

(2007) 06 KL CK 0060

In the High Court Of Kerala

Case No : Criminal Rev. Petition No. 477 of 2007 (M)

Diamond Aggregates, a Partnership

APPELLANT

Vs

State of Kerala, Mony V. Athukuzhy and Joy

RESPONDENT

Date of Decision : 20-06-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(1), 137, 138, 138(2)

Citation : (2007) 06 KL CK 0060

Hon'ble Judges : V. Ramkumar, J

Bench : Single Bench

Advocate : S. Sreekumar, for the Appellant; Public Prosecutor, for the Respondent

Judgement

V. Ramkumar, J.—In this revision filed u/s 397 read with Section 401 Cr.P.C. the petitioner, who was the B party before the Sub Divisional Magistrate, Muvattupuzha challenges Annexure-3 order passed by the Sub Divisional Magistrate and Annexure-9 order passed by the District Collector.

2. I heard Advocate Sri. S. Sreekumar, learned Counsel appearing for the revision petitioner and Advocate Sri. K.J. Manuraj representing Senior Advocate Sri. V. Giri appearing for the respondents, who were the A party before the Sub Divisional Magistrate, Muvattupuzha.

3. The facts leading to the impugned orders can be summarised as follows:

On 23.9.2004 respondents 2 and 3 herein moved the Sub Divisional Magistrate, Muvattupuzha u/s 133 Cr.P.C. alleging that the blasting operations in the granite quarry run by the revision petitioner was causing a danger to their lives and properties. On 11.4.2005 the Sub Divisional Magistrate passed Annexure-1 provisional order presumably u/s 133(1)(b) issuing a provisional prohibitory order against quarrying operations and calling upon the revision petitioner to file his objections, if any. The revision petitioner entered appearance and filed his objections. Subsequently, the Sub Divisional Magistrate directed the Tahsildar,

Muvattupuzha to file a report after getting the assistance from an expert committee consisting of the officials from the Kerala State Pollution Control Board, Department of Mining and Geology and PWD(Buildings). The expert committee after conducting a joint inspection submitted its report. After receipt of the said report, the Sub Divisional Magistrate passed Annexure-2 order dated 24.6.2005 amending Annexure-1 order and permitting quarrying operations till the final report of the Tahsildar, Muvattupuzha was received. Subsequently, on receipt of the final report dated 5.10.05 of the Tahsildar, Muvattupuzha, the Sub Divisional Magistrate passed Annexure-3 final order dated 20.12.2005 making the provisional order absolute and prohibiting quarrying operations in the quarry of the revision petitioner. The only material relied on was the report of the Tahsildar and the result of the local inspection conducted by the Sub Divisional Magistrate on 17.12.2005. Thereafter, the revision petitioner moved the District Collector, Ernakulam by means of a representation dated 4.1.2006 assailing Annexure-3 order passed by the Sub Divisional Magistrate. The revision petitioner also filed W.P.(C) No. 7849/06 seeking disposal of the representation filed by him before the District Collector. As per Annexure-4 judgment dated 29.3.2006 this court directed the District Collector to consider and pass appropriate orders on the representation filed by the revision petitioner in accordance with law. The District Collector was also directed to hear all the affected parties and to consider whether the application/representation filed by the revision petitioner before the District Collector was maintainable in law. It appears that the District Collector called for a report from the PWD Assistant Executive Engineer. The Assistant Executive Engineer submitted Annexure-6 report dated 23.6.2006 in which it was, inter alia, noted that hairline cracks were seen only on the wall plastering of some of the nearby buildings and that it could be due to temperature variations, defective construction or vibrations caused on account of blasting. The Assistant Executive Engineer had also observed that the intensity of the vibrations on account of blasting could not be ascertained during his inspection as there was no blasting operations. He had also noticed that the RCC water tank standing on a single RCC pillar and situated close to the quarry had no damage and that certain semi-permanent sheds constructed using hollow blocks with G.I. sheet roofing also had no damage and also that the window glass of the residential buildings too had no damage. The District Collector appears to have called for a report from the Kerala State Pollution Control Board also which submitted Annexure-7 report dated 4.8.06 in which it was stated that the Pollution Control Board had issued consent to the revision petitioner to operate the metal crusher in the quarry till 31.12.2008 with a permitted capacity of 30 HP. The Revenue Divisional Officer, Muvattupuzha also appears to have submitted a report to the District Collector which was some what on the same lines as that of the PWD Executive Engineer. Subsequently, the District Collector passed Annexure-9 order dated 25.9.06 holding, inter alia, that the revision petitioner had not made out any grounds persuading the District Collector to alter Annexure-3 order of the Sub Divisional Magistrate and rejected the claim of the revision petitioner, inter alia, noting that there was no subsisting licence as

well for the revision petitioner.

4. It is admitted by both sides that the District Collector has absolutely no jurisdiction either in his capacity as District Collector or in his capacity as the District Magistrate to sit in appeal against Annexure-3 final order passed by the Sub Divisional Magistrate in purported exercise of his power u/s 138 Cr.P.C. Merely because the revision petitioner ill- advisedly filed a representation before the District Collector assailing Annexure-3 order of the Sub Divisional Magistrate, that would not clothe the District Collector with any jurisdiction to examine the legality or otherwise of the order passed by the Sub Divisional Magistrate. Hence, Annexure-9 order which has been passed without any jurisdiction whatsoever cannot be sustained and is accordingly quashed.

5. The only other question which survives for consideration is as to whether Annexure-3 order passed by the Sub Divisional Magistrate can be sustained. As noticed earlier, consequent on the revision petitioner who was the B party entering appearance and filing objection to the preliminary order, the Sub Divisional Magistrate could not thereafter straight away proceed to pass a final order u/s 138 Cr.P.C. by merely placing reliance on the final report of the Tahsildar and the impressions gathered by the Sub Divisional Magistrate himself during the local inspection conducted by him on 17.12.2005. An Executive Magistrate, who makes a conditional order absolute u/s 138(2) Cr.P.C., cannot do so without taking evidence of the party at whose instance he passed the conditional order *Velayudhan v. Kesavan Nair* 1968 KLT 889. If the person against whom the show cause summons has been served files his objection, the Executive Magistrate cannot straight away dispose of the case u/s 138 Cr.P.C. But he will have to take evidence and satisfy himself as to whether the conditional order passed by him is reasonable and proper. This is the legal position even in a case where the person concerned does not pursue his objections. It is for the complainant, who moved the Magistrate to lead evidence on his side. He cannot leave the Magistrate to base his order on the materials placed before him when the preliminary order was passed. Report of the Tahsildar, police papers or evidence adduced while passing the preliminary order u/s 133 Cr.P.C. are not substitutes for taking evidence u/s 137 Cr.P.C. *Bhaskaran Nair v. Samuel* 1974 KLT 591. Taking of evidence is a condition precedent to the making of the conditional order absolute *Narayana Shetty and Ors. v. Varkey Antony* 1971 MLJ 293 (Kerala). Similarly, the impressions gathered by the Sub Divisional Magistrate during the local inspection conducted by him cannot also form the basis for passing a final order. Annexure-3 order also cannot therefore, be sustained and is accordingly set aside. It shall be open to the Sub Divisional Magistrate to continue the proceedings in case a motion is made at the instance of the A party on whom the burden to substantiate their allegations lay. It goes without saying that even in the event of the Sub Divisional Magistrate dropping the proceedings initiated u/s 133 Cr.P.C. the revision petitioner will be entitled to continue the blasting operations only if the licence in his favour has been renewed and also in case he complies with the safeguards fixed by the Pollution

Control Board and other statutory authorities.

This revision petition is disposed of as above.