

Asharfi Lal Vs. the State

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Court : Allahabad

Decided On : Nov-27-1963

Reported in : AIR1965All215; 1965CriLJ535

Judge : D.S. Mathur, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 133

Appeal No. : Criminal Ref. No. 177 of 1963

Appellant : Asharfi Lal

Respondent : The State

Advocate for Def. : Devendra Swarup, Adv.

Advocate for Pet/Ap. : K.M. Dayal, Adv.

Judgement :

D.S. Mathur, J.

1. Tills is a Criminal Reference by the Additional Sessions Judge of Kanpur with the recommendation that the Magistrate's order dated 7-5-1962 directing the applicant, Asharfi Lal, to remove the encroachment made by him on the public path situated in plot No. 342 be removed within ten days failing which he would be liable to penalty provided under Section 188, I. p. c. be set aside. There is no dispute in

that the shop of Asharfi Lal stands on the land of Old Moghal Koad which is still public land, though it is said on behalf of Asharfi Lal that the land in front of his shop is not being used as a Rasta since the opening of the New Moghal Koad. From the evidence on record it appears that Asharfi Lal constructed a Kachcha shop sometimes in or about 1050 and pucca constructions were made within a year or two.

2. On the report of the Collector of Kanpur the Sub-Divisional Magistrate of Bhogmpur took action under Section 133, Cri. P. C. and under the Impugned order confirmed the conditional order and directed Asharfi Lal to remove the encroachment within a period of ten days. This order was challenged in revision before the Sessions Judge who has made the reference on the ground that the constructions made are old and could not be ordered to be removed In a summary proceeding Tender Section 133, Cri. F.c, Keliance was placed upon a reported decision of this Court.

3. it has been strongly contended on boehalf of the Antarim Zila Farlshad, Kanpur, that Section 133 Cri. P. C. does not place any such restriction and an order under this section can be passed for so. long as the encroachment exists on the public land or public way.

4. Section 133, Cri. P. C. does not by itself lay down any such restriction In the exercise of jurisdiction, it simply provides that whenever a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of the First Class considers, on receiving a police report or other information and or taking such evidence, if any, as he thinks at, that any unlawful obstruction or nuisance should be removed from any way, which is or may be lawfully used by the public, or from any public place, he may make a conditional order requiring the person causing such obstruction or nuisance to remove such obstruction or nuisance within a time to be fixed in tne order, and it he objects so to do, to appear before him or some other Magistrate of the First or second Class, and move to have the order set aside or modified. The only restriction imposed by Section 133, Cri. P.C. is that public way is such which is or which may be lawfully used By the public. With regard to public land there is no such restriction. Courts of Jaw cannot, however, overlook the factor that a

proceeding under Section 333, Cri P. C. is of a summary nature, and disputes of title etc., can be properly and finally adjudicated upon by a competent Court and not by a criminal Court, It is for this reason that this Court has laid down that action under Section 133, Cri. P. C. should be taken when there exists urgency for removal of the obstruction or nuisance. If the obstruction has been in existence for a long period and there is no change in circumstances, the removal of the obstruction cannot be said to be urgent and It is often stressed that the state should seek remedy before the civil Court, if the removal of the obstruction was not at one occasion urgent but on ; the change of circumstances it becomes necessary ; to have the obstruction removed at once, in other words, an urgency exists, action under Section 133, Cri. P.C. can be taken even though the obstruction had been in existence for a comparatively long period.

5. The earliest case brought to my notice is the one relied upon by the learned Sessions Judge, in this case, *Ghura Das v. Shakalraj Das* : AIR 1926 All 157 , the Magistrate's order directing the removal of an obstruction in existence for at least 15 or 16 years was set aside on the ground, that, Section 133, Cri. P. C. was not intended to be employed to avoid the necessity of filing a civil suit in regard to a construction which had been in existence for such a long period. In what circumstances action under Section 133, Cri. P.C. can be taken was considered in *Basanti Devi v. Rex* AIR 1949 All 650 and *Kedar Nath v. Satish Chandra* . In AIR 1949 All 650. It was observed:

'The idea behind the section is that the danger should be such that if the Magistrate does not take action and only directs the public to have recourse to the ordinary Courts of law or takes action under the ordinary law in the Courts established for the purpose, irreparable damage would be done.'

6. Similarly, in , it was observed that proceedings under Ch. 10 including Section 133, Cri. P. C. were of a summary nature intended to enable Magistrates to deal with cases of emergency and not intended to enable a complainant to obtain relief which he should seek in the civil Court.

7. The consistent view of this Court has thus been that a proceeding under Section 133, Cri. P. C. should be taken in cases of emergency where the public

shall be put to great inconvenience and shall suffer an irreparable injury if the encroachment or nuisance is not removed at once by adopting the summary procedure contained in Ch. 10, Cri. P. C. it is for this reason that ordinarily no action under Section 133, Cr. P. C. can be taken where the obstruction or nuisance has been in existence for a long period. However, there is no legal bar to seeking remedy under Section 133, Cr. P. C. where there exists a genuine emergency to have the encroachment or nuisance removed. Such an action can be taken even though the encroachment or nuisance has been in existence for a reasonably long period.

8. The Learned Advocate appearing for the Antarim Zila Parishad of Kanpur invited my attention to a decision of the Patna High Court in *Jadunandan Lal v. Rampeyare Sao* AIR 1943 Pat 32. It was rightly held therein that it was the encroachment and not inconvenience which was to be seen; but this case can be distinguished on the ground that the obstructions made were found to be recent and not old. Action under Section 133, Cr. P. C. can, in each and every case, be taken where the obstruction or nuisance was made recently.

9. From the evidence on record it appears that considerable encroachments have been made on the old Moghai Koad such that carts cannot easily pass along it. The encroachments were made more than 10 years back and such encroachments can be ordered to be removed in a summary proceeding under Section 133, Cr. P. C. only if there exists an urgency for the removal of the obstruction and if the encroachments are not removed forthwith the public shall suffer an irreparable injury. The Magistrate has not recorded any finding on the question of urgency, in fact, this point was also not considered by the Sessions Judge, it is desirable that the case be remanded for a fresh hearing to enable the Magistrate to pass a proper order on consideration of the evidence on record, additional evidence to be adduced by the parties and, one may say, the conduct of the prosecutor also. In case the other encroachments made on the old Moghai Koad are not sought to be removed, that would be a factor suggesting that there exists no urgency.

10. The reference is hereby accepted in the sense that the impugned order of the Magistrate is set aside but the proceeding is remanded to the Magistrate for a fresh hearing in accordance with the law. It shall not be necessary for the Magistrate to record the evidence already adduced by the parties. He can pass an order after recording the additional evidence of the parties.

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