

Mohd. Ibrahim Ganai and anr. Vs. State of J. and K. and ors.

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SooperKanoon Citation : sooperkanoon.com/898708

Court : Jammu and Kashmir

Decided On : Dec-17-1997

Reported in : AIR1999J& K20

Judge : Syed Bashir-ud-Din, J.

Acts : Jammu and Kashmir Constitution - Section 104; ;Code of Criminal Procedure (CrPC) - Section 133; ;Jammu and Kashmir Code of Criminal Procedure (CrPC) , 1989 - Section 133; ;[Constitution of India](#) - Article 226

Appeal No. : O. Writ Petn. No. 1078/97

Appellant : Mohd. Ibrahim Ganai and anr.

Respondent : State of J. and K. and ors.

Advocate for Def. : M.H. Attar, AAG

Advocate for Pet/Ap. : G.Q. Bhat, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Syed Bashir-ud-Din, J.

1. In the petition it is averred that petitioners and the Public have access to their agricultural land over a common path way measuring 7 x 110 feet Which has been encroached upon by one Abdul Hamid Khan after the path way was sold to him by Respondent No. 6 on 25-4-97. The petitioners approached Respondent No. 2 District Development Commissioner, Anantnag through a petition for removal of nuisance and clearance of obstruction on the path way so as to give free ingress and egress to the path users, the petitioners and the Public. The Naib Tehsildar under orders of Respondent No. 2 forwarded the report along with Annexures (P2 to P6) to Respondent No. 3. However, Respondent No. 3, Tehsildar, Executive Magistrate, Kulgam is not taking any action to clear the pathway and remove the encroachment and nuisance on the spot. Though the petitioners have alternative remedy available to approach the Civil Court, but as it is time consuming process and is not efficacious enough, the petitioners have chosen to approach the High Court through the medium of this writ petition. In case the obstruction is not removed and nuisance is not cleared, the petitioners would be deprived of their livelihood. The agricultural land approachable only through this common pathway cannot be cultivated and their source of livelihood would come to an end.

2. The exercise of powers under Section 133, Cr. P. C. by the competent Magistrate is a speedy and efficacious remedy for providing free unobstructed passage and access to the cultivable lands of the petitioners. The non-consideration of the petitioners case by the authorities in terms of Section 133, Cr. P. C. is to deprive the petitioners right of livelihood as guaranteed to them under Article 21 of the Constitution. The petitioners on these grounds have prayed for mandamus commanding the respondents to take action under Section 133, Cr. P. C. for removal of the nuisance on the pathway and seeking to implement the provisions of Section 133, Cr. P. C. in this case.

3. Learned counsel for the respondent concede that the District Magistrate, Respondent No. 2 is under legal duty to consider the petitioners case and pass such orders as may be warranted after following the due process of law within the ambit of Section 133, Cr. P. C. The question of inaction on the part of Respondent No. 2 is negation of public duty and amounts to refusal to discharge the legal duty cast on the District Magistrate (D. C., Anantnag) under law.

4. The question whether petitioners make out a case for removal of nuisance and/or clearance of the obstruction over the pathway is a matter which the Respondent No. 2 or the empowered Magistrate has to find out on inquiry in the proceedings initiated under Section 133 of Cr. P. C. The Writ Court is not called upon to comment on merits of the case either way. If the law provides a remedy to the petitioners and they pursue it, then a legal duty is cast upon the competent authority to go into the question and provide the relief if any made out in the inquiry and on the proceedings as envisaged by law. Though the petitioners have a remedy of approaching the civil Court but all the same such remedy obviously is not as expeditious and speedy as taking recourse to proceedings under Section 133, Cr. P. C.

5. Mr. Attar, A AC, appearing for the respondents concedes that a direction has to be issued to the Respondents No. 2 and 3.

6. For the aforesaid reasons, the petition is allowed to the extent that the concerned District Development Commissioner, Anantnag (Respondent No. 2) and Tehsildar-Executive Magistrate First Class, Anantnag (Respondent No. 3) are directed to consider the petitioners case within the parameters of law as laid down by Section 133 of Cr. P. C. and further to pass such orders thereto, as may be warranted by merits of the case in exercise of powers in proceedings under Section 133 of Cr. P. C.