

P. Preman Vs. M.P. Andy

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SooperKanoon Citation : sooperkanoon.com/823909

Court : Chennai

Decided On : Jan-06-1997

Reported in : 1997(1)CTC305

Judge : R. Balasubramanian, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 133, 136, 137, 137(1) and 138

Appeal No. : Crl. R.C. No. 14 of 1987 and Crl. M.P. No. 412 of 1987

Appellant : P. Preman

Respondent : M.P. Andy

Advocate for Def. : G. Godwin, Adv. for ;O.K. Sridevi, Adv.

Advocate for Pet/Ap. : D. Saravanan, Adv. for ;K.T. Pal Pandian, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

R. Balasubramanian, J.

1. In this revision petition the revision petitioner is challenging the order dated 24.12.1986 in Reference No. 5066/C2/85 on the file of the Court of the Sub

Divisional Magistrate (Executive) Mahe. A few facts are essential to be stated In this case. The revision petitioner and the sole respondent are neighbours. There is admittedly a tree situated in the house of the revision petitioner. On 28.9.1985 the respondent gave a complaint to the Executive Magistrate, complaining that the existence of the tree in the house of the revision petitioner is a source of nuisance not only to his personal safety but also to his property. In otherwords, his grievance was that the tree is situated in such a manner that it is likely to fall at any time on his house and thereby cause danger to his personal safety as well as damages to the property. On this basis he moved the Executive Magistrate to take appropriate steps to protect him.

2. The Executive Magistrate passed an order under Section 133 of the Code of Criminal Procedure on 2.12.1985, directing the removal of the tree as a whole. Thereafter, the revision petitioner filed a petition before the Sub Divisional Magistrate stating that the petition moved by the respondent would not come within the purview of Section 133 of Cr.P.C. He had further stated in that petition that if the tree is removed, it would hurt the religious feeling of several people. It is his further case that the respondent in the revision petition knowing fully well about the existence of the tree, had constructed his house underneath the tree and having done so, it is not open to him now to complain. On the basis of the petition, he wanted the order to be rescinded. It appears the Executive Magistrate by his Proceedings dated 22.9.1986 intimated both the revision petitioner and the respondent about his proposed inspection of the site on 25.9.1986 at 11.30 A.M. It is not disputed that this notice was not served on either of the parties. Thereafter, after conducting the local inspection pursuant to the notice referred to earlier, the Executive Magistrate passed an order on 24.12.1986 in and by which he directed that instead of removal of the tree as a whole, it is enough if the branches that protrude and extend over the respondent's house property need be cut and removed. This order is challenged in this revision petition.

3. Mr. D. Saravanan, learned counsel for the revision petitioner put forward the following points to set aside the order impugned in this revision petition. According to him, the Executive Magistrate is bound to take evidence as provided for in Section 138 of Cr.P.C, which he had failed to do. Secondly, he would say that the

Executive Magistrate had not furnished him the copy of his inspection report therefore, he was deprived of a reasonable opportunity to know what it contained and effectively put forward his defence.

4. As far as second point raised is concerned I do not see any records showing that the revision petitioner had asked for a copy of the inspection report. Though a ground is raised in the criminal revision case here, yet in the absence of a written demand and refusal, it is not possible to allow such a ground at this stage because one may not be sure whether really a demand was made or not. As far as the first point is concerned, I am of the following opinion:-

Under Section 133 of the Code of Criminal Procedure, a preliminary order is passed for removal of the nuisance. The person against whom an order is made and on being served with such an order, has a right to either obey the order or show cause as to why he shall not obey as provided for in Section 133 of the Code Of Criminal Procedure. If a person against whom an order is passed does not obey the order or show cause as to why he shall not obey, he shall be liable with the penalty prescribed in that behalf in Section 188 of the Indian Penal Code as provided for in Section 136 of the Code.

5. In this case, the complaint was made by the respondent about the nuisance on 28.9.1985. The Executive Magistrate passed an order on 2.12.1985 as provided for under Section 133 of the Code of Criminal Procedure. Obviously, in accordance with Section 135 of the Code of Criminal Procedure, the revision petitioner filed the statement to the Executive Magistrate on 23.12.1985. Thereafter, after giving notice of inspection to the revision petitioner and the respondent fixing 25.9.1986 as the date of inspection, the Executive Magistrate had inspected the site. After such inspection, he passed an order on 24.12.1986, which, as already stated, is impugned in this criminal revision case. The Executive Magistrate, while considering the cause shown by the aggrieved person is under a legal obligation to inquire into the matter before proceeding under Section 138, Cr.P.C. In otherwords, the inquiry contemplated under Section 137 shall precede the further proceedings under Section 138 of the Code, as could be seen from the wording of Section 137(1) itself. Section 137 of the Code contemplates the

Executive Magistrate conducting an inquiry as provided for therein on the appearance of the person against whom an order under Section 133 Cr.P.C. was made and the Executive Magistrate has to question him as to whether he denies the existence of any public right in respect of the way, river, channel or place in respect of which the order had been made. On such questioning if the concerned aggrieved person denies such right, then the Magistrate before proceeding under Section 138 should inquire into the matter. The questioning to be done by the Magistrate under Section 137, as is clear from the entire section itself, is only with reference to any order that has been made for preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place and not in any other cases. This order preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, is covered under Section 133(1)(a) of the Code. In otherwords, a reading of Section 137(1) itself makes it clear that whenever any order is passed under Section 133 relating to a public right, then only the questioning under Section 137(1) would arise. Why I am saying this is because Section 133 contemplates various types of orders being passed and all those types of orders do not necessarily relate to any Public right. For instance, the order impugned in this criminal revision case relates to the contingency said to have been provided for in Section 133(1)(d) of the Code. Section 133(1)(d) cannot be said to relate to any public right and it is definitely a private right, hi this case, the grievance made to the Executive Magistrate was with reference to the private right of the sole respondent in the criminal revision case and it does not relate to any public right. Therefore, I am of the opinion that only when an order is made, involving a public right in the use of any way, river, channel or place, then only the questioning as stated under Section 137(1) of the Code should be made and otherwise not.

6. In this case, as already stated by him, the revision petitioner had not anywhere stated that the grievances of the respondent based on the location of the tree in his house would not come under Section 133(1)(d) of the Code. In otherwords, he had not stated that no injury whatsoever would be caused to the respondent, who is his neighbour. The objections of the revision petitioner to the order passed on 2.12.1985, if perused carefully, do not any way touch upon this apprehension of danger to personal safety and to the property of the respondent. The revision

petitioner had not categorically stated anywhere in his objections dated 23.12.1985 that the nuisance as apprehended by the respondent is not there. In otherwords, the nuisance as apprehended by the respondent is impliedly admitted by there being no express denial. In my view, this stand of the revision petitioner in his statement dated 23.12.1985 would not amount to showing cause against the order dated 2.12.1985 passed under Section 133 of Cr.P.C. When a public right is not involved, the Executive Magistrate is at liberty to go over to Section 138 of the Code. Here, I have to point out that there is a provision in Section 137 of the Code of Criminal Procedure which makes it very clear that if a Public right is denied by the aggrieved party and there is reliable evidence in support of such denial, the jurisdiction of the Magistrate is ousted and he must await the result of the verdict from a civil forum regarding such public right. Section 137(2) also says that if the Executive Magistrate finds no such reliable evidence, it is open to him to proceed in accordance with Section 138 of the Code of Criminal Procedure. I have already stated that no public right at all is involved in this case and it is a private right of the respondent that was decided by the Executive Magistrate. Even otherwise, when the revision petitioner had already filed a written objection to the order passed under Section 133, the need to question him as provided for in Section 137(1) of the Code is wholly superfluous. In otherwords, even assuming for a moment that the Magistrate is bound to question him, it has become wholly unnecessary in view of the statement filed by him before the Executive Magistrate.

7. The next stage that follows is provided for in Section 138 of the Code of Criminal Procedure. Though Section 138(1) says that the magistrate shall take evidence in the matter as in a summons case on the aggrieved person showing cause against the order, yet I am of the view that on the facts of the case, recording of evidence as provided for in Section 138 would not arise at all. The emphasis is on the word 'shows cause'. I have already found that the revision petitioner had not shown any cause at all to defeat the rights of the respondent as provided for in Section 133(1)(d) of the Code. The Magistrate exercising the power either under Section 137 or under Section 138 of the Code is given a power to direct a local investigation to be made by such person as he thinks fit. In this case, the local investigation has been done by himself on 25.9.1986, long after the preliminary order and three months before the final order under Section 138.

Therefore, the Magistrate making a local investigation by himself is in order and on such investigation, he should have come to the conclusion that the uprooting of the entire tree itself is not necessary and in that context, his original order dated 2.12.1985 needs modification. Only in this back ground, the learned Magistrate had passed on impugned order dated 24.12.1986.

8. Under these circumstances, the argument of the learned counsel for the revision petitioner that the Magistrate is under an obligation to record evidence in this case is wholly unwarranted by any provision of law muchless by Section 138 of the Code. If the Magistrate is satisfied on his local investigation about the factual position and if he has come to a definite conclusion that his earlier order needs a modification, there is no need for him to examine any further evidence before Court, In my opinion, the revision petitioner had not shown any cause against the original order dated 2.12.1985 before the Executive Magistrate. He has not also produced any reliable evidence before the Magistrate about any public right being involved. When the questioning relates to the public right alone as provided for under Section 137 of the Code and if there is any denial, then the party denying such right should produce the reliable evidence. If he fails to deny or having made a denial and fails to adduce reliable evidence in support thereof, he shall not be allowed in the subsequent proceedings to make any such denial, under the same principle, I am of the opinion that having failed to show cause against the preliminary order dated 2.12.1985, it is not open to the revision petitioner to contend that he must be permitted to let in evidence under Section 138 of the Code. In any event, it is not the case of the revision petitioner that he asked for an opportunity to let in evidence before the Court and that it has been refused, assuming for a moment without admitting that he has a right to let in evidence. Under these circumstances, I see no reason at all to interfere with the order of the Executive Magistrate and the revision is dismissed. Consequently, Cr.M.P.No. 412 of 1987 is also dismissed.