
(2001) 10 OHC CK 0025

In the Orissa High Court

Case No : Criminal Revision No. 640 of 2000

Shyam Khatua and Others

APPELLANT

Vs

Biswanath Panda

RESPONDENT

Date of Decision : 09-10-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 137, 138, 139

Citation : (2002) 1 OLR 126

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : Bansidhar Baug, N.N. Mohapatra and B.R. Das, for the Appellant;
S.K. Das, S. Swain, S.R. Subudhi and R.C. Jena, for the Respondent

Final Decision : Allowed

Judgement

L. Mohapatra, J.—This revision has been filed challenging the order dated 8.8.2000 passed by the Sub-divisional Magistrate, Jajpur, in a proceeding u/s 133 of the Code of Criminal Procedure directing the Tahsildar, Sukinda, to remove the earth deposited on the disputed plot Nos. 851 and 843 of village Asangaria and remove the encroachers.

2. From the impugned order it appears that the proceeding u/s 133, Cr. P.C. was initiated on the basis of a petition filed by the opposite party Biswanath Panda alleging obstruction of a water channel by the present petitioners. On perusal of the report submitted by the Officer-in-charge of Korai P.S., a conditional order was passed directing the present petitioners to remove the obstruction made by them over the water channel which was alleged to have been filled up with earth on plot No. 851 as well as plot No. 843 and the present petitioners were directed to appear and file their objection, if any. The petitioners filed their objection stating that the water channel in question in due course of time lost its nature and character of a water channel and became so narrow that no excess water from the tank could pass through the said channel and the channel running on plot No. 851 was practically of no use. In their objection they further stated that

Plot No. 843 is the adjacent plot which is a private land and has no communal character. They also denied the allegation that they had created obstruction by filling earth in the so called water channel. The learned Sub-divisional Magistrate on perusal of the police report and documents was of the view that a water channel was existing on the said plots and the present petitioners having obstructed the same by filling earth, such obstruction is liable to be removed.

3. Shri Baug, learned counsel appearing for the petitioners, submitted that the proceeding is not maintainable at the instance of one individual and that an inquiry as envisaged u/s 137, Cr. P.C. should have been made.

4. Shri S. K. Das, learned counsel appearing for the opposite party, submitted that the learned Sub-divisional Magistrate while passing the order had taken into consideration the report submitted by the Officer-in-charge of Korai P.S. and also looked into the relevant records and was satisfied that a water channel was existing on the said plots and obstruction has been created by the second party members by filling earth.

5. Before entering into the question as to whether the proceeding was maintainable or an inquiry was required to be made, it is necessary to look into the objection filed on behalf of the present petitioners. From the lower Court record it appears that the petitioners filed the objection on several grounds. It was contended on behalf of the petitioners that the first party and the second party members belong to the same village. Plot No. 842 is a private land belonging to Panda, Mishra and Acharya families of the village. Plot No. 843 comprising an area of Ac.0.07 dec. close to the tank is also a private land belonging to Ganga Acharya and others. They often close the entrance area of the tank as well as the land in Plot No. 843 by putting soil over the same as a result of which excess water could never pass through the channel which created inconvenience to the villagers. The water channel in course of time lost its nature and character of a water channel and during the C.S. operation in the year 1928 though its width was more than 30 kadis due to encroachment made by Panda, Mishra and Acharya families the width of the channel became narrow and lost the character of a water channel. They further submitted in their objection that the water channel became so narrow that no excess water from the tank can pass through the said channel. They also denied the allegation that they had closed the water channel by putting earth or creating obstruction over the same and their specific case was that due to encroachment and gradual amalgamation of the land from both sides by Panda, Mishra and Acharya families, the water channel is practically closed and the excess water from the tank does not pass through the channel easily.

6. From the objection it appears that several factual grounds were taken which required inquiry. Section 137 of the Code of Criminal Procedure prescribes that where an order is made u/s 133 for the purpose of preventing obstruction, nuisance or danger to the public in use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the

order was made, question him as to whether he denies the existence of any public right in respect of the channel or not and if an objection is raised, the Magistrate shall, before proceeding u/s 138, inquire into the matter. Section 138 prescribes that if the person against whom an order u/s 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case. Section 139 also empowers the Magistrate to make local investigation, summon and examine expert for the purpose of inquiry as in Section 137 or 138. From the impugned order it appears that though several factual aspects were brought to the notice of the learned Magistrate stating that the water channel had lost its character due to encroachment made by Panda, Mishra and Acharya families, it was obligatory on the part of the learned Magistrate to make inquiry instead of relying on the police report and the documents. Records relating to the water channel would definitely show existence of a water channel. But the objection raised by the present petitioners that due to encroachment by the aforesaid families the channel had become narrow and had lost its character cannot be ascertained from the records. There is no dispute that the learned Magistrate has not made any inquiry as envisaged u/s 137 of the Code of Criminal Procedure.

7. I, therefore, set aside the impugned order and direct the learned Magistrate to make an inquiry as provided u/s 137, Cr. P.C. and only after conclusion of the inquiry and after hearing the parties, pass appropriate orders.