

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

Crl.Rev.Pet.No. 1497 of 2011 ()

(AGAINST THE PROCEEDINGS K-4597/2010 OF
SUB DIVISIONAL MAGISTRATE, KOTTAYAM)

REVISION PETITIONER(S)/RESPONDENT:

VASU ASARI, AGED 65,
S/O.PARAMESWARAN ASARI, EDAMANAVADAKKETHIL HOUSE
PARIYARAM, KANGAZHA VILLAGE, KOTTAYAM DISTRICT
PIN-686 541.

BY ADV. SRI.JESWIN P.VARGHESE

RESPONDENT(S)/COMPLAINANT & REVENUE AUTHORITIES:

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1. AMMINIKUTTIAMMA, AGED ABOUT 65,
RADHALAYAM HOUSE, PARIYARAM, KANGAZHA VILLAGE
KOTTAYAM DISTRICT, PIN-686 541.
 2. THE SUB DIVISIONAL MAGISTRATE,
KOTTAYAM. PIN-686 002.
 3. THE VILLAGE OFFICER,
KANGAZHA VILLAGE, KOTTAYAM DISTRICT. PIN-686 541.

R1 BY ADV. SRI.C.P.UDAYABHANU
R2 & R3 BY PUBLIC PROSECUTOR, SHRI.V.S.SREEJITH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
13-11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

B.SUDHEENDRA KUMAR, J.

Crl.R.P.No.1497 of 2011

Dated this the 13th day of November 2015

O R D E R

The revision petitioner is the respondent in K.4597 of 2010 on the files of the Court of the Sub Divisional Magistrate, Kottayam, who in this revision petition challenges the order passed by the court below under Section 138 of the Code.

2. The first respondent herein filed a complaint before the learned Sub Divisional Magistrate alleging that two trees standing in the property of the revision petitioner were leaning towards the house of the revision petitioner causing danger to his life and property. On receipt of the

said complaint, the learned Magistrate called for a report from the Village Officer concerned and thereafter, the learned Magistrate passed a conditional order under Section 133(1) of the Code directing the revision petitioner to cut and remove the branches of the trees or to appear before the learned Magistrate on 7.6.2011 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. Thereafter, the learned Magistrate passed the order impugned making the conditional order absolute.

3. Heard.

4. It has been argued by the learned counsel for the revision petitioner that even though the revision petitioner appeared before the learned Magistrate and filed objection,

the learned Magistrate did not record the evidence in the matter as in a summons case as mandated under Section 138(1) of the Code before making the conditional order absolute under Section 138(2) of the Code and in the said circumstances, the order impugned is not legal, proper and correct.

5. This Court in **Annakody v. State of Kerala & others** [2015(4) KHC 892] in paragraph 8 held thus:-

“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. ”

6. The learned Magistrate relied on the report of the Village Officer and passed the order impugned. It appears from the records that no evidence was recorded by the learned Magistrate as mandated under Section 138(1) of the Code before making the conditional order absolute. Since the learned Magistrate passed the order impugned without recording the evidence as mandated under Section 138(1) of the Code, the order impugned cannot be said to be legal and correct.

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 in this order, affording reasonable opportunity to both sides to substantiate their contentions.

The revision petitioner shall appear before the Sub Divisional Magistrate Court on 18.12.2015 at 3 p.m.

Sd/-

**B.SUDHEENDRA KUMAR,
JUDGE**

dl/17.11.2015

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PA to Judge