

(2004) 09 PAT CK 0047

In the Patna High Court

Case No : Criminal Miscellaneous No. 28276 of 2001

Daya Shanker Prasad Gupta

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 06-09-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 134, 137, 138, 139

Citation : (2004) 4 PLJR 329

Hon'ble Judges : Radha Mohan Prasad, J

Bench : Single Bench

Advocate : Ashok Jang Bahadur, for the Appellant; Sunil Kumar Mandal for the State, for the Respondent

Final Decision : Allowed

Judgement

Radha Mohan Prasad, J.—Heard learned counsel for the petitioner and the learned counsel for the State. This miscellaneous application is directed against the order dated 12.9.2001 passed in Criminal Revision No. 147/2000 by the learned Sessions Judge, Aurangabad dismissing the revision application and thereby affirming the order dated 7.6.2000 of the learned Sub-divisional Magistrate, Aurangabad in Case No. 1580/99.

2. In short, the relevant facts are that on the basis of written report of Ram Vinay Singh, S.I. of Police, Aurangabad (Town) P.S. dated 3.12.1999, a case u/s 133 Cr.P.C. was initiated against second party and third party. The informant alleged that the rain water deposited in the Thana premises used to flow through the piece of land situated adjacent towards west of Police Club and east of Durga Mandir. Admittedly, the above land belongs to the second and third party and on account of partition between them, second party started new construction work in place of old and dilapidated house. It is alleged that Rita Gupta, wife of the petitioner, gave an application to the Police Station and on her application an inquiry was held. Informant found that if above construction was allowed to continue, rain water deposited in the Thana premises shall not flow freely and on

account of above deposit of water it will cause problem in day to day working and spread epidemic disease in the long run.

3. The learned Magistrate started a proceeding between the parties, vide order dated 20.12.1999, and passed conditional order to remove the alleged encroachment of new construction on the land. Learned Magistrate further gave notice to the parties to appear and file show cause as to why aforementioned conditional order may not be confirmed. In response to the notice, second party appeared and the first party remained absent. After considering the documents and show cause filed by the parties, the learned Magistrate, vide order dated 7.6.2000, made above mentioned conditional order absolute and gave direction to the third party to remove encroachment and put up fresh construction on the land to facilitate free flow of water from the Thana premises through the said land. Being aggrieved by the said order, third party preferred the aforementioned Cr. Revision No. 147/2000, which has been dismissed by the impugned order, contained in Annexure 2.

4. In paragraph 7 of the miscellaneous application, the petitioner has specifically stated that the statement in the report that Smt. Rita Gupta, wife of the petitioner, had filed a written application in connection with this matter to Aurangabad Police Station on 28.10.1999 is totally false and baseless. It is asserted that no such application was filed by Smt. Rita Gupta to the Police Station nor has any such application been brought on record.

5. This Court, vide order dated 16.5.2002, issued notice to opposite parties no. 2 to 5, who are the District Magistrate, the Superintendent of Police, Aurangabad, Inspector-Cum-Officer in Charge, Town P.S., Aurangabad and S.I. Ram Vinay Singh, Town RS. Aurangabad, respectively, but despite ample opportunity granted by adjourning the matter on the request of the learned counsel for the State on number of occasions, no counter affidavit has been filed by any of them. In fact, on 29.6.2004 this Court made it clear that in case no counter affidavit is filed, the Court may dispose of the matter in absence of the counter affidavit. Again on 19.7.2004, this Court made it clear that if no counter affidavit is forthcoming the Court may construe it as obstacle in course of proceeding and proceed on the basis of materials on record.

6. Learned counsel for the petitioner contended that the entire proceeding u/s 133 Cr.P.C. is mala fide and bad in law. Learned counsel contended that the report was filed on 1.12.1999 when there was no rainy season, yet by taking the plea of deposit of rain water in the Thana premises, the said report was filed. He contended that the written report falsely mentioned that Rita Dayal, wife of the third party, gave an application to the RS. and on her application inquiry was held when there was no such application filed by the wife of third party (petitioner). Learned counsel contended that the admitted fact is that the land in question belongs to the second and third party (petitioner) and on account of partition between them, second party started new construction work in place of old and dilapidated house and third party also started construction when at the

instance of the police, the Sub-divisional Magistrate passed the conditional order for removal of the construction on the land treating them as encroachers. It has been contended that there cannot be any question of encroachment over their own land and so far the application of section 133 of the Cr.P.C. is concerned, it is completely misconceived and mala fide and in view of the admission in the report itself that the land belongs to the petitioner and his cousin, namely, third party and second party respectively and not that it is a public land, over which any unlawful construction or nuisance as alleged was sought to be removed.

7. Learned counsel for the State has not been able to defend the impugned order on the basis of admission in the written report itself that the land belongs to the second and third party and the construction was being done by them over their own land. This facts is also apparent from the impugned orders of the learned Sub-Divisional Magistrate as well as of the learned Sessions Judge, Aurangabad.

8. Section 133 of the Cr.P.C. provides 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 (if any) as he thinks fit, considers 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, such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance to remove such obstruction or nuisance within the time fixed in the order.

9. In view of the admitted fact in the present case that the land belongs to the second and third party and cannot be said to be a public place being lawfully used by the public, this Court finds that the action u/s 133 of the Cr.P.C. of the learned Sub-divisional Magistrate is wholly misconceived and mala fide. Moreover, the learned counsel for the petitioner has rightly submitted that the impugned order has been passed without taking the evidence and following the procedure laid down in sections 134 and 137 to 140 Cr.P.C. and the order of the learned Sessions Judge also suffers from non-application of mind.

10. I fail to appreciate the approach of the learned Sessions Judge that "Section 133 Cr. P.C. nowhere states that such order shall not be passed with regard to private land", when section 133 Cr.P.C. of which he has taken notice clearly provides that any unlawful construction or nuisance is to be removed from the public place. The learned Sessions Judge has dismissed the revision application on the ground that the accumulated water was hazardous to health for the people staying and working within the Thana premises, which has no relevance to the present case. It is for the public authority to provide for proper outlet and prevent such accumulation of water but not to use private land without proper acquisition. Thus, this Court finds no valid justification for sustaining the impugned orders passed by the learned Sub-divisional Magistrate and the learned Sessions Judge, Aurangabad. The miscellaneous application is, thus, allowed and the impugned orders are quashed.