

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ajoy Kumar Mukherjee

C.R.R. 3357 of 2019

Haran Sardar & ors.

-vs-

The State of West Bengal & ors.

For the Petitioners : Mr. Anirban Mitra
Mr. Amit Halder
Mr. Akash Ghosh
Md. Wasim Akram

For the State : Mr. S.S. Imam
Mr. S. Kundu

Heard on : 21.6.2022

Judgment on : 27.06.2022

Ajoy Kumar Mukherjee, J.

1. The present revisional application has been directed for quashing of the entire proceeding in connection with M.P. Case No. 504 of 2014 under section 133 of the Code of Criminal Procedure now pending before Executive Magistrate, Basirhat, North 24 Parganas.

2. The case as set out by the petitioners in the revisional application is that an application was filed by the opposite party no. 2 before the learned Executive Magistrate, North 24 Parganas in connection with M.P. Case no. 504

of 2014 alleging that opposite party no. 2 is the owner of 21 Satak of land at Dag no. 332 corresponding to L.R. plot no. 2639 which comprised of a room along with a kitchen and a privy. There is an adjacent pathway adjacent to that plot but the present petitioners and his family members are trying to restrain the opposite party no. 2 from using the adjacent pathway over plot no. 3074 and as a result, the opposite party no. 2 was compelled to file the said application. The said application was heard from time to time and by an order dated 14.2.2019, the Executive Magistrate, Basirhat was pleased to pass an order, thereby directing that the order dated 15.2.2018 stands absolute and the opposite parties of that case i.e. petitioners herein must remove the obstruction immediately and the compliance to be submitted by next date otherwise opposite parties/petitioners herein will be liable for prosecution under Section 188 of the Indian Penal Code.

3. It is further case of the petitioners that they have already filed a partition suit being no. T.S. 119 of 2019 before learned Civil Judge, (Senior Division) at Basirhat for partition and injunction in respect of said plot being J.L, no. 93, Dag no. 3074, measuring 44 Satak of land under Khatian no. 2411, 2637 and 2466, where pathway allegedly exists. The petitioners also filed an ad-interim injunction application and learned trial Judge was pleased to pass an order of status quo which is continuing till date.

4. Learned advocate for the petitioner Mr. Anirban Mitra strenuously argued that without considering the materials on record particularly the pendency of the civil suit and the order of status quo in connection with same

plot of land, Magistrate has passed the impugned order mechanically and without applying judicial mind. Learned Magistrate also failed to consider essential ingredients enumerated under Section 133 of the Code of Criminal Procedure as he did not take evidence of either of the parties before passing the impugned order. Now the continuation of proceeding under Section 133 of the Code of Criminal Procedure will be an abuse of process of law and therefore liable to be quashed on the ground that subject matter of the said application under Section 133 of the Code of Criminal Procedure is also the subject matter of the civil suit, wherein the order of status quo passed by a competent civil court, is in force.

5. Learned advocate for the petitioners Mr. Mitra further argued that there is no material or evidence which goes to show that any nuisance/obstruction was created at the instance of the petitioners at the time of passing of the impugned order dated 15.2.2019. It appears from the written complaint filed Under Section 133 of the Code of Criminal Procedure that the allegation is that the second parties of that case namely, the petitioners herein, are threatening to raise construction in plot no. 3074 in order to obstruct first party/ opposite party no. 2 in respect of their only ingress and egress from their plot No. 2639. It further appears that the first party and her deceased husband were apprehending of a serious assault which can cause murder. There is also alleged apprehension of breach of peace. The schedule of complain described the pathway, which she mentioned as her only ingress and egress from her house, situates at Mouza Tatra Neyah J.L. no. 93 Khatian no. 2411/2337

being plot no. 3074 which runs towards east west direction and which is a pathway measuring 155 long and 8 feet wide. It further appears from the schedule of Title Suit No. 119 of 2019 that schedule of said partition suit also relates to Mauza Tatra Neyah J.L. No. 93, Khatian no. 2411, 2637, 2466 being plot no. 3074 measuring 44 katas of land. So it is not disputed that the pathway in question in application under Section 133 of the Code of Criminal Procedure and property in question in Title Suit No. 119 of 2019 are the same i.e. plot no. 3074 under Khatian no. 2411 and 2637. The petitioners also filed an application for information dated 18.6.2022 wherefrom it appears that learned civil Judge, Senior Division Basirhat has passed a direction to maintain status quo with regard to the nature and character of the above mentioned suit property i.e. over plot no. 3074 till 28.6.2022.

6. Before going to the further details, let me reproduce Section 133 of the Code of Criminal Procedure which reads as follows:

“133. Conditional order for removal of nuisance.- (1) Whenever a District Magistrate or a Sub- divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by 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, considers-
(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 configuration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood 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, tank, well or excavation, or owning or possessing such animal or tree, within a 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 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."

7. In view of the facts and circumstances of the case as stated above, it is clear that the complaint case was filed under Section 133 of the Code of Criminal Procedure by Halima Molla/Opposite Party No. 2 only on the basis of

an apprehension and/or threat allegedly made by the petitioners herein that the petitioners are going to obstruct the only pathway for their ingress and egress. Admittedly, no imminent danger for filing the said application has been manifested in application as required under Section 133 of the Code of Criminal Procedure and it is also evident that an order of status quo in respect of said plot of land is in force as on this date. Now Section 138 of the Code of Criminal Procedure contemplates as under:-

*“138. Procedure where he appears to show cause:- (1) 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.
(2) if the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.
(3) if the Magistrate is not satisfied , no further proceedings shall be taken in the case.”*

8. Needless to say that the jurisdiction of the Magistrate under Section 133 of the Code of Criminal Procedure is for its immediate effect which is for removal of obstruction and/or nuisance from public place and before passing any order, the Magistrate have to decide summarily whether such piece of land is a public or a private land and that too only for incidental purpose. If It can be shown that the plot in question is not a public thoroughfare but is a private property of the petitioners, the learned Magistrate will be precluded from dealing with the place under the section. The object and purpose beyond Section 133 of the Code of Criminal Procedure is in the sense that if the learned Magistrate fails to take recourse immediately, irreparable danger would

be caused to the public but the order under section 133 of the Code is not intended to apply to future likelihood or event that may happen at some later point of time. It does not deal with all potential danger but in the cases where danger is in existence.

9. It is also well settled that mere pendency of the civil suit is no sufficient ground for dropping any proceeding under Section 133 or 137 or 138 of the Code of Criminal Procedure because civil suit decides permanent settlement of the rights of the parties but if the nuisance is existing and urgent relief is required then Section 133 of the Code of Criminal Procedure will certainly come into play. In other words, if the nuisance is such that there is urgent need of removal of nuisance or obstruction on the pathway, the enquiry is to be made by the learned Magistrate and order is to be passed and learned Magistrate's, right to pass appropriate order in such urgent cases, cannot be denied merely because some civil suit is pending wherein no specific order has been passed. But the proceeding under Section 133 of the Code of Criminal Procedure obviously cannot be enforceable when a specific order is passed by the civil court in respect of the possession of the property or when rights of parties are decided.

10. Let us come back to the present case wherein merely an apprehension of threat has been expressed over a pathway the right off which is yet to be finally decided by a competent Civil Court. Moreover, in the present context, the nature of relief which has been granted by the learned Executive Magistrate, has been passed only on the basis of a police report and no evidence was

taken, in compliance with section 138 of the Code before making the order absolute.

11. Learned advocate for the petitioners referred a Judgment of Andhra Pradesh High Court passed in the case of **Kranti Parcel Service vs. The State** which was disposed of on 10.9.1996 stating that Section 138 of the Code prescribes the procedure to be followed after appearance of the person in pursuant of the show cause notice. It mandates that the Magistrate shall take evidence in the matter as in a summons case and there, afterwards if he is satisfied with the order made originally is reasonable, he shall confirm the same or if he thinks, to modify he can modify the orders earlier passed by him. If the Magistrate is not so satisfied no further proceedings shall be taken in the case.

12. Accordingly, Sub-section (1) of Section 138 of the Code of Criminal Procedure casts an obligation on the Magistrate to take evidence as in a summons case and admittedly in the present case, no evidence was recorded by the Magistrate.

13. Having considered the facts and circumstances of the case and considering the fact that there is no urgent need of removal of nuisance or obstruction on the path in view of the fact that a competent civil court has already passed an order of status quo in respect of nature and character of property where alleged pathway exists and which is still in force and by which the parties in the suit are compelled to maintain the present nature and character of the property in question, I find that there is hardly any chance of

creating immediate obstruction on the alleged path or there is any urgent need of removal of nuisance and as such the proceeding initiated under Section 133 of the Code of Criminal Procedure if allowed to continue will be an abuse of process of court and may confront the order of status quo in respect of which appropriate civil court is in seisin.

14. In view of the above, the revisional application being CRR 3357 of 2019 is allowed.

15. The entire proceedings of M.P. Case no. 504 of 2014 under Section 133 of the Code of Criminal Procedure is hereby quashed.

There will be no order as to costs.

Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)