

Sadanand Tiwari Vs. State

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Court : Allahabad

Decided On : Aug-27-1957

Reported in : AIR1958All174; 1958CriLJ314

Judge : Asthana, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 133, 137 and 139

Appeal No. : Criminal Revn. No. 1997 of 1955

Appellant : Sadanand Tiwari

Respondent : State

Advocate for Def. : J.R. Bhatta, Asst. Govt. Adv.

Advocate for Pet/Ap. : S.K. Varma, Adv.

Disposition : Revision allowed

Judgement :

ORDER

Asthana, J.

1. It appears that an application was made by one Kamla Pandey against the present applicant (Sadanand Tiwari) for the removal of certain encroachments which were alleged to have been made in plots Nos. 39 and 42 which were said to

be public path and which adjoined the house of Sadanand Pandey which was in plots Nos. 39 and 41.

On this application the Naib Tahsildar was deputed to make measurement. He measured and reported that there was an encroachment in plot No. 39 of 36 Karis by 3 Karis in front of plot No. 40 and 39 by 2 Karis in front of plot No. 41. After this report a preliminary order was passed against Sadanand to remove the obstructions within fifteen days or show cause against it.

Sadanand appeared in response to the notice issued to him. His defence was that he had not made the alleged encroachment. The learned Magistrate after hearing both the parties was of the opinion that there was an encroachment in plot No. 40 to the extent of 36 x 3 Karis. He, therefore, modified the preliminary order and directed Sadanand to remove the said encroachment within fifteen days and in default it would be removed through police at his cost.

Sadanand filed a revision against the said order before the learned District Magistrate, Ghazipur. It was contended in revision that Under Section 137, Cr. P. C. the learned Magistrate was not competent to modify the preliminary order and that he could either confirm it or vacate it. It was further contended that under Section 139, Cr. P. C. the learned Magistrate sitting with jury could modify the preliminary order passed under Section 133, Cr. P. C.

In support of this contention reliance was placed on a decision of the Madras High Court Reported in D'Silva v. D'Silva, AIR 1943 Mad 335 (A). The learned Additional District Magistrate was of the opinion that the above decision was not applicable to the facts of this case and that the trial Magistrate was competent to modify the preliminary order passed under Section 133, Cr. P. C. He, therefore, rejected the revision. Sadanand has now come up to this Court in revision.

2. It has been contended before me that under Section 137, Cr. P. C. the Magistrate was not competent to modify the preliminary order passed by him under Section 133, Cr. P. C. and that he could either stay further proceedings or make the preliminary order absolute.

In support of his contention he has relied on one more decision of the Calcutta High Court reported in Secretary, Rate Payers' Committee, North Barackpore Municipality v. Dwip Narain Singh. : AIR1952 Cal127 , besides that of Madras High Court already referred to above. In both these cases it was held that under Section 137, Cr. P. C. a Magistrate sitting alone was not competent to modify the preliminary order passed by him under Section 133, Cr. P. C. In the Calcutta case it was alleged that encroachment had been made on several roads and a preliminary order was passed under Section 133, Cr. P. C. in respect of the alleged encroachments on all the three roads.

After a consideration of the evidence the learned Magistrate found that the encroachment had been made only on one of the three roads, namely Bagdipara Ghat Road. He accordingly, modified his preliminary order and directed the encroachment on this particular road to be removed. It was held by the Calcutta High Court that the above order passed under Section 137. Cr. P. C. by the Magistrate was illegal and beyond his powers under that section.

3. In this connection it may be necessary to refer to the provisions of Sections 133, 135, 137 and 139. Cr. P. C. Section 133 provides that where a preliminary order has been made against a certain person he may appear before himself, or some other Magistrate of the first or second class at a time and place to be fixed by the order, and move to have the order set aside or modified in the manner hereinafter provided.

Section 135 lays down that the person against whom such order is made shall (a) perform, within the time and in the manner specified in the order, the act directed thereby; or (b) appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom its was made to appoint a jury to try whether the same is reasonable and proper.

Section 137 provides that if he appears and Shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case and if the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case, and if the Magistrate is not satisfied, the order shall be made absolute.

Section 139 lays down that if the jury or a majority of the jurors find that the order of the magistrate is reasonable and proper as originally made, or subject to a modification. which the Magistrate accepts, the Magistrate shall make the order absolute, subject to such modification, if any.

4. It will appear from an examination of the above provisions that there is a difference in the power of the Magistrate when he is sitting alone and when he is sitting with a jury. In the former case his powers are denned under Section 137, Cr. P. C. and according to that provision he can either make the preliminary order as originally passed absolute, or stay further proceedings.

This section does not empower him to modify the order passed by him under Section 133, Cr. P. C. In case an application has been made for the appointment of jury and a jury has been appointed, then a Magistrate has been given the power to modify the preliminary order in accordance with majority opinion of the jurors.

in view of these two provisions it cannot. be said that the Legislature had not in contemplation the possibility of the modification of the preliminary order after hearing both. the parties and going through the evidence on. the record. The Legislature did not confer on. the Magistrate sitting alone the power of modifying the preliminary order passed by him, whereas in the case where he is sitting with. jury, he has been expressly conferred that, power.

If the intention of the Legislature were that the Magistrate while sitting alone could either modify the order passed under Section 133 and make it absolute with that modification, then there is no satisfactory reason why the words used in Section 137, Cr. P. C. should be different than those under Section 139, Cr. P. C. and why under Section 137, Cr. P. C. the powers of the Magistrate should be limited only to make absolute-the preliminary order or stay the proceedings.

Section 133, Cr. P. C. also lays down that it would be open to the person against whom, a preliminary order has been made to move the Magistrate to have that order set aside, or modify 'in the manner hereinafter provided'. If he wants the modification of that order which a Magistrate sitting with the jury alone is competent to pass, then an application should be made to the Magistrate for the

appointment of the jury under Section 135, Cr. P. C.

In this connection reference may be made to the decision of this Court reported in *Jhan Lal v. Emperor* : AIR1925 All310 . It was held in this case that Section 133, Cr. P. C. contemplated that in suitable cases the order initially made might be modified and a modified order may b'e allowed to stand. This decision, however, does not lay down whether the Magistrate sitting alone is competent under Section 137, Cr. P. C. to modify the preli-minary order passed by him under Section 133, Cr, P. C.

There is no doubt that if a person against whom the preliminary order has been passed under Section 133, wants that it should be modified, he should make an application under Section 135, Cr. P. C. for the appointment of a jury and then the learned Magistrate sitting with the jury can pass an order under Section 139, Cr. P. C. modifying the preliminary order if the majority of the jurors are in favour of it.

5. In the circumstances, I am of opinion that the order of the learned Magistrate passed under Section 137, Cr. P. C. modifying the preliminary order and directing the removal of the encroachment from a portion of the disputed land, is not correct and cannot be maintained.

6. I, therefore, allow this revision and set aside the order of the learned Magistrate.

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