
(2010) 11 BOM CK 0130

In the Bombay High Court

Case No : Criminal Writ Petition No. 82 of 2010

Santosh R. Prabhugaonkar

APPELLANT

Vs

STATE and Menino Santan Fernandes

RESPONDENT

Date of Decision : 15-11-2010

Acts Referred:

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

Citation : (2010) 11 BOM CK 0130

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : C.A. Coutinho, for the Appellant; T.D. Costa, Advocate, for the Respondent

Judgement

N.A. Britto, J.—Heard learned Counsel on behalf of both parties. Challenge in this Writ Petition is to the order dated 24/08/2010 of the Conservator of Forests by which the said Conservator has directed the petitioner to cut down the first, second and the fifth coconut trees and to fasten the third and fourth coconut tree by strong ropes, all belonging to the petitioner.

2. The petitioner and respondent No. 3 are neighbours. The first round of litigation between them concerning the said trees taken u/s 133 of the Code of Criminal Procedure, 1973 ended with the order dated 11/09/2009 of the learned Additional Sessions Judge, Margao. By the said order, the order dated 8/01/2009 of the learned Ex. Magistrate, dropping the proceedings u/s 133 of the said Code was upheld and the revision application filed against the said order was rejected.

3. The respondent, therefore, filed another application dated 23/11/2009 to the Deputy Collector and Sub-divisional Officer, Margao u/s 12-A of the Goa, Daman and Diu Preservation of Trees Act, 1984 (the Act, for short). On receipt of the application, the S.D.O. (Sub-divisional Officer) called for the report from the Deputy Conservator of Forest. The said report is dated 23/11/2009. After the receipt of the said report, the S.D.O. by order dated 7/07/2010 directed the "petitioner to cut the first two trees within a period of fifteen days, and in

default, respondent no. 3 was given an option to cut the same at his own costs.

4. Dissatisfied with the orders of the learned S.D.O. dated 7/07/2010, both the parties approached the appellate authority i.e. the Conservator of Forests, the petitioner by way of an appeal and the respondent No. 3 by way of cross-objections. The Conservator of Forests also called for reports. The first report is dated 5/08/2010 and the second report is dated 18/08/2010, and based on the same, and without any further inquiry, directed the petitioner, as already stated to cut down the first and the second tree and to pull the third and fourth coconut tree away from the house of respondent No. 3 by strong anchorages. It is this order which is in challenge before this Court, in this Writ Petition.

5. Section 12-A of the Act, as amended, deals with removal of trees, etc. which are in ruinous state or likely to fall and sub-section

(1) thereof provides that:

Notwithstanding anything contained in any other law for the time being in force, it shall be lawful for the Tree Officer or the Deputy Collectors having jurisdiction over their respective areas, if it appears to him at any time that any tree over any land or its branch or a part thereof is in ruinous state or is in such condition that it is likely to fall and thereby cause injury to a person living or carrying on business in the neighbourhood or passerby or to a building or house or any public place, he may, by written order require the person owning or possessing such tree to lop or cut down such tree or portion of a tree, which is in such condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by:

Provided that no order under sub-section (1) shall be made unless the owner or occupier of land has been given a reasonable opportunity of being heard in the matter in person or by his agent in support of his objections:

Provided further that where the Tree Officer or the Deputy Collector in consultation with the Tree Officer is of the opinion that there is likelihood of the tree or any portion thereof falling and causing injury or danger to persons and danger is of hourly imminence and it is not expedient to provide opportunity to file objection, he may, for reasons to be recorded in writing, issue order directing the person owning or possessing such tree, to cut down and remove such tree or any portion thereof forthwith or within the time as fixed in the order and if he fails to do so, the Tree Officer or the Deputy Collector, as the case may be, will take all necessary steps towards its removal.

(2) ...

(3) ...

6. At the hearing of this petition, Shri C.A. Coutinho, learned Counsel appearing on behalf of the petitioner has stated that the petitioner will cut down the first two trees on his own and within a period of thirty days from today. The

statement is accepted. The petitioner to cut the said two coconut trees as undertaken by him.

7. The petition, therefore, is heard as regards trees nos.3,4 & 5.

8. Shri Coutinho, the learned Counsel appearing on behalf of the petitioner points out to the report dated 23/11/2009 and submits that the coconut tree No. 3 is slightly leaning towards the house of respondent No. 3 and its main stem is healthy. Learned Counsel further submits pointing out to the same report that same is the condition reported as regards coconut trees nos.4 & 5. Next, learned Counsel points out to the report dated 18/08/2010 and submits that as per this report also trees nos. 3,4 & 5 have also been reported to be healthy, though slightly leaning towards the open place of the respondent's property. Learned Counsel therefore submits that the authorities under the Act could have ordered the cutting down of the trees only in case they were in ruinous state or were in such a condition that they were likely to fall and cause injury to a person living or carrying on business in the neighbourhood. Learned Counsel further submits that in none of the reports including the report dated 28/12/2009, on which respondent No. 3 has placed reliance, it is opined that any of the said three trees are likely to fall and, therefore, there was no question of the authorities under the Act having ordered the cutting down of the said trees or ordering the pulling away the said trees from the said house of the respondent.

9. On the other hand, Shri T. D''Costa learned Counsel appearing on behalf of respondent No. 3, submits that the said three trees are leaning towards the property of respondent No. 3 and obstruct the enjoyment of the said property by respondent No. 3. Learned Counsel further submits that the respondent No. 3 has an opening to the wall near the third and fourth trees and that a leaf or a coconut may fall on respondent No. 3 when he uses the said passage and, therefore, Shri D''Costa submits, that this is a fit case to order the cutting down of the fifth tree and pulling away the third and fourth trees.

10. Admittedly, the first two trees were opined to be deceased by the report given by the Deputy Conservator of Forest, Margao dated 23/11/2009 and the petitioner herein has undertaken to cut the same and the controversy ought to have ended there.

11. As can be seen from Section 12-A of the Act, it gives jurisdiction to the S.D.O. (Deputy Collector/Tree Officer) to cut in such condition that it is likely to fall and cause injury to a person living or carrying on business in the neighbourhood, etc. It certainly does not give powers to the S.D.O. (Deputy Collector/Tree Officer) to prevent a private nuisance from being removed, which is being caused to respondent No. 3 either by the fall of leaves or the coconuts from the said trees into the property of respondents No. 3. Section 12-A of the Act uses the same expression as is used in Section 133 of the Code i.e. "that it is likely to fall and thereby cause injury to a person living or carrying on business... etc." The expression "likely to fall" with reference to Section 133 has been

explained by this Court in the case of Peter Fernandes by observing as follows:

14. This Court in unreported judgment dated 23.11.2006 in Criminal Writ Petition No. 25 of 2006 in the case of Mr. Vyanjkatesh Y. Gaonkar V/s State had noted that proceedings u/s 133 of the Code are not meant to settle private disputes between two parties. Section 133 of the Code provides for a summary and quick remedy, inter alia, for cutting down of a tree which was likely to fall. The word "likely" is otherwise not defined in the Code but its ordinary dictionary meaning as per Concise English Dictionary, is such as well might happen or be true, promising, probably. There is no doubt that whether a particular tree or its branch are likely to fall cannot be foretold with any degree of accuracy but certainly some evidence must be produced to show that a particular tree is likely to fall either because it has developed a crack or is infested with insects or suffers a disease or weakness or other infirmity, etc. which would make it fall. The danger of falling must be in praesenti, as observed by the Apex Court in Kachrual (supra) and in normal weather conditions and not in distant future since one cannot foretell as to what could happen in abnormal weather conditions. Only because the informant feared that the branches of the said trees might fall in the ensuing monsoon season was insufficient to have given any jurisdiction to the Learned Executive Magistrate who has initiated the proceedings u/s 133(1) (d) of the Code. Likewise a mere allegation that the trees had become old was insufficient for the Learned Executive Magistrate to conclude that they were likely to fall and invoked his jurisdiction under the said Section.

15. In case the said branches of the trees belonging to the petitioner caused any nuisance to the informant, her remedy was clearly by way of a civil suit. It was necessary for the informant who approached the Executive Magistrate for initiation of proceedings u/s 133(1) (d) to have shown that the danger was imminent i.e. in praesenti that the tree was likely to fall.

16. It is also to be noted that proceedings u/s 133 of the Code are not meant to settle private disputes between two members of the public or members of two households and for public authorities to waste their time in trying to settle such disputes. A Magistrate u/s 133 of the Code exercises a public duty and he can exercise it only when jurisdictional facts are present. There were none present in this case.

12. The same meaning need to be given to the same expression under this Act as well and, therefore, since none of the trees namely coconut trees nos.3,4 & 5 were in ruinous state nor were likely to fall in ordinary circumstances, in my view, the authorities under the said Act could not have ordered the cutting of one of them and pulling the other two away from the house of respondent No. 3. Provisions of Section 12-A like those of Section 133 of the observation of the Apex Court in Kachrual Bhagirath Agrawal and Others Vs. State of Maharashtra and Others, would equally apply to proceedings taken u/s 12 of the Act, which were otherwise made with reference to Section 133 of the Code:

The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable danger would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time. It does not deal with all potential nuisances and on the other hand applies when the nuisance is in existence.

13. In the light of what has been stated herein above the Writ Petition deserves to succeed and the impugned order to the extent that it orders cutting down of coconut tree No. 5 and pulling away from the house of respondent No. 3 by strong anchorage trees nos. 3 & 4 is hereby set aside. Considering the facts, there will be no order as to costs.