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Budh Singh and ors. Vs. Hapu Ram and ors.

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Court : Rajasthan

Decided On : Dec-04-1995

Reported in : 1996CriLJ1576; 1996(2)WLC133

Judge : R.R. Yadav, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 133, 133(1), 133(2), 134, 137(1), 137(2), 138, 142, 145, 397, 465, 482 and 537

Appeal No. : SB Cr. Misc. Petn. No. 649/1995

Appellant : Budh Singh and ors.

Respondent : Hapu Ram and ors.

Advocate for Def. : M.D. Purohit, Adv. for respondents Nos. 1 to 6 and; J.P.S. Choudhary, Public Prosecutor

Advocate for Pet/Ap. : Karan Singh Rathore, Adv.

Disposition : Petition dismissed

Judgement :
ORDER

R.R. Yadav, J.

1. I have heard the learned counsel for the petitioners at length and perused the order impugned.

2. The brief facts necessary to be noticed for disposal of the instant petition are that the non-petitioners have filed an application under Section 133 Cr. P.C. against the petitioners on 12-9-95 before the learned Sub Divisional Magistrate, Jaitaran wherein they have stated that they are the Khatedars of Bera Navora which is situated in the agricultural boundary of village Bagyara. They are living with their families and others at the said well where their houses are situated.

3. It is further alleged that they are using a 161/2 feet wide public way which connects their well from Khushalpura Bagyara Road as was shown in the enclosed rough sketch by red-line and marked 'A,B,C and D'. The existence of public pathway was alleged to be in existence for last 100 years.

4. It is also alleged by the non-petitioners in their application under Section 133 Cr. P.C. that through the public way in question they lead their cattle to the pasture-land, take dead bodies of deceased relatives to the cremation ground and their children go to school at Bagyara. According to the non-petitioners the public way in question is the only way for going and coming from their village and there is no other alternative path way available to them.

5. It is also alleged by the non-petitioners that the present petitioners have obstructed the aforesaid public way by digging trenches and raising 'pala' over it on 12-9-95 and thus they have caused obstacles in use of the said public way which amounts to public nuisance.

6. The learned Sub Divisional Magistrate, Jaitaran forwarded the said application to the Station House Officer, Police Station, Jaitaran for enquiry and report. During the enquiry the Station House Officer recorded the statements of Hapu Ram non-petitioner No. 1, Kana non-petitioner No. 6, Shankar non-petitioner No. 3,Prabhu non-petitioner No.2 and one Rajendra Singh and prepared the site plan of the disputed public path way and submitted his report on 13-9-95.

7. The learned Sub Divisional Magistrate, Jaitaran after being satisfied passed conditional order after receiving the report of the Station House Officer,. Jaitaran on 15-9-95 directing to the petitioners in the preliminary order to remove the obstructions from public way immediately and they were further directed to show cause as to why the preliminary order should not be made absolute. The learned Sub Divisional Magistrate directed the petitioners to appear in his Court personally or through pleader on 19-9-95.

8. On 19-9-95 Shri Heer Singh Advocate appeared on behalf of the petitioners and made a request for adjournment to show cause notices issued to them.

9. Although the order passed under Section 133(1) Cr. P.C. was served on the petitioners as contemplated under Section 134 Cr. P.C yet the learned Sub Divisional Magistrate while taking lenient view adjourned the case for the next day i.e. 20-9-95.

10. On 20-9-95 the existence of Public way was denied by the petitioners and in support of their denial of existence of public way they filed a copy of Jamabandi Khevat Khatauni and survey map and some photographs were also alleged to have been placed on record.

11. The learned Sub Divisional Magistrate after denial of existence of public way by the petitioners in compliance of Section 137(1) Cr. P.C. before proceeding under Section 138 made a sincere effort to enquire into the matter. He proceeded on the spot and found the trace of existence of public path way which was found to have been obstructed by the petitioners by digging trenches and raising 'pala' over it. The learned Magistrate during the course of enquiry under the aforesaid provisions further found that 15 to 20 families are being deprived of that public way and due to the obstruction in the public way in question these 15 to 20 families are facing inconvenience of taking a round about 7 to 8 kms. to reach their village.

12. The learned Magistrate found the existence of public way as old and the petitioners by creating obstacles have blocked the way of 15 to 20 family members due to which these family members are not able to take their cattle to the pasture land and their children are not going to school. Taking into account the aforesaid

facts and circumstances the learned Sub Divisional Magistrate treating it to be the public nuisance passed injunction order under Section 142 Cr. P.C. pending further enquiry into the matter and directed the Station House Officer, Jaitaran to remove the obstructions created by the petitioners and fixed 17-10-95 for enquiry under Section 138 Cr. P.C as contemplated under Section 137(2) Cr. P.C.

13. Aggrieved against the order passed by the learned Sub Divisional Magistrate the present petitioners preferred a revision under Section 397 Cr. P.C. before the learned Additional Sessions Judge, Sojat camp at Jaitaran, who after hearing both the parties dismissed the revision vide his order dated 9-11-1995.

14. Aggrieved against the dismissal of the revision by the learned Additional Sessions Judge, Sojat camp at Jaitaran the present petition under Section 482 Cr. P.C. has been filed by the petitioners on the ground inter-alia that the order passed by the learned Sub Divisional Magistrate amounts to abuse of process of the Court.

15. The main thrust of the argument of the learned counsel for the petitioners before me is that after passing of the conditional order if the petitioners appeared and denied the existence of public way and adduced evidence in support of such denial the learned Magistrate ought to have stayed the proceedings until the matter of the existence of such right has been decided by a competent Court as envisaged under Section 137(2) Cr. P.C.

16. The next contention of the learned counsel for the petitioners before me is that in the present case the learned Sub Divisional Magistrate, Jaitaran did not question the petitioners about existence of public way as contemplated under Section 137(1) Cr. P.C, therefore, the order impugned passed on 20-9-95 is not sustainable in the eye of law. According to him since the learned Sub Divisional Magistrate failed to perform his statutory duty by asking questions to the petitioners, therefore, the impugned order is liable to be set aside on this ground alone.

17. In support of his aforesaid contentions the learned counsel for the petitioners placed reliance on some decisions which he has disclosed in the petition.

18. Before addressing the questions argued by the learned counsel for the petitioners I consider it proper to observe that the aim and object of the legislature in enacting Section 133 Cr. P.C. is to enable the District Magistrate or a Sub Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government on receiving of the report of a police officer or other information and on taking such evidence as he thinks fit to pass quick orders and deal speedily with the cases where public nuisance or any other kind of obstructions have been made in the right of public.

19. In my considered opinion for invoking jurisdiction under Section 133(1), Cr. P.C. of a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government it is not necessary that there should always be danger or inconvenience to public at large. In a particular case even if danger or inconvenience is about to be caused to an individual over a public right, it would be sufficient. In fact public way creates a public right to each and every individual to use it and any obstructions danger or inconvenience even to an individual is actionable under Section 133(1) and 138, Cr. P.C.

20. With the aforesaid introspection, now I propose to discuss the arguments advanced by the learned counsel for the petitioners threadbare.

21. As regards the first contention of the learned counsel for the petitioners to the effect that after passing of the conditional order if the petitioners appeared and denied the existence of public way and adduced evidence in support of such denial the learned Magistrate ought to have stayed the proceedings until the matter of existence of such right has been decided by a competent Court as envisaged under Section 133(2), Cr. P.C, although attractive but it is fallacious.

22. As a matter of fact under Section 137(2) Cr.P.C., the Magistrate has two options. According to first option as envisaged under Section 137(2), Cr. P.C. if a person or persons to whom show cause notice or notices have been issued under Section 134, Cr. P.C. appeared before the learned Magistrate and denied the existence of public way and adduced evidence in support of such denial, the learned Magistrate before proceeding under Section 138, Cr. P.C. is required to

enquire into the matter as contemplated under Section 137(1), Cr. P.C. When the learned Magistrate, during the course of enquiry under Section 137(1), Cr. P.C. comes to the finding that there is a reliable evidence in support of denial of existence of public way then he is required to stay the proceedings under Section 137(2), Cr. P.C. Mere denial of public way and mere adducing evidence in support of such denial is not enough unless the learned Magistrate comes to the finding that there is reliable evidence in support of denial of existence of public way. In fact, denial of existence of public way and adducing of reliable evidence itself is not sufficient to stay the proceedings under Section 137(2), Cr. P.C. unless the learned Magistrate records a positive finding to that effect. In my humble opinion, recording of a positive finding by a Magistrate that there is reliable evidence in support of denial of public way is a condition precedent to stay the proceedings under Section 137(2), Cr. P.C.

23. Here in the present case, it is true that the present petitioners have denied the existence of public way and have adduced evidence but the learned Magistrate while making enquiry into the matter after such denial by the petitioners under Section 137(1), Cr. P.C. made a local inspection and found the existence of public way to be an old. He further found and recorded a prima facie finding that the old public way has been obstructed; by the petitioners by digging trenches and raising 'Pala', therefore, the evidence adduced by the petitioners in the present case was not found to be reliable evidence in support of denial of the existence of public pathway. Hence, the learned Magistrate rightly refused to exercise his first option as envisaged under Section 137(2), Cr. P.C.

24. In fact, in the present case, the learned Sub Divisional Magistrate on the basis of report submitted by the Station House Officer, Jaitaran on 13-9-95 and also on the basis of his local inspection arrived at a prima facie finding that the existence of public pathway is old which is being obstructed by the petitioners by digging trenches and by raising 'pala'. It was further found by the learned Sub Divisional Magistrate that due to the aforesaid obstructions 15 to 20 families are being deprived to lead their cattle to the pasture-land and their children are not going to schools. Therefore, in the present case the learned Sub Divisional Magistrate, Jaitaran on the aforesaid facts and circumstances has rightly decided to proceed

under Section 138 Cr. P.C. by availing his second option as contemplated under Section 137(2) Cr. P.C. and an argument contrary to it is not acceptable.

25. In my humble opinion the second option adopted by the learned Sub Divisional Magistrate as envisaged under Section 137(2) Cr. P.C. is eminently just and proper. In fact here in the present case the learned Sub Divisional Magistrate has ample jurisdiction to weigh the evidence in support of such denial adduced by the petitioners as well as the evidence about existence of public way and its obstruction causing danger or inconvenience to the public at large or to an individual having right to use the public way.

26. I do not propose to burden this judgment with some of the decisions quoted in the petition. In fact the facts and circumstances of the present case are distinguishable to the facts and circumstances of the decisions mentioned in the petition. The decisions on which the learned counsel for the petitioners proposed to rely in those cases the Magistrates have recorded positive findings about reliable evidence in support of denial of the existence of the public way yet in those cases Magistrates proceeded under Section 138 Cr. P.C. In such a situation the courts ruled that after recording such a positive finding the learned Magistrate ceased to have jurisdiction and ought to have stayed the proceedings under Section 137(2) Cr. P.C. But in the present case as discussed above the learned Sub Divisional Magistrate, Jaitaran has not recorded any finding in his order dated 20-9-95 that there is reliable evidence in support of denial of the existence of public pathway, therefore, he was not required to stay the proceeding as argued by the learned counsel for the petitioners. Second option contemplated under Section 137(2) Cr. P.C. cannot be allowed to become redundant.

27. As regards the second contention 6f the learned counsel for the petitioners to the effect that in the present case the learned Sub Divisional Magistrate, Jaitaran did not question the petitioners about existence of public way as contemplated under Section 137(1) Cr. P.C, therefore, the order impugned passed on 20-9-95 is not sustainable in the eye of law is also not acceptable inasmuch as indisputably although the learned Magistrate has not questioned to the petitioners as contemplated under Section 137(1) Cr. P.C. yet they have denied the existence of

public pathway in writing and have adduced evidence in support of such denial.

28. In my considered opinion, where it is found that against whom conditional order was passed under Section 133(1) Cr. P.C. put in appearance under Section 137(1) Cr. P.C. and the Magistrate did not question them about existence of public way but they themselves denied the existence of the public way, in such a situation failure to ask question under Section 137(1) Cr. P.C. by the Magistrate is not mandatory. In my humble opinion it is mere irregularity which is curable and is to be ignored as contemplated under Section 465 Cr. P.C. corresponding to old Section 537 of Cr. P.C.

29. Nothing has been brought to my notice as to how failure of asking question by the learned Sub Divisional Magistrate, Jaitaran to the petitioners under Section 137(1) Cr. P.C. has occasioned a failure of justice while the petitioners themselves denied the existence of public pathway' in writing and adduced evidence in support thereof.

30. In my considered opinion in such a situation omission of the learned Sub Divisional Magistrate, Jaitaran to ask question to the petitioners under Section 137(1) Cr. P.C. is a mere irregularity which is curable and to be ignored as contemplated under Section 465 Cr. P.C. It has no bearing on the merit of the case. No prejudice has been caused to the petitioners by mere omission of the learned Sub Divisional Magistrate to ask question for them after their appearance under the said section. No failure of Justice has occasioned to the petitioners in the present case by the aforesaid omission. Order impugned passed by the learned Magistrate which is eminently just and proper cannot be set aside on the aforesaid mere irregularity having no bearing on the merit of the case.

31. Apprehension of the learned counsel for the petitioners to the effect that as a conditional order passed under Section 133(1), Cr. P.C. is not questionable in any Civil Court under Sub-section (2) of Section 133, Cr. P.C. similarly the final order passed under amended Section 138, Cr. P.C. by a Magistrate shall also not be called in question in any Civil Court is a far fetched conclusion based on imagination. The provisions of summary proceedings contemplated under Section 138, Cr. P.C. are pari materia to the provisions of Section 145, Cr. P.C, therefore,

such orders passed by the Magistrates can be called in question in any Civil Court of competent jurisdiction as orders passed under Section 145, Cr. P.C. are questioned before a Civil Court.

As a result of the afore-mentioned discussion, the instant petition lacks merit and it is hereby dismissed in limine.

It goes without saying that the prima facie finding recorded by the learned Sub Divisional Magistrate about existence of public way and its obstructions in his impugned order dated 20-9-95 would be subject to the further detailed enquiry as contemplated under Section 138,Cr. P.C.

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