

**INDRAJIT MAHANTY, J.**

CRLREV NO.781 OF 2010 (Decided on 29.03.2011)

**RAVINDRA KUMAR MALLICK**

.....Petitioner.

.Vrs.

**NARAYAN MALLICK & ANR.**

.....Opp.Parties.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.133.

For Petitioner - M/s. P.K.Pattnaik, S.N.Senapati,  
A.K.Dwibedy, S.K.Pattnaik &  
H.R.Mishra.

For Opp.Parties - M/s. Padmanava Jena , K.C.Sahoo,  
H.K.Tripathy, P.K.Das & C.Kasturi

---

**I.MAHANTY, J.** The petitioner in the present revision application has sought to challenge the judgment dated 16.4.2010 passed by the learned Adhoc Addl. District and Sessions Judge, Fast Track Court No.IV, Cuttack in Criminal Revision No.37 of 2009/01 of 2010, whereby, the lower revisional court has been pleased to set aside the order dated 20.7.2009 passed by the ADCP-cum-Executive Magistrate, Cuttack in Criminal Misc. Case No.297 of 2009 wherein a proceeding under Section 133 Cr.P.C. had come to be disposed of directing cutting down and removal of a teak tree located in the premises of the opposite parties and on finding that the said tree had in a tilted/dangerous manner over the asbestos of the dwelling house of the petitioner by creating apprehension of danger to the life and property. This act on the part of the opposite parties was held to be amounting to public nuisance under Section 133(d) Cr.P.C. and, therefore, liable to be removed or cut down.

**2.** On perusal of the record, it appears that the order of the ADCP-cum-Executive Magistrate came to be set aside by the lower revisional court, inter alia, on two grounds:

Firstly, on the finding that the notice had been served on the 2<sup>nd</sup> party (Opposite Party No.1 herein) only on 19.6.2009 and no notice has been served on the Opposite Party No.2-Surendra Mallick (2<sup>nd</sup> party) and, therefore, proceeded ex parte against the 2<sup>nd</sup> party and held that notice was not sufficient.

Secondly, the lower revisional court quashed the order passed by the learned ADCP-Cum-Executive Magistrate under Section 133 Cr.P.C. since the nuisance alleged by the first party (petitioner herein) was, in essence, a private dispute and did not attract the provision under Section 133 Cr.P.C.

**3.** Learned counsel for the petitioner submitted that the complaint of the present petitioner was to the effect that the 1<sup>st</sup> Party-petitioner had filed under Section 133 Cr.P.C. before the learned ADCP-Cum-Executive Magistrate, Cuttack seeking

removal/cutting of a Saguan (Teak) tree which is titled in a dangerous manner, over the asbestos roof of the petitioner and thereby, endangering the life of the family of the petitioner as well as his property.

He submitted that the petitioner had at no point of time claimed title over the teak tree in question and therefore, the finding of the lower revisional court that the dispute of the proceeding is essentially a "civil dispute" was erroneous. Apart from the aforesaid fact, learned counsel for the petitioner stated that the report of the I.I.C., Madhupatna P.S. clearly confirmed the assertion made by the petitioner regarding the danger caused by the teak tree to the dwelling house as well as to the life of the family members of the petitioner. He stated that in spite of intervention of the local gentries, the opposite party did not pay any heed to their suggestion to compensate for the damage caused to the dwelling house of the petitioner and instead, no compensation was ever given and the petitioner had to carry out repairs out of his own recourses.

4. Ms. Kasturi, learned counsel for the opposite parties, on the other hand, submitted that the allegation made by the 1<sup>st</sup> party-petitioner (informant) even under Section 133 Cr.P.C., did not make out any case of "public nuisance" as contemplated thereunder. Apart from the aforesaid assertion, learned counsel further submitted that, the report of the I.I.C., Madhupatna P.S. itself would indicate that pursuant to the present order, there is no real danger to the dwelling house of the petitioner or the life of the petitioner and his family, since the I.I.C. has noted that the tree may only fall in the event of severe cyclone.

5. Perused the order passed by the lower revisional court as well as by the ADCP-Cum-Executive Magistrate. After hearing the learned counsel for both the parties, insofar as the finding of the lower revisional court is concerned relating to the non-service of notice to Opposite Party No.2-Surendra Mallick, the same is substantiated. No notice appears to have been served on the 2<sup>nd</sup> party-Surendra Mallick and absence of necessary notice on the 2<sup>nd</sup> party, the learned Executive Magistrate should not have proceeded in the matter ex-parte without affording the 2<sup>nd</sup> party an adequate opportunity to present this case.

Insofar as the second finding of the lower revisional court is concerned, vis-à-vis holding that the complaint made by the petitioner was in the nature of "private complaint" and, therefore, the same did not come within the ambit and scope of Section 133 Cr.P.C., I am in respectful agreement on the submissions made by the learned counsel for the petitioner that, even though the tree is standing on the land owned by the opposite party (second party) yet, if such tree is likely to endanger the life of their neighbour or endanger their dwelling house, the petitioner has a right to move the Executive Magistrate under Section 133 Cr.P.C. In this respect, Sec. 133 (1)(d) Cr.P.C. is quoted hereinbelow:

**"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—

(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”

In terms of the aforesaid provision, it is clear therefrom that where an Executive Magistrate receives a report from the police officer and on considering such facts as he think proper is empowered to direct the removal of a tree if necessary. Such a Magistrate is empowered to direct removal of such obstruction or nuisance if the same is likely to fall and thereby cause injury to the persons living. The Executive Magistrate does not need to wait till the tree collapses prior to issuing the necessary directions. This authority is clearly vested in order to prevent injury or damage and such nuisance can be directed to be removed, if the Magistrate is of the view that it may likely cause damage or injury.

6. In view of the aforesaid provision, it is clear that the Executive Magistrate is empowered to direct removal of such tree which in the likelihood of falling may cause injury to any person/property and based on the report of the Police Officer or by taking such evidence as may be necessary. Therefore, the view expressed by the lower revisional court that the dispute in the present case cannot be settled under Section 133 Cr.P.C. is erroneous. It is not necessary that a tree must fall and cause injury to a person prior to an order of removal of such tree be passed by the Executive Magistrate. The real likelihood of a tree falling and causing injury to any person/property is adequate for the purpose of directing its removal.

7. In view of the finding arrived at hereinabove, the present revision is allowed with the following directions:

- (i) The order dated 16.4.2010 passed by the learned Adhoc Addl. District and Sessions Judge, Fast Track Court No.IV in Criminal Revision No.37 of 2009/1 of 2010 is set aside and the order dated 20.7.2009 passed by the learned ADCP-cum-Executive Magistrate, Cuttack in Criminal Misc. Case No.297 of 2009 is also set aside and the matter stands remitted back to the learned ADCP-cum-Executive Magistrate, Cuttack for disposal afresh.
- (ii) Both the parties are directed to appear before the learned ADCP-cum-Executive Magistrate within a period of two weeks from today along with a certified copy of this order and no further notice need be issued to either party.
- (iii) The opposite parties may file their show-cause within two weeks therefrom and the Executive Magistrate may proceed to take such evidence as he may deem necessary apart from the evidence collected.
- (iv) The opposite parties shall be given an opportunity of cross-examine Sri R.Prusty, the I.I.C., Madhupatna P.S. as well as Sukant Kumar Mallick who has been examined as a witness on behalf of the 1<sup>st</sup> party-petitioner.
- (v) After affording an opportunity of hearing to both the parties, the ADCP-cum-Executive Magistrate shall do well to dispose of the matter in accordance with law, expeditiously preferably within a period of four weeks from the date of their appearance keeping in view of the fact that the Monsoon is arriving shortly.

- (vi) LCRs be sent back to the respective courts immediately.

Revision allowed.