
(1991) 02 OHC CK 0014
In the Orissa High Court
Case No : Criminal Revision No. 97 of 1987

Narayan Pradhan and Others

APPELLANT

Vs

Nakul Pradhan and Others

RESPONDENT

Date of Decision : 01-02-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 142(1)

Citation : (1991) 1 OLR 229

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : Pradipta Kumar Mohanty, for the Appellant; P.K. Mishra, N.C. Pati, S.K. Swain and B.K. Nayak, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—Dispute between two villagers relating to closure of a water channel is subject matter of this revision.

2. Bhatapada is a hamlet of village Rahadamal. There are agricultural lands in both the villages. On 18-12 -1986, Tahasildar Sadar, Puri addressed a letter to Sub-divisional Officer that on receipt of report about apprehended trouble concerning earthen embankment put on Government land he along with Revenue Inspector of Balikerapachhipal and Rsvenue Supervisor Chandinpur visited villages Rahadamal and Bhitapada. on 15-12-1986. This earthen embankment was raised by villagers of Bhatpada since 15 to 20 days before that date as a result of which excess water could not be discharged and has spread over the paddy fields over an area of 400 acres. On that account paddy crop over those lands could not be harvested. Although he called villagers of Rahadamal to ascertain the position, they did not appear on account of absence of their leader. Tahasildir went to the village and called gentlemen, in course of discussion with them, they said that they had strengthened the existing embankment. From the village map, Tahasiidar found that there was no embankment. In the report, it was stated by Tahasildar "The villagers said that there are other channels for

discharge of excess water of the village Bhatpada and this is not the channel where excess water of the village shall pass. They further said that if the embankment shall be cut, the water will submerge their "paddy land". The report was received by Sub-divisional Officer on the same day but no action seems to have been taken on it. On 20-12-1986, villagers of Rahadamal tiled an application before Collector requesting for deputing police force to cut the embankment put by villagers of Bhatpada which was forwarded by Collector to Sub-divisional Magistrate on the same day. No action seems to have been taken on the said application. On 23-12-1986, villagers of Rahadamai filed an application before Sub-divisional Magistrate for initiation of proceeding u/s 133, Cr. P. C. against villagers of Bhatpada and filed another petition for injunction against them directing removal of the embankment. On receipt of this petition, a proceeding was registered and on the same day learned Sub-divisional Magistrate passed the following order.

"Perused the petition filed by 1st party. Heard.

I am satisfied that there is apprehension of imminent danger. Start proceeding u/s 133, Cr. P. C. against the members of the 2nd party. Direct the O. P. members to remove the nuisance by 26-12-1986 or: appear in the Court on 27-12-1986 and show cause as to why the orders should not be made absolute against them if they so like.

Put: up on 27-12-1986

Later: Heard. Issue injunction. Preliminary order u/s 142 Cr. P. C. directing them to remove the obstruction within three days failing which the local police is to be directed to remove the same."

Notices were served on 25-12-1986 and on 26-12-1986, some of the villagers of Bhatpada appeared intimated that they would show, cause. As the learned Sub-divisional Magistrate was on tour, the case was posted to next day and on application of villagers of Bhatpada was adjourned to 7-1-1987. On the basis of notices, villagers of Bhatpada filed a revision in the Court of Sessions Judge and moved for stay praying to exempt from filing certified copy of order. Learned Additional Sessions judge granted interim stay of order dated 23-12-1985. On 7-1-1987 cause was shown by villagers of Bhatpada.

3. Learned Sessions Judge held that initiation of the proceeding u/s 133, Cr P. C. and order of injunction u/s 142, Cr. P. C. are justified. It, however, held that the land in respect of which there is dispute has been recorded as village road and it cannot be treated as a channel over which the villagers can exercise public right of passage of water. Besides, and has been, recorded to be of Jagannath Mahaprabhu, Bije at Puri and the owner of the plot not being a party to the proceeding, initiation of the proceeding u/s 133, Cr. P. C. is not legal and proper. On these findings learned Sessions Judge has set aside, the impugned order which is grievance of the villagers of Rahadamal in this revision . . . :

4. Exercise of power u/s 133, Cr. P C. is meant for maintenance of public order and tranquillity, if the requirement of that provision is satisfied. So far as relevant it reads as follows:

"133, Conditional order for removal of nuisance :

(1) When aSubdivisional Magistrate.....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 .. "..... Such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance within a time to be fixed in the order.

(i) to remove such obstruction or nuisance.....or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute."

5. Since exercise of power u/s 133(1), Cr. P C Involves maintenance of public order and tranquility and Parliament has not provided for an appeal against an order u/s 133(1), Cr. P. C. revisional power is to be exercised sparingly to allow the proceeding to be completed Revisional Court is to keep in mind that conditional order u/s 133(1) does not operate where a party objects to the direction therein and where a party raises objection, He can bring to the notice of learned Magistrate all objections to the proceeding including maintainability. Therefore, it should not interfere with the order at that stage unless it is satisfied that on account of abuse of power the party would be prejudiced in such manner which cannot be mitigated unless interference is made by it. While so considering revisional Court may pass such order as it would be appropriate so that the proceeding may continue but party would not be prejudiced until the conditional order is made absolute.

6. In this case, learned Subdivisional Magistrate considered on perusal of the application filed by villagers of Rahadamal was of the opinion that order u/s 133(1); Cr. P C. is to be passed. This petition is supported by affidavit. Learned Sessions Judge ought not to have set aside the order in exercise of revisional power and ought to have allowed the proceeding to be finalised when cause had already been shown on 7-1-1987 by villagers of Bhatapada. All objections should have been allowed to be raised before learned Magistrate. Accordingly, the revisional order is not sustainable in law as villagers of Bhatapada would not be prejudiced in any manner if enquiry is made as envisaged in the Code.

7. Learned Subdivisional Magistrate exercised power u/s 142(1) Cr. P. C directing villagers of Bhatapada to remove the obstruction within three days. This order was passed ex pane. To appreciate correctness of the order Section 142(1) is to be

kept in mind which reads as follows:

"142. Injunction pending enquiry : (1) If a Magistrate making an order u/s 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person, against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter."

8. Power under Sec 142, Cr. P. C. is drastic in its nature. When there is either a prohibitory injunction or a mandatory injunction, Magistrate exercising power is to keep in mind the principles of grant or refusal of temporary injunction by a Civil Court. He has to consider the balance of convenience and irreparable injury. Under Order 39, C. P. C, provision has been made that where ex parte order is required to be passed reasons for the same is to be given. Although the same is not provided for in Section 142, Cr. P. C. same principle should always be followed. A party likely to be prejudiced by such interim order of injunction u/s 142, Cr. P. C, should be given a chance of being heard before the order is passed, unless it is found that giving such a chance is likely to frustrate the very object of passing the order of injunction." This being a judicial order by a Court should be supported by reasons. In this case, learned Magistrate has given no reason while exercising power u/s 142, Cr. P. C. Accordingly, such order is vulnerable being abuse of the power vested under Sec 142, Cr. P. C. Learned "Magistrate ought to have weighed the injury that might be caused to villagers of Bhatpada if the obstruction is removed. Rightly, learned Sessions Judge stayed the order.

9. Be that as it may, order of injunction has become inoperative since 1986. No useful purpose would be served by maintaining such an order even if I would have held that the order was not abuse of power. In this month of February, there is no chance of accumulation of water to cause any nuisance. Ends of justice would be best served in case I direct that the proceeding u/s 133, Cr. P. C. is finalised before end of May, 1991.

10. In the result, revision is allowed.