

**Chhitar and ors. Vs. Chhoga and ors.**

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**Court :** Rajasthan

**Decided On :** Mar-26-1974

**Reported in :** 1974CriLJ1230; 1974(7)WLN255

**Judge :** B.P. Beri, C.J.

**Appellant :** Chhitar and ors.

**Respondent :** Chhoga and ors.

**Judgement :**

ORDER

B.P. Beri, C.J.

1. Against the order of the learned Sessions Judge, Ajmer, dated December 2, 1970 Chhitar and four others have come up in revision before me in a proceeding under Section 133, Code of Criminal Procedure.

2. The applicants before me had filed an application against the opposite parties Chhoga and some others under Section 133 of the Code of Criminal Procedure, in the Court of the Sub Divisional Magistrate, Ajmer. Their grievance was that there is a Budh Sagar Tank bearing No. 118 which is a Government tank in village Bagsuri which served to irrigate nearly 2000 Bighas of land in villages Bagsuri, Laxmipura and Budhpura. The tank accumulated the rain water from the hillocks of Banevara through a natural water course (Bala'). The opposite parties of village Banevara raised a mud wall and also constructed a 'pucca' wall in the bed of the

'Bala' with a view to appropriate the rain water. The applicants contended that the said obstruction starved the Budh Sagar Tank which occasioned considerable loss to the cultivators of the villages mentioned above. The learned Sub Divisional Magistrate registered a case under Section 133 of the Code of Criminal Procedure on July 28, 1966 and passed a conditional order thereunder for the removal of the obstruction or nuisance mentioned above. A show cause notice was given along with a copy of conditional order to the opposite parties who challenged the conditional order and filed their reply on March 26, 1968. They denied the existence of any public right in respect of the water course and questioned the legality of the conditional order. The opposite parties, however, failed to produce any evidence under Section 139A of the Code of Criminal Procedure, in support of their contention and in fact, they failed to appear before the Court on September 27, 1969. In their absence ex parte proceedings were started and since there was no evidence in support of the denial the procedure under Section 137, Code of Criminal Procedure, was followed by the learned Magistrate. After considering the affidavits produced by the applicants in support of their application, the learned Sub-Divisional Magistrate concluded that evidence adduced by the applicants in support of their claim was insufficient and he accordingly vacated the conditional order. A revision application was filed' before the learned Sessions Judge who observed that the Sub-Divisional Magistrate was not justified in concluding that the affidavits put in by the applicants were vague, and merely because the wall had been broken at some places it was wrong to say that the entire obstruction had been removed. The learned Sessions Judge after examining the two reasons given by the learned Sub-Divisional Magistrate namely, (1) that no objection was raised by the applicants for three years and (2) the resultant presumption was that there was no public right over it, the learned Judge came to the conclusion that this long delay showed that it was not a case of urgency or imminent danger and as such, no proceedings under Section 133 Code of Criminal Procedure were justified and he accordingly dismissed the revision application. The applicants are dissatisfied and they are before me.

3. Apart from the affidavits produced' by the applicants there is the 'Ghatna Bahi Patwari' the certified copy whereof has been produced by the applicants and, in my opinion, this is a valuable document giving the genesis of the trouble. Broadly

translated<sup>1</sup> this document records that 'on 7-2-1963 in village Banevara the people had gathered. In Khasra No. 1018 which is the Government land, there was a 'nala' which flows through it. The villagers commenced the work of obstructing this 'nala' and the Patwari called Numberdars of the Village Raju and Bherusingh of the village and Juwara Panch at the site and enquired about the construction on this nala. The answer given by the villagers was that they had decided to obstruct the nala in their pleasure and that they had not taken any permission from the Government in this behalf, and when the Patwari asked them to sign over the proceedings of the Ghatna Bahi they declined to oblige him. The learned Sub-Divisional Magistrate has relied upon this document to show that the construction was commenced in the month of February, 1963. The application under Section 133, Criminal Procedure Code was made on July 25, 1966 and as I have already noticed, the conditional order was passed (in July 28, 1966. The question on which I have to focus my attention succinctly stated is: whether a delay of little over three years in making the application under Section 133, Criminal Procedure Code disentitled the applicants to the relief claimed by them

4. A reading of the portion material for our purposes of Section 133, Criminal Procedure Code would show that whenever a Sub-Divisional Magistrate on receiving a police report or other information and on taking such evidence (if any) as he thinks fit, that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, the Magistrate may make a conditional order requiring the person causing such obstruction or nuisance to remove such obstruction or nuisance. The conditional order is served, if practicable, under Section 134, Criminal Procedure Code on the person against whom it is made, in the manner provided for service of a summons and the person against whom such order is made shall perform, within the time and the manner specified in the order, the act as directed thereby. In the case before me, if the opposite parties appeared and showed cause against the order, the Magistrate would have taken evidence in the matter as in a summons case. Under Section 139A, Criminal Procedure Code where an order is made under Section 133 for the purpose of preventing obstruction, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denied the

existence of any public right in respect of the way, river, channel or place, and if he did so, the Magistrate shall, before proceeding under Section 137 or Section 138, inquire into the matter. The learned Magistrate has observed, and it is not disputed, that the opposite parties did not appear before the Sub-Divisional Magistrate and accordingly he proceeded under Section 137 and the only impediment according to the learned Sub-Divisional Magistrate which dissuaded him from making his order on July 28, 1968, absolute, was that the applicants had been guilty of coming after three years for seeking the remedy.

5. Learned Counsel for the applicants has cited before me a number of authorities which might be profitably referred to. Dealing with these authorities chronologically, the first case is *Jagroshan Bharti v. Madan Pande* AIR 1927 Pat 265 : 28 Cri LJ 910 where *Jwala Prasad, J.*, has observed, :

Encroachment upon a public road is an obstruction to the public path, and it is a nuisance in itself under Section 268 of the Penal Code. No length of user can justify an encroachment upon a public way.

6. In *Satya Sunder Ghose v. Sailendra Kinkar Pal* : AIR1954 Cal560 the observations of the learned Judge are that there is no period of limitation fixed as far as Section 133 of the Code was concerned.

7. In *Raj Kumar v. State* 1962 (2) Cri LJ 413 (All) W. Broome, J., of the Allahabad High Court has made significant observations dissenting from the judgment of the Patna High Court to which I shall presently advert, in the following words, :

There is nothing in Section 133, Criminal Procedure Code prescribing any time limit within which the unlawful obstruction to the public way should be ordered to be removed and it cannot be laid down as an inflexible rule that where a structure constituting an unlawful obstruction to a public way has been allowed to stand for a number of years it can in no case be ordered to be removed under Section 133.

In the Allahabad case the structures were in existence for a period of ten years before action was taken for the removal.

8. The State of Madhya Pradesh v. Manji Raghu 1964 (2) Cri LJ 94 (Madh. Pra.) is a case from the Madhya Pradesh High Court and the observations therein which are of significance for our purposes are:

Under Section 133 no man can acquire a prescriptive right to commit a public nuisance; for, long enjoyment cannot legalize a public nuisance.' The learned Judge has further observed, --

It is no answer to the petition under Section 133 of the Code of the aggrieved persons to say that the Mill has been in existence in the locality for a long time.

9. The last case relied upon by the learned Counsel for the applicants is Asharfi Lai v. The State : AIR1965 All215 . In this case the encroachments were made more than ten years back but the learned Sessions Judge made a reference that as the constructions were old they could not be ordered to be removed in a summary proceeding under Section 133, Criminal Procedure Code. The learned Judge rejecting this argument observed, :

Section 133, Criminal Procedure Code does not by itself lay down any such restriction in the exercise of jurisdiction, ' and directed the Magistrate to hear the matter and record the evidence.

10. Mr. R. R. Vyas, learned Counsel for the opposite parties has invited my attention to Emperor v. Tulsi Ram AIR 1938 Lah 523 : 39 Cri LJ 775 where Young, C. J., delivering the judgment of the Bench in a case relating to a 'tharu' which was constructed about 14 years ago by the respondent and his brothers, observed, :

Section 133 is not intended for longstanding obstruction but for an unlawful obstruction lately built in a public place.' The learned Judges further observed that action under Section 133 may be taken on proof of urgency or imminent danger. It could not be used as a substitute for litigation in Civil Courts.

11. In Rameshwar Prasad v. State of Bihar : AIR1958 Pat210 Imam, J., observed.:

Thus where an alleged nuisance from obstruction caused by a house constructed on railway pipe land has been there for seven long years and the public did not

appear to have been inconvenienced by it and all of a sudden after a lapse of so many years it is found that there had been an encroachment, then it can hardly be held that in these circumstances Section 133, Criminal Procedure Code, is applicable.

12. Section 133, Criminal Procedure Code deals with certain specific public nuisances and provides a summary remedy for their removal. In some cases the view taken is that the section has been formulated to deal with emergent evils which are either existent or imminent. It is, however, equally true that no period is prescribed within which the Court could be moved for the removal of an evil the existence whereof is not disputed. In this context, it will be relevant to remember the entry in the 'Ghatna Bahi' which I have already detailed above, that the dispute came into existence sometime in February, 1963, and when the Patwari challenged the right of the people to obstruct the 'Nala' which fed the Budh Sagar Tank, the villagers exhibited a defiant contumacy. The peculiarity of this obstruction, in my opinion, is directly related to the rainy season. The inconvenience, therefore, obviously is not of a continuous character for we all know that the rains in Rajasthan are miserly and erratic. Hence, in the case before me, consciousness of the grievance arising from the nuisance was necessarily periodic. This obstruction, therefore, irked the villagers only when the rains came and Budh Sagar Tank was deprived of its replenishment and the lands which were served by it, needed irrigation. The Patna case : AIR1958 Pat210 relates to construction of a house on a railway pipe line and for seven years nobody objected to it. The learned Magistrate declined to substitute a civil action by a proceeding under Section 133 Criminal P.C. The Lahore case AIR 1938 Lah 523 : 39 Cri LJ 775 related to 'thara' which existed on the public high way for 14 years and the construction whereof had behind it the sanction of the Municipal Council. Resort to Section 133 Criminal P.C. was, therefore, discouraged. The cases cited by the learned Counsel for the opposite parties are therefore clearly distinguishable and it cannot be contested that the legislature does not lay down any categorical conditions of time for the exercise of jurisdiction under Section 133, Criminal Procedure Code and each case will have to be regulated by its own circumstances. In my opinion, three years delay in complaining against a grievance which occurs intermittently or seasonally, cannot be characterised as a

belated action in regard to such a precious commodity as water for the parched lands in Rajasthan the lack of which substantially injured the agricultural community.

13. I, accordingly, set aside the order of the learned Sub-Divisional Magistrate and make absolute the order of the said Magistrate dated July 28, 1966, and direct the opposite parties to remove the obstruction with\* in a period of one month from today.

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