
(2012) 10 KL CK 0095
In the High Court Of Kerala
Case No : Criminal R.P. No. 700 of 2006

V.P. Subaida

APPELLANT

Vs

Revenue Divisional Officer, Ottapalam and Another

RESPONDENT

Date of Decision : 09-10-2012

Acts Referred:

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

Citation : (2012) 4 KLJ 521

Hon'ble Judges : P.S. Gopinathan, J

Bench : Single Bench

Advocate : Peeyus A. Kottam, for the Appellant; Madhu Ben (PP), E.R. Venkateswaran and R. Sreehari, for the Respondent

Final Decision : Allowed

Judgement

P.S. Gopinathan, J.—Assailing the legality, correctness and propriety of Annexure A1 order dated 16/2/2006 purporting to have been issued u/s 133(1) of the Code of Criminal Procedure (CrPC) by the Sub Divisional Magistrate, Ottappalam, this revision petition is preferred. Annexure A1 order reads as follows:

Village Officers's report dated 21/10/2005—It is reported that after receive the notice the respondent has cut and remove some branches of trees which caused nuisance to the property of the petitioner and two coconut trees has been tied with stay wire—but it is also reported that, on enquiry it is known that one coconut tree belonging to the respondent standing near the house of petitioner is to be cut and removed to abate this threat.

Going by Annexure A1 order, I could not make out any head or tail out of it.

The records were called for. The records do not contain any such order. Whereas it would contain a copy of the order dated 20/9/2005 issued as if a notice. The operative portion of the order reads as follows:

In this circumstance, in view of the report submitted by the village officer,

Chalavara, I hereby direct the respondent Siddique to cut and remove/tie with stay wire the trees/branches of trees which are found to be posing threat to the life and property of the petitioner within 7 days in receipt of this notice without fail in the presence of the village officer, Chalavara.

The above order would show that there is a mandate directing the revision petitioner to cut and remove/tie with stay wire the trees/branches of trees which are found to be posing threat to the life and property of the petitioner within seven days. Records also would show that the petitioner filed objection stating that she had cut down branches of trees which posed threat and coconut trees were tied with stay wire and there is no further threat.

2. There is no whisper in the order that in fact, the lower authority had considered the objection raised by the petitioner and arrived at a conclusion that any of the trees are further threat to the life and property of the defacto complainant. Whatever it may be, I find that neither Annexure A1 order or the notice is in compliance of Section 133 CrPC which reads as follows:

133. Conditional order for removal of nuisance.- (1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers--

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of, Such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or

keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order--

(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.--A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

Going by the above provision, it can be seen that only a conditional order can be issued u/s 133 CrPC, giving an opportunity to show cause for not making the order absolute and that an absolute/final order can be issued only u/s 138 CrPC. In the event, the party aggrieved opposes the notice and shows cause for not complying with the conditional order, it is for the lower authority to conduct enquiry and decide the case on merits. Here no any such procedure is seen followed by the lower authority. The notice dated 20/9/2005 would not show that any opportunity was given to the petitioner to show cause for not complying with the order. Though the revision petitioner denied any further threat, without any enquiry or finding regarding any threat to be abated, Annexure A1 order was issued. It is clear violation of the procedure laid down by CrPC. Therefore, it would go without saying that the order impugned is not sustainable and liable to be interfered.

In the result, this revision petition is allowed. Annexure A1 order would stand set aside. The matter is remitted back to the lower authority for fresh disposal on merits in accordance with the procedures laid down after giving an opportunity to the petitioner to raise her objection.