
(2013) 02 KL CK 0021

In the High Court Of Kerala

Case No : Criminal R.P. No. 2452 of 2012

Daniel Kutty

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 28-02-2013

Acts Referred:

Citation : (2013) 2 KHC 635

Hon'ble Judges : K. Harilal, J

Bench : Single Bench

Advocate : Syam J. Sam, for the Appellant; Seena Ramakrishnan, Public Prosecutor and Johnson Gomez, for the Respondent

Judgement

K. Harilal, J.—Revision petitioner is the counter-petitioner in the impugned order under challenge which was passed u/s 133 of Code of Criminal Procedure (for short "Cr.P.C.") in MC No. 201/2012 on the files of the Sub Divisional Magistrate, Kollam. The allegation against the revision petitioner in the petition filed by the 2nd respondent is that three anjili trees and four rubber trees standing in the revision petitioner's property are dangerous to the residential building of the 2nd respondent and also said leafy trees polluted well water of the 2nd respondent. It is seen that a conditional order u/s 133(1)(d) of the Cr.P.C. was issued on 03/07/2012 to the revision petitioner to cut and remove the trees within seven days or to file objection, if any, and appear before the Court on 11/07/2012. On 11/07/2012, the 2nd respondent was present and the revision petitioner was absent. Then the case was posted to 25/07/2012. On 25/07/2012 there was no sitting and the case was postponed to 05/09/2012. On 05/09/2012 the counsel for the 2nd respondent was present and the revision petitioner was absent. Again the case was postponed to 21/11/2012. On 21/11/2012 also the revision petitioner was absent. In the said circumstance the conditional order was made absolute. The revision petitioner was ordered to cut and remove three anjili trees and four rubber trees within seven days from the date of receipt of that order. This order is challenged in this revision petition. The counsel for the revision

petitioner submits that the notice against the revision petitioner either u/s 133(1) (d) or under 138(2) was not served so far as the revision petitioner was working abroad. It is also submitted that in the absence of the revision petitioner in the house wherein the revision petitioner is dwelling, the notice should have been served as provided u/s 65 of the Cr.P.C. But without resorting to the procedure provided u/s 65 of the Cr.P.C. and without making sure that the notice was served duly and properly the learned Sub Divisional Magistrate proceeded in the absence of the revision petitioner and passed the order ex parte. The said procedure is illegal and cannot be justified. Admittedly the revision petitioner is working abroad and copy of the passport is produced as Annexure-A2. When the revision petitioner was found continuously absent, despite repeated adjournments, the learned Sub Divisional Magistrate should have ascertained whether the notice was duly served to the revision petitioner and that could have been specifically mentioned in the order passed ex parte. It is pertinent to note that for service of notice a specific procedure is contemplated under Sections 64 and 65 of Chapter VI of Cr.P.C. The impugned order doesn't say anything about service of notice under the said procedure, though the order was passed ex parte. Therefore the impugned order is illegal and unsustainable under law and I set aside the order under challenge.

2. The counsel for the revision petitioner submits that he is ready to appear before the Court of the Sub Divisional Magistrate either in person or through counsel if a further opportunity is granted. In view of the above submission, the parties shall appear before the learned Sub Divisional Magistrate on 14/03/2013. The learned Sub Divisional Magistrate shall proceed in accordance with law and pass orders afresh within a period of one month from 14/03/2013.

This Criminal Revision Petition is disposed of accordingly.