

Omanakutty Amma vs Sajeev Kumar.M.R on 27 October, 2010

Author: V.K.Mohanan

Bench: V.K.Mohanan

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Crl.Rev.Pet.No. 2089 of 2010()

1. OMANAKUTTY AMMA,
... Petitioner
2. JAYASREE, D/O.OMANAKUTTY AMMA,
3. SURESH,
4. VIJAYALAKSHMI, D/O.OMANAKUTTY AMMA,

Vs

1. SAJEEV KUMAR.M.R,
... Respondent
2. VASU, LAKSHAM VEEDU HOUSING COLONY,
3. V.RAVEENDRAN,
4. VAPPI CHERUVELITHARA,
5. PURUSHOTHAMAN, SAVITHRI NILAYAM,
6. STATE OF KERALA, REP.BY PUBLIC

For Petitioner :SRI.K.V.SOHAN

For Respondent :SRI.P.SANKARANKUTTY NAIR

The Hon'ble MR. Justice V.K.MOHANAN

Dated :27/10/2010

O R D E R

'C.R.'

V . K . MOHANAN , J .

Crl.R.P.No. 2089 of 2010

Dated this the 27th day of October,2010

O R D E R

Whether a "copy of the plaint" in a suit pending before a civil court can be treated as 'reliable evidence' as required in Section 137(2) of the Code of Criminal Procedure (hereinafter referred for short as 'Cr.P.C.'), is the short question to be considered in this Criminal Revision Petition. The challenge in this Crl.R.P. is against the order dated 9.6.2010 in File No.F- 1224/05/(D) of the Sub Divisional Magistrate, Alappuzha, which is a proceedings issued under Section 138 of the Cr.P.C. For the better understanding of the above question, the necessary facts involved in the above revision petition are absolutely inevitable which I shall now refer in brief.

2. The petitioners, four in number, are the counter- petitioners in the above proceedings. The respondents 1 to 5 herein are the petitioners in the said proceedings, who Crl.R.PNO. 2089 of 2010 :-2-:

approached the court below by filing a petition under Section 133 of the Cr.P.C. alleging that the revision petitioners herein have interfered with the right to public pathway having a width of 12 links.

3. On the appearance of the respondents, they have filed a counter affidavit in the above revision petition along with which they have produced Annexures R3,R3(a) and R3(b) documents and also a petition to vacate the interim order issued by this Court. During the pendency of the above Crl.R.P., the petitioners in the revision petition have preferred Crl.M.A.No.8623 of 2010 to receive the documents which are produced along with the said petition and marked as Annexures XI,XII,XIII,XIV and XV. In the above petition against the prayer to accept additional documents, the third respondent therein had filed a counter affidavit along with which the third respondent has produced Annexure R3(c) report of the Tahsildar, Cherthala along with the location map, submitted before the Revenue Divisional Officer in the above Crl.R.PNO. 2089 of 2010 :-3-:

proceedings. Thus, the pleadings are complete.

4. As indicated earlier, the respondents herein preferred Annexure-I petition under Section 133 of the Cr.P.C., which is a petition dated 14.2.2005 alleging that the petitioners herein obstructed 12 links public pathway by erecting pillars and fence and thereby, reduced the width to 6 links. The petitioners herein preferred Annexure-II objection disputing the existence of the public pathway. Thereafter, the Sub- Divisional Magistrate, Alappuzha issued Annexure-III order holding that the disputed pathway is a private property and the dispute does not come within the jurisdiction of the learned Magistrate. Challenging Annexure-III order, the respondents herein approached this Court by filing W.P(C) No.34330 of 2005 and Crl.R.P.No.2604 of 2006 and this Court disposed of the

above writ petition as well as the revision petition by a common judgment dated 20.8.2007, a copy of which is produced in the counter affidavit of the respondents as Annexure R3(a). In the said judgment, this Court directed the Crl.R.PNO. 2089 of 2010 :-4-:

Sub Divisional Magistrate to proceed on Ext.P3 complaint in accordance with law and set aside Annexure III order of the Sub Divisional Magistrate. Subsequently, the Sub Divisional Magistrate issued Annexure IV order reiterating his earlier stand in Annexure III order and accordingly, the petition filed by the respondents was dismissed. Against the said order, the respondents herein preferred Crl.R.P.No.1687 of 2008, complaining that Annexure IV order was against the direction contained in the common judgment of this Court in W.P(C) No.34330 of 2005 and Crl.R.P.No.2604 of 2006, and the respondents herein had also preferred Contempt Case (C) No.605 of 2008. Thus, as per Annexure V common order, this Court has observed that the Sub Divisional Magistrate has failed to pass a conditional order in terms of Section 133 of the Cr.P.C. and the order dated 20.2.2008 passed by him pursuant to the remand by this Court cannot be supported and thus, the same is set aside. This Court has also observed that it would be open to the petitioners herein to appear before the Sub Crl.R.PNO. 2089 of 2010 :-5-:

Divisional Magistrate and raise all contentions available to them on receipt of the conditional order. This Court has also directed the learned Magistrate to pass the conditional order in terms of Section 133 of the Cr.P.C. within two weeks of receipt of a copy of that order.

5. Thus, in pursuance of Annexure V common order and in terms of the direction contained therein, the Sub Divisional Magistrate issued Annexure VI order. According to the petitioners, in pursuance of Annexure VI order, they have appeared before the Sub Divisional Magistrate and produced a civil court order by which the respondents herein were restrained from widening the pathway. It is also the claim of the petitioners that when they appeared before the Sub Divisional Magistrate, they have filed Annexure VII petition with a prayer that the proceedings initiated under Section 133 by the Sub Divisional Magistrate may be deferred till the decision of the civil court in O.S.No.702 of 2007. It is also the claim of the petitioners that along with Annexure VII petition, Crl.R.PNO. 2089 of 2010 :-6-:

they have produced Annexure VIII order dated 16.10.2007 of the court of Additional Munsiff, Cherthala in I.A.No.3042 of 2007 in O.S.No.702 of 2007. After hearing the parties concerned, the Sub Divisional Magistrate issued Annexure IX order dated 10.9.2009 and declined the request for staying the proceedings under Section 133 of Cr.P.C.

6. Aggrieved by the above order, the petitioners herein approached this Court by filing Crl.M.C.No.3713 of 2009 under Section 482 of the Crl.P.C. to quash Annexure IX order and to direct the Sub Divisional Magistrate to stay the proceedings till the disposal of O.S.No.702 of 2007. This Court observed that if the petitioners deny the public right, the Sub Divisional Magistrate should

conduct an inquiry as provided under section 137(1) of the Cr.P.C. to find out whether there is any "reliable evidence" in support of such denial. This Court further observed that on such inquiry, if the officer finds that there is reliable evidence for such denial, even without an application filed by the petitioners, the officer is bound to stay the CrI.R.PNO. 2089 of 2010 :-7-:

proceedings till the matter of existence of such a right has been decided by the competent court. Thus, this Court by Annexure X order, disposed of the above CrI.M.C. directing the Sub Divisional Magistrate to question the petitioners and conduct an enquiry under Section 137(1) within two months from the date of receipt of a copy of the said order.

7. In the light of the direction contained in Annexure X order and in compliance thereof, the learned Sub Divisional Magistrate issued the impugned order dated 9.6.2010 by which the learned Magistrate found that the respondents herein who are the petitioners before the Sub Divisional Magistrate have the right to get the pathway extended to 12 links and the arguments of the respondents therein, who are the petitioners herein, are not supported by any reliable evidence. Accordingly, the preliminary order under Section 133 issued on 1.9.2008 is made absolute as per Section 138 of the Cr.P.C. and accordingly, the petitioners herein are directed to remove the obstructions created on the pathway within 15 CrI.R.PNO. 2089 of 2010 :-8-:

days from the date of receipt of that order. It is the above order that is assailed in this revision petition.

8. According to the petitioners, there is no public pathway and it was part of the private property of the petitioners. The case of the petitioners is that persons, who are residing on the eastern side of the property of the petitioners, were allowed to pass through the property of the petitioners and for that purpose, a pathway having a width of 1= metres were given out by the petitioners and there never existed a public pathway having a width of 12 links. According to the petitioners, the respondents, who are the petitioners before the Sub Divisional Magistrate, are not the persons using the pathway. Therefore, according to the petitioners, the Sub Divisional Magistrate ought to have verified, the dispute between the petitioners and the respondents, that whether the alleged pathway is a private pathway voluntarily allowed by the petitioners having a width of 6 links or is it a public pathway having a width of 12 links as claimed by the CrI.R.PNO. 2089 of 2010 :-9-:

petitioners. It is the further case of the petitioners that at the instance of the petitioners, the competent civil court has granted an injunction in O.S.No.702 of 2007 and therefore, a parallel proceedings under Section 133 is not called for.

9. It is the specific case of the petitioners that though by filing Annexure VII petition, along with which they had produced Annexure IX order, and sought for the stay of proceedings, the Sub Divisional Magistrate refused to stay the proceedings by invoking Section 137(2) of the Cr.P.C. It is also the contention of the petitioners that

though the petitioners have produced Annexure XIV copy of the plaint, the same was not considered, accepted and acted upon by the Sub Divisional Magistrate in spite of the direction issued in Annexure-X order of this Court. According to the petitioners, the above mentioned documents are "reliable evidence" produced by the petitioners and therefore, the Sub Divisional Magistrate is bound to stay the proceedings initiated by him, by invoking the provisions under Section 137(2) of the Cr.P.C., but the learned Crl.R.PNO. 2089 of 2010 :-10-:

Magistrate failed in discharging his statutory duty and therefore, the impugned order is liable to be set aside.

10. Stoutly resisting the claim and averments contained in the above revision petition and opposing the relief sought for, the respondents 1 to 5 have filed a detailed counter affidavit. According to the respondents, the 12 links wide pathway is starting from the National Highway and the same is being used by the people for the last several generations and mainly used by the people, who are residing on the eastern side of Kannankulangara Temple which is situated in Ward No.VII of Ezhupunna Grama Panchayath in Cherthala Taluk.

According to the respondents, the pathway which is starting from the National Highway ends at Laksham Veedu Colony. It is also the case of the respondents that when there was an attempt to reduce the width of the pathway by constructing a wall along 30 metres at the beginning of the pathway from the Highway, the same was questioned before the Sub Divisional Magistrate, Alappuzha and in that case, the Sub Divisional Crl.R.PNO. 2089 of 2010 :-11-:

Magistrate has already found that there is a public pathway having the width of 12 links. Such findings are finally approved by this Court and thereafter, the illegal construction was demolished on 16.10.2004 thereby executing that order. It is subsequently, that the petitioners, whose properties are lying continuously on the eastern side of the property of which the previous proceedings were initiated and covered, obstructed the general public from using the public pathway by installing post and fence and thereby reduced the 12 links width of the public pathway to six links. So, according to the respondents, the present attempt of the petitioners is diametrically against the judgment of this Court in Crl.R.P.No.1062 of 1995. It is also the claim of the respondents that by a common judgment dated 20.8.2007 in Crl.R.P.No.2604 of 2006 and W.P(C) No.34330 of 2005, this Court has confirmed the right of public pathway and the present attempt of the petitioners is to deny the right to enjoy the public pathway, which was already declared by this Court. Crl.R.PNO. 2089 of 2010 :-12-:

It is also the case of the respondents that when the Sub Divisional Magistrate rejected their petition earlier, the respondents have approached this Court on several occasions and finally, this Court, as per the judgment dated 16.7.2008 in Crl.R.P.No.1687 of 2008 and Cont.Case(C) No.605 of 2008 directed the Sub

Divisional Magistrate to pass a conditional order under Section 133 of the Cr.P.,C. and in that Contempt Case, the Sub Divisional Magistrate had filed Annexure R3(b) affidavit before this Court offering his apology. Thus, according to the respondents, the above common judgment and the affidavit of the Sub Divisional Magistrate will establish that the disputed pathway is a public pathway. Thus, according to the respondents, this Court as per Annexure R3 judgment dated 7.4.2004 in Crl.R.P.No.1062 of 1995 and Annexure R3(a) common judgment dated 20.8.2007 in W.P(C) No.34330 of 2006 and Crl.R.P.No.2604 of 2006 has unequivocally declared the existence of 12 links public pathway and the present attempt of the revision petitioners is Crl.R.PNO. 2089 of 2010 :-13-:

to circumvent the above judgment and the findings and declaration of the 12 links public pathway and to deny the valuable right of the general public including the respondents. It is also the case of the respondents that copy of the plaint i.e., Annexure XIV has not been produced by the petitioners before the Sub Divisional Magistrate, in spite of the observation and direction contained in Annexure X judgment of this Court. According to the respondent, neither Annexure VII interim order of the civil court nor the copy of Annexure XIV plaint can be treated as "reliable evidence" as contemplated by Section 137(2) of the Cr.P.C. Hence, this revision petition is liable to be dismissed.

11. I have heard Sri.K.V.Sohan, learned counsel appearing for the revision petitioners and Sri.P.Sankarankutty Nair, learned counsel appearing for respondents 1 to 5 and Sri.V.Tek Chand, learned Public Prosecutor appearing for the sixth respondent, State.

12. Reiterating the averments contained in the Crl.R.P., Crl.R.PNO. 2089 of 2010 :-14-:

Mr.K.V.Sohan, learned counsel for the petitioners submitted that the disputed pathway is not a public pathway so as to attract the jurisdiction of the Sub Divisional Magistrate, Alappuzha under the provisions of Cr.P.C. Learned counsel submitted that the petitioners herein had set forth a portion of the property to use as a private pathway and no public right is involved in any way. It is also the contention of the learned counsel that as evidenced by Annexures VIII and XIV, serious civil dispute is pending before the Munsiff's Court at Cherthala and when such civil dispute is pending, the Sub Divisional Magistrate has no jurisdiction to have a parallel proceedings with respect to the same matter. It is also the contention of the learned counsel that the petitioners herein have produced Annexures VIII and XIV before the Sub Divisional Magistrate, Alappuzha and they have emphatically denied the public right, but the learned Sub Divisional Magistrate has miserably failed to follow the procedure as contemplated by Section 137(2) of the Cr.P.C. According to the learned counsel, Annexures VIII Crl.R.PNO. 2089 of 2010 :-15-:

and XIV documents certainly will come within the term "reliable evidence" as contemplated by Section 137(2) of the Cr.P.C. and therefore, the Sub Divisional Magistrate has no other option than to stay the proceedings initiated by him under Section 133 of the Cr.P.C. and relegating the parties to approach the civil court and to get resolved the dispute therein. In support of the above submission, the learned counsel placed reliance upon the following decisions, i.e. Rupan and others v. State of U.P. (1976 Crl.L.J.502) and Wali Uddin and another v.

State of U.P. (1988(2) Crimes 384).

13. Stoutly opposing the arguments advanced by the counsel for the petitioners, Sri.P.Sankarankutty Nair, learned counsel appearing for the respondents vehemently submitted that the present attempt of the revision petitioners is to defeat the right of general public and to prevent them from using the public pathway. It is the specific contention of the learned counsel that this Court, by two separate judgments, by Annexure R3 judgment dated 7.4.2004 in Crl.R.P.No.1062 of Crl.R.PNO. 2089 of 2010 :-16-:

1995 and R3(a) common judgment dated 20.8.2007 in Crl.R.P.No.2604 of 2006 and W.P(C) No.34330 of 2005 has specifically found that the pathway in question is a public pathway starting from the National Highway reaching up to the Laksham Veedu Colony and both the courts have admitted and declared the existence of 12 links public pathway. According to the learned counsel, the impugned order is issued by the Sub Divisional Magistrate in terms of the above findings of this Court by two different judgments and therefore, there is no scope for any further enquiry in this matter. According to the learned counsel, by Annexure R3 judgment, while considering the similar issues with respect to the western segment of the pathway as a public pathway, this Court has held that there is definite material to come to a conclusion that 12 links wide pathway has been obstructed by reducing the width to 8 links by construction of a compound wall and the 12 links wide pathway deserves to be restored and accordingly held that the findings of the Sub Divisional Crl.R.PNO. 2089 of 2010 :-17-:

Magistrate and the direction issued appears to be correct and accordingly, the order of the Sub Divisional Magistrate was restored. It is also the contention of the learned counsel that the petitioners herein never produced Annexure XIV plaint copy before the Sub Divisional Magistrate at the appropriate time. It is the further contention of the counsel that the copy of the plaint cannot be treated as an evidence as envisaged by Section 137(2) of the Cr.P.C. Therefore, according to the learned counsel, as the petitioners have miserably failed to produce any reliable evidence so as to deny the public right, the challenge against the direction and order of the Sub Divisional Magistrate is not sustainable. Learned counsel relied on the following decisions:- Augusthy v. Varkey (1989 (1) KLT 654), Naryanankutty v. Sekhara Menon (1984 KLT

915), M/s.East India Commercial Co.Ltd., Calcutta v.

Collector of Customs, Calcutta (AIR 1962 SC 1893).

14. Supporting the findings and conclusions arrived on by the Sub Divisional Magistrate as discernible from the order Crl.R.PNO. 2089 of 2010 :-18-:

impugned, the learned Public Prosecutor submitted that even according to the petitioners, there is a pathway which is being used by the public and therefore, the Sub Divisional Magistrate is fully correct in rejecting the contentions of the petitioners against the existence of the public pathway and the right of general public. The learned Public Prosecutor pointed out that Annexure XIV suit was filed after the initiation of the proceedings under Section 133 of Cr.P.C. and the petitioners approached the civil court with oblique motive so as to oust the jurisdiction of the Sub Divisional Magistrate on the ground of the pendency of the civil dispute. Therefore, according to learned Public Prosecutor, the revision petition is devoid of any merit and the same is liable to be dismissed.

15. I have carefully considered the arguments advanced by both the counsel for the contesting parties and the learned Public Prosecutor. I have also perused the materials made available on record and I have carefully gone through the authorities cited during the time of the arguments. Crl.R.PNO. 2089 of 2010 :-19-:

16. Thus, the challenge in this revision petition is against an order issued by the Sub Divisional Magistrate, Alappuzha under Section 138 of the Cr.P.C. The main contention of the learned counsel for the petitioners is two folded. According to the petitioners and their counsel, the pathway in question is not a public pathway. On the other hand, it is only a private pathway set forth by the revision petitioners through the property of the petitioners. The other contention fortified is that the order impugned is liable to be set aside as the Sub Divisional Magistrate has miserably failed to follow the mandatory provisions contained in subsection (2) of Section 137, though the revision petitioners have requested for the stay of the proceedings in terms of Section 137(2) of the Cr.P.C. by filing Annexure VII petition and producing Annexures VIII interim order and XIV copy of the plaint, and that too in spite of the direction contained in Annexure X judgment of this Court. Of course, the learned counsel, on the strength of the decisions cited supra argued that Annexures Crl.R.PNO. 2089 of 2010 :-20-:

VIII and XIV are reliable evidence and therefore, the Sub Divisional Magistrate has no option other than to stay his own proceedings and the averment to the effect that the pathway in question is a private pathway is only supplementary to the above main contention.

17. But, according to the respondents, the pathway in question is a public pathway which is being used by generations and the fact that the pathway in question is a public pathway is recognised and approved by this Court by two authoritative pronouncements that is, Annexures R3 and R3(a) judgments.

18. Learned counsel for the respondents vehemently submitted that Annexure XIV copy of the plaint was not produced by the petitioners before the Sub Divisional Magistrate, Alappuzha and the suit itself was filed after initiating proceedings under Section 133 of the Cr.P.C. and neither Annexure XIV copy of the plaint nor Annexure VIII interim order can be treated as reliable evidence as Crl.R.PNO. 2089 of 2010 :-21-:

contemplated by Section 137(2) of the Cr.P.C. It is also the submission of the learned counsel that even though the property belongs to the petitioners, respondents and their earlier generations, the pathway is being used as a public pathway, having a width of 12 links starting from the National Highway and reaching the Laksham Veedu colony. Therefore, according to the learned counsel, the pathway is a public pathway and the subsequent filing of the suit is not sufficient to lose the character of the pathway.

19. On a careful consideration of the materials on record, including the averments of the petitioners and the judgments of this Court which are referred above, it can be seen that there is a pathway being used by the general public. According to the respondents, the original pathway is having 12 links width. In paragraph 2 of Annexure II objection, the petitioners herein claimed that the pathway is their property and they denied the claim that the pathway was used by the general public as a public pathway and it is admitted that with Crl.R.PNO. 2089 of 2010 :-22-:

the permission of the petitioners, the inhabitants on the eastern side of the petitioner's property used the pathway for their travel purposes. It is also stated that a pathway having 1= metres width has already been left along the side of the petitioner's property for the use as a pathway. So, as per the above admission, even according to the petitioners, there is a pathway having a width of 1= metres which is lying along the side of the petitioner's property and the same is being used by the inhabitants residing on the eastern side. Even if the contention of the petitioners is admitted for the sake of arguments that it is private property, in the light of the decision of this Court reported in Augusthy v. Varkey (1989 (1) KLT 654), the learned Sub Divisional Magistrate is fully justified in holding that the pathway in question is a public pathway, especially when the petitioners admit the using of the pathway by people residing in the locality. In this juncture, it is also relevant to consider the findings of this Court and Annexures R3 and R3(a) judgments of this Court. As I Crl.R.PNO. 2089 of 2010 :-23-:

indicated earlier, Annexure R3(a) judgment arose out of a dispute connected with the very same pathway, but the property therein lies on the western segment of the very same pathway. Annexure R3 judgment is in Crl.R.P.No.1062 of 1995 wherein also the proceedings originated under Section 133 of Cr.P.C. Therefore, when a conditional order was issued under Section 133, the respondents therein appeared and denied the right of public pathway consequent to which an enquiry under Section 137 was conducted. But, during such enquiry, the Sub Divisional Magistrate found that 12 links width public pathway was in existence. Finally, recognising the public pathway,

the Sub Divisional Magistrate issued an order under Section 138 of the Cr.P.C. directing to remove the obstruction. That order was challenged before the Sessions Court and the Sessions Court, setting aside the order issued under Section 138, held that the dispute regarding the width of the pathway must be resolved by civil proceedings. It is against the above order of the Sessions Court, the above revision petition was filed which Crl.R.PNO. 2089 of 2010 :-24-:

culminated in Annexure R3 judgment. In paragraph 9 of Annexure R3 judgment, this Court has held as follows:-

"9. That the pathway had an original width of 12 links is found by the Sub Divisional Magistrate. That finding is not disturbed by the first revisional court. I have been taken through the evidence. I find no reason not to endorse that finding of the Sub Divisional Magistrate. The pathway now in existence has a width of only about 8 links. That finding is also rendered by the Sub Divisional Magistrate and is not disturbed by the first revisional court. That finding of fact can also be accepted safely."

Further, in paragraph 11 of the very same judgment, this Court has held as follows:-

"11. I am, in these circumstances, unable to accept the conclusion of the learned Sessions Judge that no finding regarding the width of the pathway can be rendered by the Sub Divisional Magistrate and that the dispute must be left to be resolved in civil proceedings. There is definite materials to come to a conclusion that a 12 links wide public pathway has been obstructed by reducing the width to 8 links by construction of a compound wall. The 12 links wide pathway deserves to be restored. The finding of the Sub Divisional Magistrate and the directions issued, therefore, appear to be correct and deserves to be restored."

Thereafter, by allowing the revision petition, this Court was Crl.R.PNO. 2089 of 2010 :-25-:

pleased to set aside the order of the learned Sessions Judge and restore the order of the Sub Divisional Magistrate. It is also made clear that the original pathway need not be restored and it will be sufficient if a 12 link wide pathway was left on the southern side of 17 cents of land held by the respondents.

20. It is also relevant to note that following Annexure R3 judgment, another learned Judge of this Court in Annexure R3

(a) judgment has categorically held in para 3 of Annexure R3

(a) judgment as follows:-

"3. There is no dispute that the pathway which is the subject matter of the present dispute is a continuation of the pathway which was the subject matter of Ext.P2 order. When in proceedings which were fought upto this Court it was conclusively held that the western segment of the present pathway was a public pathway, it is puerile for the respondents to contend that the eastern segment of the pathway which is a continuation of the said pathway towards the east is not a public pathway but a private pathway. A public pathway which is intended for the use of the public cannot terminate midway without reaching anywhere. Hence, the objection raised by respondents 3 to 5 who are also adjacent owners is prima facie untenable. The second respondent Sub Divisional Magistrate was not justified in declining the jurisdiction for the reason Crl.R.PNO. 2089 of 2010 :-26-:

that the disputed pathway is a private pathway. In the fitness of things, he could have passed a conditional order under Sec.133 Cr.P.C.calling upon the obstructors to remove the obstructions or show cause why the conditional order should not be made absolute."

As indicated earlier, Annexure R3(a) judgment was issued upon a revision petition preferred by the respondents herein and the petitioners herein and some other persons are the respondents in that revision petition and therefore, the above findings are binding on the petitioners.

21. It is, after considering the above judgments of this Court and considering the particular plea of the revision petitioners and the materials available on record, the Sub Divisional Magistrate issued the impugned order. It is against the above findings and order of the Sub Divisional Magistrate, the learned counsel submitted that the impugned order is liable to be interfered with as the same is not in accordance with Section 137(2) of the Cr.P.C. It is the contention of the learned counsel that Annexure XIV plaint and Annexure VIII Crl.R.PNO. 2089 of 2010 :-27-:

order of the civil court are reliable evidence to oust the jurisdiction of the Sub Divisional Magistrate since the denial of public pathway is established by the revision petitioners.

22. In the light of the rival pleadings and the materials on record including Annexures.R3 and R3(a) judgments of this Court, the question to be considered is whether any interference is warranted with the order of the Sub Divisional Magistrate in exercising the revisional jurisdiction of this Court on the ground that the above order is illegal, irregular or improper for the reason that the learned Sub Divisional Magistrate has not considered Annexure XIV plaint as reliable evidence and not staying the proceedings by invoking Section 137(2) of the Cr.P.C.

23. In the light of the foregone discussion and the materials referred above, it can be seen that there is a pathway starting from the National Highway and leading to the Laksham Veedu colony and the same is lying adjacent to the property of the petitioners. The petitioners have also admitted Crl.R.PNO. 2089 of 2010 :-28-:

the presence of the pathway, but according to them, the same is having only 1= metres width and the same is not a public pathway. But according to the respondents, the pathway is a public pathway having a width of 12 links. The above stand and claim of the respondents herein are recognised and approved by this Court as per Annexures R3 and R3(a) judgments.

24. It is true as per Annexure X order, this Court has observed that "..... If Sub Divisional Magistrate, on enquiry, finds that there is reliable evidence for such denial, even without application filed by petitioners, he is bound to stay the proceedings till the matter of existence of such right has been decided by the competent court.....". It is also relevant to note that in Annexure X order, this Court has observed that "It is clear from Annexure X plaint that petitioners are disputing the public right of way in respect of the disputed extent of land and in such circumstances, if the Magistrate finds that there is reliable evidence in respect of the denial, in view of Crl.R.PNO. 2089 of 2010 :-29-:

Annexure X plaint, Sub Divisional Magistrate cannot proceed as provided under Section 138....." (emphasis supplied). Accordingly, this Court directed the Sub Divisional Magistrate to question the petitioners and conduct an enquiry under Section 137(1). It is, thereafter the learned Magistrate issued the impugned order. Thus, from Annexure X judgment, it can be seen that when Annexure XIV copy of plaint was produced before this Court, this Court was of the opinion that the said copy of plaint is sufficient to hold that the petitioners were disputing the public right or denying the same, but this Court was not satisfied with the fact that such dispute or denial can be treated as an evidence. Otherwise, this Court need not direct the Magistrate or observe that "if the Magistrate finds that there is reliable evidence in respect of the denial, in view of Annexure X plaint". On the other hand, this Court could have directed the Sub Divisional Magistrate to stay the proceedings or the Crl.M.C. itself could have been disposed of, instead of relegating the petitioners to the learned Magistrate, by Crl.R.PNO. 2089 of 2010 :-30-:

restraining the Magistrate from further proceeding and directing parties to approach the civil court. Therefore, all the contentions of the petitioners based on Annexure X are unsustainable. Therefore, the question to be considered is whether the copy of the plaint- Annexures XIV and VIII can be treated as reliable evidence so as to oust the jurisdiction of the Sub Divisional Officer or to stay Section 133 proceedings initiated by him by resorting to Section 137(2) of the Cr.P.C.

25. Neither the word 'evidence' nor 'reliable evidence' is defined in the Code of Criminal Procedure. According to Section 3 of the Indian Evidence Act,1872 evidence is defined as follows:-

"Evidence".-- "Evidence" means and includes--

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral

evidence;

(2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence."

The copy of the plaint or copy of the interlocutory order Crl.R.PNO. 2089 of 2010 :-31-:

produced by the petitioners will not come within the definition of evidence as per the Indian Evidence Act.

26. According to the Law Lexicon compiled and edited by P.Ramanatha Aiyar, 'evidence' is the means from which an inference may logically be drawn as to the existence of a fact. It consists of proof by testimony of witnesses, on oath; or by writings or records. In Advanced Law Lexicon by P.Ramanatha Aiyar 3rd Edition Reprint 2007, Blackstone defines it as signifying that which demonstrates, makes clear or ascertains the truth of the very fact or point in issue either on the one side or on the other". According to Taylor, the word "Evidence" includes "all the legal means, exclusive of mere arguments which did tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation." According to HALSBURY's Laws of England, 1st Edn., Vol.15, para 145,242, "the mere statement of plaintiff's witnesses cannot constitute the plaintiff's evidence in the case unless and until it is tested by cross-examination. The right of the defence to cross- Crl.R.PNO. 2089 of 2010 :-32-:

examine the plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff's evidence cannot be acted upon." From the above authorities, it can be seen that a copy of the plaint cannot be substituted for the requirement of reliable evidence.

27. As per the Advanced Law Lexicon by P.Ramanatha Aiyar, "dispute" means a conflict or contest; sometimes used in the sense of controversy. It is also relevant to note that the 'dispute' may perfectly arise when only one disputant is articulate and the other stands mute when called upon to plead. So what is required is that one party should affirm and the other deny, and the conduct will do this as well as words. In the present case, the respondents are constrained to approach the Sub Divisional Magistrate when, according to them, their 12 feet public pathway is obstructed by the petitioners by erecting stumps. Thus, the petitioners, by conduct, raised a dispute which persuaded the respondents herein to approach the Sub Divisional Magistrate. As part of Crl.R.PNO. 2089 of 2010 :-33-:

such an enquiry, the petitioners were required to produce "reliable evidence" in support of the denial of a public right. It is, then, that they produced the plaint copy. After raising a dispute by the conduct of erecting stumps and fence, raising a further dispute by way of filing copy of plaint before the Sub Divisional Magistrate cannot be equated as reliable evidence. But, the learned counsel, heavily relying upon the decision of the Allahabad High Court reported in Brahmanand Rai v. State of U.P. and others [1991 Crl.L.J. 3238], submitted that copy of plaint is a reliable evidence,

which will come within the ambit of Section 137(2) of the Cr.P.C.

28. The plaint is not defined in the Code of Civil Procedure, 1980. Order IV Rule 1 says that a suit is to be commenced by plaint. Order IV Rule 1 reads as follows:-

"1. Suit to be commenced by plaint.- (1) Every suit shall be instituted by presenting a plaint in duplicate to the Court or such officer as it appoints in this behalf. (2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable. (3) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub-

Crl.R.PNO. 2089 of 2010 :-34:-

rules (1) and (2)."

Order VI Rule 1 deals with pleading and accordingly, the "pleading" shall mean plaint or written statement. Order VII deals with plaint and Order VII Rule 1 deals with particulars to be contained in plaint. One of the particulars to be incorporated in plaint, as per subsection (e) of Order VII Rule 1, must be "the facts constituting the cause of action and when it arose" . Going by the above provisions of the C.P.C., it cannot be stated that a copy of the plaint satisfies the requirements of "reliable evidence" as envisaged by Section 137(2) of Cr.P.C.

29. In this juncture, it is relevant to note that Section 137 of Cr.P.C, coming under Chapter X of Cr.P.C. which deals with maintenance of public order and tranquility and the public nuisance is covered by the second part of the above chapter. As per the scheme of the Cr.P.C., whenever there is a threat to the general public, either with respect to the maintenance of public order and tranquility or public nuisance or dispute with immovable property, which are likely to affect public Crl.R.PNO. 2089 of 2010 :-35:-

tranquility and law and order situation, with the intention to abate the same, wide powers are given to public administrative authorities instead of relegating the aggrieved persons to approach the civil courts because such proceedings are time consuming and the public order or maintenance cannot be timely protected and the public nuisance cannot be abated instantaneously and proper and urgent relief cannot be given to the general public. Therefore, as and when a complaint is received by the authorities, they are bound to abate the public nuisance instantaneously including the obstruction against the right to public pathway of the general public. Thus, while exercising such emergent powers, jurisdiction of such public Administrative Authorities cannot be ousted unless there is a concrete, satisfactory and convincing evidence in support of the denial of public right. Strict interpretation of the term "reliable evidence" is required in view of the above legislative intent. Particularly, it is the demand of the time, since as a money minting business, real estate lobbies are unconcerned Crl.R.PNO. 2089 of 2010 :-36:-

with the Government properties or public right and right to public pathway and therefore, such rights of the general public can be preserved only by invoking the statutory remedies and procedures, meant for preventing danger to the public, to preserve the public tranquility and to abate the public nuisance, and thereby, protecting the constitutional rights of the citizens of India enshrined in Articles 19(1)(d), 19(1)(e) and Article 21 of the Constitution of India. As discernible from the facts and circumstances involved in the case, the pathway in question is being used by the general public, particularly the weaker section of society, who are residing in the Laksham Veedu Colony, where the pathway ends. Therefore, the jurisdiction of the Public Administrative Authorities like the Sub Divisional Magistrate or Collector, who are bound to protect the constitutional right of the general public, cannot be ousted unless the "reliable evidence" contemplated in Section 137(2) shall be such a strong, reliable, acceptable legal evidence and mere denial in the form of a dispute is not *Crl.R.PNO. 2089 of 2010 :-37-*

sufficient. In such a situation, the Magistrate should see whether there is reliable evidence in support of the denial and note that there is non-existence of the public right. During such enquiry, according to a decision of the High Court of Calcutta (AIR 1966 Calcutta 215), the expression "reliable evidence" as used in Section 139-A means evidence on which a competent Court may place reliance. In that case, what was produced as reliable evidence was a settlement record published at that time. So, according to me, the 'reliable evidence' means the evidence on which it is possible for a competent court to place reliance. The plaint contains only a pleading which cannot be equated as a reliable evidence for the purpose of Section 137(2) of the Cr.P.C. Therefore, in support of the denial of public right, there must be some evidence like public records, such as settlement registers, revenue records or survey marks. The plaint produced by the petitioner will not come under any of such category. Considering the responsibility bestowed on the public *Crl.R.PNO. 2089 of 2010 :-38-*

administrators, a mere production of a copy of a plaint is not sufficient and the same cannot be treated as reliable evidence. Therefore, I am unable to approve the view taken by the Allahabad High Court taken in the decision in *Brahmanand Rai v. State of U.P. and others* (1991 *Crl.L.J* 3238). In this case, it is relevant to note that the petitioners approached the civil court after initiation of the proceedings under Section 133 of the Cr.P.C. The suit in question was filed after issuing the conditional order under Section 133 of the Cr.P.C. Thus, if the copy of the plaint in a suit, which is filed after issuing a conditional order, is treated as reliable evidence, it will definitely defeat the very purpose of the above provision. Therefore, according to me, a copy of the plaint produced in this case cannot be treated as a reliable evidence at all. Even, according to the revision petitioners, the respondents herein by filing Annexure I petition dated 14.2.2005 had approached the Sub Divisional Magistrate, Alappuzha invoking his jurisdiction under Section 133 of the Cr.P.C. According to the *Crl.R.PNO. 2089 of 2010 :-39-*

petitioners, they had filed objection in the said petition setting forth their claim. It is also the case of the petitioners that the Sub Divisional Magistrate, by Annexure III order, had dismissed the above petition directing the petitioners herein to approach the civil court. From the above facts, it is evident that the revision petitioners herein approached the civil court only after the learned Magistrate initiated proceedings under Section 133 of the Cr.P.C. In the above background, if a copy of the plaint is accepted as evidence for denial of a public pathway, the very worthiness of the various provisions contained in Chapter X would render as unworkable and the very purpose will be defeated.

30. In the present case, as indicated earlier, this Court, by two separate judgments, recognised the existence of 12 links width pathway, starting from the National Highway and ending at Laksham Veedu Colony, which is being used by the general public and the pathway in dispute is the continuation of the said pathway. The revision petitioners have no right to Crl.R.PNO. 2089 of 2010 :-40-:

obstruct the right of the general public to use such pathway as a public pathway and they have miserably failed to adduce any reliable evidence in favour of them. Therefore, the order dated 9.6.2010 in File No.F-1224/2005(D) of the Sub Divisional Magistrate is legal, correct and proper and no interference is warranted. Accordingly, there is no merit in the revision petition.

31. However, the petitioners are granted one month time to comply with the direction issued by the Sub Divisional Magistrate. Accordingly, the learned Magistrate is directed to issue a memo to the petitioners, on getting a copy of this order directing the petitioners to comply with the impugned order within one month from the date of receipt of such memo and if there is any failure to comply with the above order of the learned Magistrate, it is for the learned Magistrate to take appropriate steps to implement his order. Crl.R.PNO. 2089 of 2010 :-41-:

The Criminal Revision Petition is dismissed accordingly.

V.K.MOHANAN, Judge.

MBS/ Crl.R.PNO. 2089 of 2010 :-42-:

In Annexure-X order, this Court has observed as follows "..... It is clear from AnnexureX plaint that petitioners are disputing the public right of way in respect of the disputed extent of land and in such circumstances, if the Magistrate finds that there is reliable evidence in respect of the denial, in view of Annexure X plaint, Sub Divisional Magistrate cannot proceed as provided under Section 138.".