
(2025) 10 JH CK 0042

Jharkhand HC

Case No: Criminal Miscellaneous Petition No. .1205 of 2017

Kashi Rajak

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision: Oct. 15, 2025

Acts Referred:

- Code of Criminal Procedure, 1973 — Section 133, 133(1), 137, 138, 482

Hon'ble Judges: Anil Kumar Choudhary, J

Bench: Single Bench

Advocate: Sudhir Kr. Sharma, Ram Prakash Singh, Shashi Shekhar Dwivedi, V. S. Sahay,
Sanjay Kr. Pandey, Anurag Kumar

Final Decision: Allowed

Judgement

Anil Kumar Choudhary, J

1. Heard the parties.

2. This Criminal Miscellaneous Petition has been filed invoking the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 with the prayer to quash the order dated 10.03.2017 passed by the learned Additional Sessions Judge-V, Giridih in Criminal Revision No.68 of 2015 whereby and where under the learned Additional Sessions Judge-V, Giridih has allowed the Criminal Revision and set aside the order dated 08.11.2014 passed by the learned Sub-Divisional Magistrate, Giridih in connection with Case No.16 of 2014 by which the learned Sub-Divisional Magistrate, Giridih dropped the proceeding under Section 133 of Cr.P.C.

3. The brief fact of the case is that the opposite party No.3 filed an application under Section 133 of Cr.P.C. which was registered as Case No.16 of 2014 before the learned Sub-Divisional Magistrate, Giridih. It was contended by the opposite party No.3 herein, who was the first party of the said proceeding before the Subdivisional Magistrate, that the petitioner is obstructing the road leading to plot No.203 Khata No.19 of Mouza- Sirsia and has constructed a house by encroaching over the same. The learned Sub-Divisional Magistrate, Giridih did not pass any conditional order.

After obtaining the report from the Circle Officer, Giridih and the Officer In-charge of Giridih Muffassil Police Station as well as the affidavit of the six persons filed on behalf of the opposite party No.2/first party; came to the conclusion that the petitioner herein who was the member of the second party before the Sub-Divisional Magistrate, Giridih, has not encroached upon any Government land/public road and on the basis of the same dropped the proceeding.

4. Being aggrieved by the said order dated 08.11.2024 passed by the learned Sub-Divisional Magistrate, Giridih in Case No.16 of 2014, the opposite party No.2 herein filed Criminal Revision No.68 of 2015 in the court of learned Sessions Judge, Giridih which was ultimately heard and disposed of by the learned Additional Sessions Judge-V, Giridih. The learned Additional Sessions Judge-V, Giridih considered the provisions of Section 133, 137 and 138 of Cr.P.C. and came to the conclusion that the evidence has to be taken by the concerned court but as the learned Sub-Divisional Magistrate, Giridih has not recorded any evidence but relied upon the report of the Police Officer and the Circle Officer, Giridih, having dropped the proceeding; set aside the same.

5. Learned counsel for the petitioner submits that here is the case where the learned Sub-Divisional Magistrate, Giridih has not made any conditional order requiring the petitioner of this Cr.M.P. to remove any obstruction etc., in terms of Section 133 (1) of Cr.P.C. nor has he called upon the members of the second party as to whether the member of the second party objects to such removal. Hence, the applicability of Section 138 of Cr.P.C. does not come into the operation. It is next submitted that therefore, the learned Additional Sessions Judge-V, Giridih has committed an illegality by setting aside the order of the learned Sub-Divisional Magistrate, Giridih. Hence, it is submitted that the prayer of the petitioner, as prayed for in the instant Cr.M.P., be allowed.

6. Learned Addl.P.P. appearing for the State and the learned counsel for the opposite party No.2 on the other hand vehemently oppose the prayer of the petitioner made in the instant Cr.M.P. and submit that since the proceeding under Section 133 of Cr.P.C. was registered, so, it was incumbent upon the learned Sub-Divisional Magistrate, Giridih to record the evidence in terms of Section 138 of Cr.P.C. and having not done so the learned Additional Sessions Judge-V, Giridih has rightly set aside the same. It is lastly submitted that this Cr.M.P., being without any merit, be dismissed.

7. Having heard the rival submissions made at the Bar and after carefully going through the materials available in the record, it is pertinent to mention here that the conjoint reading of Sections 133, 137 and 138 of Code of Criminal Procedure make it abundantly clear that whenever inter alia a Sub-Divisional Magistrate receives the report of the Police Office or other information and upon taking such evidence, if any, he thinks it fit and considers that any unlawful obstruction etc., should be removed from any place etc. and to do any act or omission as mentioned in Section 133 (1) of Cr.P.C. then such Magistrate may make a conditional order requiring the person causing such obstruction etc., to remove the same. Once inter alia the Sub-Divisional Magistrate makes the conditional order requiring the person causing the obstruction etc., within the time to be fixed by the order to remove such obstruction etc., he will direct such person to appear before it or some other Executive Magistrate subordinate to him at the time and place to be fixed by the order and to show-cause in the manner under Section 137 and 138 of the Cr.P.C. as to why the order should not be made absolute. So, upon making of the conditional order requiring removal of the obstruction

etc., the person directed to remove the obstruction etc., may object to do so and he can appear before the Sub-Divisional Magistrate or some other Executive Magistrate subordinate to him at the fixed time and place to be mentioned in the order of the Sub-Divisional Magistrate. If the person removes the obstruction as ordered by the Sub-Divisional Magistrate then automatically the proceeding comes to an end but instead of removing the obstruction, if the person objects to the same and appears before the Sub-Divisional Magistrate, the Magistrate shall question such person as to whether such person denies the existence of any public right in respect of the way, river, channel or place and if such person does so, the Magistrate shall before proceeding under Section 138 of the Cr.P.C., inquire into the matter if upon such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, such Magistrate shall stay the proceedings until the matter of existence of such right as has been decided by a competent court but if such Magistrate finds that there is no such evidence, the Magistrate shall proceed with the procedure as laid down under Section 138 of the Cr.P.C. So, once the person against whom the order under Section 133 of Cr.P.C. is made, appears and shows-cause against the order, it is incumbent upon a Magistrate to take evidence in the matter as in a summons case.

8. It is crystal clear that the Magistrate need not take evidence at the time of making conditional order under Section 133 (1) of Cr.P.C. and such conditional order may even be made ex-parte. So, from the bare reading of Section 133 of Cr.P.C., it is crystal clear that merely because an application under Section 133 of Cr.P.C. is filed, the Magistrate is not duty bound to make a conditional order regarding removal of any encroachment from any public place etc. But the Magistrate may make such conditional order, if and only if, such Magistrate upon receiving the report of the Police Officer or other information and on taking such evidence, if necessary, thinks fit that unlawful obstruction or nuisance should be removed from the public place etc.

9. Now, coming to the facts of the case the Magistrate upon receipt of the Police Report, Report of the Circle Officer and the affidavits of six persons filed by the first party to the Case No.16 of 2014 and upon spot visit, came to a conclusion that the members of the second party have not made any encroachment nor have they constructed any encroached public place. So, obviously, the learned Sub-Divisional Magistrate, Giridih was left with no option but to drop the proceeding; which he has rightly done. Since no conditional order has been passed by the learned Sub-Divisional Magistrate, Giridih under Section 133 (1) of Cr.P.C., the appearance of the second party before the Magistrate concerned and filing show-cause does not arise and in the absence of the same the mandate under Section 138 of the Cr.P.C. that the Magistrate shall take evidence in the matter as in summons case does not arise. It appears that the learned Additional Sessions Judge-V, Giridih was under the erroneous impression that this is a case where the Sub-Divisional Magistrate, Giridih was to take evidence and has set aside the order of the learned Sub-Divisional Magistrate, Giridih.

10. Under such circumstances, as the conditional order having not been passed by the learned Sub-Divisional Magistrate, Giridih in terms of Section 133 (1) of Cr.P.C., the learned Additional Sessions Judge-V, Giridih has committed a grave illegality by setting aside the order of the learned Sub-Divisional Magistrate, Giridih, on the ground of non-recording of the evidence under Section 138 of Cr.P.C.

11. Accordingly, the order dated 10.03.2017 passed by the learned Additional Sessions Judge-V, Giridih in Criminal Revision No.68 of 2015 is not sustainable in law, hence, the same is quashed and set aside and the order dated 08.11.2014 passed by the learned Sub-Divisional Magistrate, Giridih in Case No.16 of 2014 is restored.

12. This Cr.M.P. stands allowed to the aforesaid extent.