

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 29TH DAY OF NOVEMBER 2013/8TH AGRAHAYANA, 1935

Cr1.Rev.Pet.No. 1969 of 2013

AGAINST THE ORDER PASSED BY EXECUTIVE MAGISTRATE, KOYILANDY,
D1.2051/2013 DATED 23/08/2013.

REVISION PETITIONER(S)/PETITIONER/RESPONDENT:

ANIYOTH POYIL BALAKRISHNAN NAIR
AVIDANELLUR VILLAGE, NADAVANNUR, KOYILANDY-673414.

BY ADVS.SRI.R.PARTHASARATHY
SMT.SEEMA

COMPLAINANT(S)/RESPONDENTS/STATE:

1. THE TAHSILDAR & EXECUTIVE MAGISTRATE,
KOYILANDY-673305.

2. V.V. CHATHUKUTTY
ANIYOTH POYIL, PUVATH, NADUVANNUR
KOYILANDY-673305.

3. RAVEENDRAN K.K.
KALIVAYALIL MEETHAL, PUVATH, NADUVANNUR
KOYILANDY-673305.

R2 & R3 BY ADV. SMT.SHERLY THOMAS
R1 BY PUBLIC PROSECUTOR SRI.ROY THOMAS.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 29-11-2013, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

APPENDIX

PETITIONER'S ANNEXURES:

- A1 : COPY OF THE SHOW CAUSE NOTICE ISSUED BY THE SUB
DIVISIONAL MAGISTRATE, KOZHIKODE UNDER SEC.133 OF
CRIMINAL PROCEDURE CODE.
- A2 : COPY OF THE REPLY SUBMITTED BEFORE THE EXECUTIVE
MAGISTRATE, KOYILANDY DATED 20/03/2013.
- A3 : COPY OF THE ADDITIONAL REPLY SUBMITTED BEFORE THE
EXECUTIVE MAGISTRATE, KOYILANDY BY THE PETITIONER
DATED 16/05/2013.
- A4 : COPY OF THE ORDER PASSED BY THE EXECUTIVE MAGISTRATE,
KOYILANDY DATED 23/08/2013.

RESPONDENTS' ANNEXURES : NIL

//TRUE COPY//

P.A TO JUDGE

stu

K.HARILAL, J.

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Crl.R.P.No.1969 of 2013

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Dated this the 29th day of November, 2013

ORDER

The revision petitioner is the 2nd counter petitioner in D1.2051/2013 on the files of Executive Magistrate, Koyilandy, a proceedings initiated against him and one another by Raveendran under Sec.133 of the Code of Criminal Procedure, on a complaint filed by the 3rd respondent herein. The 3rd respondent herein filed a complaint claiming right of way through the “varamb” along with the boundary of revision petitioner’s property and that of the revision petitioner’s son’s property. The 3rd respondent claims that the public has the right of way over the said “varamb”. On receipt of the complaint, the 1st respondent passed a conditional order under Sec.133 of the Cr.P.C directing to restore the “varamb” and also to show cause while the provisional order shall not be made absolute. The said order issued under 133 is produced and

marked as Annexure A.

2. In response to Annexure A order, the revision petitioner filed a detailed objection denying the alleged right of way as public pathway. But, the Executive Magistrate, without considering the objection raised by the revision petitioner, passed the impugned order purportedly under Sec. 138 of the Cr.P.C. This order is under challenge in this revision petition.

3. The learned counsel for the revision petitioner submits that the impugned order is vitiated by procedural irregularity and no enquiry has been conducted as contemplated under Chapter X of the Cr.P.C. The learned counsel further submits that the alleged “varamb” is not a public pathway, for which jurisdiction under 133 of the Cr.P.C can be invoked. Hence, the impugned order is liable to be set aside.

4. Per contra, the learned counsel for the respondent advanced arguments to justify the impugned order under

challenge. The learned counsel for the respondent submits that though the revision petitioner had received the provisional order under Sec. 133, no evidence has been adduced by the revision petitioner against the claim raised by the respondent. Therefore, in the absence of any contra-evidence, no kind of irregularity can be attributed to the procedure adopted by the Executive Magistrate.

5. In view of the rival contentions, the short question to be considered is whether there is any illegality or impropriety in the impugned order under challenge. Going by impugned order itself, it could be seen that the said order is passed under Sec.138 of the Cr.P.C. The revision petitioner himself admitted that earlier he had received Annexure A order passed under Sec.133 of the Cr.P.C. If that be so, it was incumbent on the revision petitioner to enter appearance before the Executive Magistrate so as to contest the claim raised by the respondent. The learned counsel for the revision petitioner submits that in response

to the order passed under 133, the revision petitioner had sent a detailed reply and the Executive Magistrate ought to have accepted the contentions in the reply. But, I am unable to accept the argument advanced by the learned counsel for the revision petitioner as the said submission is made in ignorance of well delineated procedure contemplated under 133 of the Cr.P.C. Needless to say, on receipt of the order passed under 133, it was incumbent upon the party who receives the order under 133 to enter appearance and to adduce sufficient evidence in support of his contentions in the enquiry to be conducted by the Executive Magistrate. The revision petitioner himself admitted that he only sent an objection and he did not enter appearance before the Executive Magistrate for enquiry. If that be so, I cannot find fault with the procedure adopted by the Executive Magistrate.

6. Anyhow, having regard to the facts and circumstances of the case, I am of the opinion that a further

opportunity can be given to both parties to adduce evidence in support of their respective claims before the Executive Magistrate.

7. Hence, the impugned order under challenge will stand set aside and the matter is remitted back to the Executive Magistrate for fresh consideration and also to pass order afresh under Sec.133, after complying the procedure contemplated under 133 of the Cr.P.C. The parties shall appear before the Executive Magistrate on 2nd January, 2014.

This revision petition is disposed of accordingly.

**K.HARILAL,
JUDGE.**

Stu

//True copy//

P.A to Judge