

(1982) 10 AHC CK 0003

In the Allahabad High Court

Case No : Criminal Misc. Application No. 4220 of 1981

Bundu

APPELLANT

Vs

Mohammad Hasan and Others

RESPONDENT

Date of Decision : 11-10-1982

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 137, 386, 389, 390

Citation : (1982) AWC 831

Hon'ble Judges : M. Wahajuddin, J

Bench : Single Bench

Advocate : Tej Pal and Prayag Das, for the Appellant; S.N. Tewari and S.A. Shah, for the Respondent

Final Decision : Dismissed

Judgement

M. Wahajuddin, J.—Petitioner Bundu has come forward with a prayer that the proceedings u/s 133, Code of Criminal Procedure, in the court of Sub-Divisional Magistrate, Sikandrabad, District Bulandshahr, and order dated 24-9-1980 of the Sub-Divisional Magistrate, Sikandrabad, directing the Petitioner to remove the obstructions mentioned in the order of the Sub-Divisional Magistrate as well as the order dated 22-7-1981 of the II Additional Sessions Judge, Bulandshahr, maintaining that order and rejecting his revision, all be quashed.

2. It would appear that the proceedings were initiated on an application preferred by Chhittar Singh and others. It would further appear that after receiving a police report, the present opposite party No. 6, namely, Chhittar Singh, was arrayed as the applicant and the present Petitioner and opposite parties Nos. 2 to 5 of this petition and one Chhanga, brother of the present Petitioner, were arrayed as opposite parties. Chhittar Singh later preferred an application that he does not want to proceed with the matter and the proceedings, be terminated. The proceedings related to the land, alleged to be the public passage. The proceedings were initiated on an allegation that the present Petitioner has obstructed such passage. The Magistrate in pursuance of this application of

Chhittar Singh dropped the proceedings and thereafter a revision was preferred and the Sessions Judge set aside the order of the learned Magistrate and remanded the proceedings back for being decided in accordance with law. Thereafter, ultimately the present impugned order was passed, which was upheld in revision.

3. The Petitioner's first contention is that the opposite party No. 1 could not continue the proceedings. The second contention of the Petitioner is that after the earlier remand made in this case by an order in an earlier revision, the proceedings should have been started afresh and the evidence that was recorded earlier could not be read. The third contention of the Petitioner is that as the present Petitioner had denied the claim that the land involved was a public passage, at first his evidence should have been recorded and in view of Section 137, Code of Criminal Procedure, the proceedings should have been stayed.

4. It is argued that in view of the provisions of Section 397, Code of Criminal Procedure, a revision could be entertained by the Sessions Judge, only if preferred by any of the parties to that proceedings; and as initially Mohammad Hussain, present opposite party No. 1, was not a party to the proceedings before the remand, neither the revision could be entertained nor a remand could be made. The judgment in that revision has been annexed as Annexure "3" to the rejoinder affidavit. It would show that it was Mohammad Hussain who had preferred the revision. The question is whether Mohammad Hussain had a locus standi to do so. It is noteworthy that from a perusal of Annexure "3" to the rejoinder affidavit, namely, the judgment dated 12-5-79 of the V Additional Sessions Judge, Bulandshahr, it is clear that the initial application that was moved was by a large number of persons including Mohammad Hussain, alleging unlawful obstruction of public passage. When that happened to be the position, it cannot be urged that Mohammad Hussain was an unconcerned person. He figured in the proceedings like others. As to how the parties were arrayed as such is a different matter. I may also observe that the objections now raised are not open. It was Mohammad Hussain who had preferred the revision. A perusal of the order dated 1-5-1978 of the then Sub-Divisional Magistrate, Sikandrabad, against which the first revision was preferred, itself reveals that Mohammad Hussain and a number of others had preferred application before him alleging obstructions and in pursuance of such application the police report was sought. In the circumstances, there is no force in the submission that Mohammad Hussain was not a party to the proceedings and the order of remand made in the earlier revision was in any way bad on that score. In fact, the point cannot be re-agitated.

5. The second contention, that the proceedings should have been re-initiated afresh after the remand, has again no force. Reliance was placed by the counsel for the applicant upon the case of *Ukha Kolhe v. State of Maharashtra* AIR 1963 SC 1531. That was a case of conviction by the Magistrate. On appeal to the court of sessions, the order of conviction was set aside and a re-trial was directed. A

number of other observations with relevant only to the facts of that case were made. The applicants counsel relied upon the following observations made by the Supreme Court:

Ali order of re-trial wipes out from the record the earlier proceedings.

It was urged that in view of such observations when a case is sent back to the lower court, entire earlier proceedings stand wiped out. It is but natural that when a re-trial is directed in any appeal, directed against conviction, that would be the position, as in such a case Sub-clause (b) (i) of Section 386, Code of Criminal Procedure would be attracted. But where the revision relates to any other order, the appropriate provisions that would be attracted are Sub-clauses (d) and (e) of Section 386, Code of Criminal Procedure, which deals with the powers of the appellate court. The powers of Sessions Judge in revision are contained in Section 399, Code of Criminal Procedure. It lays down that the Sessions Judge may exercise all or any of the powers, which may be exercised by the High Court under Sub-section (1) of Section 401, Code of Criminal Procedure. Section 401, Code of Criminal Procedure, lays down the powers of the High Court in revision and expressly provides that the High Court can exercise any of the powers conferred on a court of appeal by sections 386, 389, 390 and 391, Code of Criminal Procedure. When this section is read with Section 390, Code of Criminal Procedure, it is manifest that the Sessions Judge can exercise the powers of a court of appeal, as contained in the aforesaid four sections including Section 386, Code of Criminal Procedure. It is noteworthy that there are five Sub-clauses (a) to (e) in Section 386, Code of Criminal Procedure. Sub-clause (a) relates to appeal from an order of acquittal; Sub-clause (b) related to an appeal from a conviction; and sub Clause (c) relates to appeal for enhancement of sentences. These sub-clauses are, thus, inapplicable to any revision against an order passed u/s 133, Code of Criminal Procedure, and only Sub-clauses (d) and (e) of Section 386, Code of Criminal Procedure, apply to it. Sub-clause (d) empowers for altering the order and Sub-clause (e) empowers for passing any consequential or incidental orders. Under these two sub-clauses the Sessions Judge is fully empowered to remand the case to the trial court for proceeding in the matter according to the directions given by the revisional court. In such situation, the earlier proceedings would not be wiped off and on the contrary the Magistrate has to proceed on the basis of the materials already on record as well as any further evidence that is adduced before it and is allowed. It is, thus, not correct to say that the entire earlier proceedings after the remand stood wiped off.

6. The next argument urged in this case is that the Magistrate has not observed the procedure contained in Section 137, Code of Criminal Procedure. A perusal of the Magistrate's order coupled with the counter-affidavit of the opposite party makes it perfectly evident that the Magistrate did follow that procedure. The averment in the petition and the affidavit in support is purposely vague and it is not shown that the procedure laid down u/s 137, Code of Criminal Procedure,

was not observed.

7. As regards the findings on merits, the matter is concluded by a finding of fact by the Magistrate, upheld by the revisional court. When that is the position, this Court while exercising inherent powers u/s 482, Code of Criminal Procedure, would not function as a court of appeal or revision, nor enter into such matters of fact. It is a well settled law that the extra ordinary powers u/s 482 Code of Criminal Procedure, are to be sparingly exercised and a case for any exercise of such power is not made out.

8. In the result, this petition fails and is dismissed.