Chandrapal And Ors. vs State Through Mahabir And Anr. on 28 July, 1953

Equivalent citations: AIR1954ALL14, AIR 1954 ALLAHABAD 14

ORDER

Randhir Singh, J.

1. This is an application in revision against an order of the Sessions Judge refusing to Interfere with an order passed by a Magistrate, first class, under Section 133, Cr. P. C., requiring the applicant to remove an obstruction from a public way.

2. Mahabir and Babadin made an application to the Sub Divisional Magistrate under Section 133, Cr. P. C., against Chandrapal and two others praying that the applicants should be ordered to remove the obstruction which they had placed on a public way inasmuch as the applicants had parked their bullockcart, had set up some troughs and were tying cattle in the way. On receipt of this application the Magistrate asked for a report from the police and the Tahsildar and on being satisfied that there was obstruction, issued a preliminary notice to the applicants to show cause why they should not be ordered to remove the obstruction.

3. The applicants appeared before the Magistrate and filed a written statement in which they denied the existence of a public way and further alleged that they had been in possession of the piece of land on which they had been parking buliockcart and tying their cattle for quite a long time. They also in their statement alleged that if necessary a jury may be appointed.

4. The parties were then asked to produce evidence and a number of witnesses were examined on behalf of Mahabir and Babadin. The qanungp and the patwari were also produced and a certified copy of the village Khasra was also filed in which the land in dispute was entered as 'rasta'. The applicants produced oral evidence which did not appear to be reliable to the learned Magistrate and he made his earlier order absolute and ordered the applicants to remove the obstruction. Before passing the final order the Magistrate enquired of Chandrapal, who was present, if he wanted a jury and he made a statement to the effect that he did not want a jury. Thereafter the final order was passed.

5. Against the order of the learned Magistrate the applicants went in revision to the Sessions Judge, who dismissed the application for revision. The applicants have now come up in revision to this Court.

6. Section 135, Cr. P. C., lays down : "The person against whom such order is made shall-

> (a) perform, within the time (and in the manner) specified in the order, the act directed thereby or
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> (b) appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try whether the same is reasonable and proper."

The provisions of this section, therefore, clearly show that it is open to a person to whom a notice had been issued under Section 133, Cr. P. C., either to submit to the order or to have recourse to one of the two other alternatives, viz., to appear and show cause or to apply for the appointment of a jury. In the present case, it appears that the applicants wanted that an inquiry be made by the Magistrate and it was only towards the end of their written statement that they mentioned that a jury may be appointed, if necessary. They did not, therefore, ask for a jury straightway. The parties adduced evidence and after the evidence had been recorded the Magistrate was cautious enough to enquire of the applicant, Chanderpal who was present, if he wanted a jury and he made a clear statement that he did not want a jury. The other two applicants Prahlad and Shanker were not present and it appears from the order sheet that they did not put in appearance after the written statement had been filed. They were not present at any of the subsequent hearings and this conduct of theirs shows that they had entrusted the conduct of the defence to Cnandrapal. After Chandrapal had given his statement that he did not demand a jury, the Magistrate made the order absolute.

7. It is not contended on behalf of the applicants in this Court that it was the duty of the Magistrate to have asked all the three applicants if they wanted a jury. In support of this contention a ruling of the Calcutta High Court --'Shamji Tricumdas v. Ram Moye', AIR 1933 Cal 318 (A), has been cited. It was held in this ruling that it is open to the persons to whom notices have been issued under Section 133, Cr. P. C., to ask for a jury, even after the Magistrate has come to the conclusion after enquiry that there was no reliable evidence in support of the contention that there was no public way in existence. With great respect I am unable to agree with the view taken by the learned Judges in this case. A plain reading of Section 138, Cr. P. C., also leads to the same inference. The relevant provision in Section 138 is:

> "On receiving an application under Section 135 to appoint jury, the Magistrate shall -
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> (a) forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom foreman and one-half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant;
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> (b) summon such foreman and members to attend such place and time as the Magistrate thinks fit; and
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> (c) fix a time within which they are to return their verdict."

It would thus appear that a Magistrate would appoint a jury after the party, against whom a notice under Section 133, Cr. P. C., had been issued, appears and asks for a jury. There is no provision that

the Magistrate would appoint a jury even after he has come to the conclusion that there was no reliable evidence in support of the contention that there was no public way, after an inquiry.

8. It is, however, not necessary to discuss the merits of the ruling cited on behalf of the applicants in this case as on the facts also there is no ground for interference with the order passed by the learned Magistrate. The oniy psrty present out of the applicants was Chandrapal and he was asked if he wanted a jury and he gave a statement that he did not want a jury. No application or even a request was made on behalf of the other two applicants, who did not even care to turn up after the first hearing. There was no obligation cast upon the learned Magistrate to make an inquiry at that stage if the applicants wanted a jury. It was open to them to make a request to the Magistrate and if he had refused to appoint a jury, they could have had a legitimate grouse on this score. There was thus nothing improper or irregular in the proceedings taken by the learned Magistrate. After he had come to the conclusion that there was no reliable evidence in support of the contention of the applicants before him, the only order which he could pass was to order the applicants in the present case to remove the obstruction.

9. There is thus no force in this application. The application for revision is, therefore, dismissed. The stay order is discharged.