Thaneswar Bora Vs Kumud Sarmah

Court: Gauhati High Court

Date of Decision: April 7, 1986

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 133, 134, 135, 136, 137

Citation: (1987) CriLJ 1293

Hon'ble Judges: K.M. Lahiri, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

K. Lahiri, J.
The questions that fall for determination in this revision stemming from a proceeding u/s 133 of the Criminal Procedure Code,

("the Code" for short) are whether the proceeding was invalid for breach of the provisions contained in Sections 137 and 141 of "the Code"? If

so, whether the impugned order dated 10-9-1984 passed by the Sub-divisional Magistrate (Executive), North Lakhimpur in Misc. Case No.

333/84 u/s 138 of "the Code" is invalid, illegal and liable to be set aside? If appropriate procedure has not been followed should the entire

proceeding be quashed or it should be allowed to continue from the stage where the learned Magistrate committed the error of law?

2. This is a proceeding u/s 133 of "the Code". The applicants (opposite party) herein were interested to see trial the general public get adequate

water supply from the rivulet named ""Gogola Mornoi"". It appears that the rivulet is the fountain head of water supply to many villages including the,

applicants village. The stream being the life-blood, the opposite party could not tolerate when the petitioners Shri Thaneswar Bora and Ors. put

obstructions impeding free flow of water, on the plea that they had started a fishery by taking loan from the Government and the obstruction put by

them was to divert the ""water course to catch fish.

3. Mr. Phukan, learned Counsel for the opposite party is justified in submitting that on the side of the petitioners it was an assertion of "private

right" to fish for their personal gain whereas the villagers (opposite party) were fighting for "life and health1 of the villagers, On receipt of the

complaint u/s 133, a competent Magistrate passed a conditional, order requiring the petitioners to remove the blockade set up by diem. It also

appears that one of the second party removed the obstruction. At least one amongst the party ''realised that his action was against ""public interest"".

He is Gaya Ram Gogoi. Accordingly his name was struck off from the list of second party.

4. In the instant case learned Magistrate has completely failed to comply with the provisions of Section 137(1) of ""the Code"" inasmuch as he did

not ask the members of the opposite party, on their appearance before him, as to, whether they denied the existence of public right in respect of

the river or channel. As such, the moot question that arises for consideration is, whether the provision of Section 137(1) of ''the Code'' is

mandatory or directory?

5. Sections 133 to 143 of ''the Code'' deal with proceedings for removal of public ; nuisance or unlawful obstruction from any '' public place or

from any way, river or channel etc. It is thus seen that the Magistrate can I assume jurisdiction to decide whether a party should remove any

obstruction provided the obstruction amounts to public nuisance or unlawful obstruction in any public place or from any way, river or channel. If a

private right is affected the provisions are not attracted nor should the Magistrate assume jurisdiction to pass a final order u/s 138 of ''the Code''.

However, if public right, is jeopardised or obstructed the Magistrate can proceed to hear and make a final order u/s 138 of ''the Code''. The

applicant may assert public right but that by itself is not enough. The party against whom a conditional order u/s 133 is made for removal of the

nuisance or the obstruction should be personally asked as to whether he affirms or denies the existence of any public right alleged by the first party.

If the party against whom a conditional order has been made u/s 133 of ''the Code'' admits the existence of such right the Magistrate can

straightway proceed to determine the respective rights of the parties and finally determine the case u/s 138 of ''the Code'' upon taking evidence.

However, if the party against whom a conditional order has been made denies the I existence of public right and thereby intends to take away the

jurisdiction of the Magistrate to decide the rights of the parties, the Magistrate must hold an enquiry, and, if in such enquiry he finds that ""there is

reliable evidence in support of such denial"" the Magistrate shall stay the proceeding until the '' matter of the existence of such public right has been

determined by a competent Court, It is thus seen that only after the decision of a competent court that the applicant has public right then and then

only the Magistrate can proceed to decide the case finally u/s 138 of ''the Code''. In short, if the opposite party admits the existence of public right

the Magistrate may on admission of the party, proceed u/s 138 of ''the Code'' to decide the respective rights of the parties. However, if the public

right is denied the Magistrate must hold an enquiry. If he finds that there is any reliable evidence in support of such denial he must stay the

proceedings until the existence of public right is decided by a competent court in favour of the applicants. If he finds on enquiry that the denial of

the opposite party has no backing of any evidence he shall proceed u/s 138 of the Code. As such, Parliament has laid down a set procedure

directing the Magistrate to proceed in that particular manner as prescribed in Section 137(1) of ''the Code''. He must comply with the terms of the

order. If the opposite party denies the existence of the public right he cannot decide the issue on merit without holding an enquiry. It is a condition

precedent to exercise jurisdiction u/s 138 of ''the Code''. For the foregoing reasons I hold that the provisions of Section 137(1) of ''the Code''

which enjoin the Magistrate to put the relevant question to the party served with the conditional order u/s 133 as to whether he denies the existence

of any public right are mandatory.

6. In the instant-case, learned Magistrate did not put any question to the members of the second party as to whether they denied the existence of

public right claimed by the first party and skipping over the mandatory provision learned Magistrate assumed jurisdiction to decide the merits of the

case u/s 138 of ''the Code''. While deciding the merits of the case u/s 138 it may not at all be necessary for the Magistrate to reconsider the

question as to the existence of public right. As such, the parties are not required to adduce any evidence on the issue when an enquiry u/s 138 of

''the Code'' is made. I am constrained to hold that in the instant case learned Magistrate has failed to comply with the mandatory provisions of

Section 137(1) of ''the Code'' and assumed jurisdiction to render an order u/s 138 which is violative of the mandatory provisions of ''the Code''.

Under these circumstances when the impugned order has been made in breach of the mandatory provision of Section 137(1) the final order

rendered u/s 138 must be set aside, which I hereby do.

7. However, the proceedings prior to the '' non-compliance of Section 137 were valid. As such, upon setting aside the final order I direct learned

Magistrate to follow the procedure laid down in Section 137(1) of ''the Code'', put the necessary question to the members of the opposite party,

hold an enquiry if the existence of public right is denied and then to proceed in accordance with the provisions of Section 138 of ''the Code''. The

conditional order passed by the learned Magistrate is sustained in view of the nature of the proceedings. Learned Magistrate shall proceed from

the stage envisaged in Section 137(1) of "the Code". If occasion arises, and an order of injunction pending enquiry becomes necessary learned

Magistrate may exercise the power to uphold the public interest. I direct both the parties, through their counsel to appear before the Sub-Divisional

Magistrate (Executive), North Lakhimpur on 20-4-86 to take necessary orders from the learned Magistrate. On such appearance learned

Magistrate may put the relevant question u/s 137(1) to the members of the opposite party, either on that date or on any other day convenient to

him. Thereafter, learned Magistrate shall do the needful enjoined by the provisions of "the Code". If the members of the second party admit the

existence of public right, learned Magistrate may take evidence and or may with the consent of the parties decide the merit of the case on the basis

of the evidence already adduced or he may take fresh evidence but the proceedings must be finally disposed of by May 1986.

8. In the result the petition is accepted to the extent indicated above. Send down the records forthwith to the learned Sub-divisional Magistrate

(Executive), North Lakhimpur.