(1982) 09 KL CK 0013

High Court Of Kerala

Case No: S.A. 714 of 1977

Kuppandy		APPELLANT
	Vs	
Sivasankaran		RESPONDENT

Date of Decision: Sept. 20, 1982

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11, 9
- Criminal Procedure Code, 1973 (CrPC) - Section 133, 133(1), 133(2), 137, 137(2)

Citation: (1982) KLJ 598

Hon'ble Judges: George Vadakkel, J

Bench: Division Bench

Advocate: T. C. Mohandas, for the Appellant; N. K. Sreedharan and M. C. Gopi, for the Respondent

Final Decision: Dismissed

Judgement

1. The defendent is the appellant. The plaintiff-respondent died and his legal representatives are additional respondents 2 and 3. The appellant and the respondents are neighbours. -The appellant has his residence in the eastern plot (plaint B schedule property) and the res-pondents have their house in the western plot (plaint A schedule property) The appellant''s compound is lower in level than that of the respondent. There is a fence 3 to 4 feet high dividing the two compounds. This fence is 6 to 10 inches west of the wall of the appellant''s house. There is a mango tree in the respondent''s compound. It stands 4 feet 7 -inches west of the wall of the appellant''s house. In July 1973 when the Commissioner inspected it, its bottom portion had a girth of about 40 inches. It was then 30 to 35 feet tall. The Commissioner estimated that it was then 10 to 14 years old. In his opinion it is a healthy tree which is not likely to fall down. It is common case that this mango tree is there even today and it has not fallen down till now. This tree leans a little to the east. It has 3 main branches at a height of 51/2 feet from the ground level. One of its branches grows straint up and the other two branches grow east and south-east

into the appellant''s compound and towards the appellant''s building. The dispute in this case concerns this mango tree - as to whether it should be cut and removed.

2. On 2-12-1979 the appellant filed a complaint before the Executive First Class Magistrate, Palghat stating that the branches of the mango tree over-hanging the appellant''s compound is likely to endanger the lives of those who live in the appellant''s house. The Executive First Class Magistrate forwarded it to the Tahsidar, Palghat for his report. On receipt of the Tahsildar''s report, the Executive First Class Magistrate, on 5-4-1971 passed a conditional order u/s 133 of the Code of Criminal Procedure, 1898 requiring the plaintiff to cut and remove the mango tree or to appear before him on 7-5-1971 and show cause against the same. The plaintiff appeared on 7-5-1971 and filed his objections. The Executive First Class Magistrate then took evidence. He made the conditional order absolute. Ext. B2 is the copy of that order. It is dated 31-12-1971. The plaintiff went up in revision before the Sessions Court, Palghat. That Court was of the view that Ext. B2 order has to be Interfered with and therefore referred it to this Court u/s 438 of the Code of Criminal Procedure. This Court held that no interference with Ext. B2 order is called for and that the reference was bad. This Court, therefore, rejected the reference. This was as per Ext. Bl order dated 28-8-1972.

3. On 19-10-1972 the plaintiff filed O.S. No. 434 of 1972 before the Munsiff''s Court, Palghat for declaration that the mango tree is not liable to be cut and removed pursuant to Ext. B2 order. This is the substantial relief sought for in the plaint. The appellant resisted this suit. The lower courts found that the tree in question is a healthy tree and it is not likely to fall down. However, the lower courts held that the plaintiff is liable to cut and remove the two branches overhanging the appellant''s compound and growing towards the appellant''s house. The lower courts also directed the plaintiff to fasten and secure the trunk of the tree by strong metal ropes tied to another mango tree standing further west and inside the plaintiff''s compound.

4. The concurrent findings of fact that the mango tree in question is a healthy tree and that it is not likely to fall down as a whole are beyond challenge in this court and the correctness thereof was not canvassed before me. Moreover, the apprehension entertained by the appellant as early as from December 1970 that the tree might fall down has not materialised till now - about 12 years thereafter - and it is still there, as admitted at the bar.

5. The questions, of law raised are; that the suit is not maintainable, and that in any event the same is barred by the rule of rest judicata.

6. Proceedings u/s 133 are intended to empower and enable the Magistrates to deal with cases of emergency. Necessarily, therefore, they are summary in nature and procedure. Chapters IX, X and XI of the 1898 Code under the captions ''unlawful assemblies,'' ''public nuisances'' and ''temporary orders in urgent cases of nuisances

or apprehended danger,'' have been brought into one chapter in the present Code, viz., chapter X, with the heading ''Maintenance of Public Order and Tranquility,'' a chapter divided into three parts: A, relating to ''Unlawful Assemblies;'' B, as regards ''Public Nuisance;'' and, C, in respect of ''urgent cases of nuisance or apprehended danger.'' The questions that arise in proceedings of this kind taken by a Magistrate, are not disputes inter-. partes between two persons but one between the Magistrate as representing the Public at large and the person against whom the proceedings are taken. If the questions arising in such proceedings are inter-partes disputes, where one party asserts his rights as against the opposite party and claim relief on the basis that the opposite party has violated the complaining party''s legal rights, and the other party denies or defends such violation, the dispute, invariably, is of a civil nature to be redressed by a civil court. The Executive First Class (Magistrate is not competent to decide and determine such private dispute. His jurisdiction is exercised in order to maintain public order and tranquility within the territorial limits of his jurisdiction. Mark, under S. 133 the Magistrate acts on receiving a police-report or other information and on his prima facie being satisfied of one or the other of the matters mentioned therein, and that thereunder the complainant, if any, is only an informant. In short, therefore, the jurisdiction of the Executive First Class Magistrate is entirely different from that of the civil court, and an order passed by the former would not and could not operate as rest judicata Pro veritate accepitur (A thing adjudicated is received as the truth) for the simple reason nothing has been adjudicated as between any two parties. Since there has been no decision as between the plaintiff and the defendant by the Executive First Class Magistrate of any matter in dispute between them as per Ext. B2 order that order would not bar the suit by the rule of estoppel by judgment or estoppel per rem judicatum. There can be no case that S. 11 of the Code of the Civil Procedure 1908 is attracted, for, there are no two suits, one decided earlier, the decision wherein would preclude a decision on the same matter in issue in the other, viz., the subsequently decided suit.

7. The lower court''s finding on issue 2, namely, ''whether the suit is hit by rest judicata and estoppel by judgment'' which is in favour of the plaintiff is right and does not call for any interference.

8. Is the suit not maintainable? is the next question that falls to be examined. The argument in short is that the civil court is not competent to sit in appeal or revision over Ext. B2 order of the Executive First Class Magistrate as confirmed by this Court as per Ext. Bl order. Submitted in this form, the, principle stated, namely, that the civil court has no appellate or revisional jurisdiction over criminal courts and in respect of orders passed under and by virtue of exercise of the jurisdiction vested in those courts, admits of no exception. However, the point raised is not that simple as is attempted to be made out as will be seen hereinafter.

9. Section, 133 of the Criminal Procedure Code, 1898 (this is substantially the same as S. 133 of the present Code) inter alia provides that when the Magistrate, on receiving a police-report or other information and on taking such evidence (if any) as he thinks fit, considers that 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 therefore it has to be removed or supported, he may make a conditional order requiring the owner of the tree to remove or support it; or, if he objects to do so, to show cause why he need not do so. Under sub-section 2 of S. 133 such a conditional order cannot be called in question in any civil court, presumably because it is not a final order, wherefor the concerned person can show cause against the order before the Magistrate himself and can have the proceedings dropped by the Magistrate under S. 137(2) . If however it is not shown to the Magistrate that the conditional order is not reasonable, he shall under S. 137(3) make the conditional order absolute. So far as the absolute order is concerned it is not provided anywhere in the Code that it shall not be called in question in a civil court.

10. Section 140 of the Old Code (S. 141 of the present Code) sets out the procedure on the preliminary order being made absolute. Sub-section 3 of Section 140 is significantly silent about any suit calling in question the absolute order, though that sub-section prohibits any suit in respect of anything done by the Magistrate in good faith under S. 140 . The suit prohibited by S. 140(3) is, obviously, a suit for damages against the Magistrate, Section 142of the old and the new Code enables the Magistrate to issue such injunction to the person against whom a preliminary order has been made as is necessary, to obviate or prevent such danger or injury as is apprehended pending the determination of the matter, if the Magistrate considers that immediate measures have to be taken to prevent imminent danger or injury of a serious kind to the public. Here again there is no provision (as is obtained in S. 133(2) that the injunction-order shall not be called in question in any civil court, though under S. 142(3) as in the case of S. 140(3)) no suit shall lie in respect of anything done in good faith by a Magistrate under S. 142 .

11. Therefore, while S. 133(2) expressly and explicitly bars a suit calling in question a preliminary order under S. 133(1) , there is no such prohibition as regards an injunction order passed by the Magistrate under S. 142 and the final order passed under S. 137 , though the Magistrate is protected from any suit in respect of anything done by him in good faith pursuant to the injunction order and/ or the final order, as the case may be. It cannot be said that the legislature overlooked the likelihood of the injunction order or the final order being challenged in civil courts, for the Legislature was aware of such a contingency in the case of a preliminary order and provided against such eventuality by enacting sub-section (2) of S. 133 of the Code. It seems to me that the Legislature deliberately did not provide against such suits in the cases of an injunction order and final order and that the Legislature intended only to protect the Magistrate who in good faith has passed an injunction

order or a final order and has done something pursuant to and in furtherance of such order, from being dragged to a civil court to defend his action.

12. This is as it ought to be. By having recourse to the summary proceedings intended to secure and maintain public order and tranquility, the Magistrate cannot invade civil rights of citizens to any extent than that is absolutely necessary and is immediately called for. For, since nuisance is a practical branch of the law, one which assumes that because a man has been damnified without fault of his own, that therefore someone else must be to blame, it naturally tends to stretch out in all directions. It is like equity, both in its extent and in its wide application of moral justice; the spirit of the law of nuisance is the maxim sic utere tuo ut alienum no leadas'' (So use your own property as not to injure your neighbour''s). Law of Nuisances, Pearce and Meston, p. 4. And, as stated in Whittled and Jolowiez on Tort, (11th Edn., p. 352) ''the prevailing stance of nuisance liability is that of protection of private rights in the enjoyment of land, so that control of injurious activity for the benefit of the whole community is incidental. So far as the preliminary order is concerned, the person aggrieved by such an order, can appear before the Magistrate and establish that the preliminary order is unreasonable and not called for. However, the Magistrate may honestly take the view that there is likelihood of imminent danger or injury of a serious kind to the public and that urgent steps have to be taken to prevent such danger or injury, even before the determination of main proceedings. He is, therefore, empowered to issue such injunction as is required to prevent the danger or injury. This, some times may turn out to be uncalled for in the final proceedings, whereupon, the proceedings will be dropped; or, where the preliminary order is made absolute, may be established to have been not necessary in a civil court. In either case, if the Magistrate has acted in good faith, he would not be and cannot be made, liable for anything done pursuant to the injunction order or the final order, as the case may be. But where pursuant to such orders of the Magistrate, no mischief and harm has been done, the civil court would be competent to declare that the premise on which such orders are founded is not obtained, and such declaration will prevail over the (Magistrate''s direction, at any rate, as between the parties to the suit.

13. No doubt, in cases where the Magistrate''s order has been implemented, there will be no remedy to the affected person, since he cannot sue the Magistrate for damages; nor can he, perhaps, sue any person who has figured as the informant, for, as earlier seen, the criminal proceedings of this nature are not between such informant and the affected party - I am not deciding this aspect here.

14. It seems to me that the proceedings u/s 133 of the Code of Criminal Procedure do not bar a suit, if such a suit is otherwise maintainable under the Code of Civil Procedure. I find support for this view in the decision of the Full Bench of five Judges of the Calcutta High Court in Chuni Lall v. Ram Kishen Sahu (I.L.R. 15 Cal. 460 at 468-69). Affirming the earlier Full Bench decision of that Court in Raj Koomar Singh

v. Shahebzada Roy (I.L.R. 3 Calcutta 20), it was held:

The decision of a Magistrate in a summary proceeding is not, I think, ordinarily final and conclusive on a question of title, and does not exclude the juris-diction of the Civil Courts to enquire into the matter, unless the intention of the Legislature that it shall have such effect is shown. In the present case, no such intention is expressely declared, and such indications of intention as arc to be found seem to me to point in the other direction, It is expressly said that a preliminary order under S. 133 is not to be called in question by a Civil Court, and that no suit shall He (which means I apprehend no suit for damages) for anything done in good faith under s. 140 or s. 142 . But nothing is said as to the order absolute which, if anything does so, affects the title.

15. The Bombay High Court in the Secretary of State for India in Council v. Jeethabhai Kalidas (I.L.R. 17 Bombay 293) followed this decision and ruled:

It has,, however, been throughout contended that the jurisdiction of the Court is taken away by section 133 of the Criminal Procedure Code, which provides that "no order duly made by a Magistrate under this section shall be called in question in any Civil Court". We entirely agree with the lower appeal Court that the decisions of this Court, as well as of the Calcutta High Court, are distinct authorities that the Magistrate''s order is not a conclusive determination of the question of title - Chuni Lali v. Ram Kishen ILR 15 Calc. 460.

16. The Allahabad High Court has also taken the same view in Duli-chand v. Emperor (A.I.R. 1929 Allahabad 833) wherein it is said:

The view I take of proceedings under S. 133 is that the procedure, adopted by a Magistrate is more or less summary and his decision goes so far as to fix upon the party who must go to the civil court to get a civil dispute decided.

No decision which takes a contrary view has been brought to my notice.

17. The next question that arics for consideration is as to whether the suit for the declaration that the tree standing in the plaintiff''s compound is not liable to be cut and removed pursuant to the final order passed under S. 133 of the Code of Criminal Procedure and to injunct the defendant from causing it to be cut and removed pursuant to that order (plaintiff has sought for this consequential relief also), is maintainable under S. 9 of the Code of CiviJ Procedure, 1908. Shortly out, the point that falls to be decided is, as to whether such a suit is one of civil nature and whether such a suit would lie on general principles.

18. Everyone can use his land in any manner he likes short of so using it as to injure his neighbour. Protruding branches of trees, though may not amount to encroachment or trespass, would constitute nuisance. The neighbour into whose compound the branches protrude may have resort to court if thereby he is damnified or inconvenienced. Where he incurs no damage nor is inconvenienced he

has no cause of action against the owner of the tree. However, he himself can abate the nuisance bycutting back the offending branch or branches. But for This purpose he cannot enter upon the compound where the tree stands, unless, it be, there is the threat of imminent danger justifying instant action. There are the normal rights and liabilities of neighbouring owners of land in regard to growing trees and plants in their respective compounds. In this regard, it is immaterial that the tree or plant or is one which has spontaneously grown there. See Fleuing on the Law of Torts, 5th Edn., pp. 44 and 430; and Bavey v. Harrow Corporation ((1958) 1 Q.B. 60) where Lord Goddard C.J. said as follows:

If trees encroached onto adjoining land, whether by branches or roots, and caused damage, an action for nuisance would lie against the owner of the land on whose property the trees stood. No distinction was to be drawn between trees that were planted and those that were self-sown and it was no defence to say that damage was caused by natural growth.

Tested by these rules, the appellant in this case is entitled to lop off the branches of the mango tree in question to the extent they protrude into his compound. He can file a suit to have such branches cut and removed, if he is in any way demnificd or inconvenienced. However, he has no cause of action in respect of any portion of the tree which grows within the limits of the respondents'' compound. If there is any threat by the appellant to the growth of the tree confined to the respondents'' compound, the respondents are entitled to an injunction restraining the appellant from carrying out such threat. The threat here is that the appellant will cause the tree to be cut and removed under colour of Ext. B2 order of the Executive First Class Magistrate''s Court as confirmed by Ext. Bl order of this Court. The respondents therefore seek for a declaration that the tree in question is not liable to be cut and removed pursuant to the said orders by the appellant or any one at his instance. Both the reliefs are reliefs of a civil nature. But for any other inhibition or prohibition, on general principles such a suit would lie. As already seen, there is no other inhibition or prohibition. So the suit is maintainable.

I dismiss this appeal, but in the circumstances of the case without any order as to costs.