



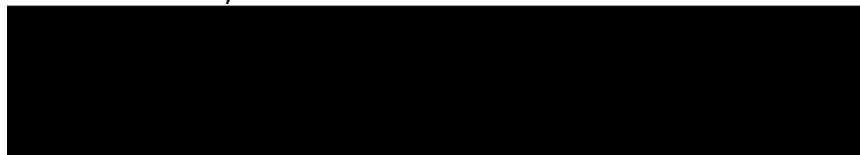
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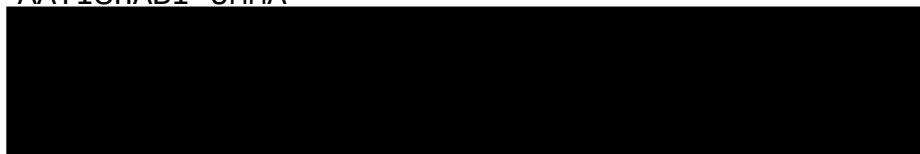
IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN
MONDAY, THE 16TH DAY OF OCTOBER 2023 / 24TH ASWINA, 1945
CRL.MC NO. 3410 OF 2023
MC 1(A)/2019 OF SUB DIVISIONAL MAGISTRATE, KOZHIKODE

PETITIONERS/PETITIONERS:

1 SHAMSUDHEEN,



2 AAYISHABI UMMA



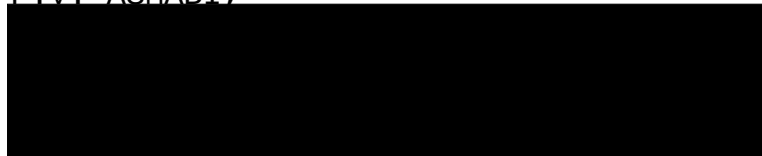
3 FAIZAL



4 SEKKEENA P.V.



5 P.V. ASMABI,



BY ADVS.
K.MOHANAKANNAN
H.PRAVEEN (KOTTARAKARA)



RESPONDENT/STATE & RESPONDENTS:

- 1 STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HON'BLE HIGH COURT OF KERALA,
ERNAKULAM -, PIN - 682031
- 2 EXECUTIVE MAGISTRATE AND TAHSILDAR,
ERANHIPPALAM, KOZHIKODE -, PIN - 673020
- 3 HARTIDASAN



BY ADVS.
R.SUDHISH
M.MANJU(K/003562/1999)

OTHER PRESENT:

MP PRASANTH

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR
ADMISSION ON 16.10.2023, THE COURT ON THE SAME DAY
PASSED THE FOLLOWING:**



'CR'

P.V.KUNHIKRISHNAN, J.

CrI.M.C. No.3410 of 2023

Dated this the 16th day of October, 2023

ORDER

This Criminal Miscellaneous Case is filed with following prayers:

- i) To call for the records leading to Annexure.A7 and quash the same;
- ii) To direct the 2nd respondent to restore and finalize the proceedings in MC No. 1(A)/2019 within a time frame to be fixed by this Hon'ble Court after hearing the parties.

(SIC)

2. Annexure-A7 is an order passed by the Executive Magistrate and Tahsildar, Kozhikode. The petitioners are supplemental petitioners before the Executive Magistrate and Tahsildar in a proceeding initiated under Section 133 of the Code of Criminal Procedure (for short, the Code) as MC No.1(A)/2019. The petitioners are the legal heirs of one late P.V. Moideenkoya, who was the petitioner before the Executive



Magistrate in MC No.1(A)/2019. The petition was filed because of the dangerous standing of two trees causing danger to the original petitioners' house. The proceedings was commenced in the year 2016 and was continued based on the directions of this Court in Annexure-A1 judgment. The 2nd respondent conducted a site inspection on 24/10/2019 and found that one jack fruit tree, two mango trees and one teak tree are standing in the property of the 3rd respondent herein and it is causing danger to the house of the petitioners and it may fall at any time. Even though direction was issued to remove the branches, only one of the trees was removed and therefore, Annexure-A2 final order was passed. Annexure-A2 order was challenged by the 3rd respondent by filing a revision petition before the Sessions Court and the Sessions Court dismissed the revision petition as per Annexure-A3, confirming the order. The 3rd respondent challenged the correctness of Annexure-A3 order before this Court by filing Crl.M.C. No.240/2021. During the pendency of the above Crl.M.C., the original petitioner, P.V. Moideenkoya passed away. Legal heirs were impleaded as respondents 3 to 7 before this Court. This Court, as per Annexure-A4 order, set aside the impugned orders in that case, stating that the



impugned orders were passed without following the legal procedures contemplated under Section 138 of the Code.

3. After Annexure-A4 order, the petitioners appeared before the 2nd respondent and were impleaded in the proceedings before the 2nd respondent. It is the case of the petitioners that on all postings, the petitioners and their counsel were present before the 2nd respondent. Subsequently, as per Annexure-A7, the Executive Magistrate closed the case invoking the powers under Section 256(1) of the Code. Aggrieved by Annexure-A7, this criminal miscellaneous case is filed.

4. Heard the learned counsel for the petitioners and the learned counsel appearing for the 3rd respondent. I also heard the learned Public Prosecutor appearing for respondents 1 and 2.

5. The short point to be decided in this case is whether the Executive Magistrate and Tahsildar is empowered to invoke Section 256(1) of the Code. This Court, in Annexure-A4 order, only observed that the Executive Magistrate/Tahsildar shall pass fresh orders on the application submitted, after complying with the legal procedure contemplated under Section 138(1) of the Code, by taking the evidence of the matter as in the case of a



summons case. It is true that under Section 138(1) of the Code, it is mandatory for the learned Executive Magistrate to take evidence as in the case of a summons case. That does not mean that the Sub-divisional Magistrate has got all the powers of a Judicial Magistrate, as per Chapter XX of the Code. Now the Sub-divisional Magistrate, invoking Section 256 of the Code, closed the matter. It will be better to extract Section 256 of the Code:

“Section 256. Non-appearance or death of complainant

(1) If the summons has been issued on complaint and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained, acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

PROVIDED that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so



far as may be, apply also to cases where the non-appearance of the complainant is due to his death.”

6. Section 256 of the Code says that, if the summons has been issued on '**complaint**', and on the day appointed for the appearance of the '**accused**', or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything herein before contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day. Sub-section (2) of Section 256 says that the provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death. Therefore Section 256 is applicable only if the summons has been issued on a **complaint** and on the day appointed for the appearance of the **accused**, the complainant does not appear, the Magistrate can acquit the accused. The counter petitioners before an Executive Magistrate are not accused persons. Moreover, a petition filed before the Executive Magistrate is not a complaint as defined under Section 2(d) of the Code. Section 2(d) of the Code is extracted hereunder:



“2(d). “complaint” means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.”

7. As per the above section, complaint means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an **offence**, but does not include a police report. The Sub-divisional Magistrate, invoking the powers under Section 133 of the Code, is not acting based on any complaint. Section 133(1) says that 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, can pass appropriate orders. Nowhere in Section 133 of the Code it is stated that the District Magistrate or Sub-divisional Magistrate or any Executive Magistrate is taking action based on any ‘**complaint**’, instead, Section 133 clearly states that action taken is based on a ‘**report**’ of a police officer or other ‘**information**’. Moreover,



the respondent in a proceeding under Section 133 of the Code, is not an accused.

8. In such circumstances, I am of the considered opinion that Section 256 of the Code cannot be invoked by an Executive Magistrate or Sub Divisional Magistrate or District Magistrate, while invoking the powers under Sections 133 to 138 of the Code. The upshot of the above discussion is that Annexure-A7 order passed by the Executive Magistrate closing the case invoking the powers under Section 256 of the Code is unsustainable.

Therefore, this Criminal Miscellaneous Case is allowed in the following manner:

1. Annexure-A7 order is set aside.
2. The 2nd respondent is directed to restore M.C.No.1(A)/2019 and finalise the proceedings, after giving an opportunity of hearing to the petitioners and the 3rd respondent, as expeditiously as possible.



APPENDIX OF CRL.MC 3410/2023

PETITIONER ANNEXURES

- Annexure A1 TRUE COPY OF THE JUDGMENT IN WP(C) NO. 34587/2017 DATED 10/08/2018
- Annexure A2 TRUE COPY OF THE ORDER OF THE 2 ND RESPONDENT DATED 26/12/2019
- Annexure A3 TRUE COPY OF THE JUDGMENT IN CRIMINAL REVISION PETITION NO. 3/2020 DATED 23/12/2020
- Annexure A4 TRUE COPY OF THE JUDGMENT IN CRL.M.C. NO. 240/2021 DATED 11/07/2022
- Annexure A5 TRUE COPY OF THE APPLICATION FILED BY THE PETITIONERS BEFORE THE SUB DIVISIONAL MAGISTRATE DATED 17/08/2022
- Annexure A6 TRUE COPY OF THE LIST OF DOCUMENTS SUBMITTED BY THE PETITIONERS DATED 06/03/2023
- Annexure A7 CERTIFIED COPY OF THE PROCEEDINGS OF THE 2 ND RESPONDENT, NO. A2- 14193/2021 DATED 07/03/2023
- Annexure A8 PHOTOGRAPHS OF THE TREES