
(2011) 12 KL CK 0022

In the High Court Of Kerala

Case No : Writ Petition (C) No. 14832 of 2011

Kochukrishnan and Another

APPELLANT

Vs

The Revenue Divisional Officer and Others

RESPONDENT

Date of Decision : 23-12-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(1), 134, 135

Citation : (2012) 1 KLJ 815

Hon'ble Judges : C.K. Abdul Rahim, J

Bench : Single Bench

Advocate : S. Easwaran and P. Muraleedharan, for the Appellant; Rose Michael (GP) and N.N. Sugunapalan (Sr.), for the Respondent

Judgement

C.K. Abdul Rahim, J.—Second petitioner is the son of the first petitioner. During pendency of this writ petition the first petitioner died and a memo to that effect was filed. According to the learned counsel for the petitioner, the 2nd petitioner is the sole owner of the property which is the subject matter involved and hence impleading of other legal heirs is not required. Hence the writ petition is allowed to be prosecuted by the second petitioner. Respondents 4 and 5 submitted Ext P1 complaint before the 1st respondent that, the petitioners have caused illegal obstruction to a pathway situated on the northern side of property belonging to them, which was being used by them and others for the last so many years. Since the 1st respondent has not taken any steps on the basis of Ext. P1, the 4th respondent herein had approached this court in W.P. (Q.24242/10. In Ext. P2 judgment this court directed the 1st respondent (4th respondent in that writ petition) to pass a conditional order u/s 133(1) Cr.P.C. and to proceed with further steps, if he is convinced that there is obstruction to a public pathway. Pursuant to Ext. P2 judgment, the 1st respondent issued Ext. P3 a conditional order u/s 133 Cr.P.C. In Ext. P3 it is mentioned that, "it has been made to appear to me that a Puramboke pathway used by the petitioners is obstructed by you....". Through Ext. P3 the petitioners were directed to remove such obstructions within 15 days or to appear and show cause as to why the order

should not be enforced.

2. The first petitioner herein filed a Review Petition against Ext. P2 judgment, contending that the writ petition was disposed of without hearing him and that sufficient materials are available to dissuade the 1st respondent from proceeding with the matter, especially in view of the decrees passed by the civil court in suits instituted between the parties in question. While disposing the Revision Petition, this court found that the first petitioner will get opportunity to show cause before the RDO with respect to such matters and it will be open to the 1st petitioner to bring to the notice of the 1st respondent about impact of the decrees passed by the civil court. However, it was observed by this court that the 1st respondent will advert to those materials before proceeding with further steps. Ext. P4 is the judgment of this court passed in the Review Petition.

3. The 1st petitioner produced Ext P4 judgment and all relevant documents in support of their contentions, before the 1st respondent. Even though hearing was conducted, no order was issued by the 1st respondent. But the petitioners were served with Ext. P5 and P6 notices issued by the Taluk Surveyor, (3rd respondent) intimating that survey of the land comprised in Sy.No. 520/4 of Block No. 34 of Aluva West village will be conducted, and the petitioners were requested to be present in person or through agent and to provide necessary assistance for conducting the survey. It is pointed out that in Ext. P5, reference was seen made about proceedings pending before the 1st respondent and about Ext. P2 judgment. According to the petitioners, the 1st respondent has no jurisdiction to direct survey and demarcation of the boundary of any property, in exercise of the powers vested u/s 133 Cr.P.C. Hence the petitioner is challenging the action initiated pursuant to Ext. P5 and P6 notices.

4. Exhibits P5 and P6 are notices issued in Form No. 12 under the provisions of the Survey Manual and it is evident that the proceedings initiated by the 3rd respondent is one coming within the purview of the Survey and Boundaries Act. Question arising for consideration is as to whether the 1st respondent, can issue direction to the 3rd respondent to conduct survey and to demarcate boundary of any property under the provisions of the said Act.

5. In the counter affidavit filed on behalf of the 1st respondent it is stated that as per reports received by the 1st respondent from the Village officer and the Tahsildar, the disputed pathway is recorded in Survey No. 520/4 in Block No. 34 of Aluva East Village and an extent of 10.85 Ares of land was recorded as

in the Basic Tax Register. It is stated that the 1st respondent had issued a direction to the Secretary of the Grama Panchayat to evict the encroachment/obstruction in the

on 9.3.2009. But in view of Ext. P2 judgment a conditional order was issued as per Ext. P3 and proceeded further u/s 133 of Cr.P.C. It is admitted that the petitioners have produced judgment of the Sub Court, Paravoor in order to show that there was no such pathway in existence as alleged But the 1st respondent

found that a measurement of the properties with the help of the Taluk Surveyor is required before issuing final order. Hence the Tahsildar, Aluva was directed to take steps for such measurement after issuing notice to all concerned parties.

6. Contention in the counter affidavit of the respondents 4 and 5 is to the effect that the properties involved in the litigations in the civil courts are not related to the pathway in question, as the suit was only for fixation of boundary. It is further stated that the dispute is not pending adjudication before this court in RSA No. 1212/2009. According to them the complaint before the 1st respondent was filed since the petitioners have encroached upon the puramboke pathway and obstructed the respondents from using the same. Copies of the reports of the Village officer and Tahsildar were produced as Ext. R4(b) and R4(c), in order to show that there existed a pathway which was being used by the respondents. It is contended that since the complaint submitted before the 1st respondent pertains to a puramboke pathway the proceedings initiated by the 1st respondent is sustainable, and there is no irregularity in ordering survey and demarcation of the boundary of that puramboke pathway.

7. While deciding the question mooted as above, a perusal of the relevant provisions of the Code of Criminal Procedure will be beneficial. Section 135 Cr.P.C. provides that, a person against whom a conditional order u/s 133 was issued, should either perform the act directed or should appear and show cause against the direction before the Sub Divisional Magistrate. Section 136 deals with the consequence on the event of failure in complying with or in showing cause against the conditional order. Section 137 deals with the procedure to be followed when the person appears and show cause against the direction issued. It prescribes that the Magistrate should question him as to whether he denies existence of any public right in respect of the way under sub section (2) of Section 137, if on questioning the Magistrate finds that there is any reliable evidence in support of the denial of such existence, he should stay the proceedings until the matter with respect to existence of such right has been decided by a competent court. On the other hand if he finds there is no evidence in support of such denial, he should proceed with an inquiry as contemplated u/s 138. Section 138 further provides that the Magistrate shall take evidence in the matter as in a summons case. Sub section 2 of section 138 provides that if in the inquiry the Magistrate is satisfied that the conditional order passed or such other order issued with modification is reasonable and proper, then he shall make the order with or without modification as the case may be.

8. It is evident that Section 138 provides a comprehensive procedure for a preliminary questioning as well as for a detailed inquiry, it is pertinent to note that on the preliminary questioning, if the Magistrate finds that there is reliable evidence in support of the denial of existence of a public right, then the Magistrate has no Jurisdiction to proceed further. The only course then left open to the Magistrate is to stay the proceedings until existence of such right claimed

is decided by the competent civil court.

9. In the case at hand it is evident that the 1st petitioner had denied existence of a public right, on the alleged pathway. In other words, even existence of the pathway itself was denied before the Magistrate. Further it is evident that this court made observations in Ext. P4 judgment that the petitioner will be having opportunity to show cause before the Magistrate as to why the conditional order sought to be made absolute, by bringing notice of the Magistrate about the impact of the decrees passed by the civil courts. In that judgment this court issued specific direction that the Magistrate should avert to those materials before proceeding with further steps. Therefore it is evident that the Magistrate was bound to arrive at a prima facie conclusion as to whether denial of existence of a public right made by the petitioner is reliable or not. For arriving at such a conclusion, he is bound to consider the decrees of the civil court. Further, if the Magistrate had formed an opinion that the denial is not reliable, he could have recorded such a finding and proceeded further with an inquiry u/s 138 by taking evidence as in a summons case. Instead of recording any such findings and without proceeding with trial of the matter, the Magistrate had issued direction to the Tahsildar to conduct survey and to demarcate boundaries of the alleged pathway through the Taluk Surveyor. Going by the provisions it is clear that the course adopted is not in compliance with the procedure contemplated. When the denial is supported by the decrees the Magistrate ought to have recorded a finding on the basis of the decrees. Or in the case where the decrees are not sufficient to arrive at such conclusion, he could have adopted the course as contemplated u/s 137 (2). At any rate the direction for survey ordered cannot be sustained. Hence I am of the view that there is illegality and impropriety in the direction issued by the Sub Divisional Magistrate in ordering survey and demarcation of the alleged pathway in question. Under the above mentioned circumstances, the writ petition is allowed and Ext. P6 is hereby quashed. The action initiated by the 3rd respondent to conduct survey and demarcation on the basis of the direction issued by the 1st respondent is also quashed. The 1st respondent is directed to consider Ext. P1 complaint afresh, in the light of the objections/denial raised by the 1st petitioner or which may be raised by the 2nd petitioner and also on the basis of the civil court decrees produced, and to arrive at a specific finding as contemplated u/s 137 Cr.P.C. and to finalize the matter taking note of the procedure contemplated under sections 133 to 138 of Cr.P.C. with due notice to the parties to the proceedings.

It is made clear that this judgment will not stand in the way of any competent authority under the Survey and Boundaries Act or the Survey Manual, taking appropriate steps and decisions, independently of any direction of the 1st respondent, on the basis of application if any submitted by any of the parties.