
(2005) 03 AHC CK 0076

In the Allahabad High Court

Case No : Criminal Miscellaneous Writ Petition No. 7280 of 1989

Satya Prakash, Ashok, Shanker Lal and Shiam Lal	APPELLANT
Vs	
Special and Additional Sessions Judge and Others	RESPONDENT

Date of Decision : 11-03-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133

Citation : (2005) 03 AHC CK 0076

Hon'ble Judges : Ravindra Singh, J

Bench : Single Bench

Advocate : A.B.L. Gaur, for the Appellant; Devendra Swaroop and A.G.A., for the Respondent

Judgement

Ravindra Singh, J.—Heard Sri A.B.L. Gaur, learned counsel for the petitioners, Sri Devendra Swaroop, learned counsel for the respondent Nos. 4 & 5 and the learned A.G.A.

2. This petition has been filed against the order dated 8.6.1987 passed by the Sub Divisional Magistrate, Hathras, District Aligarh in CrI. Case No. 55/12 u/s 133 Cr.P.C. BASU Dev and Ors. v. Satya Prakash and Ors., whereby the application filed by the petitioners was dismissed and they were directed to remove the obstruction/ encroachment from the public way, over the land of Khasra No. 268 and the order dated 17.3.1989 passed by the learned Special Judge/ Addl. Sessions Judge, Aligarh in Criminal Revision No. 256 of 1987, whereby, the revision filed by the petitioners was dismissed.

3. It is contended that on the application filed by the respondent nos. 4 and 5, the proceedings u/s 133 Cr.P.C. were initiated in the court of learned S.D.M. Hathras. The plot Khasra No. 268, having an area of 3 bigha and 07 dism. Was the property of Gaon Sabha. The petitioners had constructed a Chabutra over the land in dispute in the year 1965. It was an encroachment made over a public way, so an application was moved by one Leeladhar against Pyarey Lal and Ors. praying therein that they may be dispossessed from the land in dispute and they

may be punished accordingly. On that application, supervisor Kanoongo, Sasani submitted a report in the court of learned S.D.M. Hathras with a recommendation of initiating a proceedings against Pyare Lal and Ors. u/s 133 Cr.P.C. and the encroachment may be removed. Thereafter, the proceedings u/s 133 Cr.P.C. were initiated by the learned S.D.M. Hathras and a conditional order dated 12.2.1996 was passed. The petitioners had denied the allegations by submitting that there was no public way over the plot in dispute and prayed for conducting an inquiry. Then the learned S.D.M. appointed three members Juri and Naib Tehsildar was appointed as Foreman. The aforesaid Juri took a decision, in light of that decision, the conditional order dated 12.2.1966 was made absolute by the learned S.D.M. Hathras on 16.7.1967 directing to the petitioner's side to remove the construction within 15 days. This order was challenged in the court of learned Sessions Judge, Aligarh who made a reference to the Hon'ble High Court, with a recommendation that the order dated 16.7.1967, passed by the learned S.D.M. Hathras may be set aside and the criminal proceedings pending in the court of learned S.D.M. may be stayed until the matter of the existence of public right of way over the encroachment in question has been decided by the competent Civil Court. This reference was rejected and the order dated 16.7.1967 passed by the learned S.D.M. was affirmed by this Court on 18.11.1968.

4. In compliance of the order dated 18.11.1968 passed by this Hon'ble Court, the encroachment made by the petitioners on the public way by constructing the Chabutra was removed. Thereafter, the Gaon Sabha allotted a plot having an area of 162 Sq. yard from the same Khasra No. 268 as residential plot to the petitioners in the year 1971. Subsequently, petitioner Shanker Lal moved an application in the court of learned S.D.M. Hathras mentioning therein that from Khasra No. 268, a residential plot having an area of 162 Sq. yards has been allotted to him, so on that plot, he wants to make construction, as such, the respondent Nos. 4 & 5 may be directed not to interfere in the alleged construction of the petitioner. That application was allowed and the learned S.D.M. directed to the S.H.O. police station Sasani to ensure the construction of the petitioner.

5. Thereafter, on 20.8.1986, the respondent No. 4 Basudev moved an application in the Court of Tehsildar Hathras On that application, the learned Tehsildar passed an order to enquire that the fact whether any Chabutra is made by the petitioners over the disputed land and if it was being made over the disputed land, the same may be stopped. The respondent No. 4 Basu Dev moved an application on 20.8.1986 in the Court of learned S.D.M. Hathras mentioning therein that the petitioners were making construction over the land in dispute so they may be directed not to construct the Chabutra over the land in dispute. Then the S.O. OF police Station Sasani was directed to stop such construction and to submit the report by 27.8.1986. The Supervisor Kanoongo submitted a report on 28.8.1986 through Tehsildar, mentioning therein that the petitioners were constructing the Chabutra on the plot allotted to them by Gaon Sabha and it was not on public way. So against this report, the other party moved an

application in the Court of the learned S.D.M. concerned mentioning therein that above report was false so the spot inspection may be done by the learned S.D.M. and the petitioners may be punished because they were constructing the Chabutra by disobeying the Court's order. On that application, the learned S.D.M. directed the Tehsildar to submit the inquiry report, the Tehsildar entrusted the inquiry to the Naib Tehsildar, who submitted his report on 6.8.1986, mentioning therein that the petitioners have again constructed the Chabutra on the public way. That report was challenged by the petitioner by way of filing an application in the Court of learned S.D.M. Aligarh, praying therein that the report is false and the spot inspection may be done by the S.D.M. or learned Tehsildar but without doing spot inspection, as prayed above, the learned S.D.M. initiated the criminal proceeding u/s 133 Cr.P.C. and passed a conditional order on 24.1.1987, then the petitioners filed objections and prayed for spot inspection, the respondents also made an application for making the spot inspection but without making spot inspection, conditional order dated 24.1.1987 was made absolute on 8.6.1987.

6. It is contended by the learned counsel for the petitioners that prior initiation of the present proceedings u/s 133 Cr.P.C., the proceedings u/s 133 Cr.P.C. were initiated against the petitioners and a final order was passed by the learned S.D.M., Aligarh on 16.7.1967 directing the petitioners to remove the encroachment which was made by them by way of constructing the Chabutra on the same land. That order was affirmed by this Hon'ble court on 18.11.1968 . So in pursuance of the order dated 18.11.1968 passed by this Hon'ble Court, the Chabutra constructed by the petitioner was demolished. At that time, the Chabutra was constructed in the land of the Gaon Sabha, which was not belonging to the petitioner but subsequently an area of 162 Sq. yard was allotted to the petitioners from the same Khasra No. 268 as the residential plot and the Gaon Sabha has changed the nature of the place by allotting the plots and demarcating the same. So the petitioners had constructed the Chabutra on the same plot as a bonafide tenure holder and there was no encroachment over any public way but the learned S.D.M. Aligarh passed an illegal order under the influence of the order dated 18.11.1968 passed by this Hon'ble Court.

7. It is further contended that after expiry of many years, the nature of the place was changed by the Gaon Sabha itself. The applications were moved by the petitioner and respondents in the Court of the learned S.D.M. concerned to make the spot inspection. The learned S.D.M. did not make any spot inspection, which was necessary to determine the present issue. There was no sufficient evidence before the learned S.D.M. to establish that the petitioner had made a construction over a public way, the learned S.D.M. has failed to determine as to whether the construction was made over the public way. It is further contended that the learned S.D.M. passed an illegal order without making the spot inspection and without considering the changed position of the place in dispute because the topography was changed subsequently by the Gaon Sabha.

8. It is further contended that the learned S.D.M. has relied upon the reports submitted by his sub-ordinate officers which were contradicting each other. In such circumstances, it was proper to make the spot inspection by the learned S.D.M. concerned. It is further contended that the order passed by the learned S.D.M. is illegal and the learned revisional court also did not consider the manifest error committed by the learned S.D.M. So the impugned orders dated 8.6.1987 passed by the learned S.D.M. Hathras and the order dated 17.3.1989 passed by the learned Addl. Sessions Judge/ Special Judge, Hathras in Criminal Revision No. 256 of 1987 are illegal, which are liable to be set aside.

9. It is also contended by the learned counsel for the petitioners that the petitioners have filed a Civil Suit No. 140 of 1989 in respect of the same property in dispute in the court of Munsif Hathras, in which an injunction order was passed in their favour. It was also not considered by the learned S.D.M. Hathras and learned revisional court. In such circumstances the proceedings u/s 133 Cr.P.C. may not be initiated.

10. In this case, civil suit was also filed in the court of learned Munsif Hathras by the petitioners. The learned counsel for the petitioner and learned counsel for the respondent Nos. 4 & 5 are unable to submit the result of the civil suit No. 140 of 1989 filed by the petitioners in the court of learned Munsif Hathras

11. The contention made by the learned counsel for the petitioner are controverted by Sri Devendra Swaroop, learned counsel for the respondent Nos. 4 & 5 by submitting that once it has been decided by this Hon'ble Court that the petitioner had made an encroachment over the public way and the same was removed thereafter, merely by allotment of the same land in favour of the petitioners will not change the position of public way. In the present case on the same place, after removal of the Chabutra again a Chabutra is constructed so the order passed by the learned S.D.M. on 8.6.1987 and the learned Revisional Court dismissing the revision filed by the petitioner, are perfect order. It requires no interference.

12. Considering the facts and circumstances of the case and the submissions made by the learned counsel for the petitioners and the respondents, it is clear that prior initiating the present proceedings u/s 133 Cr.P.C. the encroachment made by the petitioners was ordered to be removed by the learned S.D.M. Hathras 16.7.1967. the order passed by the learned S.D.M. was affirmed by the High Court on 18.11.1968 but on the same place the petitioners made the construction after obtaining the allotment of that land by the Gaon Sabha. The demarcation of the plots and ways was made by the Gaon Sabha at the time of the allotment so the nature of the place was changed. The learned S.D.M. Hathras was requested by both the parties to make the spot inspection but he did not make any spot inspection and he relied upon the reports submitted by his subordinate Naib Tehsildar and supervisor Kanoongo which were contradicting each other. In such circumstances, it was proper for the learned S.D.M. Hathras to make the spot inspection before passing the absolute order but the learned

S.D.M. Hathras has not made spot inspection. And passed the absolute order relying upon the contradictory reports of his subordinates. So, the conclusion drawn by the learned S.D.M. is not proper. The impugned order dated 8.6.1987 passed by the S.D.M. Hathras is not a perfect order and the learned Sessions Judge, Aligarh also did not consider the manifest error committed by the learned S.D.M. Hathras and dismissed the revision filed by the petitioner on 17.3.1989. So the above mentioned impugned orders are illegal, which are set aside.

13. In view of the facts and circumstances of the case, the learned S.D.M. Hathras is directed to make spot inspection and to pass a fresh order after affording an opportunity of being heard to the parties in accordance with the provisions of law in the charged circumstances,

14. With these observations, the writ petition is disposed of finally.