

Nityananda Das Vs. Premananda Das

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Court : Orissa

Decided On : Feb-28-2007

Reported in : 2007(I)OLR706

Judge : Pradip Mohanty, J.

Appellant : Nityananda Das

Respondent : Premananda Das

Advocate for Pet/Ap. : Mr. Pujari

Disposition : Petition allowed

Judgement :

Pradip Mohanty, J.

1. This revision is directed against the order dated 10.5.2006 passed by Sub-Divisional Magistrate, Kendrapara in Criminal Misc. Case No. 58 of 2006.

2. This fact of the case in a nutshell is that the present opposite party filed a petition under Section 133 Cr.P.C. before the Sub-Divisional Magistrate, Kendrapara alleging therein about the obstruction created by the present petitioners over Hal plot Nos. 515 and 518. The Sub-Divisional Magistrate forwarded the petition to the O.I.C., Pattamundai P.S. to enquire and report and to prevent breach of peace between the parties. On receipt of the report from the

O.I.C. and considering the facts, circumstances, gravity and urgency of the case, the Sub-Divisional Magistrate by order dated 12.4.2006 initiated a proceeding under Section 133 Cr.P.C. with conditional order directing the petitioners to clear the obstruction by removing the fences within seven days with liberty to file show cause on 22.4.2006 in case the petitioners do object the same. Accordingly, the notices were duly served on the petitioners on 18.4.2006. Pursuant to the notice, the petitioners appeared on 22.04.2006 and filed a petition for time and accordingly the case was posted on 29.04.2006 for filing of show cause. Ultimately, on 10.5.2006 final order was passed making the conditional order absolute against the petitioners with direction to the petitioners to remove the obstruction within seven days.

3. Mr. Pujari, learned Counsel for the petitioners submits that Section 133 Cr.P.C. relates to public nuisance in a public place. But the case road is a private road belonging to the petitioners and the opposite party and in no way concerns the general public. The dispute is purely of civil nature, but the learned Magistrate has erroneously passed the order treating the private road as a public road. He further submits that while passing the order, he has not followed the procedure as provided under Sections 134 to 141 under Chapter-X of the Cr.P.C. In support of his contention, he relies on *Gayasundari Devi v. Jagannath Nayak* 55 (1983) CLT 110 and *Bairagi Sahu v. Giri Nayak* 84 (1997) CLT 629.

4. On the other hand, Mr. Patnaik vehemently contends that the learned Sub-Divisional Magistrate has rightly passed the impugned order and there is no illegality on the same. The Sub-Divisional Magistrate called for a report from the O.I.C. Pattamundai P.S. and on being satisfied passed the order under Section 133 Cr.P.C. The police report reveals that the disputed road is leading to Sadar road and the petitioners had intentionally obstructed the road by erecting fence over the same. The said report is also very clear that the opposite party and his family members are facing difficulties and their movements have been obstructed by the petitioners. It has also been mentioned in the report that there was possibility of law and order situation and also loss of human life. Considering the above facts, the Sub-Divisional Magistrate has rightly passed the order to make the conditional order absolute.

5. Section 133 Cr.P.C. reads as follows:

133. Conditional order for removal of nuisance - (1) 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 as he thinks fit, considers

(a) that any unlawful obstruction or nuisance should be removed from any public place from any way, river or channel which is or may be lawfully used by the public; or

(b) xx xx xx

(c) xx xx xx

(d) xx xx xx

(e) xx xx xx

(f) xx xx xx

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 owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time' to be fixed in the order

(i) to remove such obstruction or nuisance; or

(ii) xx xx xx

(iii) xx xx xx

(iv) xx xx xx

(v) xx xx xx

(vi) xx xx xx

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation - A 'public place' includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

From a bare reading of the above section, it is crystal clear that the Magistrate can pass an order for removal of obstruction under Section 133 Cr.P.C. only when it relates to public road, river or channel used by the public. In such a case, the onus is on the complainant to establish that the road is a public road and used by the public.

6. Perused the impugned order and the R.O.R. Admittedly, the R.O.R. stands in the name of the petitioners and the father of the opposite party. In the said R.O.R. the case plots have been shown as road, but the title lies with the parties. In other words, this is a private road. Dispute is between two private parties and in no way connects the general public: The application of the opposite party, which forms the basis of the proceeding, clearly indicates that the said private road leads to the Sadar rdad and the report of the OIC is also to the same effect. It appears from the materials on record that the road in question is a private road and stands in the name of the private parties. Admittedly, no enquiry as contemplated under Sections 137 or 138 Cr.P.C. was conducted by the Sub-Divisional Magistrate. It appears that the dispute between the parties is essentially of civil nature. For all the aforesaid reasons, this Court holds that there was no material before the Sub-Divisional Magistrate to come to a conclusion that the road in question is a public road where nuisance has been created affecting the general public. In view of the above, the impugned order of the Sub-Divisional Magistrate is set aside.

7. However, if there is any law and order situation, it shall be open to the Sub-Divisional Magistrate to pass necessary orders basing upon the police report under Sections 107 to 109 Cr.P.C.

The CRLREV is accordingly allowed.

