

GAHC010063722022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Rev.P./270/2022

MUJAM UDIN PRODHANI AND 2 ORS
S/O LATE SAHABUDDIN PRODHANI
R/O VILL- DIGHALTARI, P.O. DIGHALTARI, P.S. GOLAKGANJ PART- 3, DIST.
DHUBRI, ASSAM

2: POYES UDDIN PRODHANI
S/O LATE SAHABUDDIN
R/O VILL- DIGHALTARI
P.O. DIGHALTARI
P.S. GOLAKGANJ PART-3

DIST. DHUBRI
ASSAM

3: SAJEDA BIBI
W/O SUJAMUDDIN PRODHANI
R/O VILL- DIGHALTARI
P.O. DIGHALTARI
P.S. GOLAKGANJ PART-3
DIST. DHUBRI
ASSA

VERSUS

THE STATE OF ASSAM AND ANR
REP BY THE PP, ASSAM

2:SMT. JOYGUN BEWA
W/O VILL- DIGHALTARI
PART-III

P.O. DIGHALTARI
P.S. GOLAKGANJ
DIST. DHUBR

Advocate for the Petitioner : MR. B P BORAH

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN**

JUDGMENT

20.01.2023

Heard Mr. B.P. Borah, learned counsel for the petitioners. Also heard Mr. R.J. Baruah, learned Addl. P.P., Assam, appearing for the State respondent and Mr. A. Das, learned counsel for the respondent No.2.

2. In this petition, under Section 397 read with Section 401 of the Code of Criminal Procedure, three petitioners, namely, Mujam Udin Prodhani, Poyes Uddin Prodhani and Musstt. Sajeda Bibi, have challenged the correctness or otherwise of the order dated 29.01.2022, passed by the learned Sub-Divisional Magistrate, Dhubri, in Misc. Case No.13/2021.

3. It is to be mentioned here that vide the impugned order, dated 29.01.2022, the learned Sub-Divisional Magistrate, Dhubri, in exercise of the power conferred under Section 133 of the Cr.P.C., has ordered for immediate removal of the bamboo fencing erected by the petitioners, obstructing the path used by the respondents herein and by other public and to keep the same open for future use by the respondents and other public, and to keep free from any type of construction in the aforesaid path in the land and directed the Officer-in-Charge of Golakganj Police Station to execute the order and maintain peace between the parties during execution of the order, and to submit a report and requested the Circle Officer of Agomoni Revenue Circle to remain present during the execution process and report compliance.

4. In order to decide the controversy at hand, with greater precision, it would be beneficial to briefly refer to the facts of the case leading to passing of the impugned order dated 29.01.2022:-

“On 20.02.2021, the petitioner, Mustt. Jaygun Bewa has lodged an FIR before the In-Charge of Halakura Police Check Post, stating inter alia amongst others that on 13.02.2021, the petitioners herein suddenly obstructed the public path with bamboo fencing which is being used by the respondents and public since more than 50 years and prayed for removing such obstruction. Accordingly, the police made an inquiry and found that there is a dispute regarding the use of the road.

Thereafter, the respondents herein filed one Misc. Case No.13/2021, before the learned Sub-Divisional Magistrate, Dhubri, for removal of the obstruction. Then the learned Sub-Divisional Magistrate, after hearing both the parties, vide impugned order dated 29.01.2022, directed for immediate removal of the bamboo fencing erected by the petitioners, obstructing the path used by the respondents herein and by other public and to keep the same open for future use by the respondents and other public, and to keep free from any type of construction in the aforesaid path in the land.”

5. Mr. B.P. Borah, learned counsel for the petitioners, submits that the dispute between the petitioners and the respondent No.2 is purely a private dispute, and the land over which the road is situated, is in the name of the petitioners and the same is apparent from the report of the Circle Officer, which is annexed with the petition as Annexure-C. Mr. Borah further submits that initially upon the FIR, lodged by the respondent No.2, the Officer-in-Charge has forwarded the same to the learned Sub-Divisional Magistrate for drawing up a proceeding under Section 107 Cr.P.C. and accordingly, a proceeding was drawn up, and later on, it was converted to a proceeding under Section 133 of the Cr.P.C. and the same was made in contravention of the provision of law, and the Magistrate has no power to convert a proceeding under Section 107 Cr.P.C., to a proceeding under

Section 133 Cr.P.C. Referring to another decision of Hon'ble Supreme Court in **Vasant Manga Nikumba and others vs. Baburao Bhikanna Naidu and another**, reported in **1995 Supp (4) SCC 54**, Mr. Borah submits that the exercise of the power under Section 133 of the Code of Criminal Procedure should be of judicious and discretion has to be exercised objectively on pragmatic consideration of the given facts and circumstances from evidence on record. The proceedings under Section 133 is not intended to settle private disputes or a substitute to settle civil disputes though the proceeding under Section 133 is more in the nature of civil proceedings in a summary nature. Referring to another decision of Hon'ble Supreme Court in **State of M.P. vs. Kedia Leather & Liquor Ltd. and others**, reported in **(2003) 7 SCC 389**, Mr. Borah submits that Section 133 of the Code of Criminal Procedure, appeared in Chapter VIII of the Code, deals with maintenance of public order and tranquility, which is a part of heading "Public Nuisance" and to bring in an application under Section 133 of the Code of Criminal Procedure, there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc. and the object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involve a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable damage would be done to the public. Mr. Borah, referring to a decision of the Hon'ble Supreme Court, in the case of **C. A. Avarachan vs. C.V. Sreenivasan and another**, reported in **(1996) 7 SCC 71**, submits that a preliminary order has to be drawn up, which is *sine qua non* for initiating proceedings under Section 133 of the Code of Criminal Procedure and the procedure prescribed under Section 138 of the Code of Criminal Procedure is to be followed, else the proceeding would be unsustainable and vitiated. Referring to another decision of Hon'ble Supreme Court, in the case of **Hukam Chand Shyam Lal vs. Union of India and others**, reported in **(1976) 2 SCC 128**, Mr. Borah submits that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. It is even more necessary to observe this rule where power is of a drastic nature and its exercise in a mode other than the one provided else it will be violative of the fundamental principles of natural justice. As the impugned order was passed in contravention of the

provisions of law, the same suffers from manifest illegalities and therefore, Mr. Borah has contended to allow this petition, by setting aside the impugned order dated 29.01.2022, passed by the learned Sub-Divisional Magistrate, Dhubri, and also to dismiss the Interlocutory Application filed by the respondent No.2, for vacating the interim order.

6. On the other hand, Mr. A. Das, learned counsel for the respondent No.2 submits that to maintain the law and order, the learned Sub-Divisional Magistrate, Dhubri has herself visited the place of occurrence, and having been satisfied, passed the impugned order dated 29.01.2022, under Section 133 of the Cr.P.C. and the impugned order suffers from no irregularity or infirmity, requiring any interference of this Court and therefore, it is contended to dismiss the petition and to allow the Interlocutory Application, by vacating the interim order passed by this Court.

7. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record. Also, I have carefully gone through the impugned order so passed by the learned Sub-Divisional Magistrate, which is quoted here in below for ready reference:

ORDER

U/S 133 CrPC

29/01/2022.

1st party present and filed hazira, 2nd party present and represented by Ld Advocate. Seen the case record. Heard the Ld counsel of both the parties. Seen the W/S submitted by the 2nd party Sl. No.1, 2, 3 where they admitted that both 1st party members and other public also using that path since 48/49 years.

Perused the original petition filed by the petitioner Smti Joygun

Bewa, W/O- Lt Sahabuddin Prodhani of village Dighatari, P.S. Golakganj that they are the resident of Village Dighaltari Amtola and is using one public road of 120 meter long to enter

into their house not only by them but also by the public of that village. But on 13/02/2021 the 2nd party members forcefully erected bamboo fencing on that road and tried to possess that area as a result obstruct the ingress and egress of the petitioner. On 15/02/2021 the dispute was settled down by the well known persons of that village and opened a 10 ft road for movement of the 1st party. But opposite party members again sealed that road. As a result the way used by the people of 1st party as well as other villagers was closed.

Perused the report of Circle Officer, Agomoni Rev. Circle where it was mentioned that under Agomoni Rev Circle Village Dighaltari Kherak Mayadi Patta No 500, Dag No.1079 total land measuring 14B 2 K has been recorded in the names of Smti Rabrya Bibi W/O- Abdul Jobbar, Shri Jahanur Rahman, S/O- Lt Sabdar Ali, Shri Poyesh Uddin Prodhani, Shri Muzamuddin Proda-hni, S/O- Sahan Uddin Prodahni, Shri Sahar Uddin Prodhani, S/O- Lt Bosir Uddin Prodahni. As per report of the Lot Mondal on the above mentioned land there is a road for movement of people but earlier there were a more broad path and no road has been recorded at that land as mentioned above moreover there is a dispute between the 1st party and 2nd party over that land. Also gone through the police report submitted by the SI Alokaesh Nath in charge Halakuar P.C.P. It is mentioned in the report that S.I. has locally enquired the matter and found that the petitioner Smti Joygun Bewa and opposite party are kith and Kin and are residing as neighbor and are using that village path for more than 30/40 years, but, suddenly the opposite party erected bamboo fencing on the middle of the road for which the 1st party is facing problem in moving along the path and there is an apprehension of breach of peace between the parties.

On 28/01/2022, the undersigned has personally visited the disputed area and found that one bamboo fencing has been erected on the middle of the road. It is understood that due to the blockage over road at that point will create a problem for the ingress and egress of the petitioner as well as public resulting in trouble at the locality which will disturb the peace and tranquility at large at that area. Further, the Learned Advocates for both the parties admitted that the said road was used by the petitioner as well as public for their movement.

From the above discussion, it has become clear that the second party members constructed bamboo fencing on the road used by both 1st party and other public and obstruction at a

particular point of the readily used road has been used for more than 30/40 years which has created an environment of public nuisance at the locality, and upon finding all the circumstances the undersigned on being satisfied draw a proceeding U/S 133 CrPC and declare the obstruction at above mentioned scheduled land is illegal in nature and order for immediate clearance of the blockage.

Now, therefore, I Smti Darshan Chetia, Sub Divisional Magistrate, Dhubri in exercise of the power conferred upon me u/s 133 of Cr Pc, 1973 do hereby order that the bamboo fencing erected by the 2nd party obstructing the path used by the 1st party and other public be removed immediately and be kept open by the 2nd party members in future for use by the 1st party and other public free from any type of construction in the aforesaid path in the land. O/C, Golakganj PS to execute the order and maintain peace between the parties during execution of the order and submit report. Circle Officer, Agomoni Rev Circle is requested to be present during the execution process and report compliance.

This order shall come into force with immediate effect.

Given under my hand and seal this 29th Day of January, 2022”.

Sd/

Eligible

8. Having carefully considered the submissions of learned Advocates of both sides, and perusing the documents placed on record, I find sufficient force in the submission made by Mr. Borah, learned counsel for the petitioners. It is no more *res integra* that Section 133 of the Cr.P.C., can be invoked when there is danger to health and property of the public and public nuisance is involved. In the case in hand, Annexure-C, the report of Circle Officer, Agamoni which is enclosed with the application, at Page 12, reveals that the road in question was situated over a plot of land measuring 14 Bigha 2 Katha, under Periodic Patta No.500 and Dag No.1079 and the said land is in the name of one Smti. Rabeia Bibi, Jahanur Rahman, Poiesh Uddin Prodhani, Mujamuddin Prodhani and Sahar Uddin Bepari,

and nothing has been mentioned in the record of the Government, about the aforesaid road, and the same is not a public road and there is dispute between the petitioners and the respondent No.2, in connection with the aforesaid road.

9. Thus, it appears that the road in question is not a public road. It is situated in private plot of land belonging to the petitioners. Though the learned counsel for the respondent No.2, Mr. A. Das tried to persuade this Court that the said road is being used by public, yet the report of the Circle Officer, Annexure-'C', speaks otherwise.

10. Since the road in question is not a public road, the question of causing nuisance to public does not arise and as such, the power given under Section 133 of the Cr.P.C., cannot be invoked here in this case. Besides, it appears from the impugned order that the learned Court below, while converting the proceeding under Section 107 Cr.P.C. to a proceeding under Section 133 Cr.P.C., has not followed the procedure prescribed under Section 138 of the Cr.P.C. Besides, the learned Court below has not drawn up any preliminary order, which is *sine qua non*, as held by the Hon'ble Supreme Court in the case of **C.A. Avarachan** (supra) referred by Mr. Borah, learned counsel for the petitioners.

11. In view of above, I find sufficient merits in this petition and accordingly the same stands allowed. The impugned order dated 29.01.2022, passed by the learned Sub-Divisional Magistrate, Dhubri, in Misc. Case No.13/2021, is set aside and quashed.

12. Consequently, the interlocutory application, filed by the respondent No.2 also stands dismissed.

JUDGE

Comparing Assistant