

(1971) 11 GAU CK 0001  
**Gauhati High Court (Kohima Bench)**  
Case No: None

Rasamayee Das and Others

APPELLANT

Vs

Nakul Ch. Deb and Others

RESPONDENT

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**Date of Decision:** Nov. 25, 1971**Acts Referred:**

- Criminal Procedure Code, 1898 (CrPC) - Section 133, 134

**Citation:** (1972) CriLJ 936**Hon'ble Judges:** P.K. Goswami, C.J**Bench:** Single Bench

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**Judgement**

@JUDGMENTTAG-ORDER

P.K. Goswami, C.J.

This criminal reference is by the learned Sessions Judge. Lakhim pur recommending to quash an order passed u/s 133. Criminal Procedure Code. or in the alternative to remand the case to the Magistrate for disposal in accordance with law.

2. The proceeding u/s 133. Cr. P, C was drawn up by the Magistrate on 21st March 1968 on an application by the first party consisting of three applicants having their residential houses close to one another in Dag No. 1248 of Periodic Patta No. 437 of Tinsukia town since 35 years. It is alleged that a oath of 12 feet in breadth in front of their houses which adjoins the main road. described as Khageswar Road on the northern side. was obstructed by closing it by the opposite parties by constructing a brick wall 50 feet in length. The closure of the above path totally put a stop to their being able to communicate with the main road putting them in great distress. The Chairman. Development Authority. Tinsukia, passed a strict order directing the opposite parties not to construct a brick wall in that manner but the order was disregarded.

The opposite parties were served with the conditional order u/s 133 and they entered appearance and after taking two dates for showing cause. finally submitted their objection on 28th May 1968. They denied the claim of the first party and also denied the existence of any public right in respect of the path.

The Magistrate thereafter examined the witnesses of the respective parties and heard arguments on 29th January 1969. The Magistrate made a local inspection in the presence of the parties on 16th February 1969 and heard further arguments on 7th April 1969. The impugned order was passed on 29th April 1969 directing the opposite parties to remove the obstruction which has led to the present reference.

3. Proceeding u/s 133 is drawn up by making a conditional order requiring the person causing the obstruction etc.. to remove the same or if he objects so to do. to appear before the Magistrate and move to set aside or modify the order. The person after being served with the order Section 134) shall either comply with the order or appear and show cause against the said order. He may even apply to the Magistrate for appointment of a Jury. (Section 135). On his appearance before the Magistrate the Magistrate has to question him as to whether he denies the existence of any public right in respect of the wav etc and if he denies the existence of such right the Magistrate has to enquire to find if there is any reliable evidence in support of denial of such right. This procedure is provided for u/s 139-A although in a natural sequence and setting of the provisions this section may well have been Posited immediately after Section 135 (possibly in that case as Section 135-A). Be that as it may there is an obligation upon the Magistrate to question the opposite party in conformity with Section 139-A. when he appears. The Magistrate in this case has not strictly complied with this procedure. All the same the opposite party has denied the existence of the public right of wav which is clear from his long written statement filed in the case. In that view of the matter this non-compliance of Section 139-A in omitting to question the opposite party is a mere technical irregularity which does not vitiate the proceedings in this case as no prejudice has been caused for not questioning the opposite party at that stage. The Magistrate then had to make an enquiry from the opposite party to find out whether there is any reliable evidence in support of his denial. There is, however no attempt to do this in this case. The Magistrate took evidence of both sides and concluded the hearing as if in a regular case. This is not in accordance with the procedure laid down in Chapter 10 of the Code.

It is apparent that the first conditional order is an ex parte order. After this ex parte order. if the opposite party objects to the order and denies the existence of a public right. the Magistrate has next to enquire in order to decide whether he will continue the enquiry or stay the proceedings. Such a decision ran be reached by examining any reliable evidence that is Produced by the opposite party in support of his denial. He is required only to consider whether there is any reliable evidence in support of the denial of the public right that is to say the right of the public to use the path. He

is not required lineally to decide whether the public right is established or not because that is a matter for decision of the civil court. All that is necessary is to be satisfied that proceedings u/s 133 can be continued by him and that can be only done if the opposite party cannot satisfy the court by producing any legal and reliable evidence to prima facie support his case of denial of such a right. (At this stage, he is not even required to examine the first party. All that is necessary is to come to a conclusion on the point by taking note of the evidence oral or documentary produced by the opposite party in support of denial of the right. If he finds that there is reliable evidence with regard to denial of the existence of the public right he has to stay the proceedings until the matter relating to the existence of such right has been decided by a competent civil court. If however, he finds that there is no reliable evidence in support of denial, he then has to take evidence of the parties in order to decide whether the conditional order passed is reasonable and proper. (Section 137). This second enquiry is not required to be conducted if the Magistrate had earlier found reliable evidence about denial by the opposite party of the existence of the public right claimed by the first party.

4. In the present case, the learned Magistrate did not approach the matter in conformity with the procedure laid down u/s 139 A with a view to find out from the evidence of the opposite party as to there being any reliable evidence in support of the denial of the existence of the public right. This is not even a case where in the final order he has answered all the points required to be dealt with under the law. On the other hand, the points for determination which the learned Magistrate set out in his order betray ignorance of the procedure laid down and this has introduced a serious infirmity in the order in the case.

5. The opposite party had taken the objection to the memorandum of local inspection made by the Magistrate about a fortnight after his local inspection. Although the learned Magistrate has stated in his order that he has not relied on the objectionable portion in the report yet preparation of the memorandum in the absence of the parties and after some lapse of time as in this case cannot be encouraged. If a local inspection is made in the presence of the parties the memorandum must be made in their presence at the spot. In any view of the matter I am not satisfied that the learned Magistrate has conducted the proceedings in this case in a regular manner and I am constrained to set aside the impugned order. The order is therefore set aside and the case is remanded to the Additional District Magistrate (J). Dibrugarh, for disposal by him in accordance with law and in the light of the observations hereinabove.

6. The learned Magistrate will treat the evidence already recorded as evidence in the case and ask the opposite party if he wants to produce any further evidence regarding his denial of the existence of public right. He will then first decide whether there is any legal and reliable evidence in support of his denial and if he finds there is no such reliable evidence, he will then ask the first party if he will produce any

further evidence and then after giving an opportunity to the opposite party to lead any evidence if he chooses conclude the enquiry at an early date. The learned Magistrate will not use the memorandum of inspection of the earlier Magistrate and may if he chooses make his own inspection for the purpose of appreciating the evidence recorded in the case.

7. The reference is accepted in the above terms and the case is remanded accordingly. As the case is remanded the opinion expressed by the learned Sessions Judge on other points not adverted to in this order will not affect the learned Additional District Magistrate in disposing of the matter independently on the merits.