

(1989) 06 GUJ CK 0003

In the Gujarat High Court

Case No : Spl. Civil Application No. 1244 of 1989

Kothari Jayantilal Ramji

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 20-06-1989

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 133, 141

Citation : AIR 1990 Guj 131 : (1990) 2 GLR 744

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

Bench : Single Bench

Advocate : N.K. Thakkar, for the Appellant; H.B. Antani, Addl. Govt. Pleader and Bhavna Y. Kankad, for Y.S. Mankad, for the Respondent

Judgement

1. Petitioner, who is an occupant of the cabin constructed by him with the permission of the respondent No.3 Bhuj Municipality has by this writ petition prayed for a direction to the respondents to rebuild the cabin of the petitioner bearing Municipal Shop No. 3/1 situated near Vaniawad Naka at Bhuj,16 as according to the petitioner, he respondent No. 2 Assistant Collector and Sub-Divisional Magistrate, Bhuj illegally and unauthorisedly removed the cabin in exercise of the powers u/s 133, Code of Criminal Procedure. The petitioner was granted the land admeasuring about 7 Ft. X 41/2 Ft. and on which the petitioner had constructed a platform and was running a Pan Shop, but subsequently in the year 1980, with the permission of the respondent No. 3 Bhuj Municipality, he constructed the cabin on that land, having the bricks wall on one side and was carrying his business of Peppermint, biscuits etc. in it and the last rent was paid by the petitioner on November 15, 1988, for the period from April 1, 1988 to March 31, 1989. The petitioner was allowed to occupy the land on certain conditions specified in the licence (permits) (Annexures "A" and "B") issued to him. From the documents produced by the petitioner it is apparent that he constructed the cabin with the permission of the respondent No. 3 and was carrying the business with the permission of the respondent No. 3. It transpires

that the respondent No. 2 who is the Sub-Divisional Magistrate was informed by the Police that certain constructions in Bhuj City were obstructing the traffic and were causing nuisance and, therefore, he wrote a letter dated November 3, 1988 to the Chief Officer I of the respondent No. 2 Municipality calling upon him to remove such constructions which caused obstruction, before November 5, 1988 and appear before him on that day. It transpires that the respondent No. 3 Municipality or the Chief Officer did not take any action in pursuance of the directions by the respondent No. 2. The respondent No. 2 without taking any further action went to the cabin of the petitioner along with the Police on 13-11-1988 and demolished it without giving any notice to the petitioner. It transpires that before the action was taken by the respondent No. 2 the petitioner had sensed it and, therefore, on that day he filed a Regular Civil Suit No. 452/ 88 in the Court of Civil Judge, (S.D.), Bhuj praying for interim injunction not to dispossess the petitioner illegally or forcibly or to demolish the cabin and the Court had directed to maintain status quo but, before the said order could be passed the respondent No. 2 got the cabin demolished. The petitioner has by this writ petition challenged the action of the respondent No. 2 contending that the respondent No. 2 had no such authority to demolish such construction which was lawfully constructed and in occupation of the petitioner, without following the procedure prescribed by law.

2. Shri H. B. Antani, learned Assistant Government Pleader appearing for the respondents Nos. 1 and 2 states that the respondent No. 2 had taken action under the provisions of Section 133 Code of Criminal Procedure; but frankly conceded that except for writing the letter dated November 3, 1988 to the Chief Officer of the Municipality as stated above, the respondent No. 2 had not served show cause notice to the petitioner or had not followed the procedure prescribed under Section 133 Code of Criminal Procedure. Shri Antani, however, maintains that action is taken under the provisions of Section 133 Code of Criminal Procedure.

3. For taking action for the removal of the unlawful construction or nuisance u/s 133 and other relevant sections of the Code of Criminal Procedure, the District Magistrate or the Sub-Divisional Magistrate is required to follow the prescribed procedure. In case the District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf, by the State Government receives the report of a police officer or is given information in any other manner that any unlawful obstruction or nuisance should be removed from any public place or from any other way, river or channel which is or may be used by the public such Magistrate has to make a conditional order requiring the persons causing such obstruction or nuisance to remove the obstruction or nuisance. In case such person objects he should be directed to appear before such Magistrate or some other Executive Magistrate subordinate to him at the time and place to be fixed by the order and to show cause as to why the order should not be made absolute. This is the specific mandatory provision required to be followed by Sub-Divisional Magistrate intending to pass an order to remove the obstruction. The Sub-Divisional-Magistrate has thereafter to follow the

procedure prescribed under the provisions of Sections 134 135 and 141, Criminal Procedure Code as the case may be. The order is required to be served to such persons in the manner provided for the service of summons. The person against whom such order is made has to perform, within the time and in the manner prescribed in the order, the act directed by such order or to appear in accordance with such order to show cause against the same. As provided in Section 136 Criminal Procedure Code if such person does not perform such act or appears and shows cause, he shall be liable to the penalty prescribed in that behalf in Section 188 of the Indian Penal Code and the order can be made absolute by the competent authority. If the public right is denied then the Magistrate has to inquire in the matter and follow the provisions of Section 137 Code of Criminal Procedure. If the person against whom the order u/s 133 is made appears and shows cause against the order, the Magistrate has to take the evidence in the matter as in the summons case and in case the Magistrate is satisfied that the order is reasonable and proper he may make the order absolute without, modification or with such modification as may be necessary. As provided in Section 138 Code of Criminal Procedure in case the Magistrate is not satisfied no further proceeding should be taken in the case. If required that the Magistrate may direct local investigation as provided in Section 139 Code of Criminal Procedure and also may issue written instructions. In case the order is made absolute under Sections 136 and 138, Criminal Procedure Code the Magistrate should give notice of the same to the person against whom the order is made and he is also empowered to further require such person to perform the act is directed by the order within a time to be fixed in the notice and inform such person that, in case of disobedience, he Will be liable to the penalty provided by Section 188 of the Indian Penal Code. Under sub-section (2) of Section 141 Code of Criminal Procedure such Magistrate has power to cause such act to be performed.

4. Sub-section (2) of Section 141 Code of Criminal Procedure provides, as under:

"If such act is not performed within the time- fixed, the Magistrate may cause it to be performed, and may recover the costs or performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other movable property of such person within or without such Magistrate's local jurisdiction and if such other property is without such jurisdiction, the order shall authorise its attachment and sale when endorsed by the Magistrate within whose local jurisdiction the property to be attached is found."

5. Sub-section (3) of Section 141 protects the act done in good faith and Section 141 specifically prohibits the suit against such act done in good faith. The District Magistrate if at all intended to take action under the provisions of Section 133 read with Section 136 or u/s 133 read with Section 137 or 138 Code of Criminal Procedure, he should follow the prescribed, procedure as discussed above. Admittedly the respondent No. 2 did not follow the procedure and he behaved in

a high handed manner ignoring all mandatory provision - s of law. It is clear from the documents produced by the petitioner that the petitioner has leased the land vested in the Municipality and was in occupation of it for the last many, years and not only that, but he was allowed the construction by the respondent No. 3 Municipality. In such a case, the respondent No. 2, therefore, should have ascertained the legal right of the petitioner to occupy the land and should have ascertained whether the petitioner was in authorized possession and such construction caused obstruction to the public. Even after being satisfied against the petitioner he should have followed the prescribed procedure and should not have demolished the cabin causing damage to, the petitioner. The act of the respondent No. 2 being arbitrary, unauthorised and not proper cannot be sustained in a democratic society governed by rule of law and protected by Constitution of India. The petitioner is, therefore, entitled to constitutional remedy by writ under Article 226 Constitution of India. Under normal circumstances where order is passed u/s 133 136 138 or 141 Code of Criminal Procedure the order is revisable under Code of Criminal Procedure but in this matter except referring that order is passed u/s 133 Code of Criminal Procedure, the mandatory procedure is violated and arbitrary and unauthorised act is committed and therefore this Court should exercise power under Articles 226 and 227 Constitution of India.

6. Miss B. Y. Mankad for the respondent No. 3 Municipality has adopted a neutral attitude in the matter. Obviously the Municipality could not have supported the act of the respondent No. 2 as the Municipality had authorised the petitioner to occupy the land.

7. In spite of the fact that the act of demolition of the cabin of the petitioner is unauthorised, arbitrary and not proper, the question, however, arises as to what relief the petitioner should be given in this particular matter. Petitioner has prayed for a direction to the respondents to rebuild the cabin of the petitioner at the cost of the respondents and to direct the respondents to pay compensation to the petitioner for the damages caused to the petitioner due to "stopage of his business due to the demolition of the cabin". The mandate to rebuild or to construct the cabin should not be issued by this Court as the period of lease is over on March 31, 1989. The petitioner has not produced any document to show that the lease period is continued after March 31, 1989.

8. Mr. N. K. Thakkar, learned Advocate for the petitioner states that when the cabin was demolished he was in lawful possession and after that on November 13, 1988 the Court had passed an order of status quo and, therefore, also he can be said to be in lawful possession of the property. On the day on which the cabin was demolished he was admittedly in lawful possession; but while considering the prayer for direction to rebuild the cabin this Court has to consider as to whether he can be said to be the lessee of the property and could have lawfully made construction at present. As the lease period is over it cannot be held that he has now the right to make lawful construction on the property. If the petitioner

cannot make construction lawfully on the land for which lease period is over, the direction should not "be issued to the respondents Nos. 1 and 2 to construct the cabin for the petitioner.

9. It is also not the case of the petitioner that the lease period is continued after March 31, 1989. The petitioner has not stated specifically as to what damage was caused to him for the loss of his business. Apart from that, no such damage can be assessed by this Court while exercising jurisdiction under Article 226 of the Constitution of India. The petitioner, therefore, should be left to civil remedy if at all available. No relief for the direction to construct his cabin or for the damages, therefore, can be granted by this Court in this writ petition.

10. With these observations the Rule is made absolute to that extent with cost against the respondents Nos. 1 and 2.

11. Order accordingly.