
(2013) 06 KL CK 0017
In the High Court Of Kerala
Case No : Criminal R.P. No. 230 of 2013

Balkees

APPELLANT

Vs

Revenue Divisional Officer

RESPONDENT

Date of Decision : 12-06-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(c)

Citation : (2013) 3 ILR (Ker) 100 : (2013) 2 KHC 865 : (2013) 3 KLJ 65 :
(2013) 3 KLT 50 : (2013) 4 RCR(Criminal) 226

Hon'ble Judges : K. Harilal, J

Bench : Single Bench

Advocate : T.C. Suresh Menon, P.S. appu and A.R. Nimod, for the Appellant;
Babu Karukapadath, M.A. Vaheeda Babu, Jagan George, K.A. Noushad, P.G.
Pramod, Kandampully Rahul, Rajesh S. Subrahmanian and Public Prosecutor
(Liju V. Stephen), for the Respondent

Final Decision : Allowed

Judgement

K. Harilal, J.—The Revision petitioner is the counter petitioner in MC. No. 80/12/D(5767/12/D) on the files of the Sub Divisional Magistrate, Fort Kochi. The above petition was filed by the 3rd respondent herein under S. 133 of the Code of Criminal Procedure seeking a direction to demolish the structure which was allegedly constructed by the revision petitioner in a manner causing danger and nuisance to the 3rd respondent and her family members. On the above application, the first respondent conducted an enquiry through the Village Officer and on the basis of the site inspection report and report of the Village Officer, passed an order under S. 133 of the Cr.P.C. directing the revision petitioner to stop the construction of the building at once or to appear the court on 10.8.2012 and show cause why this order should not be enforced. The revision petitioner has entered appearance and trial proceeded with trial. After trial, the first respondent made the provisional order absolute with modification and thereby directed the revision petitioner to demolish the illegally constructed wall within 15 days from the date of receipt of the impugned order. The said order is under

challenge in this Revision Petition. It is the third respondent's case that the revision petitioner has resorted to unauthorised construction by making construction of the building close to the building of the third respondent, on the top of the northern wall of her house in violation of the Kerala Municipality Building Rules causing danger and nuisance to the third respondent's life and property. According to her, the house is an asbestos sheeted small house. So during rainy season there is every likelihood of leaking water inside her house.

2. The learned counsel for the revision petitioner submits that in view of the averments in the complaint the petition itself is not maintainable under S. 133 Cr.P.C. and the Sub Divisional Magistrate has no jurisdiction to entertain the petition and pass such an order. The first respondent has wrongly invoked the powers under S. 133 Cr.P.C. to decide a dispute between two private parties involving their private rights. In short, the impugned order is one passed without jurisdiction. This is the argument advanced by the learned counsel for the Revision petitioner.

3. Per contra, the learned counsel appearing for the third respondent submits that the averments in the complaint are sufficient to invoke the jurisdiction under S. 133 Cr.P.C. and the impugned order passed by the first respondent is legally sustainable. The counsel further submits that the construction of the building on the top of the wall of the 3rd respondent's house may cause imminent danger and nuisance to the third respondent's life and property. Therefore, if there is any likelihood of causing danger or nuisance, certainly the petition will come under public nuisance and thereby within the jurisdiction provided under S. 133 of the Cr.P.C.

4. I heard Sri. T.C. Suresh Menon, the learned counsel for the petitioner and Sri. Babu Karukapadath, the learned counsel for the 3rd respondent.

5. In view of the rival submissions, the question to be considered is whether the 1st respondent has jurisdiction to entertain the petition on which the impugned order has been passed under S. 133 Cr.P.C. Put it differently, whether the petition complaining of the construction on the top of the wall of the complainant's house without permit and in violation of the Building Rules would come under the jurisdiction envisaged under S. 133 Cr.P.C. Before considering the merits of the case, it is apposite to have a look at the relevant law. It is admitted by both parties that the question involved in this case pertains to S. 133(c) and (d) Cr. P.C. S. 133(c) and (d) Cr. P.C. reads as follows: 133. Conditional order for removal of nuisance.-- (1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers-

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(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or exposition, should be prevented or stopped; or

(d) that any building, tent or structure, or 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, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

XXX XXX XXX.

Going by sub-section (c), indisputably, it can be seen that petition complaining construction of any building or the disposal of any substance as is likely to occasion conflagration or explosion alone will come under sub-s.(c) of S. 133 Cr.P.C. The 3rd respondent has no case that the alleged construction is likely to occasion conflagration or explosion. Therefore, I am of the view that certainly the averments in the petition do not come under sub-s.(c). Coming to sub-s.(d), the statutory mandate is that petition complaining construction of any building, tent or structure that 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, repair or support of such building, tent or structure alone would come under sub-s.(d) of S. 133 Cr.P.C. The 3rd respondent has no complaint that the alleged construction is likely to fall and thereby cause injury to persons and in consequence the removal, repair or support of such building is necessary. In short, invocation of jurisdiction under S. 133 Cr.P.C. with respect to construction of a building or the disposal of any substance which may cause imminent threat of nuisance or injury is confined to situation where such construction is likely to occasion conflagration or explosion or is likely to fall and thereby causing injury and in consequence the removal, repair or support of such building is necessary. Needless to say, nothing less than that will come under the said jurisdiction.

The nature and extent of the jurisdiction of the Sub Divisional Magistrate under S. 133 Cr.P.C. have been considered by this Court in *Jose V. Tharayil v. Revenue Divisional Officer, Fort Kochi & Anr.* (2010 (2) KLT SN 74 (C. No. 75) : 2010 (2) KHC 217 (SN)). The principle that can be culled out from the said decision is that the jurisdiction provided under S. 133 Cr.P.C. is confined to public right only. It is pertinent to note that the cardinal principle that the 1st respondent gets power under S. 133 Cr.P.C., only if a public right is involved has been totally lost sight of. Apart from this, the 1st respondent can exercise powers under S. 133 Cr.P.C. if there is any imminent danger of the building or the construction is likely to fall or likely to occasion conflagration or explosion. But the 3rd respondent has no such case. The learned counsel for the revision petitioner pointed out that the allegation in the complaint will come under sub-s.(d). But I am unable to accept that argument also, in view of the allegation in the complaint that the building has been constructed on the top of the wall of the 3rd respondent's house without permit and in violation of the Building Rules and in the rainy season there is every likelihood of leaking of water inside the house. A mere reading of the impugned order would reveal that there is no such threat as envisaged under

sub-sections (c) and (d). I am of the opinion that the argument advanced by the learned counsel for the 3rd respondent is far fetched and far stretched when the jurisdiction is totally confined to public right involving danger and nuisance. No such interpretation can be given to sub-s.(d) to redress a private grievance caused by a construction without permit and made in violation of the Municipality Building Rules. I am of the opinion that the proper remedy lies elsewhere. It is for the 3rd respondent to work out her remedy. Certainly, the 3rd respondent is not remedy less and lack of jurisdiction cannot be interpreted as to the approval of the act allegedly done by the revision petitioner. Therefore, I find that the 1st respondent had no jurisdiction to entertain the petition on which the impugned order is passed invoking the jurisdiction under S. 133 Cr.P.C. Consequently, the impugned order is set aside as it is illegal, unsustainable and passed without jurisdiction. Needless to say, the grievance is remediable by moving proper forum provided under law.

In the result, this Revision Petition is allowed.