
(1995) 07 MAD CK 0084

In the Madras High Court

Case No : Criminal R.C. No. 206 of 1992 and Criminal R.P. No. 203 of 1992

Sesamma Joy @ Chakko Mathew and Another

APPELLANT

Vs

Tahsildar

RESPONDENT

Date of Decision : 12-07-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 397, 401

Citation : (1995) 2 CTC 152 : (1995) 2 LW(Cri) 685

Hon'ble Judges : Arumugham, J

Bench : Single Bench

Advocate : K.S. Rajagopalan, for the Appellant; A.N. Rajan, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Arumugham, J.—The counter-petitioners in M.C. 21 of 1992 before the Assistant Collector and sub Divisional Magistrate, Padmanabha puram aggrieved by the Order made in M.C. 21 of 1992 dated 21-4-1992, are challenging the same by filing this revision for its want of legality and propriety.

2. The impugned order under this revision passed by learned Assistant Collector and Sub Divisional Magistrate is extracted as hereunder :-

"The petitioner has alleged that the counter-petitioners mentioned above have encroached the poramboke land in the catchment area of Chittar Dam I in R.S. No. 52/2 of Kaliel village of vilavancode Taluk thereby caused nuisance to the public who are dependent on the dam water for their agricultural and other essential purposes. The encroachment are reducing water storage capacities of the reservoir and thus farmers at tail end have insufficient water availability. The act of encroachment in the above dam sites, have caused heavy loss and nuisances to the agriculturists utilising the above dam water and hence I feel that it is necessary to initiate criminal proceedings against those who have caused such nuisances and the following order is issued.

Whereas it has been made to appear to me that you have caused nuisance to the agriculturists and other public using water from Chittar dam I by encroaching the Catchment area of the dam poramboke in R.S. No. 52/2 of Kaliel village. I do hereby direct you to appear before me on 8.5.1992 at 10 a.m. at Kuzhithurai T.B. and show cause why criminal action should not be proceeded against you."

3. This order above referred to is challenged in this revision on the ground that notwithstanding the specific conditions clearly spelt out in Section 133 of the Code of Criminal Procedure, the learned Magistrate has not followed the mandate, which would result in serious prejudice to be caused to the revision petitioner and the procedure adopted is totally against the principles of natural justice. Though the above contention was controverted on behalf of the respondent by learned Government Advocate, I failed to see any specific mentioning or narration about the type of overtact committed or done by the counter- petitioners, in the impugned order under the category of "nuisance" as contemplated u/s 133 of the Code of Criminal Procedure. Mere mentioning of the word "encroachment" would not mean a particular act which tended to such overtact causing nuisance to all the agriculturists or the persons depending on the water at the tail end of that area. Further, the concluding part of the impugned order would Contain a threat of passing criminal action by the learned Magistrate, which is also a total derogation of procedural mandate provided for the said purpose.

4. Sub Clause (1) of Section 133 of the Code of Criminal Procedure runs like this:-

"Whenever a District Magistrate or a Sub-Divisional Magistrate or any other executive Magistrate Specially empowered in this behalf by the State Government on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers... such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owing, possessing or controlling such building, tent, structure, substance, tank well or excavation or owing or possessing such animal or tree, within a time to be fixed in the order- (i) to remove such obstruction or nuisance; or (ii) to desist from carrying on or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping there of in such manner as may be directed; or (iii) to prevent or stop the construction of such building, or to alter the disposal or such substance; or (iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or (v) to fence such tank, well or excavation; or (vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; 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 herein-after provided, why the order should not be made absolute".

A casual reading of the above section of law would clearly show the fact that before proceeding in accordance with the provisions contained in Section 134 to 136 of the Code of Criminal Procedure, it is incumbent on the part of the Magistrate concerned not only to identify the type of nuisance alleged to have been committed, but also specifically deal with and spell out in the show cause notice to be given to the person perpetrated and then adequate time is expected to be given to such person to remove such nuisance as provided in clauses 1 to 6 of the proviso to Section 133 of the Code of Criminal Procedure and only on the failure to comply with the directions then, for the reasons to be recorded, he will make the order absolute and proceed further as provided under Sub sections of the Code of Criminal Procedure. Or otherwise, for any reason, if the said procedure has not been followed, the order then would become totally vitiated for the violation of the procedural mandate, simply for the reason that the procedure laid down u/s 133 of the Code of Criminal Procedure is based on the principles of natural justice and equality. In short to say, the identification of the nuisance must be stated accurately and clearly by the learned Magistrate, with specific obstruction amounting to such nuisance. A reading of the impugned order in the instant case would clinch the fact that the said show-cause notice does not contain two mandates above referred to. If the mere mentioning of the word encroachment" in the catchment area of Chittar Dam I in R.S.No. 52/2 of Kaliel village of Vilavancode taluk is deemed to be the compliance of "nuisance", as specifically spelt out in Section 133 of the Code of Criminal Procedure, then, I am of the view, by all means, that the impugned order cannot at all be sustained.

5. Barring this, the six modes provided for the removal of such nuisance in the above section of law have not been given by way of option to the counter petitioners and this procedure has not at all been followed in the instant case. The non compliance of the above two conditions in the instant case by the Learned Magistrate, in my considered view, would certainly vitiate the impugned order and it is totally against the principle of natural justice and the principle of law above referred to, with the result, the impugned order is liable to be set aside for want of its every legal propriety and validity and for non-compliance of the mandate provided by the law. While doing so, the ends of justice would require me to point out that if the nuisance is alleged to continue even, today, learned Magistrate is hereby directed to proceed in accordance with the law against the revision petitioners only when he finds it necessary and proper.

6. Thus, in the result, with the above directions, the revision is allowed and consequently, the impugned order passed by the learned Magistrate in M.C. 21 of 1992 is hereby set aside subject to the directions given above.