

Dashrat and ors. Vs. the State

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Court : Rajasthan

Decided On : Jul-22-1960

Reported in : 1961CriLJ403

Judge : L.N. Chhangani, J.

Appellant : Dashrat and ors.

Respondent : The State

Judgement :

ORDER

L.N. Chhangani, J.

1. This is a reference by the Sessions Judge, Merta recommending that the order of the Sub-Divisional Magistrate, Parbatsar dated 26-6-58, purporting to have been passed under Section 137 Cr. P.C. should be set aside.

2. The relevant facts are these.-

On 12-8-55, Surajmal and others residing in Jhandelwala Mohalla in the town of Makrana, presented an application to Station House Officer, Parbatsar stating that the rain water discharged from the houses of various persons flowing into their Mohalla had been passing through the way to the house of barbers Dasrath, Baksuram, Shanwarlal and Ramkishan from times immemorial and further

complaining 'that the above mentioned barbers had caused an unlawful obstruction to the flow of water.

The barbers had it was mentioned, kept a small mori (drain) but it was wholly insufficient to discharge the entire rain water. They proceeded to say that the collection of rain water is a serious danger to their houses and will result in sanitary conditions leading to the spread of the disease of malaria. The Station House Officer inspected the spot and made the necessary inquiries and after being satisfied of the truth of the complaint, applied to the Sub-Divisional Magistrate Parbatsar on 17-8-55 for taking proceedings under Section 133 Cr. P.C.

A specific request was made that immediate arrangements should be made for the discharge of the water alleged to have been collected. The Sub-Divisional Magistrate on 18-8-55 passed a conditional order requiring Dashrat and other non-petitioners to remove the obstruction against the flow of the rain water or to show cause against the order. Only Baksuram appeared and submitted a reply on behalf of all. He denied having caused any obstruction against the flow of rain water.

His case was that the rain water in the locality had been flowing in various directions and that other persons had obstructed the flow of the rain water in other directions. As a result there has been a greater diversion of the flow of rain water towards the houses. They had of course kept a drain or a 'mori' for the flow of rain water but on account of the extraordinary quantity of water flowing in that direction the water could not be carried through that drain and collected near their houses. He however, admitted that if it is desired that the entire water should pass through their houses a pakka drain be constructed at the cost of the mohalla.

3. The learned Magistrate did not question the non-applicants as required by Section 139-A Cr. P.C. regarding the existence of a public right and straightway held the enquiry and ultimately passed an order under Section 137 Cr. P.C. on 26th June, 1958. He directed that a pakka drain should be constructed for the flow of the rain water and that the Municipality should be asked to make necessary arrangement for this purpose.

4. Aggrieved by this order Dasharat and others filed a revision In the Court of the Sessions Judge, Merta. The Sessions Judge held that the proceedings under Section 133 Cr. P.C. in respect of obstruction to the flow of rain water were misconceived and incompetent. Examining the case on the allegations that there was an unlawful obstruction over a channel he observed as follows:

In this particular Case, the flow of water consists only of rain water discharged iron the various houses to the locality and the word 'channel' could not be made to cover the case of such a flow of water.

5. He further doubted the propriety of proceeding under Section 133 in respect of flow of rain water through the properties of other persons and pointed that even if the flow of water is treated a channel it cannot be such as is or may be law-fully used by the public. He also pointed out the irregularity committed by the Magistrate in omitting to question the non-petitioners under Section 139(a). In the result he has reported the case to this Court for quashing all proceedings under section 133.

6. Mr. Chandmal Lodha has appeared in sup-port of the reference while Mr. Harnath Calla has opposed the reference.

7. A reference to Section 133(i) shows that it contemplates removal of unlawful obstructions or nuisance from any way, river or channel which is or may be lawfully used by the public or from public place. Obviously the present case is not a case of way or river and the only controversy raised in the present case is whether the flow of rain water can be treated a channel within the meaning of Section 188(i).

8. The word channel Has Been used in association with way and river which are or may law-fully be used by the public. In the back ground oil a proper consideration of the language, I am inclined to think that the word channel is intend-ed to cover such a flow of water as can be used for positive uses such as navigation or irrigation. It is not intended to cover flow of rain water across roads, streets or lanes in cities or towns. Such flows are incapable of any positive use by the public. A prevention of loss to the property of persons by avoiding collection of water and

an insistence on a free flow of water and removal of obstruction cannot imply a use of channel in terms of Section 133(i).

9. I accordingly hold that a flow of rain water in cities and towns is not a channel which is or may be lawfully used by the public.

10. Another difficulty in applying Section 133 to the present case is that the rain water is required to pass through the houses of the non-petitioners.. Assuming that a flow of rain water can be treated as channel, still it cannot be reasonably stated that a flow of such water through somebody's house is a channel which is or may be lawfully used by the public. The public cannot make any direct or positive use of the flow of water through somebody's house and as stated earlier the claim to avoid danger to person and property of others on account of collection due to an obstruction is not a use of the flow of water as a channel by the public,

11. A similar question arose in *Jagar Nath v. Parmeshwary* AIR 1914 All 213. In that case the owner of a low level field, across which the surplus water of the neighboring fields used to flow into the tank, raised the level of his field to such an extent that the flood water, instead of flowing into the tank, as it used to do, was held back and thus caused injury to the neighbouring fields. The - Magistrate took proceedings under Section 133 Cr. P.C. and passed an order under Section 137 Cr. P.C. While setting aside the order of the Magistrate and quashing the proceedings, the learned Judges made the following observation:

It seems to us that even if field No. 35 could be described as a channel, it is not such a channel as had been or could lawfully be used by the public. If injury had been caused by any tortuous Act done by Jagarnath Sahu, then the persons who have been dignified may have their remedy by civil suits.

12. The present case is covered by the rule laid down in that case. The non-petitioners while using their properties having caused unlawful obstruction to the flow of water can only be said to have acted in tortious manner. They cannot be said to have interfered with a channel which is or may be lawfully used by the public. The persons aggrieved can have remedy in a civil suit. It is not possible to contend that there was a channel through their house and that the Mohalledarans

were entitled to use that channel and that they have been deprived of the use of that channel.

13. In my opinion on the allegations made in the petition there is no justification for proceedings under Section 133.

14. Casually it may also be mentioned that the nature of the order passed by the Magistrate is also not warranted by the language of Section 133 and other subsequent sections. Proceedings under this chapter contemplate a conditional order to be followed by an absolute order. It does not contemplate any direction for arrangements to be made by the Municipality. The order is defective when looked at from this angle also. However, I need not discuss the effect of this defect as I am holding on other grounds that the proceedings are misconceived and without jurisdiction and could not be sustained.

15. I, therefore, accept the reference, set aside the order of the learned Magistrate dated 26th June, 1958 and quash all proceedings under Section 133 Cr. P.C.

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