

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. 1463 of 2015 ()

CRRP 64/2013 of ADDITIONAL DIST. & SESSIONS COURT, MOOVATTUPUZHA
MC 76/2009 of SUB.DVL.MAGISTRATE, MUVATTUPUZHA

REVISION PETITIONER/PETITIONER:

KURIACHAN, AGED 44 YEARS
S/O.JOHN VATTATHURUTHEL HOUSE, MEMURY KARA
MEMURY VILLAGE, MUVATTUPUZHA

BY ADVS.SRI.ALIAS M.CHERIAN
SRI.U.B.SIRAS

RESPONDENTS/RESPONDENTS:

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1. MADANAMOHANAN NAIR, AGED 88 YEARS
S/O.PARAMESWARAN NAIR, KAKKATTUPUTHENPURA HOUSE
MEMURY KARA, MEMURY VILLAGE, MUVATTUPUZHA
 2. THE REVENUE DIVISIONAL OFFICER
REVENUE DIVISIONAL OFFICER, MUVATTUPUZHA

R1 BY ADV. SRI.M.S.UNNIKRISHNAN
R1 BY ADV. SRI.A.C.THOMAS ADHIKARAM
R2 BY PUBLIC PROSECUTOR, SHRI.V.S.SREEJITH

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON
13-11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

B.SUDHEENDRA KUMAR, J.

Crl.R.P. No.1463 of 2015

Dated this the 13th day of November 2015

O R D E R

The revision petitioner is the petitioner in M.C. No.76 of 2009 on the files of the Court of the Sub Divisional Magistrate, Muvattupuzha.

2. The revision petitioner filed a petition before the learned Magistrate alleging that some tress situated in the compound of the first respondent herein was leaning towards the property of the revision petitioner, causing threat and danger to the life of the revision petitioner and his family. The learned Magistrate, on receipt of the above said petition, called for a report from the Village Officer,

Memmury. After obtaining the report from the Village Officer, the learned Magistrate passed a conditional order directing the first respondent to cut and remove the branches of one teak tree, six Anjali trees and other trees within seven days of the receipt of the order or to appear before the learned Magistrate on 18.9.2008 at 11.00 a.m. and show cause why the order should not be made absolute. The first respondent appeared before the learned Magistrate and filed objection. Thereafter, the proceedings were dropped on finding that civil case was pending before the Munsiff Court.

3. Thereafter, as per the direction of the High Court in O.P.(Crl) No.1872 of 2011, the revision petitioner again

filed an application before the learned Magistrate. The learned Magistrate again obtained the report from the Village Officer and passed a conditional order under Section 133(1) of the Code directing the first respondent herein to cut and remove the branches of four Anjali trees, one vatta tree and other trees situated in the property of the first respondent or to appear before the learned Magistrate on 8.2.2013 at 11 a.m. and show cause why the order should not be made absolute. The first respondent appeared before the learned Magistrate and filed counter. Thereafter, the court below made the conditional order absolute under Section 138(2) of the Code.

4. The said order was challenged in revision. The

revisional court set aside the order passed by the learned Magistrate stating that there was no evidence of public nuisance. Aggrieved by the said order of the learned Sessions Judge setting aside the order of the learned Magistrate, this revision petition has been filed.

5. Heard both sides.

6. It is not disputed that the first respondent appeared before the learned Magistrate and filed objection on receipt of the conditional order passed by the learned Magistrate under Section 133(1) of the Code. It is also not disputed that the learned Magistrate did not record the evidence in the matter as mandated under Section 138(1) of the Code.

7. 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. ”

8. Since no evidence was recorded by the learned Magistrate as mandated under Section 138(1) of the Code

before making the conditional order absolute, the order impugned cannot be said to be legal, proper and correct for that reason alone.

9. The learned Sessions Judge held that even if the entire allegations of the petitioner are considered to be true, there is no element of public nuisance and hence, the learned Magistrate had no jurisdiction to pass the order under Section 138 of the Code. The learned Sessions Judge also observed that there was absolutely no evidence to prove that the trees in the property belonging to the first respondent herein were in a dangerous condition. The learned Sessions Judge failed to notice that no evidence was recorded in the matter as mandated under Section 138

(1) of the Code.

10. Section 133(1)(d) provides that whenever a District Magistrate, a Sub-divisional Magistrate or other executive Magistrate, on receiving the report of a Police officer or other information and on taking such evidence, if any, as he thinks fit, considers that any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, or support of such tree is necessary, such Magistrate may make a conditional order requiring the person owning or possessing such tree to remove or support such tree within a time fixed in the order or to

appear before him or some other Executive Magistrate subordinate to him at a time and place to be fixed in the order and to show cause why the order should not be made absolute.

11. In this case, the learned Magistrate had already passed a conditional order under Section 133(1) of the Code. The learned Magistrate was *prima facie* satisfied from the report of the Village Officer and the averments in the complaint that there was a case for issuing a conditional order under Section 133(1) of the Code. Therefore, the learned Magistrate issued the conditional order. In pursuance to that order, the first respondent appeared before the learned Magistrate and filed objection. In the

said circumstances, the learned Magistrate ought to have recorded the evidence to find out as to whether the trees were in such a dangerous condition as to attract the provisions under Section 133(1)(d) of the Code.

12. Even if the danger is to a single person due to the falling of the tree, the provisions of Section 133(1)(d) of the Code will be attracted. I have gone through the complaint. The relevant portion of the passage in the complaint is extracted thus:-

“എത്യുക്കക്ഷിയുടെ സ്ഥലത്തിന്റെ തെക്കുഭാഗത്തായി എന്റെ വസ്തുവിനോട് ചേർന്ന് ഏതാനും മരങ്ങൾ നിൽപ്പുള്ളതാണ്. അതിൽ ആഞ്ഞിലി മരങ്ങളും ഒരു വട്ടയും ഒരു കടപ്പാവും കാറ്റും മഴയും ഉണ്ടായാൽ എന്റെ വീട്ടിലേക്ക് മറിഞ്ഞുവീണ് എന്റെ സ്വത്തുക്കൾക്കും അവിടെ താമസിക്കുന്ന ആളുകളുടെ ജീവനും അപകടം ഉണ്ടാകുന്നവിധത്തിൽ അപകടകരമായി നിൽക്കുന്നതാണ്.”

It appears from the above passage that the complainant had

a contention that the trees were standing in such a condition that it is likely to fall and thereby cause injuries to the revision petitioner and the other inmates of the house. Therefore, the conditional order issued by the learned Magistrate under Section 133(1)(d) is justified. For the said reason, the observations made by the learned Sessions Judge and the reasons stated by the learned Sessions Judge cannot be correct and consequently, the finding of the learned Sessions Judge that the Sub Divisional Magistrate had no power to pass order under Section 133(1) of the Code is also not correct. For the said reason, the order passed by the learned Sessions Judge also cannot be sustained.

In the result, this revision petition stands allowed setting aside the order passed by the Sub Divisional Magistrate, Muvattupuzha in M.C. No.76 of 2009 and the order passed by the Sessions Court, Muvattupuzha in Crl.R.P. No.64 of 2013 and the matter is remitted to the Court of the learned Sub Divisional Magistrate, Muvattupuzha, for fresh consideration of the matter, in accordance with law, after recording the evidence as mandated under Section 138(1) of the Code. The parties shall appear before the learned Magistrate on 10.12.2015 at 3 p.m., without further notice. The learned Magistrate shall dispose of the matter untrammelled by any of the observations made in this order.

This being an urgent matter, the leaned Magistrate is directed to dispose of the matter in accordance with law, as expeditiously as possible and at any rate, within two months from the date fixed for the appearance of the parties before the leaned Magistrate, affording reasonable opportunity to both sides to substantiate their contentions. I make it clear that the leaned Magistrate shall enter into a clear finding, after recording the evidence, as to whether the trees are in such a condition as provided under Section 133(1)(d) of the Code or not, before passing the order under Section 138(2) or 138(3) of the Code.

Sd/-

**B.SUDHEENDRA KUMAR,
JUDGE**

dl/16.11.2015

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PA TO JUDGE