

Sunil Pattanayek and ors. Vs. Ajit Pattanayek and ors.

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SooperKanoon Citation : sooperkanoon.com/876265

Court : Kolkata

Decided On : Aug-03-2007

Reported in : 2007CriLJ4125

Judge : Kalidas Mukherjee, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 133, 138, 138(1), 397(3) and 482

Appeal No. : C.R.R. No. 28 of 2004

Appellant : Sunil Pattanayek and ors.

Respondent : Ajit Pattanayek and ors.

Advocate for Def. : Pratik Dhar and ;Sujoy Roy, Advs. for O.P. Nos. 1-4

Advocate for Pet/Ap. : Pushpal Satpathi, Adv.

Disposition : Application allowed

Judgement :

ORDER

Kalidas Mukherjee, J.

1. This revisional application has been preferred by the petitioners against the order dated 20-12-2003 passed by the learned Sessions Judge, Paschim

Midnapur in Criminal Revision No. 344 of 2003 confirming the order dated 3-11-2003 passed by the learned Sub-divisional Magistrate, Jhargram in M.R. case No. 236 of 2003 under Section 133 of the Cr. P.C. The case of the petitioners is that the O.P. No. 1-4 herein filed a case under Section 133, Cr. P.C. before the learned Magistrate alleging that there is a public pathway on plot No. 126, J. L. No. 208, Mouza-Gopiballavpur. It has been alleged in the petition under Section 133, Cr. P.C. that the present petitioners encroached upon the said public pathway. The learned Magistrate vide order dated 25-8-2003 directed the B. L. & L.R.O. Gopiballapur-I for causing an enquiry as to whether there is any encroachment. Pursuant to the said order an enquiry was held and report was submitted by B. L. & L.R.O., Gopiballavpur-I. The present petitioners who were O.Ps. in the proceeding under Section 133 Cr. P.C. filed an objection against the said report. In the said objection the petitioners herein contended that there was a pathway but denied the same to be public one and claimed that the said pathway was used only by the owners of the disputed plot. The petitioners have been residing in the said plot for about 50 years. The petitioners in the said objection also denied that there was any encroachment on the said pathway. The learned Magistrate directed the S.D.L. & L.R.O., Jhargram to enquire into the matter and submit a report. The S.D.L. & L.R.O. submitted a report, but, the said report was vague and unspecific as to whether the said pathway was a public way. The petitioners wanted to file an objection against the said report of S.D.L. & L.R.O., but, without giving any opportunity to the present petitioners, the impugned order dated 3-11-2003 was passed by the learned Magistrate directing the removal of the encroachment.

2. Being aggrieved by the said order passed by the learned Magistrate the present petitioners preferred a revisional application before the learned Sessions Judge, Paschim Midnapore being CRR No. 344 of 2003. Learned Sessions Judge was pleased to dismiss the said revisional application vide order dated 20-12-2003. Being aggrieved by the said order passed by the learned Sessions Judge, the present petitioners have preferred the instant revisional application.

3. The learned Advocate for the petitioners submits that there is no mention in the report of the B.L. & L.R.O. and S.D.L. & L.R.O. that it was a public path way and

there is also no mention whether any encroachment was made on the pathway. It is contended that the learned Magistrate did not record any evidence of the parties in violation of the mandatory direction contained in Section 138, Cr. P.C. as a result of which the entire proceeding was vitiated. It is contended that if it is a private pathway no proceeding under Section 133, Cr. P.C. can be drawn up. It is submitted that no opportunity was given to the present petitioners by the learned Magistrate to file written objection against the report. It has further been submitted that the O.P. previously filed a Title Suit claiming Easement Right and the suit was dismissed ex-parte. It is contended further since Easement Right was claimed, obviously, it was claimed to a private pathway.

4. The learned Advocate appearing on behalf of the O.Ps. submits that the Revisional Application before this Hon'ble Court does not lie, in as much as, the Revisional Application before the learned Sessions Judge was dismissed. It is contended that the learned Magistrate came to the conclusion that there was a pathway over 9 decimals of land in plot No. 126 and the petitioner herein did not adduce evidence in the said proceeding.

5. The learned Advocate appearing on behalf of the O.Ps. has referred to and relied on a decision reported in : (1995)5SCC751 (Deepti alias Arati Rai v. Akhil Rai) and submits that the petitioners herein preferred a Revisional Application before the learned Sessions Judge which was dismissed and, as such, the Second Revisional Application under Section 482, Cr. P.C. is not maintainable. On this point the learned Advocate appearing on behalf of the petitioners has cited and relied on decisions reported in : 1997 CriLJ1519 (Krishan v. Krishnaveni : (2005)2SCC571 (Kailash Verma v. Punjab State, Civil Supplies Corporation). It is contended that in spite of the provision under Section 397(3), the Revisional Application under Section 482, Cr. P.C. is maintainable. It is the settled position of law, in view of the decisions cited by the learned Advocate appearing on behalf of the petitioners that in spite of the Revisional Application being disposed of by the learned Sessions Judge, the application under Section 482, Cr. P.C. is maintainable in cases where there is serious miscarriage of justice and abuse of the process of the Court or when mandatory provisions of law are not complied with and in circumstances when the High Court feels that the inherent jurisdiction

is to be exercised to correct the mistake committed by the Revisional Court. Relying on the aforesaid decisions as cited by the learned Advocate appearing on behalf of the petitioners, I find that the instant application under Section 482, Cr. P.C. is maintainable.

6. In the instant case the learned Magistrate called for a report from the B. L. & L.R.O. and subsequently from S.D.L. & L.R.O. Neither in the report of S.D.L. & L.R.O. nor in the impugned order passed by the learned Magistrate, there was any mention about the existence of the public pathway. It appears from the order dated 25-8-2003 that the learned Magistrate directed the O.P. to file written statement. It has been contended in para 10 of the Revisional Application under Section 482, Cr. P.C. that the petitioners herein wanted to file a written objection against the report of the S.D.L. & L.R.O., but, the learned Magistrate without giving them an opportunity to file written objection, passed the impugned order dated 3-11-2003. It has further been contended in para 6 of the Revisional Application under Section 482, Cr. P.C. that the petitioners entered appearance before the learned Magistrate in the proceeding under Section 133, Cr. P.C. and filed an objection against the report of the B.L. & L.R.O. contending, inter alia, that there was a pathway, but, denied the same to be public one and claimed that the same was used only by the owners of the disputed plot. It is therefore, clear that the petitioners herein contended that it was not a public pathway, but, private one. The learned Magistrate also in his order did not mention that the pathway in question was a public pathway so as to attract the provisions of Section 133 of the Cr. P.C.

7. The learned Advocate appearing on behalf of the petitioner has referred to and cited a decision reported in : (1996)7SCC71 (C.A. Avarachan v. C.V. Sreenivasan). It is contended that while passing an order under Section 133, Cr. P.C. the Magistrate has to comply with the procedure as laid down in Section 138, Cr. P.C. Section 138(1) Cr. P.C. runs as follows : 'If the person against whom an order under Section 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case.' In the instant case, the petitioners herein who were the O.Ps. in the proceeding under Section 133, Cr. P.C. entered appearance and filed written objection. It was, therefore, imperative upon the learned Magistrate in such a case to record evidence. But

from the impugned order it is clear that the learned Magistrate did not ask the parties to the proceeding to adduce evidence. The mandatory provision of Section 138, Cr. P.C., therefore, has not been complied with in the instant case. The learned Magistrate passed the final order under Section 133, Cr. P.C. making the earlier order absolute only on perusal of the petition under Section 133, Cr. P.C. the reports of the B. L. & L.R.O. and S.D.L. & L.R.O. and hearing submissions of the learned Advocates of both sides. The passing of the final order without complying with the provision of Section 138, Cr. P.C, therefore, is bad in law and it has vitiated the entire proceeding. The learned Sessions Judge did not consider this aspect of the case that neither in the report of the S.D.L. & L.R.O. nor in the impugned order there was any mention about the existence of public pathway. The learned Sessions Judge also did not consider that the learned Magistrate passed the final order without complying with the provision as laid down in Section 138, Cr. P.C. Because of the non-compliance of the mandatory provision of law, there was serious miscarriage of justice and it is a fit case where the inherent power under Section 482 of the Cr. P.C. can be invoked. The impugned order, therefore, is set aside. The Revisional Application is allowed with no order as to costs.

8. Urgent Xerox certified copy, if applied for, be handed over to the parties as early as possible.