
(2013) 12 JH CK 0024

In the Jharkhand High Court

Case No : Criminal Rev. No. 177 of 2013

Ajit Kumar Kesri, Pradip Modi, Umesh Prasad and Rajesh
Kumar Aggrawal

APPELLANT

Vs

The State of Jharkhand, Ajay Barnwal, Vijay Barnwal and
Ramji Agarwal

RESPONDENT

Date of Decision : 18-12-2013

Acts Referred:

Citation : (2014) 1 JLJR 199

Hon'ble Judges : H.C. Mishra, J

Bench : Single Bench

Advocate : Rajan Raj, for the Appellant; Mukesh Bihari Lal, Assistant Public
Prosecutor for State, Shailesh, Advocate for the O.P. Nos. 2 and 3 and A.
Banerjee, Advocate for the O.P. No. 4, for the Respondent

Final Decision : Dismissed

Judgement

H.C. Mishra, J.—Heard learned counsel for the first party petitioners and the learned counsel for the State, as also learned counsel for the second party opposite parties. 2. The first party petitioners are aggrieved by the order dated 23.7.2012/2.8.2012 passed by the learned Sub-Divisional Magistrate, Dhanbad, in M.P. Case No. 321 of 2011, in a proceeding u/s 133 of the Cr.P.C., whereby in the application filed by the first party for removing of the obstruction erected by the second party on the way claimed to be used by the general public, it has been held that the general public had alternative way for use, and the way in question was not shown as public way in the map and accordingly, the application was rejected by the Court below.

2. The petitioners filed the application before the Court of learned Sub-Divisional Magistrate, Dhanbad, which was registered as M.P. Case No. 321 of 2011, wherein it is stated that the first party were residing in a locality behind Lal Kothi Market in the town of Dhanbad. It is stated that Lal Kothi Market is situated on both sides of a 16 feet wide P.C.C. road, which meets the general road and was

used by the general public of the locality. Alleging that on 02.12.2010 the members of the second party obstructed the road by putting a wall and thereby, created nuisance which was necessary to be removed for maintaining peace in the locality, the application u/s 133 of the Cr.P.C., was filed by the first party petitioners.

3. The second party opposite parties filed their show-cause in the Court below and according to their case, the road in question is not a public road, rather it is a private road on a raiyati land. According to the case of the second party, Lal Kothi was a bungalow constructed more than one hundred years back by an European Company, M/s. E.D. Sassoon & Company Ltd., on a big chunk of land measuring 2 Bighas, 6 Kathas and 14 Chhataks, and the entire Lal Kothi premises was surrounded by a boundary wall on all sides and there was no common road at all. On 27.01.1941, vide a registered sale deed, the entire Lal Kothi premises surrounded by boundary wall on all sides, was sold by the aforementioned company to one Kripashanker D. Worah, who let it out to the Bank of India, which was its first branch at Dhanbad in 1950's, which remained there for about 20 to 30 years, i.e., till late 90's with the boundary wall intact. Subsequently, the owners of the Lal Kothi raised the original building to ground and divided the entire 2 Bighas, 6 Kathas and 14 Chhataks of land into small plots and small private passage ways were created for the use of the buyers of the plots of Lal Kothi premises. According to the second party's case, the original boundary wall was kept intact and the plots and passages were created only inside the old boundary wall. Subsequently, the buyers constructed commercial and residential buildings on their respective plots, but the old boundary wall on the front road side was opened for the use of plot owners. On the other side there was Karbala road which was adjacent South of Lal Kothi premises, and the Southern boundary wall was also opened, but the Northern and Western boundary walls were kept intact. According to the case of the second party, not only the map of the registered sale deed dated 27.01.1941, but also the map prepared by a private Amin, who measured the whole land before its re-plotting on 24.05.1997, clearly showed that there was no road on the land within Lal Kothi premises, which was situated adjacent North of Karbala road and adjacent West of Dhanbad-Jharia main road. Claiming that the land was a private land and no portion of the property had ever been a public land, it was stated that no proceeding u/s 133 of the Cr.P.C., was maintainable.

4. From the perusal of the impugned order it appears that both the sides adduced evidence in support of their respective claims, but the second party did not take part during the final hearing of the case. It also appears that reports were called for from the Circle Officer and the Executive Magistrate, Dhanbad, during the pendency of the proceeding, which have also been brought on record. One report is dated 15.02.2011 submitted by the Circle Officer, Dhanbad, which shows that the shops of the second party were situated on both sides of the road in question, which was given by the land owners for use of general public, which had been blocked by constructing seven feet high wall, causing the obstruction of

the way. Yet another report, which is dated 14.07.2011, was submitted by the Circle Officer, Dhanbad, after local inspection, wherein it is clearly stated that the land is a raiyati land, situated besides Dhanbad-Jharia road the land owner had sold the land after re-plotting the land in which road was also provided and the said road was being used as a public way, which has since been closed, obstructing the way. There is yet another report dated 03.02.2012 submitted by the Executive Magistrate, Dhanbad, which shows that the land in question is a Commercial and Residential premises in which there is internal road about 15 to 18 feet wide, which is generally being used for residential and commercial purpose. The report also shows that the wall appeared to have been constructed later on, and on the other side of the wall there is a road about 8 to 10 feet wide, by the side of which there are multistoried buildings. It was stated in the said report that in case of emergency, the fire engine can't reach and it has been recommended that it would be proper to remove the wall on the humanitarian ground.

5. It appears from the impugned order that apart from the aforementioned reports and the evidence on record, the Presiding Officer of the Court also made the local inspection and he found that Lal Kothi premises is an important commercial premises which is also used for the residential purpose and on both the sides of the P.C.C. lane there are shops, and the lane is also used by the customers. It is also stated that Lal Kothi building is a separate building and it has no concern with other buildings and since it was a big premises, it had been re-plotted and sold by the erstwhile owner. In the map of 1941 there was no public way shown on the land and there is a separate road for the use of the persons of the locality behind Lal Kothi premises. It has been stated in the impugned order that Lal Kothi premises is a separate premises which has no concern with the locality behind it and the lane in the Lal Kothi premises is for exclusive use of the residential house owners and the shopkeepers, as also their customers and the same cannot be kept in the category of a public way. It has been stated that Karbala road is available for the use of first party and there was no occasion for providing them the way in the premises of the others, and accordingly, the application filed by the first party petitioners was rejected by the learned Court below.

6. Learned counsel for the first party petitioners has submitted that the impugned order passed by the Court below is absolutely illegal and cannot be sustained in the eyes of law. It has been submitted that the reports submitted by the Circle Officer and the Executive Magistrate, clearly show that the land in question was being used as a public way and accordingly, there was no occasion for rejecting the application filed u/s 133 of the Cr.P.C. It is also submitted that existence of an alternative road is no bar for not removing the public nuisance. Learned counsel has further submitted that the fact that the land in question is a raiyati land or the road is not shown as a public road in the municipal records, shall not make any difference, in as much as, once it has been found that the road is being used by the general public, and the people of the locality were

allowed access to it, the same acquired a public character, even if it is not the public property, and the same could not be obstructed by the second party. In support of his contention, learned counsel has placed reliance upon the decisions of the Nagpur High Court, in Ramkaranlal Vs. Emperor, reported in AIR 1916 Nag 15 (1), of Allahabad High Court, in Tulshi Das Vs. Emperor, as also on the decision of Kerala High court, in Augusthy Vs. Varkey and Others, Reliance has also been placed upon the decision of Delhi High Court, in Shri Ram Lal and another Vs. Shri Dharam Vir, wherein it has been held as follows:-

5. Law in this regard is well settled. Section 133 Cr.P.C. provides summary remedy for removal of specific public nuisances or obstructions etc. It is not intended to settle private dispute between the two members of the public. Proceedings under this Section do not affect the right of the public to approach a civil Court for determining the question of title. The Magistrate's jurisdiction under this Section can be invoked even by a private individual despite availability of an alternative remedy. The encroachment on the public road, however small, would inevitably result in obstruction to the persons, who may have the occasion to use the same. The expression in Section 133, Cr.P.C. "which is or may be lawfully used by the public" clearly shows that all that is required to be shown is that the land in dispute is the public way etc. which can be lawfully used by the public. The expression "public way" has not been defined in the Cr.P.C. or the Penal Code. Public way is the place where the public has a right to go or to which public can have an access by way of right either by admission, usage or otherwise. It is not necessary that the title of the place should be in the public. It would depend upon the character of the place and the usage actually made of it in the past or at a given point of time. These are all questions of the fact, which can only be determined after proper adjudication.

Placing reliance on these decisions, learned counsel submitted that the report submitted by the Circle Officer and the Executive Magistrate, clearly show that the lane in question was being used by the general public which has been obstructed, and accordingly, the impugned order rejecting the application filed u/s 133 of the Cr.P.C., cannot be sustained in the eyes of law.

7. Learned counsel for the State as also learned counsel for the second party opposite parties have submitted that the impugned order is a well discussed order, from which it is apparent that the land in question was a big chunk of land bounded by the boundary wall on all the sides and there was no access to the general public in the land. It is submitted that the land in question is a raiyati land and even in the sale deed of 1941 it was found that there was no public way on the same. It has further been submitted that the nature of the land was the same up to late 90's and it was only in the year 1997, that re-plotting was made by the land owner for the purpose of sale, and the map which was prepared by the Amin on 24.5.1997 also clearly showed that there was no road or lane across Lal Kothi premises. Learned counsels have also submitted that the wall on the road is an old wall on the private land which existed from before and there was

no access of the general public on the land, and the said lane in question is exclusively for the use of the persons residing or doing business in the said premises. Learned counsels submitted that the persons living in the nearby locality were already availing the alternative road available to them from before, and they have no right to use the private road of the second party. Learned counsels have accordingly, submitted that the land in question being a raiyati land, there can be no question of removing any public nuisance from the same and there is no illegality and/or irregularity in the impugned order, worth interference in the revisional jurisdiction.

8. After having heard learned counsels for both the sides and upon going through the record, I find that the question of the use of the lane in question for the general public has arisen only in the late 90's. Prior to that entire premises was bounded by boundary wall from all sides and it had no access to the persons living in the nearby locality. It is only after the re-plotting of the land by the erstwhile land owner, some lanes were carved out for the use of the persons to whom the land was re-plotted and sold. It is a disputed question of fact whether the wall on the lane is the part of the original boundary wall, or it has been constructed later obstructing the access of the general public, and both the parties have their respective claims about the same. In the backdrop of the facts, it is to be decided whether the first party petitioners have the right to way on the lane/road in question and the proceeding u/s 133 of the Cr.P.C. was maintainable by them.

9. Section 133 of the Cr.P.C. (1)(a) reads as follows:-

Conditional order for removal of nuisance. - (I) 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

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10. Thus a plain reading of this section clearly shows that Section 133 of the Cr.P.C., comes into play only when there is an unlawful obstruction or nuisance on the way. If the obstruction is lawful, no proceeding u/s 133 of the Cr.P.C., can be maintained. The present case appears to be a case in which till late 90's the general public had no access to the premises in question, and the entire premises was bounded by boundary wall on all the sides. This leads us to the question whether the public of the locality had the right use the lane by way of right, either by admission, usage or otherwise. Though it is not necessary that the title of the place should be in the public, but at the same time the right of the

persons of the locality to access the private road, by admission or usage or otherwise, had to be established before holding that the obstruction of the road was unlawful one. If the obstruction of the land was not unlawful, in my considered view, Section 133 of the Cr.P.C. shall not come into play. In the present case the land in question was a private land bounded on all sides by boundary wall till late 90's. It appears from the impugned order that though the first party petitioners have stated that the road was used by the general public, but there appears to be no evidence as to when the original boundary wall was removed and the same was opened for the general public. There appears to be no evidence of access to the land by the persons of the locality by way of right, either by admission, usage or otherwise. Admittedly the land in question is a raiyati land and it is not shown as a lane/road even in the municipal records. In that view of the matter, I am of the considered view that obstruction even, if any, cannot be said to be an unlawful obstruction, and consequently, Section 133 of the Cr.P.C., cannot have any application on the land in question. As such, the application filed by the first party petitioners was rightly dismissed by the learned Sub-Divisional Magistrate, Dhanbad. Consequently, I do not find any illegality and/or irregularity in the impugned order passed by the Court below, rejecting the application filed by the first party petitioners, worth interference in the revisional jurisdiction. I do not find any merit in this application and the same is accordingly, dismissed.