
(2008) 12 KL CK 0030

In the High Court Of Kerala

Case No : Criminal M.C. No. 1706 of 2008

Smt. Cheruchi and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 11-12-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(1), 135, 136, 137

Citation : (2009) CriLJ 1051 : (2009) 1 KLT 217

Hon'ble Judges : V.K. Mohanan, J

Bench : Single Bench

Advocate : K. Ramakumar, for the Appellant; S. Vidyasagar and K.L. Lakshmi Rani, Public Prosecutor, for the Respondent

Judgement

V.K. Mohanan, J.—The above CrI. M.C. is preferred challenging Annexure-A order passed by the Sub-Divisional Magistrate, Muvattupuzha in exercise of his powers u/s 137(2) of the Code of Criminal Procedure in M.C. No. 131 of 2007 as the petitioners are aggrieved in staying a proceedings initiated at their instance. Though Annexure-A order is passed by the Sub-Divisional Magistrate, Muvattupuzha, the said authority is not arrayed as respondent in this CrI. M.C.

2. The grievance of the petitioners is that the functioning of granite quarry in Sy. Nos. 590/12, 590/6, 589/12, 590/7, 589/12, 589/8, 590/19 of Vengoor (W) Village, that too without obtaining necessary permissions from the authorities, create public nuisance and endanger to the life of the residents of Vengoor Village in Ernakulam District. It is stated in the petition that the concerned competent authorities have already found that the functioning of quarry is injurious to the interest of the public. According to the petitioners, the Sub-Divisional Magistrate, Muvattupuzha has no power to stay his own proceedings u/s 133(1) of the Code of Criminal Procedure and there is no statutory recognition for such action. Thus, according to the petitioners, the order impugned is liable to be set aside and the Sub-Divisional Magistrate may be directed to restore the order initially issued by the said officer.

3. I have heard learned Senior Counsel Sri. K. Ramakumar appearing for the petitioners, Smt. K.L. Lakshmi Rani, learned Public Prosecutor appearing for first respondent and also Sri. S. Vidyasagar, counsel appearing for respondents 3, 4 and 6.

4. In order to appreciate the contentions raised in this petition, the brief facts led to the passing of Annexure-A order are absolutely necessary which are as follows:

The petitioners 1 to 3 initially approached the R.D.O. against the operation of granite quarry in the above-mentioned survey numbers. The Village Officer, Vengoor West, after a site inspection, made a report to the effect that the granite quarry is functioning in Block 10 of Sy. Nos. 590/6, 7, 8 and 12 in Vengoor (W) Village which is a patta land owned by Roy, s/o. Kuriakose, Thalali (H), Chundakkuzhi, Abraham, S/o. Kuriakose. Chirangara (H), Jolly Varghese, s/o Varghese, Chirangara (H), Kuriakose, s/o Abraham, Chirangara (H) and Benny, s/o. Paulose, Valamkottu (H) and also reported that the granite quarry is functioning without any licence and the Village Officer issued a stop memo and also stated that the above-mentioned petitioners are residing more than 100 metres away from the quarry. In the meanwhile, it is mentioned that another petition was received from one Sri. K.E. Pathrose against the functioning of quarry and that petition was also got enquired into through the Village Officer. Thereafter, the petitioners mentioned above and counter-petitioners were heard on several occasions and functioning of the quarry was prohibited.

5. In the impugned order, it is stated that the petitioners had approached this Court by filing W.P.(C) No. 30762 of 2006 with a prayer to issue a writ of mandamus or other appropriate writ or direction directing respondents 1 to 3 to ensure that the party respondents or their people are not blasting rocks from the properties mentioned above or from the adjoining properties without any valid permit and licence issued by the authorities. The said writ petition was disposed of with a direction to the second respondent, viz. the Revenue Divisional Officer, Muvattupuzha to get an enquiry conducted through any field officer and take appropriate action, if blasting is done without any licence. The third respondent-Panchayath was also directed to take appropriate action if there is any violation of the Rules. It was also ensured in the order to hear the party respondents before passing such orders. On the basis of the above order, the R.D.O. authorised the Tahsildar, Kunnathunad to conduct an enquiry and submit a detailed report regarding the stage of the quarry. In the report of the Tahsildar, it is stated that the District Collector has informed that the unauthorised functioning of the said quarry should be stopped. Against the said stop memo, the 6th respondent, the licence holder of the quarry has filed an application for withdrawal of the stop memo issued by the Tahsildar. Thereafter, the District Collector directed the Tahsildar to vacate the stop memo of the quarry provided if the quarry is functioning with a valid licence and without danger to the life and property of the neighbourhood and the blasting operation can be conducted only after closing the holes using gunny bag pieces. But the respondents did not

produce licence in spite of direction and therefore, the Tahsildar Stopped the functioning of the blasting. In the impugned order, it is also stated that the Revenue Divisional Officer conducted enquiry and heard both sides on the basis of the directions issued by this Court from the above writ petition and during such enquiry, the party respondents produced certain licences and permit on the basis of which the R.D.O. issued direction to the Tahsildar to vacate the stop memo strictly ensuring the conditions stipulated therein.

6. Aggrieved by the above order, the petitioners mentioned above approached the Commissioner, the Land Revenue Commissionerate, Thiruvananthapuram and the Commissioner stayed the order of the R.D.O. and in the meanwhile, respondents namely A.K. Abraham and N.A. Thomas had approached this Court by filing W.P. (C) No. 17108 of 2007 which was disposed of by this Court by judgment dated 14-11-2007 directing the Land Revenue Commissioner to dispose of the same within one month from the date of receipt of a copy of that judgment and it was also observed that if any of the parties were aggrieved by such order, it was open to them to challenge the order in appropriate other proceedings. On the basis of the above order of this Court, the Land Revenue Commissioner disposed of the matter observing that the matter which was pending before the Commissioner did not relate to the issue dealt with under the Act or Rules concerned and the complaint is relating to the danger to public life and property and the proper course to be adopted by the appellant is to move the Sub-Divisional Magistrate to conduct an enquiry and pass appropriate orders u/s 133 of the Code of Criminal Procedure. Thus, the case was remanded back to the Revenue Divisional Officer/the Sub-Divisional Magistrate* Muvattupuzha with a direction that the Sub Divisional Magistrate shall conduct an enquiry to ascertain as to whether there is danger to the life and property of the appellant and others in the neighbourhood. It was also ordered that if he was convinced that such danger exists, he should issue show cause notice to the respondents or any other person found responsible for causing danger to the property and life of the people in the neighbourhood and pass appropriate orders. Thus, the present impugned order is issued on the basis of the direction issued by the Commissioner of Land Revenue.

7. On a reading of Annexure-A order, it can be seen that the Sub-Divisional Magistrate, Muvattupuzha has made up his mind to the effect that the functioning of the quarry can be allowed with certain regulations. Thus, on such finding by exercising the powers conferred upon him, as per the impugned order, he stayed the proceedings initiated u/s 133(1) of the Code of Criminal Procedure and permitted the functioning of the quarry after fulfilling the conditions stipulated in the order. It is the above order under challenge in this Crl. M.C.

8. In the above petition, the main grounds urged are to the effect that neither Section 133 nor Section 137 of Cr.P.C. gives any power to the Sub-Divisional Magistrate to stay his own order passed u/s 133(1) of Cr.P.C. According to the petitioners, the Sub-Divisional Magistrate has no power to proceed u/s 137 of

Cr.P.C. and the only option available to him is to proceed u/s 138 of Cr.P.C. According to the petitioners, the action of the Sub-Divisional Magistrate who stayed his own proceedings initiated u/s 133(1) of Cr.P.C. is highly illegal and arbitrary.

9. During the hearing of the case, the contention that the Sub-Divisional Magistrate has no power to order stay of his own proceedings, has been given up. But it is argued that as there is no denial of public interest, on the appearance of the respondents before the Court below, the Magistrate has no power to further proceed u/s 137 and further proceedings ought to have been taken by the Magistrate only u/s 138 of Cr.P.C. In support of the above contentions, the learned Counsel relied upon the following decisions, viz. Ramakrishnan Vs. K. Musalikutty and Others, ; Balan v. State of Kerala 1966 KLT 1100; Velayudhan v. Kesavan Nair 1968 KLT 889; Mohammed Master v. Beeran 1980 KLT 680 and Augusthy v. Varkey 1989 (1) KLT 654 : 1989 CriLJ 183, K.G. Thilakan v. The Tahsildar, Mukundapuram 2007 (2) KLD 146 etc.

10. The learned Counsel for the contesting respondents submits that the impugned order is issued in terms of the orders passed by this Court as well as the Land Revenue Commissioner. According to learned Counsel for the respondents, the impugned order is issued in accordance with the procedure and after having fully satisfied that the respondents have been given valid licence and permissions from the concerned authorities. It is also pointed out by the learned Counsel that this petition u/s 482 of the Code of Criminal Procedure is not maintainable against the order passed by the Revenue Divisional Officer u/s 133(1) or Section 137(2) of the Code of Criminal Procedure and the remedy is to approach the Sessions Court by filing appropriate petition. The learned Public Prosecutor also admitted and endorsed the contentions of the learned Counsel for the contesting respondents and supported the impugned order.

11. I have carefully considered the contentions advanced by the counsel appearing for the petitioners and the contesting respondents and also the learned Public Prosecutor. I have perused the materials and the documents available on record.

12. Thus, it can be seen that the impugned order is issued by the Sub-Divisional Magistrate, Muvattupuzha, in exercise of his powers invested with him as per Chapter X of Cr.P.C. particularly under Sections 133(1) and 137(2) of the Cr.P.C. It is also beyond the scope of any dispute that initially, he had issued a conditional order u/s 133(1) of Cr.P.C. in pursuance of which, the counter-petitioners therein appeared and showed their reason and explanation against the further proceedings, contemplated in the conditional order. It is clear that parties to the dispute were given opportunities to substantiate their contentions and they have availed of such opportunities. From the impugned orders, it appears to me that the impugned order is issued at a stage after the appearance of the counter-petitioners therein in terms of Section 135. The parties to the proceedings and officer who issued the order will also not dispute the same.

13. Now let me consider various authorities on this aspect. In the decision reported in *K.G. Thilakan v. The Tahsildar, Mukundapuram* 2007 (2) KLD 146, this Court has held "the objections filed by the petitioner shall be considered by the Executive Magistrate. The petitioner shall be questioned u/s 136, Cr.P.C. on the next date of posting. Thereafter, if necessary, the requisite enquiry u/s 137, Cr.P.C. shall be conducted and an appropriate order passed u/s 137(2), Cr.P.C. Depending on such order that may be passed u/s 137(2), Cr.P.C. if necessary the Executive Magistrate shall proceed to conduct a further enquiry u/s 138, Cr.P.C. and pass appropriate final orders." In the decision reported in *Cherian Ouseph v. Zacharia Varkey* 1955 KLT 536, this Court had held as follows:

...Whenever a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of the First Class is satisfied by a police report or other information or evidence that there is a prima facie case for taking action u/s 133, it will be competent for him to pass a preliminary order as contemplated by that section for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place. After passing such an order, he has to proceed strictly in accordance with the procedure laid down by Section 139-A. This section contemplates three distinct stages in that procedure. The first stage is reached when the party against whom the preliminary order is issued appears before the Magistrate in pursuance of the notice issued to him. When he so appears, the section states that the Magistrate shall question him as to whether he denies the existence of the public right said to be obstructed by him. If he denies the existence of that right, the Magistrate shall before proceeding u/s 137 or u/s 138, proceed to inquire into the matter for the purpose of deciding as to whether there is prima facie acceptable evidence in support of such a denial. It is obvious that the evidence at this stage of the inquiry is to be confined to the existence or otherwise of the public right in question. If the conclusion reached by the Magistrate as a result of the inquiry is that there is prima facie evidence in support of the denial of the public right, the Magistrate shall record his findings to that effect and stay the proceedings started by him and leave the question of the existence of the public right to be decided by a competent civil Court.

3. The necessity to proceed with the second stage of the inquiry as contemplated by Section 137 or Section 138 of the Code of Criminal Procedure, regarding the other matters in controversy between the parties, will arise only if the conclusion reached by the Magistrate as a result of the earlier inquiry is that there is not even prima facie evidence in support of the denial of the existence of the public right.

A Division Bench of this Court reported in *Velayudhan v. Kesavan Nair* 1968 KLT 889 had held "a combined reading of Sections 137 and 139-A shows that there are 2 distinct stages in the inquiry contemplated by those Sections, the first being that u/s 139-A(2) and the 2nd that u/s 137. Entering on the 2nd stage arises only if the party against whom the conditional order was passed defaults to adduce reliable evidence in support of his denial of the existence of a public

right." In the decision, reported in Ramakrishnan Vs. K. Musalikutty and Others, , this Court had held that the provision in Section 137(1) is obligatory and non-compliance vitiates the whole proceedings. It was also held that where there is no inquiry regarding the public right and no finding u/s 137(1), further proceedings are without jurisdiction.

14. Right to live peacefully and protection from any danger to life and also to live in a healthy atmosphere free from all kinds of pollution are coming under the fundamental rights guaranteed to the citizen of India as per the benevolent provisions engrafted in the Constitution of India. The aforesaid rights are above the right of the citizen to engage in any trade or business. In other words, in this changed society, the right of common people to have a peaceful life, protection from endanger to life, security and a healthy and pollution free life cannot be subsided for the profit motivated trade or business. It is the duty of the State to ensure the above right of the common people. In order to ensure such constitutional right and to prevent violation of such right or misuse of the same, the State can enact Law or Rule or procedure as preventive and remedial measures by which State can control, regulate or prevent any action either under the guise of business or trade or any subject covered by Section 133 of Cr.P.C. Chapter X and the powers therein are incorporated in the Code of Criminal Procedure so as to enable the State to move its machinery to prevent any such act and to take remedial measures and thereby to protect the larger interest of general public.

15. The next section relevant after issuing a conditional order is Section 135 which deals with the options given to the person against whom a conditional order is issued and Section 136 deals with the consequences of failure on the part of the person against whom the proceedings is issued and initiated. So two options are given to a person on whom a conditional order is issued. He can comply with the direction contained in the order, or else he can appear before the authority who issued the notice and can show cause against the proceedings. Section 137 deals with procedure to be adopted in case the person has chosen to appear and show cause. In this juncture, it is relevant to read Section 133 of Cr.P.C. Section 133(1)(a) deals with the unlawful obstruction or nuisance and its removal from any public place or from any way, river or channel which is or may be lawfully used by the public (Emphasis supplied). Sub-clause (i) contemplates as a remedial measure to remove such obstruction or nuisance. On a close scrutiny of Section 137(1) of Cr.P.C. as indicated by the title of Section 137, we can see that those procedures are exclusively to deal with unlawful obstruction and nuisance connected with public place or from any way, river or channel that may lawfully be used by the public (Emphasis supplied). The above intention of the legislature is more conspicuous from the words repeatedly employed in Sub-section (1) of Section 137, similar to what exactly contained in Section 133(1) (a). In this juncture, it is relevant to note that going by Section 133(1) (b) to (f) and Sub-clauses (ii) to (vi), it can be seen that such matters need not necessarily be connected with the "public place" or "any way, river or channel

which may be lawfully used by the public". In other words, the matter complained of under these provisions necessarily need not affect the "public place" or "any way, river, channel which may be lawfully used by the public". But, it is pertinent to note that, once, when a conditional order is issued, the person to whom the order is addressed can either comply with the direction contained therein or instead of complying with such direction or condition, those persons can appear before the officer who issued the conditional order and show cause against the proceedings. Therefore, irrespective of the fact whether the conditional order is issued either u/s 133(1)(a)(i) or u/s 133(1) (b) to (f) and Sub-clauses (ii) to (vi), such person can appear before the concerned officer and can show the cause for not proceeding further under these provisions and can also deny the existence of public right, if any. If there is no such denial of public right, the authority concerned can straight way enter into and adopt the further procedure contemplated u/s 138 of Cr.P.C. In this juncture, it is to be noted that in all cases, the enquiry u/s 137 is not obligatory or non-compliance will not vitiate the proceedings, unless it involves "public place" or "any way, river, channel which may be lawfully used by the public". Therefore, the dictum laid down in the decision in Ramakrishnan Vs. K. Musalikutty and Others, appears to me not the correct position of law.

16. If a person has chosen to appear before the authority, instead of complying with the conditional order and denies the public right, supported by reliable evidence, the District Magistrate or the Sub-Divisional Magistrate will cease his jurisdiction for the time being because as discussed above. It is discernible from the title and sub-title of chapter these provisions, procedure and powers are given to such Executive Magistrate to save the interest of public and to abate the public nuisance. Suppose, if a person, who received the notice, is able to prima facie establish that there is no public right, at that moment, the Executive Magistrate has to dispense with his further proceedings and will have to wait until the matter of existence of such right has been decided by a competent Court. On a reading of Sub-section (1) of Section 137, it is clear that on appearance of the parties pursuant to the conditional order and if they are not denying the public right, the Magistrate can adopt the procedure contemplated u/s 138 of the Cr.P.C. Thus, on a correct understanding of the object and scope of Section 137, it can be seen that the procedure to be adopted by the Magistrate after issuing a conditional order u/s 133(1) will be based upon the approach of the person against whom such order is issued. If such a person has not chosen to appear and show cause, the Magistrate can make the preliminary order absolute u/s 136.

17. On the other hand, if the person has chosen to appear and show cause and denied the public right, then it is for the Magistrate to examine whether he succeeded in substantiating the denial of public right based upon reliable and supporting evidence. If the result of the enquiry is positive, the Magistrate will have to defer the enquiry, for the time being, until the right is established in a civil Court. Otherwise, the Magistrate can proceed u/s 138.

18. On an examination of the facts any circumstances involved in the present case, in the light of the above legal position and procedural provisions of the Cr.P.C. I am of the view that the learned Magistrate has committed a wrong in staying the proceedings u/s 133(1) of the Cr.P.C. instead of passing a final order u/s 138(2) of the Cr.P.C. As I observed earlier, it is discernible from the order that the petitioners and the counter-petitioners were present before the Court below and the prayer of the petitioners was to make the conditional order absolute. On 29-2-2008, both the parties appeared and the petitioners therein prayed to make the conditional order absolute and they have also submitted that they have no further evidence other than what they have already produced earlier. The counter-petitioners therein took the stand that there is no unauthorised blasting or quarrying and the nearest dwelling house is situated more than 150 metres away from the quarry. They also undertook that they will not conduct the quarry without any licence. It is also their case that they have no oral evidence, in order to substantiate their contentions, other than the documents which they have already produced. From the above, it is crystal clear that the respondents did not raise a contention denying the public right and both the parties have no further evidence. Therefore, in view of the procedure contemplated by the provisions u/s 137 mentioned earlier, the Court below ought to have stepped into the next stage, i.e., u/s 138 of Cr.P.C. and the impugned order ought to have been issued u/s 138 of the Cr.P.C. As there is no denial of public right by the counter-petitioners therein, the learned Sub-Divisional Magistrate ought not have stayed the proceedings initiated u/s 133 of the Cr.P.C. by invoking Section 137(2) of the Cr.P.C. On the other hand, the authority could have passed the impugned order straightway u/s 138 of Cr.P.C.

19. In the light of the above facts and circumstances and the discussion, I am of the view that for the purpose of enabling the Sub-Divisional Magistrate, Muvattupuzha to pass appropriate orders u/s 138 of the Cr.P.C. the impugned order should be set aside. It is made clear that the above finding is arrived at only on the basis of the procedural irregularities occurred while passing the impugned order and such finding is not based upon the merits of the case.

20. Accordingly, this Crl. M.C. is disposed of setting aside Annexure-A order of the Sub Divisional Magistrate, Muvattupuzha with a direction to pass fresh orders u/s 138 of Cr.P.C. after giving opportunities to the parties concerned if they are so required, at any rate within 45 days from the date of receipt of a copy of this order.