

(2023) 08 KL CK 0097

In the High Court Of Kerala

Case No : Criminal Revision Petition No.469 Of 2021

Pokker A

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 09-08-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 133, 133(1) , 138(1)

Citation : (2023) 08 KL CK 0097

Hon'ble Judges : Bechu Kurian Thomas, J

Bench : Single Bench

Advocate : V.John Mani, S.Jayant, Jackson Johny, Varghese Sabu, K.K.Sethulakshmi, Gayathri Menon, C.N Prabhakaran

Final Decision : Allowed

Judgement

Bechu Kurian Thomas, J.

1. An arch was constructed by the Mambatta Shiva Temple on a public road. Alleging that the said construction on the public road is illegal and causes nuisance, an application was preferred before the Sub Divisional Magistrate, Palakkad. Pursuant to a conditional order, the learned Magistrate confirmed the order directing the removal of the arch. In a revision petition preferred by the president of the temple before the Sessions Court, the order of the Sub Divisional Magistrate was set aside and the case was remanded for fresh consideration. In this criminal revision petition preferred by the applicant (complainant) before the Sub Divisional Magistrate, the order of the learned Sessions Judge is impugned.

2. The revision petitioner alleges that immediately to the eastern side of his residence, a panchayat road is in existence which leads to the Mambatta Shiva Temple, having a width of 4.15 metres. It is alleged that the road was widened by the nearby residents including the revision petitioner, relinquishing their rights over a portion of their property. However, after the road was widened and

concreted using the MLA Funds, the temple committee, under the leadership of its president, is alleged to have illegally constructed a semicircular arch at the beginning of the Panchayat road, thereby disturbing vehicular access. It was also alleged that the width of the road has been reduced to 3.65 metres and the arch even causes danger and trouble to the nearby residents.

3. Despite repeated complaints to the Panchayat, no action was initiated and finally a complaint was filed under section 133 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C') before the Sub Divisional Magistrate seeking removal of the obstruction erected on the Panchayat road. The complaint was numbered as M.P. No.2 of 2021. The learned Sub Divisional Magistrate obtained reports from the Panchayat Secretary stating that the arch was constructed illegally without getting any permission and also that the road which was constructed by the Panchayat has been reduced in its width due to the construction of the arch. The report also mentions that the revision petitioner himself had relinquished rights over a portion of his property for the purpose of widening the road.

4. On being prima facie satisfied that an unlawful obstruction has been created on a public way, the learned Magistrate issued a conditional order on 06.01.2021 directing the first opposite party therein i.e., the secretary of the Mambatta Shiva Temple, to remove the obstruction within a period of seven days or to show cause on 20.01.2021 as to why the conditional order should not be made absolute. Thereafter the case was posted on several days, and by order dated 15.03.2021, after observing that the temple committee had failed to produce any evidence against the conditional order, the learned Sub Divisional Magistrate confirmed the conditional order and directed the illegal construction erected as an obstruction to the public way to be removed by making the conditional order absolute.

5. Challenging the order of the Sub Divisional Magistrate, a revision petition was preferred by the president of the temple as CrI.R.P. No.9 of 2021 before the Sessions Court, Palakkad. By the impugned order dated 07.05.2021, the criminal revision petition was allowed by the Sessions Court after finding that the Sub Divisional Magistrate had committed an error in the procedure adopted before making the conditional order absolute. On the above findings, the criminal revision petition was allowed, and the matter was remanded to the Sub Divisional Magistrate for fresh consideration. One of the complainants before the Sub Divisional Magistrate has filed this criminal revision assailing the order of the learned Sessions Judge.

6. Even though notice to the second respondent was served, there is no appearance. The matter was heard on 04.07.2023 and was reserved for orders. However, on noticing that the lower court records had not been called for and since it was found essential, the case was reposted to 06.07.2023 and the records were called for.

7. I have perused the records meticulously. I have also called for the records of

the Sub Divisional Magistrate and perused it. I have also heard the arguments of Sri. John Mani V., the learned counsel for the revision petitioner as well as Sri. C.N.Prabhakaran, the learned Public Prosecutor, on behalf of the first respondent.

8. In Annexure A3 order, the Sub Divisional Magistrate has observed that on 06.01.2021, he had issued a conditional order directing the unauthorised construction erected on a public road to be removed within seven days or to show cause on 20.01.2021 as to why the order should not be made absolute. However, it is seen from the records that even though the second respondent appeared before the Sub Divisional Magistrate pursuant to notice, no cause was shown by him against the order. The records do not reveal that any objection was filed by the second respondent against the conditional order, nor was any explanation submitted as to why the conditional order should not be made absolute. On 20.01.2021, on 10.02.2021, on 25.02.2021 and again on 01.03.2021 there were postings. There was not even denial of any public right in respect of the way.

9. In fact, it is evident from the reports that the road is a public road and at no point in time has any objection or explanation ever been submitted by the second respondent. On the other hand, the records reveal that the Sub Divisional Magistrate was satisfied that no permission was granted by the Panchayat for erecting the arch on a public road, and the Panchayat Secretary, as well as the Village Officer, were directed to visit the site and submit a report. Thus, it is evident that pursuant to the conditional order issued under section 133(1) of Cr.P.C, the second respondent failed to show any cause against the order or even deny the existence of a public right.

10. A perusal of the judgment of the learned Sessions Judge reveals that the court went on a wrong tangent by the observations on 01.03.2021, 'no sufficient legal evidence submitted'. The said observation could only mean that no sufficient legal evidence was submitted against the conditional order. This is evident from the subsequent endorsement 'to remove within 14 days'. It is thereafter that a detailed order was passed as Annexure A3, making the conditional order absolute.

11. In the decision in *Annakody v. State of Kerala* (2015 (4) KLT 757), a learned single Judge of this Court had held that before making the conditional order absolute, evidence must be adduced as in a summons case. The said decision was relied upon by the learned Sessions Judge to set aside the order of the Sub Divisional Magistrate on an assumption that the failure of the Magistrate to take evidence has resulted in the order being vitiated. However, the learned Sessions Judge failed to appreciate the dictum laid down in the said decision, which specifically mentions that the requirement to take evidence arises only when a person shows cause against the conditional order stipulated under section 138(1) of Cr.P.C. The impugned order fails to appreciate that the respondent had never shown cause against the conditional order. Therefore the Sub Divisional Magistrate was not bound to take evidence and could legally proceed to make

the conditional order absolute. The need for adducing evidence arises only if a dispute is raised by the opposite party against the conditional order. In the absence of any cause being shown against the conditional order issued under section 133(1) of Cr.P.C, and in the absence of any denial of the public right, it is not essential for the Magistrate to proceed to take evidence.

12. In this context, it is relevant to refer to the decision of the Supreme Court in *Union of India v. State of Gujarat and Others* [(2011) 14 SCC 62]. In the said decision, the Supreme Court had categorically directed that henceforth no unauthorised construction shall be carried out or permitted in the name of temple, church, mosque or Gurudwara etc., on public streets, public parks or other public places etc. A further direction was issued to all the District Collectors and Magistrates to ensure that there is total compliance of the order of the Supreme Court. Further, in the decision in *Shali v. State of Kerala* (2019 (4) KLT 484), a learned single Judge of this Court had specifically directed that no local authority shall permit any unauthorised constructions encroaching upon public streets, including footpaths and all such encroachments will have to be removed. It was also held that such unauthorised constructions encroaching into the public streets, including footpaths causing obstruction to the users of the street, including pedestrians, must be removed by the secretaries of the local authorities without even any notice to the person who made such unauthorised constructions.

13. The aforesaid binding principles of law make it a bounden obligation upon all Magistrates and the Secretaries of the local authorities to direct removal of all illegal encroachments irrespective of any presumed objections that may be raised against such removal.

14. Concededly, no permission has been obtained by the second respondent or the temple committee for constructing an arch. In fact, no permission can even be granted either by the Secretary of the local authority or by the Government for erecting any such construction on public property. The report of the Village Officer, as well as the Secretary of the local authority available before the Sub Divisional Magistrate, clearly indicated that the width of the road had been reduced from 4.15 metres to 3.65 metres due to the construction of the arch. It was also reported that due to the construction of the arch, there is a restriction on the height of the vehicular access, which is also an obstruction in a public way. Even if vehicles can pass through the road, despite the arch, still, construction on a public road, reducing its width or height, is an illegal construction. There is also no dispute that the road is a Panchayat road which was widened using the area surrendered by the revision petitioner/complainant himself.

15. On a perusal of the impugned order of the learned Sessions Judge, it is evident that the conclusions arrived at are irregular. The conclusion that the Magistrate was bound to take evidence in the circumstance of the case is also improper and irregular. The finding that the Sub Divisional Magistrate had pre-

judged the issue, is without any basis and is also incorrect and improper.

16. In view of the above discussion, this Court is satisfied that the impugned order is liable to be interfered with. Accordingly, the order of the learned Sessions Court, Palakkad in Crl.R.P. No.9 of 2021 is hereby set aside, and the order of the Sub Divisional Magistrate, Ottapalam, dated 15.03.2021 in M.P. No.2 of 2021 is upheld.

This criminal revision petition is allowed as above.