IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

Crl.R.C.No.1623 of 2008
and
M.P.No.1 of 2008

1. Rani Pushpalatha
2. Shanmugaraj ... Petitioners

Vs.

1. The Sub Divisional Magistrate (North),
   The Assistant Collector,
   Puducherry.
2. Aradadi Ganesh
3. Shyamala Devi
4. N.V.R. Murthy ... Respondents

Prayer: Criminal Revision Case filed under Sections 397 and 401 of the Code of Criminal Procedure, against the order passed by the Sub Divisional Magistrate (North), Pondicherry, i.e., the first respondent vide his proceedings in M.C.No.107 of 2008, dated 01.04.2008.

For Petitioners: Mr.R.Suresh Kumar

For R-1 : Mr.J.Kumaran,
Government Advocate (Pondicherry)

For RR-2 to 4 : Notice served
No Appearance

ORDER

This Criminal Revision Case is directed against the order dated 01.04.2008 passed by the learned Sub Divisional Magistrate (North), Puducherry, i.e., the first respondent vide his proceedings in M.C.No.107 of 2008.

2. The brief case of the revision petitioners is as follows:-

On the complaint given by one Aradadi Ganesh/second respondent herein, the learned Sub Divisional Magistrate

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(North), Puducherry, passed an order on 01.04.2008, directing the revision petitioners to demolish the illegal construction/encroachment on the Municipal road (measuring 12.65 sq.mtrs. as steps on the ground floor and balcony-cum-sunshades measuring 6.05 sq.mtrs. on the 1st and 2nd floors as per the report of Municipal Commissioner dated 19.03.2008) and Stop the functioning of the unlicensed high capacity centralized kitchen and further directed and required the revision petitioners to obey the said order within 10 days from the receipt of the order dated 01.04.2008.

3. The learned counsel appearing for the petitioners mainly contended that the learned Sub Divisional Magistrate (North), Puducherry, invoked the jurisdiction under Section 133 of Cr.P.C. in a pure civil dispute. Hence, the order passed by the learned Sub Divisional Magistrate (North), Puducherry, is erroneous and not valid in law and it is liable to be set aside. The proceedings under Section 133 of Cr.P.C. is only a nature of civil proceedings and in the case on hand, the first respondent/Sub Divisional Magistrate, has completely omitted to took into the issue from the above said angle as the sum and substance of the issue is purely a civil dispute between the parties and erroneously passed an order which is liable to be set aside. The proceedings under Section 133 of Cr.P.C. was initiated by the first respondent not on receiving any report from the police officer, but only based on the complaint given by the second respondent alone, who preferred the complaint to settle the property dispute between the parties. Hence, the trial Court not followed the principles of law laid down by this Court in similar case.

4. The learned counsel appearing for the petitioner further contended that in this case, there is no compelling reason or ingredients as have been enumerated or indicated by the Court of Law in the above mentioned decisions are available to invoke Section 133 of Cr.P.C. and hence, the entire proceeding is vitiated. Since the learned Executive Magistrate has not followed the procedures contemplated under Section 133 of Cr.P.C., the learned counsel for the petitioners prayed that the order passed by the learned Executive Magistrate may be set aside. The lower Court has not followed the provisions of law and passed an erroneous order which is liable to be set aside and hence, the learned counsel prayed that the order passed by the learned Sub Divisional Magistrate (North), Pondicherry, in M.C.No.107 of 2008 dated 01.04.2008 may be set aside and this criminal revision case may be allowed.

5. This Court heard the submissions made by the learned Government Advocate (Puducherry) appearing for the first respondent and perused the entire materials produced on the side of the petitioner. Even though notice was served on the

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respondents 2 to 4, they have not appeared in person or through counsel.

6. On a reading of the entire order, it would clearly reveal that the learned Sub Divisional Magistrate (North), Puducherry, called for a report from the Municipal Authorities. The trial Court perused the Xerox copy of the Sale Deed dated 20.05.2004 executed by one Chandrasekarane and Thangam in favour of Gurupriyan (minor) rep. by his guardian, the second counter petitioner and examined one Karounagarane (Deputy Surveyor of Survey Department) as P.W.1. On a reading of the report of the Municipality and Survey Department, it is clear that the Municipal Surveyor surveyed the area and submitted the document to the Court as per the request of the counter petitioners. On examination of the Surveyor by the counsel for the counter petitioners, the surveyor has stated that he had measured R.S.No.20/2B/2, 20/2B/3, 20/2B/4 and the eastern boundary of 20/2B/1 and had not measured any other sub divisions in R.S.No.20, as they were not necessary to find out the extent of encroachment on the municipal road. The surveyor had also stated that he had done the measurement as per the records available in the Field Measurement Book. Further, the learned Sub Divisional Magistrate (North), Puducherry, perused the report of the Municipal Commissioner.

7. In the reply dated 19.03.2008, the Municipal Commissioner has stated that R.S.No.20/2B/3 is a Municipal road and the counter petitioners have encroached 12.65 sq. mtrs. as steps on the ground floor and balcony-cum-sunshades measuring 6.05 sq. mtrs. and also the counter petitioners are functioning a unlicensed high capacity kitchen in that area. The learned counsel appearing for the petitioners has not disputed the fact that the counter petitioners are having a licence to run the centralized high capacity kitchen. But the the learned counsel has also not produced any record to show that the counter petitioners are running the centralized high capacity kitchen with the permission of the Municipality or he has obtained any licence from the competent authority to run a kitchen in that area. Further, it is admitted by the learned counsel appearing for the petitioners that the learned Executive Magistrate passed an order stating that the counter petitioners/revision petitioners herein are encroached a portion in the municipality road measuring 12.65 sq. mtrs as steps on the ground floor and balcony-cum-sunshades measuring 6.05 sq. mtrs on the 1st and 2nd floors. The revision petitioners have stated that they have not encroached the municipality road. Hence, it is clearly proved that the revision petitioners have not preferred any objection except preferring the criminal revision case questioning the procedure followed by the learned Executive Magistrate under Section 133 of Cr.P.C. Questioning the order passed by the

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learned Executive Magistrate, the revision petitioners have not filed any civil suit stating that they are not encroached the portion of the Municipal road. Since there is no challenge against the order passed by the learned Executive Magistrate, this Court is of the considered view that the revision petitioners have encroached a portion of the municipal road is correct. Hence, the order passed by the learned Executive Magistrate is perfectly valid.

8. The learned counsel for the petitioners would mainly contend that there is a civil suit in O.S.No.33 of 2007 pending between the parties and hence, the learned Executive Magistrate has no power to pass an order under Section 133 of Cr.P.C. The above suit was filed by the first petitioner herein against Tmt.B.Sundari, represented by her Power of Attorney, Agent, Daniel C.Kulanthaivelu pillai and Tmt.Shyamaladevi. The said suit is not at all in any way connected with the municipality. The above said suit was filed for the following relief:

> "Therefore, it is humbly prayed that this Honourable Court may be pleased to pass a Judgement and Decree in favour of the plaintiff as against the defendants;
>
> i) declaring that the plaintiff is the absolute owner of the suit 'B' schedule mentioned property;
>
> ii) for eviction of the second defendant from the suit 'B' schedule mentioned property by removing the fence and other features illegally made by the second defendant in the suit 'B' schedule mentioned property and hand over the vacant possession of the suit 'B' schedule mentioned property to the plaintiff;
>
> iii) declaring that the sale deed dated 5.2.2007 executed by the first defendant in favour of the second defendant with respect to the suit 'B' schedule mentioned property is null and void and sham and nominal not binding the plaintiff;
>
> iv) granting permanent injunction restraining the second defendant, men, agents or any other persons claiming right through her from raising any construction in the suit 'B' schedule mentioned property';
>
> v) directing the first defendant to pay a sum of Rs.1,00,000/- (Rupees one lakh only) towards the damage to the plaintiff;

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vi) directing the defendants to pay mesne profits at the rate of Rs.500/- (Rupees five hundred only) per month from the date of the illegal occupation of the suit property by the defendants till the delivery of vacant possession of the suit property to the plaintiff;

vii) award the cost of the suit;

viii) and to grant such further or other reliefs."

9. On a reading of the above plaint, it is clear that the suit was filed by the plaintiff viz., Rani Pushpalatha for declaring some other rights which did not in any way connected in the encroachment made in the municipality area and running of unlicensed centralized kitchen. Hence, the argument of the learned counsel for the petitioners that since the suit is pending, the learned Executive Magistrate has no power to pass an order is liable to be rejected. The learned counsel for the petitioners further contended that the learned Executive Magistrate has no jurisdiction to pass an order under Section 133 of Cr.P.C. In the above circumstances, it is useful to refer Sections 133 and 137 of Cr.P.C. which read as follows:-

"133. Conditional order for removal of nuisance.-(1) Whenever a District Magistrate or Sub-Divisional Magistrate or any other Executive Magistrate specially powered in this behalf the State Government on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, consider --

(a) That any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel, which is or may be lawfully used by the public: or

(b) That the conduct of any trade or occupation or the keeping of any goods or merchandise; is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such, goods or merchandise should be removed or the keeping thereof regulated; or

(c) That the construction of any building, or the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

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(d) That any building tent or structure, or any tree is in such a condition that it is likely to fill and thereby cause injury to persons living or carrying on business in the neighborhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary: or

(e) That any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public: or

(f) That any dangerous animal should be destroyed, confined or otherwise disposed of,

Such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, talk well or excavation, or owning or possessing such animal or tree, within time to be fixed in the order-

(i) To remove such obstruction or nuisance; or

(ii) To desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) To prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) To remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) To fence such tank, well or excavation; or

(vi) To destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

or, if he objects so to do, to appear before himself or some other Executive Magistrate Subordinate to him at a

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time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any civil court.

Explanation. A "public place" includes also property belonging to the state, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

137. Procedure where existence of public right is denied.-(1) Where an order is made under section 113 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way river, channel or place, and if he does so, the Magistrate shall, before proceeding under section 138, inquire into the matter.

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent court; and if he finds that there is no such evidence he shall proceed as laid down in section 138.

(3) A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial."

10. In this case, the revision petitioners are running a unlicensed high capacity centralized kitchen and since they have not obtained any license from the competent authority for running the high capacity kitchen, it definitely causes nuisance to the people in that locality and it causes inconvenience to the public for using pathway road. It is also very clear from Sections 133 and 137 of Cr.P.C., that the learned Executive Magistrate can act on the report of the police officer and other information and on taking such evidence (if any) as he thinks fit. Hence, from the reading of the above Sections, it is clear that the learned Executive Magistrate empower to take action on receiving police report or any other information. In view of

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the above circumstances, the respondents 2 to 4 have given a complaint to the learned Executive Magistrate referring the nuisance committed by the revision petitioners and also the encroachment made by the revision petitioners and on receiving the complaint, the learned Executive Magistrate, after examining the Deputy surveyor and also after receiving the report from the Municipal Commissioner, came to a correct conclusion and passed an order giving 10 days time to remove the encroachment and passed an order on 01.04.2008. There is no infirmity or illegality in the order passed by the learned Executive Magistrate. This Court finds no reason to interfere with the order of the trial Court which does not warrant any interference by this Court and hence, the criminal revision case is liable to be dismissed.

11. In the result, this Criminal Revision Case is dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

To

The Sub Divisional Magistrate (North),
The Assistant Collector,
Puducherry.

+1cc to Mr.R.Sureshkumar, Advocate Sr.42623
+1cc to Government Pleader for Puducherry Sr.43017

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