.”

It is clear from sub section (1) of Section 138 Cr.P.C. that if the person against whom an order under Section 133 (1)Cr.P.C. is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case before making the conditional order absolute with or without modification, as provided under Section 138(2) Cr.P.C.

6. In this case, admittedly no evidence was recorded by the learned Magistrate as in a summons case as mandated under Section 138(1) Cr.P.C. before making the conditional order absolute under Section 138(2) Cr.P.C. In the said circumstances, the order impugned is not legal, proper and correct and consequently, the same is not sustainable.

7. In the result, this revision petition stands allowed setting aside the order impugned and the matter is remitted to the court below for fresh consideration in accordance with law, in the light of the observation made in this order, as expeditiously as

possible and at any rate within three months from the date fixed for the appearance of the parties before the learned Magistrate, affording reasonable opportunity to both sides to substantiate their contentions.

The revision petitioner shall appear before the Sub Divisional Magistrate, Fort Kochi on 20-10-2015 at 3 p.m.

Sd/-B.Sudheendra Kumar, Judge.

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P.S.to Judge