

**(2016) 02 GAU CK 0038**

**GAUHATI HIGH COURT**

**Case No:** Crl. Pet. No. 897 of 2015

Uday Sankar Goswami

APPELLANT

Vs

State of Assam

RESPONDENT

**Date of Decision:** Feb. 18, 2016

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 133, Section 482

**Citation:** (2016) 6 GauLJ 399 : (2016) 6 GauLR 516

**Hon'ble Judges:** Dr. (Mrs) Indira Shah, J.

**Bench:** Single Bench

**Advocate:** A.M. Bora, D. Gogoi Addl P.P. Assam, C. Choudhury and D.K. Baidya, Advocates, for the Petitioner; Mr. D. Das, Advocate, for the Respondents; H.R.A. Choudhury, I.A. Hazarika, A. Ahmed, R.A. Choudhury and J.M. Sulaiman, Advocates, for the Respondent Nos. 2

**Final Decision:** Disposed Off

### **Judgement**

**Dr. (Mrs) Indira Shah, J.** - By filing this application u/s 482 Code of Criminal Procedure the petitioner has challenged the order dated 29.7.2015 passed by learned Sessions Judge at Cachar, Silchar in Criminal Revision No. 316 of 2014 arising out of M.R. Case No. 14 of 2007 pending in the court of learned Addl. District Magistrate, Cachar, Silchar.

2. Heard Mr. A.M. Bora, learned counsel appearing for the petitioner. Also heard Mr. D. Das, learned Addl. P.P. appearing for the respondent State and Mr. HRA Choudhury, learned Sr. Counsel appearing for the private respondents.

3. The brief facts leading to filing of this petition are that the respondents filed an application before the District Magistrate, Cachar, contending that the scheduled private path described in their application was purchased by them vide registered sale deeds dated 17.07.1974 and 23.07.1974. As the path was narrow for their movement, they approached the land owner, namely, Amalendu Swami, to sale

more land for widening of the path. Accepting the request, the original owner sold some more land to the applicants as well as the present petitioner vide sale deed executed on 22.09.1974. Accordingly, the path was registered in the name of the respondents as well as the petitioner.

4. In the year 2013, the present petitioner purchased some low lying land situated in the eastern side of the existing path for the illegal purpose of converting the said low lying land for some other purpose by earth filling. The petitioner started to run heavy vehicles including trucks and trippers through the schedule private path. The respondents also alleged that for filling up of the said low lying land it would require thousands of vehicles to ply over the schedule path fully loaded with land. The respondent no. 2 requested the present petitioner for not using the schedule path for plying of heavy vehicles which are causing health hazards to the public at large but the petitioner did not stop plying of heavy vehicles. On receipt of the said application, MR Case No. 1407 of 2015 was registered and a proceeding u/s 133 Cr.P.C. was initiated by learned District Magistrate and a conditional order directing the petitioner to stop plying of heavy vehicle was passed.

5. Aggrieved by the said order, the petitioner preferred criminal revision before the learned Sessions Judge challenging the said order and learned Sessions Judge after hearing both the parties dismissed the criminal revision preferred by the petitioner. Hence, this application u/s 482 Cr.P.C.

6. The learned counsel for the petitioner has submitted that learned District Magistrate as well as learned Sessions Judge failed to take into account the fact that the dispute with regard to a private path is purely of civil nature and therefore, it cannot be entertained by a Magistrate u/s 133 Cr.P.C. The scope of Section 133 Cr.P.C. is only for removal of public nuisance and settlement of private dispute between the parties cannot be the subject matter of proceeding u/s 133 Cr.P.C. In the present case, the whole path is admittedly a private path and the present petitioner as well as the respondents have the equal rights to use the same.

7. Citing the case of **Gopal Saha v. Uttam Saha reported in 2013 4 GLT 990** and **Sankar Saha v. State of Tripura and Ors. reported in 2008 1 GLT 324**, the learned counsel has submitted that the term "community" in clause (1) (b) of Section 133 Cr.P.C. cannot be taken to mean a resident of a particular house or 4/5 houses. A private individual cannot be allowed to use the provision of Section 133 Cr.P.C. to remove a purely private nuisance by attempting to take a short route.

8. Per contra, the learned counsel appearing on behalf of the respondents has submitted that the petitioner has challenged the order of District Magistrate by filing an application against the interim order. Only a conditional order was passed and notice to the petitioner was issued to show cause in terms of Section 135 Cr.P.C. The petitioner instead of filing reply to the show cause, preferred a revision against the interim order. The learned District Magistrate initiated a proceeding in terms of

sub-clause (1) (b) of Section 133 Cr.P.C. which is quoted under -

"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-

(a) \*\*\* \*\*\*

(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated;"

9. From a plain reading of the aforesaid provision, it appears that the Magistrate may initiate a proceeding u/s 133 Cr.P.C. and pass conditional order for removal of nuisance in respect of any trade or occupation or the keeping of goods or merchandise which is injurious to health or physical comfort of the community. This is not the case here. The petitioner is not keeping any goods or merchandise injurious to health or physical comfort of the community.

10. This Court in Gopal Saha (Supra) has interpreted the word "Community" in Clause( b) of Section 133 (1) Cr.P.C. and held that the word "community" so interpreted in Clause (b) of Section 133 (1) cannot be taken to mean residents of a particular house. it means something wider, i.e. the public at large or the residents of an entire locality but it cannot be taken to mean residents of a particular house or 4/5 houses. In the case of Shankar Saha (Supra), the court in para 24 and 27 held as follows -

"24. If a dispute is of civil nature, such dispute cannot be entertained by a Magistrate under Section 133 Cr.P.C. The provision of the Section can be used only for settlement of dispute in relation to public right in the general interest of public at large. Unless a nuisance is created at a public place, Section 133 does not apply and no order can be passed under this section. As has been held by this Court in **Bhaba Kanta v. Ramachandra reported in 1987 Cr.L.J. (Gau.) 1155**, when the obstruction did not cause public nuisance or the alleged conduct did not affect public right, the Magistrate has no jurisdiction to continue the proceeding under Section 133 Cr.P.C. For the applicability of Section 133 Cr.P.C. the public must have a right of way which is being obstructed or on which nuisance is made or it must be a public place where the alleged obstruction is created. The ingredients of Section 133 Cr.P.C. imply not only that the way, river or channel must be one of public use, but the obstruction must be to that of public use.

27. This Court in **Thaneswar Bora v. Sri Kumud Sarmah reported in (1986) 2 GLR 161** considered the ambit and scope of Sections 133, 137 and 138 Cr.P.C. and the

conditions precedent towards exercising the power vested on the Executive Magistrate. It has been held that if a private right is affected, the provisions are not attracted nor could the Magistrate assume jurisdiction to pass a final order. Similarly in **Arfan Ali v. Binod Bihari De reported in (1990) 1 GLR 228**, it has been held by this Court that the Magistrate exercising its power under Section 133 Cr.P.C. must satisfy himself that it is a public nuisance or obstruction affecting injuriously a number of persons and that the Section does not relate to a private dispute for which proper forum is the Civil Court."

11. In the instant case, both the parties are owners of the private path. Admittedly the petitioner has purchased a low lying land situated near the private path. The petition filed by the opposite parties before the District Magistrate depicts that the petitioner had not allowed plying of any heavy vehicles on the path and the opposite parties have admitted to have restrained the petitioner from developing his purchased land by filing petition before the District Magistrate. The dispute is purely civil in nature and the proceeding u/s 133 Cr.P.C. cannot be maintained in respect of private dispute. Therefore, the proceeding pending in the court of learned District Magistrate is liable to be set aside and quashed.

12. Accordingly, the judgment passed by the learned Revisional Court is also set aside and quashed and this petition is allowed and disposed of.

13. Send a copy of the order to the learned court below.