
(2001) 01 KL CK 0056
In the High Court Of Kerala
Case No : Criminal M.C. No. 3811 of 2000

Ganapathy

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 11-01-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 397(3), 482

Citation : (2001) 1 ALT(Cri) 227

Hon'ble Judges : R. Rajendra Babu, J

Bench : Single Bench

Advocate : V. Chitambaresh and T.C. Suresh Menon, for the Appellant; V.K. Mohanan, Public Prosecutor, P.G. Parameswara Panicker and A. Santheep, for the Respondent

Final Decision : Dismissed

Judgement

R. Rajendra Babu, J.—The 2nd respondent herein filed a petition before the Taluk Sabha Office, Chittur alleging that the petitioner herein was creating nuisance by the construction of a latrine, pit very close to the well situated in the nearby compound belonging to the respondent and the water in the well had been polluted rendering it unfit for drinking purposes. The Tahsildar, Chittur, being the head of the Taluk Sabha, directed the petitioner to remove the latrine pit and as he refused to comply with the above direction, a report was sent to the Sub Divisional Magistrate, Palakkad for initiating proceedings under S. 133 Cr.P.C. and accordingly the Sub Divisional Magistrate initiated proceedings in M.C. 97/96 and a preliminary order was issued against the petitioner directing him to remove the latrine pit at a distance of 15 metres away from the well so that pollution of the water in the well could be prevented. Aggrieved by the above order, the petitioner preferred Crl.R.P. 27/97 before the Sessions Court, Palakkad. The above revision was allowed and the matter was remitted to the Sub Divisional Magistrate directing the court below to afford an opportunity to the revision petitioner to substantiate his contentions. Thereafter opportunity was given to

the petitioner to let in evidence. Thereafter the Sub Divisional Magistrate passed a final order directing the petitioner to remove the latrine pit to a distance of 15 metres away from the well. Aggrieved by the above order, again the petitioner filed Crl.R.P. 11/98 before the Sessions Court, Palakkad. After considering the evidence the Sessions Court dismissed the revision. Aggrieved by the above order, the petitioner has come up before this court invoking S. 482 Cr.P.C.

2. Heard the learned counsel for the petitioner and the 2nd respondent.

3. The main argument advanced by the learned counsel for the petitioner was that the Sub Divisional Magistrate had no jurisdiction to pass such an order as no public interest was involved in the above case. It was further submitted that it was a pure dispute between two individuals and as such the Sub Divisional Magistrate was not competent to invoke S. 133 Cr.P.C. and hence the order passed by the Sub Divisional Magistrate and confirmed by the Sessions Court was a nullity and is liable to be set aside. The learned counsel for the 1st respondent submitted that the well of the petitioner was the only one from where the people of the locality were drawing water during draught and as such the public had a right for using the well for drawing drinking water and thus there was a public right and as such the Sub Divisional Magistrate had jurisdiction to invoke S. 133 Cr.P.C. In order to invoke S. 133 Cr.P.C., there should be an infringement of a public right. This Court in C.V. Muthuvelas Velappan Vs. K.V. Narayanan Nair, held that S. 133 Cr.P.C. can be invoked only when there is an infringement of a public right. The learned counsel for the petitioner placed reliance on a decision of this Court in Rajappan v. Sub Divisional Magistrate 1988 (2) KLT 915. There also it was held that in order to attract S. 133, there should be an infringement of a public right. The learned counsel for the 1st respondent argued that when the public at large was drawing water from the well of the 1st respondent, there was a public right involved in the matter and hence the Sub Divisional Magistrate had jurisdiction to interfere in the matter invoking S. 133 Cr.P.C. Reliance was placed on a decision of this Court in Augusthy v. Varkey 1989 (1) KLT 654 there it was held:

"The distinct expression "public place" & "any way" clearly illustrate, that the section comprehends not only public places, but "any way" which may be lawfully used by the public. Lawful use by the public of "any way" would bring it within the ambit of the section. A private place may be frequented by public and may become a public place for the time it is used. That apart, "public place" for purposes of the section, is not restricted to a place dedicated to public. The expression "public" or "public place" has been understood in a larger sense. If public have access to a place by right, permission or use, it is a public place, even if it is not public property. One test of ascertaining this, will be to see whether there is a right vested in a large number of persons as to make them unascertainable and make them a class-unascertainable not by vastness of numbers, but by character of class".

In the present case there was a report of the Tahsildar showing that the well in

the property of the 1st respondent was the only one where there would be water during draught season and the public at large was drawing water from the well. In view of the above report it has to be held that the public was having a right to draw water from the above well and there was public right involved and as such the Sub Divisional Magistrate was competent to invoke S. 133 Cr.P.C. and to pass appropriate orders. Hence the argument advanced by the learned counsel for the petitioner that there was no infringement of any public right entitling the Sub Divisional Magistrate to invoke S. 133 Cr.P.C. cannot be accepted.

4. The microbiologist of the Medical College hospital examined the water collected from the well and found that the water had been polluted as a result of the dirt percolated from the nearby toilet pit. An argument was advanced by the learned counsel for the petitioner that the water was collected without notice to the petitioner and as such the above report cannot be accepted. It is true that the water was collected without notice to the petitioner. In fact there is no reason for doubting the correctness of the report of the microbiologist. The water was collected for ascertaining whether it was polluted and unfit for human consumption. On examination it was revealed that the water was contaminated due to the dirt from the toilet pit and was unfit for human consumption. For the sole reason that the examination of the water was held without notice to the petitioner, the report of analysis cannot be ignored. If, in fact, the petitioner had a case that the water was not polluted, he could have taken steps for getting the water analysed further. As he had not taken any steps for analysing the water, the above argument also cannot be accepted. Here is a case where the public at large were using the water from the well though the well was in the private property of the petitioner. When the people at large were drawing water from the above well, there was a public right and the Sub Divisional Magistrate was fully competent to invoke S. 133 of Cr.P.C. I find no reason to interfere with the above order.

5. The learned counsel for the 2nd respondent submitted that this petition under S. 482 Cr.P.C. is not maintainable as it is in the form of a second revision which is barred under S. 397(3) Cr.P.C. He was placing reliance on the decision of the Supreme Court in *Rajathi Vs. C. Ganesan*, Being in the form of a second revision, this petition is not maintainable too. All the contentions put forward by the petitioner were considered by the revisional court (the Sessions Court) in detail and found that the order of the Sub Divisional Magistrate was proper in accordance with law. In fact the same contentions are being raised before this Court Thus the contentions put forward by the petition being in the nature of a second revision, it is hit by S. 397(3) Cr.P.C. On that basis also this petition is not maintainable.

6. In the result, the petition is dismissed.