
(1990) 12 AHC CK 0087

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 6485 of 1982

Jagdamba Prasad Tewari and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 04-12-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(1), 135, 137, 137(1)

Citation : (1991) CriLJ 1883

Hon'ble Judges : P.S. Chauhan, J

Bench : Single Bench

Advocate : Sunil Ambwani, for the Appellant; Standing Counsel and N. Lal, for the Respondent

Final Decision : Allowed

Judgement

P.S. Chauhan, J.—By means of this petition u/s 482, Cr. P.C., the petitioners have sought the relief for quashing the orders dated 7-8-1981 and 12-8-81 passed by Sub-Divisional Magistrate, Machhali Shahr, District Jaunpur. While admitting the petition, this court stayed the proceedings in pursuance of the aforesaid orders.

2. Proceedings u/s 133, Cr. P.C. commenced against the present petitioners on a police report made by the Station Officer, Police Station, Sujanganj, District Jaunpur to the Sub-Divisional Magistrate Machhali Shahr, Jaunpur. The report was to the effect that in village Dompur towards the northern side of the house of Shiv Shanker Shukla, the house of Jagdamba-applicant is situate and towards the eastern side the house of applicant No. 2 Ram Lal is situate. Both these petitioners have obstructed the passage through which the rainy season water used to flow. Apart, this Gali is being used by Shiv Shanker Shukla and other residents of the village as a way. The nature of the obstruction, as alleged in the report, was that the applicants have constructed a wall blocking the passage as well as the flow of the rainy season water.

3. The cause for initiation of the proceedings arose on account of construction of

the wall on the way in question and denial of user of the same by Shiv Shanker Shukla and other villagers.

4. On the basis of the aforesaid police report dated 30th October, 1980, the Sub-Divisional Magistrate, Machhali Shahr issued a conditional order Under Sub-section (1) of Section 133, Cr. P.C. requiring the petitioners for removal of the said obstruction.

5. Jagdamba Prasad Tiwari, applicant No. 1, thereafter appeared before the Sub-Divisional Magistrate and filed his written statement showing cause by denying the existence of any public way and saying that he has not caused any obstruction and the initiation of the proceedings are as a result of collusion between Shiv Shanker Shukla and the Station Officer, Sujanganj, District Jaunpur. Apart from these, he also stated that the disputed construction exist on his own land which had never been used as a public way. He was also examined by the Sub-Divisional Magistrate before whom he also denied that the passage had ever been used as a public way or that he has encroached upon any public land. On 30-4-1981, Sri Jagdamba Prasad Tiwari was questioned by the Sub Divisional Magistrate u/s 137(1), Cr. P.C. as to whether he denied that existence of any public right in respect of the way but on this matter Magistrate did not make any inquiry.

6. Ram Lal, applicant No. 2, on 27-5-81 filed a separate written statement denying the existence of public way over the land in question and he further said that the same was never used by the villagers as a way.

7. Though the applicant No. 1, Jagdamba Prasad Tiwari, moved an application for the transfer of the case before the District Magistrate, but the same has no relevance so far as the question for decision is involved in the present case.

8. The conditional order as passed by the Sub-Divisional Magistrate was made absolute as against Ram Lal on 7th August, 1981, though on this date Ram Lal made an adjournment application along with the medical certificate, but the same was rejected and after rejecting the application, the Magistrate proceeded to make the conditional order absolute. The Sub-Divisional Magistrate on 12-8-1981 made the aforesaid conditional order absolute, as against the applicant No. 1. Jagdamba Prasad Tiwari saying that today he was to give evidence but he did not give any evidence.

9. As against the order dated 12-8-1981 passed by the Sub-Divisional Magistrate making the conditional order as absolute against applicant No. 1. (Jagdamba Prasad Tiwari), a revision was filed before the Sessions Judge which was numbered as Revision No. 175 of 1981 and was dismissed by him.

10. Heard learned counsel for the petitioners Sri Sunil Ambawani and the learned counsel for the respondent Sri N. Lal Learned counsel for the petitioners raised fourfold submissions:

a) even if no evidence is adduced by the applicants in support of the objection,

the Magistrate acquired no jurisdiction to proceed with the matter unless he comes to the conclusion that the denial, as made, is unreliable and in this connection the Magistrate has not recorded any finding.

b) before making the conditional order absolute u/s 138, Cr. P.C., the Magistrate, under the law, was bound to take prosecution evidence in the same manner as is done in the summons cases, i.e. as provided u/s 254, Cr. P.C. but in the present case the Magistrate for not complying with the procedure as laid down, is procedurally ultra vires and it is a case of abuse of the process of court.

c) the police report, which has been made the basis of the proceedings in the present case, cannot be said or held to be the evidence for the purpose of Section 138, Cr. P.C. and as such the impugned order of the Magistrate cannot be said to be based on any evidence.

d) the order of the Magistrate u/s 138(2), Cr. P.C. has to be the speaking order informed with the reasoning based on the evidence on record specially for the reason that the proceedings are judicial one and the word satisfaction used under the section is in reference to the judicial proceedings which means that even the order of satisfaction has to conform with the judicial norms and to be based on the objective materials.

11. On the other hand the objections of the learned counsel for the respondent are only twofold:

a) that u/s 138, Cr. P.C. the Magistrate is not bound to take evidence and if no evidence is adduced by the objector after showing cause, and the Magistrate is justified in straightway proceeding Under Sub-section (2) of Section 138, Cr. P.C. making the conditional order absolute.

b) that in view of the Full Bench decision of this court in H.K. Rawal and Another Vs. Nidhi Prakash and Another, the present petition u/s 482, Cr. P.C. is not maintainable as it has been filed after the revisional order, which has become final.

12. As regards the other points the learned counsel for the respondent has stated that he does not want to give any reply to the other points raised by the learned counsel for the petitioners.

13. The first submission of the learned counsel for the petitioners that even if no evidence is adduced in support of the objection u/s 137, Cr. P.C. the Magistrate cannot proceed unless he comes to the conclusion that the denial is unreliable. When a person who denies the existence of any public right in respect of way, the Magistrate is required to enquire into the matter and the purpose of inquiry is that if there is reliable evidence in support of such denial then he may stay the proceedings until the matter of the existence of such right has been decided by the competent court and if he finds that there is not such evidence, he shall proceed as laid down u/s 137, Cr. P.C. is as extracted below.

137(2) If in such inquiry the Magistrate finds that there is any reliable evidence in-support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent court; and if he finds that there is no such evidence, he shall proceed as laid down in Section 138".

It clearly contemplates for evidence in respect of the denial of the public right and the denial has to be through a reliable evidence and the words used "if in such inquiry, Magistrate finds that there is any reliable evidence in support of such denial" clearly indicate that the burden to lead evidence is on the person who denies the existence of public right. Thus the submission of the learned counsel for the petitioners on the first point being devoid of merit is rejected.

14. Points Nos. 2, 3 and 4, as raised by the learned counsel for the petitioners, are in fact interlinked and the same can be disposed of together.

15. To deal with and to appreciate the argument as canvassed by the learned counsel for the petitioners it is apt to quote the provisions of Section 138, Cr. P.C.

"138. Procedure where he appears to show cause --

(1) If the person against whom an order u/s 133 is made appears and shows cause against the order, the Magistrate shall take

evidence in the matter as in a summons case.

(2) If the Magistrate is satisfied that the order either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.

(3) If the Magistrate is not so satisfied, no further proceedings shall be taken in the case".

Section 138, Cr. P.C. speaks that if the person against whom order u/s 133 is made, appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case. In the present case both the applicants appeared before the Sub-Divisional Magistrate and showed cause. After the cause is shown, the question, as is involved in the present case, arises as to on whom, the burden to lead evidence lies. According to the petitioners' counsel, the burden is on the prosecution and according to the counsel for the respondent, the burden is on the objectors themselves.

16. The language of the provision of Section 133 is unambiguous in terms and it leaves no scope for two divergent interpretations. According to the provision, itself, it is clear that it is incorrect to say that the burden of proof is on the person against whom the conditional order is made. The words "the Magistrate has to take evidence as in the summons case" make it clear that the evidence is to be led by the prosecution and the burden to lead evidence is on the prosecution irrespective of the fact whether the objector leads or does not lead any evidence before the ex parte order passed Under Sub-section (1) of Section

133, Cr. P.C. is made absolute. The complainant has to produce before the court legal evidence to justify a finding that what is complained of amounts to obstruction or public nuisance.

17. In the summons case the complainant is the person to begin with the case first by calling his witnesses who may then be cross-examined by the other party. As has been stated earlier, the respondent is not bound to lead evidence until the party who has set the law in motion has produced his evidence.

18. Thus the argument as advanced by the learned counsel for the petitioner has got substance. The argument as advanced by the learned counsel for the respondent being devoid of substance is liable to be rejected.

19. Accordingly, I come to the conclusion that the conditional order passed u/s 133, Cr. P.C. cannot be made absolute without the first party being called upon to adduce evidence in support of his claim, even though the second party does not after showing cause u/s 135 appear to give evidence in support of the denial of the right claimed by such party. The provisions of Clause (1) of Section 138, Cr. P.C. are mandatory in nature and before making an order absolute, Under Sub-clause (2) thereof, it is imperative for the Magistrate to take evidence in the manner as required in the summons case.

20. In the present case no such procedure having been observed, the entire proceedings are not only vitiated but are procedurally ultra vires.

21. So far as the question, whether the police report can be the evidence, is concerned, it requires no pronouncement. As under the Evidence Act, police report cannot be the piece of evidence. It is not tested on the anvil of cross-examination. The other question remains to be dealt with is whether the order u/s 138(2), Cr. P.C. has to be the speaking order informed with the reasoning also loses significance in the background when it is held that the Magistrate can pass order under Sub-section (2) of Section 138, Cr. P.C. only after taking the evidence of the prosecution Under Sub-section (1) of Section 138 and this fact by itself implies that the Magistrate for arriving at his satisfaction would apply its mind on the evidence so available before him.

22. Now remains the other argument of the learned counsel for the respondent that the petition u/s 482, Cr. P.C. is not maintainable in view of the fact that the revision has already been filed which has attained finality. Reliance has been placed on the Full Bench decision of this court H.K. Rawal and Another Vs. Nidhi Prakash and Another, . It may be pointed out that no strait-jacket formula has been established. The power u/s 482, Cr. P.C. is of widest amplitude and the restriction imposed in the exercise of the power is in the interest of justice. This Full Bench in para 17 has said "wherein an application u/s 397, Cr. P.C. filed by any party in the court of sessions is decided against him, it is open to that party to invoke extraordinary jurisdiction of this High Court u/s 482, Cr. P.C. only, if the order of the Sessions Judge has resulted in the abuse of the process of court and/or calls for interference to secure the ends of justice.".

23. Apart from this the Supreme Court in the case of Raj Kapoor and Others Vs. State and Others, has said (at p. 261)

"In short "However, there is no total ban on the exercise of inherent powers where abuse of the process of the court or other extraordinary situation excites the court"s jurisdiction. The limitation is self restraint, nothing more. Interlocutory orders pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face."

Further in para 17 of the case (supra) court has said:

"The law is not homeless, wandering ghost. It is a phase of human life located in time and space".

The facts and circumstances of the case clearly go to indicate that it is a case fit for interference u/s 482, Cr. P.C. as the order passed by the court below are procedurally ultra vires, which has resulted in the miscarriage of justice and also in the abuse of the process of court.

24. In view of what has been stated here-before, I allow this petition and set aside the order passed by the Sub-Divisional Magistrate Machhali. Shahr dated 12-8-1981 whereby he made the conditional order passed u/s 133(1), Cr. P.C. absolute and direct the Magistrate to proceed for passing the final order accordingly in the light of the observation made above.