

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

THURSDAY, THE 10TH DAY OF SEPTEMBER 2015/19TH BHADRA, 1937

Crl.Rev.Pet.No. 761 of 2015 ()

MC 11/2014 of SUB DVL.MAGISTRATE COURT,DEVIKULAM

REVISION PETITIONER:

ANNAKODY, AGED 57 YEARS
S/O.RAJU, GANDHINAGAR, MULLANTHANDU POOPPARA
SANTHANPARA, IDUKKI (DIST).

BY ADV. SRI.BABU PAUL

RESPONDENTS/RESPONDENTS:

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1. STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.
 2. THE SUB INSPECTOR OF POLICE
SANTHANPARA - 675 612.
 3. MARY KANNAN
MULLANTHANDU, GANDHINAGAR, POOPPARA - 675 612.

ADDL.4.R.RAJA, S/O.KOLANTHRAJ, THOTTAMUKKIL HOUSE
GANDHINAGAR COLONY, MULLANTHANDU, POOPPARA KARA
POOPPARA P.O., IDUKKI DISTRICT, PIN 685 619.

ADDL.5.SMT.KALA, W/O.SAMUDRA RAJ, AANANDHABHAVANAM
GANDHINAGAR BHAGOM, MULLANTHANDU, POOPPARA KARA
POOPPARA P.O., IDUUKKI DISTRICT, PIN 685 619.

ARE IMPEADED AS ADDITIONAL RESPONDENT NOS.4 AND 5 RESPECTIVELY
AS PER THE ORDER DATED 21.8.2015 IN CRL.M.A.4622/2015 IN CRL.R.P.761/15.

RADDL 3&4 BY ADV. SMT.MABLE.C.KURIAN
RADDL 3&4 BY ADV. SRI.MABLE C.KURIAN
R3 (B/O) BY ADV. SRI.ANOOP V.NAIR
R3 BY ADV. SRI.P.MOHANDAS (ERNAKULAM)
R3 BY ADV. SRI.ANOOP.V.NAIR
R1 & 2 BY PUBLIC PROSECUTOR, SHRI.V.S.SREEJITH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
10-09-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C.R.

B.SUDHEENDRA KUMAR, J.

Crl.R.P. No.761 of 2015

Dated this the 10th day of September 2015

O R D E R

The revision petitioner is the counter petitioner in M.C. No.11 of 2014 on the files of the Court of the Sub Divisional Magistrate, Devikulam, who in this revision petition challenges the order passed by the court below under Section 138 of the Code of Criminal Procedure (for short 'Cr.P.C.')

2. The respondent Nos.3 to 5 and others filed a petition before the Sub Divisional Magistrate, Devikulam alleging that the revision petitioner was unauthorisedly

conducting a cardamom drier, which would cause health hazards to the nearby residents.

3. On receipt of the said complaint, the learned Sub Divisional Magistrate called for a report from the Village officer, Pooppara. Thereafter, the learned Sub Divisional Magistrate issued a conditional order directing the revision petitioner to stop the functioning of the above said drier or to appear before the learned Sub Divisional Magistrate on 3.12.2014 at 11.00 a.m. and show cause why the conditional order should not be made absolute.

4. In response to the said order, the revision petitioner appeared before the learned Sub Divisional Magistrate and filed objection. Thereafter, the learned Magistrate obtained a report from the Secretary, Grama Panchayath and also from the Pollution Control Board. The Assistant Collector

also visited the place and filed a report before the learned Sub Divisional Magistrate. After considering all the said reports and hearing both sides, the learned Sub Divisional Magistrate made the conditional order absolute under Section 138 Cr.P.C.

5. Heard both sides.

6. The learned counsel for the revision petitioner has argued that even though the revision petitioner appeared before the learned Sub Divisional Magistrate and filed objection to the show cause notice, no evidence was recorded in the matter as provided under Section 138(1) Cr.P.C. before making the conditional order absolute and hence, the order impugned cannot be sustained. The learned counsel for respondent Nos.4 and 5 has, on the other hand, argued that even though no evidence was

recorded by the learned Sub Divisional Magistrate, the reports available before the learned Sub Divisional Magistrate were sufficient to make the conditional order absolute under Section 138 Cr.P.C. and in the said circumstances, the order passed by the learned Magistrate cannot be said to be incorrect. The learned counsel for respondent Nos.4 and 5 has further argued that the Assistant Collector also visited the place and filed a strong recommendation to stop the activities of the unit and hence, there is no need to record any evidence before making the conditional order absolute under Section 138 Cr.P.C.

7. The records would show that on receipt of the complaint, the learned Sub Divisional Magistrate called for a report from the Village Officer concerned. Thereafter, the learned Sub Divisional Magistrate passed the

conditional order as provided under Section 133(1) Cr.P.C. directing the revision petitioner to stop the functioning of the drier on receipt of the said order or to appear before the learned Sub Divisional Magistrate on 3.12.2014 at 11.00 a.m. and show cause why the conditional order should not be made absolute. It is borne out from the records that the revision petitioner appeared before the learned Magistrate on receipt of the conditional order and filed an objection.

8. 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 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.”

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. The site inspection by the Assistant

Collector or even the learned Magistrate himself cannot be a substitute for taking the evidence as mandated under Section 138(1) Cr.P.C. The report of the Secretary of Grama Panchayat or the Pollution Control Board cannot also be a substitute for taking the evidence as mandated under Section 138(1) Cr.P.C.

9. 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.

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 observations 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 parties shall appear before the Sub Divisional Magistrate, Devikulam on 1.10.2015 at 3 p.m.

**Sd//
B.SUDHEENDRA KUMAR,
JUDGE.**

dl

/ True copy /

PA to Judge