

**(2001) 05 GAU CK 0010**

**Gauhati High Court**

**Case No:** Criminal Revision No. 226 of 1997

Sushil Ranjan Nath and Others

APPELLANT

Vs

Satyabrata Dey and Others

RESPONDENT

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**Date of Decision:** May 31, 2001

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 133, 142

**Citation:** (2001) CriLJ 4472 : (2001) 2 GLT 221

**Hon'ble Judges:** P.C. Phukan, J

**Bench:** Single Bench

**Advocate:** B.R. Dey, for the Appellant; P.K. Roy Choudhury, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

P.C. Phukan, J.

Heard Mr. B.R. Dey, learned counsel for petitioners and Mr. P.K. Roy Choudhury, learned counsel for opposite parties.

2. This revision petition is directed against the judgment and order date 2.4.1997 passed by the learned Sessions Judge, Kamrup, Guwahati in CR No. 11/97 setting aside the order of the Executive Magistrate in Case No. 230m/95 u/s 133 CrPC whereby the learned Magistrate passed order for removing a portion of 6 feet wall for public path measuring 10 ft. from North to South.

3. The facts leading to filing this revision petition may be stated as follows:

4. The present petitioners filed a petition before Deputy Commissioner, Kamrup, Guwahati for removal of blockage in public road in patta No. 1 of Odalbakra FS Grants stating therein that by blocking the Bye Lane No. 2 of Green Wood Lane near the plot of S.B. Dey, great inconvenience has been caused to the residents of the locality. The police report was called for and by preliminary order dated 21.6.1995 a proceeding u/s 133 CrPC was drawn up and a conditional order was passed. The

opposite party contested the proceeding and disputed the claim of public path and denied the existence of public right. While the matter was pending at that stage, the petitioners filed an application for passing necessary order u/s 142 CrPC.

5. After hearing the learned counsel for the parties, learned Magistrate vide order dated 21.1.1997 ordered for removal of a portion of 6 ft. wall constructed on the disputed road.

Opposite party filed Cr. Revision No. 11/97 against the demolition order and the learned Sessions Judge by his order dated 2.4.1997 allowed the revision petition and set aside the impugned order.

6. Being aggrieved, the petitioners have come up before this court in the instant revision on the ground that the order dated 21.1.1997, being interlocutory order, the learned Sessions Judge ought not to have entertained the revision petition in view of the specific bar u/s 397(2) CrPC and as such the learned Sessions Judge acted illegally by passing the impugned order dated 2.4.1997 that there is specific bar u/s 132(2) CrPC for approaching civil court and that no order duly made by the Magistrate u/s 133 CrPC can be questioned in any civil court.

7. Learned counsel for the opposite party Mr. P.K. Roy Choudhury contends that the order dated 21.1.1997 passed by the learned Magistrate is not an interlocutory order and in support of his contention referred to a decision in K.K. Patel and Another Vs. State of Gujarat and Another, wherein it has been held as follows:

"It is now well settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage (vide Amar Nath v. State of Haryana, Madhu Limaye v. State of Maharashtra, V.C. Sukla v. State through CBI and Rejendra Kumar Sitaram Pande v. Uttam). The feasible test is whether by upholding the objections raised by a party it would result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code."

8. In the instant case, Mr. P.K. Roy Choudhury, learned counsel for opposite party has pointed out that in case of demolition of wall pursuant to the learned Magistrate's order, there would be nothing left for decision and it would be resulted in culmination of the proceeding.

9. In the facts and circumstances of the case, the learned Sessions Judge cannot be found fault for entertaining the revision petition against the order dated 21.1.1997 passed by the learned Magistrate.

10. Mr. P.K. Roy Choudhury, learned counsel for opposite party has further contended that the learned Magistrate could not have ordered the demolition of the wall without going through the procedure laid down in the Criminal Procedure Code simply by taking resort to Section 142 CrPC. In this regard he has referred to a

decision of this court in Sahida Begum (Smti) and Anr. v. Sarifuddin Ahmed and Ors. 2001 (1) GLT 379 wherein it has been held that when a proceeding is drawn up u/s 133(1) CrPC for alleged obstruction of a public right, the Magistrate is to make two enquiries - firstly to determine whether or not there exists any public right in respect of the way etc. and secondly, whether or not there has been obstruction caused on the said way etc. regarding the use of it by the public. These two enquiries cannot be made simultaneously without complying with the requirements of Sections 137 and 133 CrPC. If the party against whom the conditional order has been made denies the existence of the alleged public right, the Magistrate shall enquire that question by taking evidence of such objector. It on such enquiry the Magistrate finds that the evidence in support of the denial of alleged right is reliable the Magistrate shall stay the proceedings before him until the question of existence of such right is decided by a competent court. If, however, the Magistrate finds that such evidence is not reliable, he shall then proceed u/s 138 CrPC to determine that other question viz., whether there has been any obstruction etc. caused by the objector, by taking evidence of both the parties. If on taking such evidence the Magistrate finds that the conditional order is reasonable and proper, he shall make it absolute, with or without modification as may be necessary; or, if not so satisfied he shall close the proceeding u/s 133 CrPC.

11. In the instant case, I am of the opinion that the Magistrate could not have passed the impugned order dated 21.1.1997 for demolition of the wall without following the procedure laid down as aforesaid. Taking resort to Section 142 CrPC the Magistrate can pass an order only when he considers that immediate measure is required to be taken to prevent imminent danger or injury of a serious kind to the public. In this regard Mr. P.K. Roy Choudhury, learned counsel for opposite party submits that in the present case there is no necessity for taking any immediate measures to prevent imminent danger or injury of a serious kind to the public. The petitioners even now have way to reach their homes and they have filed this petition u/s 133 CrPC just to get a short cut. In this regard Mr. P.K. Roy Choudhury, learned counsel, has referred to a very old decision in Mirza Moharnmad Ashraf v. Emperor and Ors. reported in AIR 1937 Lah 101. The relevant portion reads as follows :

"A case u/s 133, CrPC was pending in the court of the Magistrate, First Class, Batala, and during the pendency of that case the Magistrate passed an order u/s 142, Criminal PC in the following terms:

All the four entrances, at present closed, on the four sides of the Reti Chhalla, be opened and left for public use without let or hindrance of any description whatsoever, the entrances on the north and west, being temporarily closed by means of wire and stakes to be opened today, by the removal of the wire, and the stakes to be removed within seven days; the entrances on the south and east being closed by means of bricks are to be opened within seven days.

This order appears to have been necessitated by an apprehension of the breach of peace on account of the obstruction caused by the persons proceeded against in a public way. Mirza Moharnmad Ashraf, Nazim Jaidad Sadr Anjuman Ahmadiya, Gadian, presented a petition to the Sessions Judge, Gurdaspur, objecting to the legality of this order. The petition was, under the orders of this court, transferred to the court of Sessions at Amritsar and the Sessions Judge, agreeing with the Magistrate, has dismissed it. After hearing counsel on both sides, I am of opinion that the order of the Magistrate is illegal and cannot therefore be maintained. The material portion of Sub-section (1) of Section 142 Criminal PC, reads as follows :

If a Magistrate making an order u/s 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may... issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

It would thus appear that Section 142, Criminal PC is not an independent section, but is controlled in its effects by Section 133, Criminal PC. Now a reference to Section 133 Criminal PC, shows that the section is confined to certain matters which are specifically mentioned therein and cannot brought into play to govern or control other matters which are quite extraneous to it. The matters dealt with by this section are as follows :

(a) Unlawful obstruction or nuisance is any way, river or channel, or public place; (b) the conduct of any trade or occupation which is injurious to the health or physical comfort of the community; (c) the construction of any building or the disposal of any substances, as is likely to occasion conflagration or explosion; (d) The removal, repair or support of any building, tent or structure, or the removal or support of any tree, which 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; (e) The fencing of any tank, wall or excavation adjacent to any public way or public place so as to prevent danger arising to the public; and (f) the destruction, confining or disposal otherwise of any dangerous animal.

It would be obvious from this analysis of Section 133 that it is nowhere contemplated by the section that it would govern cases where an imminent breach of the peace is apprehended. The "serious injury" or the "imminent danger" contemplated by Section 142 Criminal PC, refers to the injury or danger emanating from those things themselves which are specified in Section 133 and consequently Section 142 is limited in its scope. An order u/s 142 could therefore be passed only if an injury or danger specified in Section 133, Criminal PC, was apprehended and not otherwise. Such "serious injury" or "Imminent danger" is non-existent, in this case. I am accordingly constrained to hold that the order was ultra vires of the Magistrate and I have no option but to set is aside."

12. In view of what has been stated above, the learned Sessions Judge has rightly set aside the impugned order dated 21.1.1997 passed by the learned Magistrate for demolition of the wall in question. Accordingly, there is no merit in this revision petition and the same is dismissed. Interim order, if any, passed by this court shall stand vacated.

13. Send down the Lower Court records immediately along with a copy of the order of this court. The learned Magistrate shall make an endeavour for expeditious disposal of the case preferably within a period of 2 months from the date of receipt of this order along with records.