

**CRIMINAL REFERENCE.***Before Mookerjee and Sheepshanks JJ.*

RAIMOHAN KARMAKAR

v.

EMPEROR.\*

1916

June 7.

*Public Pathway—Obstruction—Proceedings against several without statement of particular acts of obstruction done by each—Initial and final orders, vague—No reasonable opportunity given to show cause and adduce evidence—Legality of order based on local inquiry or information at time of conditional order—Criminal Procedure Code (Act V of 1898), ss. 133, 136, 137.*

In a proceeding under s. 133 of the Criminal Procedure Code against several persons, alleging various acts of unlawful obstruction to a public way, the initial and final orders must state accurately the specific obstruction caused by each, and which he is required to remove, unless it is alleged that all of them are jointly responsible for all the obstructions complained of.

An order under the section should not be vague, indefinite or ambiguous, but such as to afford information by its terms to the person to whom it is directed what he is to do in order to comply with it.

*Kali Mohan Kar v. Nakari Chandra Das* (1) followed.

It is desirable that reasonable opportunity should be given the parties proceeded against under s. 133 to show cause under s. 135 (b) or adduce evidence under s. 137 (1).

The report or other information on which the Magistrate has passed the conditional order under s. 133, is not evidence against the person to whom it is directed.

*Srinath Roy v. Ainaddi Halder* (2) approved.

An order under s. 133 cannot, even by consent of parties, be based on information gathered at a local inquiry.

*Upendra Nath Mandal v. Rampal* (3) approved.

\* Criminal Reference No. 81 of 1916, by M. Smither, Sessions Judge of Dacca, dated May 25, 1916.

(1) (1909) 11 C. L. J. 114.

(2) (1897) I. L. R. 24 Calc. 395.

(3) (1909) 10 C. L. J. 482.

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ON the 21st February 1916, the President Panchayet of the Hashara Union, in the district of Dacca, reported to the Subdivisional Officer of Munshigonj that the *halat* from the Bazar to Teghoria had been destroyed by several persons (of whom six were named) who had "either dug earth therefrom, excavated a pond, or ploughed up the land and included it in their holdings." On the 4th March, the Magistrate directed proceedings under s. 133 of the Criminal Procedure Code to be taken against the persons named to show cause, on the 24th March, why they should not remove the said obstructions. A proceeding or initial order under s. 133 was accordingly drawn up in form xvi to Schedule V of the Code against the six persons jointly, stating that they had obstructed the said *halat* "by digging earth, excavating a pond or extending your ploughed land," and requiring them to remove the obstructions within seven days or show cause on the 24th March.

No copy of the order was sent to the parties, but summonses to appear were served on them on the 21st March. On the 24th instant, one appeared and consented to the order, two others applied for an adjournment to file written statements which was refused. The remaining three did not appear. The Magistrate made the order absolute against all without taking any evidence, and a notice was thereupon issued on them to remove the obstructions immediately.

Neither the initial nor the final orders specified the particular act or acts of obstruction each had committed, nor what particular obstruction each was required to remove.

The Additional Sessions Judge reported the case to the High Court under s. 438 of the Code recommending the reversal of the final order.

No one appeared at the hearing of the Reference.

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**MOOKERJEE AND SHEEPSHANKS JJ.** This is a reference by the Sessions Judge of Dacca, under section 438 of the Criminal Procedure Code, in the matter of a proceeding under section 133.

On the 21st February 1916, the President Panchayet of the Hashara Union reported to the Subdivisional Magistrate of Munshigonj that the *halat* from the Hashara Bazar to Teghoria had been destroyed by several persons (6 of whom were mentioned in his list) "who had either dug earth therefrom, or excavated a pond, or had ploughed up the land and included it in their holdings." On the 4th March, the Magistrate directed proceedings to be drawn up against all the persons to show cause why they should not remove the obstructions mentioned; by the same order he fixed the 24th March for the hearing of the case. A proceeding was then drawn up against the six persons jointly requiring them to remove the obstructions mentioned within seven days or to show cause on the 24th March why the order should not be confirmed. The order, however, in the form No. xvi of Schedule V of the Criminal Procedure Code, was not drawn up and signed till the 14th March and was not made over to the peon till the 18th March. His return shows that the order was not served till the 21st March. On the date fixed, one of the six persons mentioned in the notice appeared and stated that he had no objection to remove the obstruction, and the order was made absolute against him; three of the others were absent and the order was made absolute against them under section 136. The remaining two persons appeared and prayed for an adjournment to enable them to file a written statement. The Magistrate refused the application and made the order absolute against them also.

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Pursuant to this order a notice was issued upon them that they do remove the obstruction immediately on receipt of the notice. The Sessions Judge has, upon the application of these two persons, who had appeared to show cause under section 135, recommended that the order be set aside on two grounds, namely, *first*, that the petitioner had not sufficient opportunity to show cause against the order; and, *secondly*, that the proceedings were defective, because the initial as well as the final order was not sufficiently precise. We are of opinion that these objections are well founded.

The initial order under section 133, though made on the 4th March, was not served till the 21st March. The reason for the delay has not been explained; but the result has been that the petitioners had only two days to enable them to show cause. Their application for an adjournment was thus not unreasonable. It cannot be overlooked that a proceeding under section 133 is, in the first instance, entirely *ex parte*, and, as pointed out in *Srinath Roy v. Ainaddi Halder*(1), the report or the other information whereon the Magistrate has taken action before making the conditional order is no evidence against the opposite party. It is consequently desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by section 135, clause (b), and to adduce evidence as prescribed by section 137 (1). In the case before us we agree with the Sessions Judge that the petitioners had not such opportunity given to them. We may add that the Magistrate in his Explanation relies upon the result of an inspection he had made of the locality in the course of a tour long previous to the institution of the proceedings. It may be pointed out, as explained in *Upendra Nath Mandal v.*

(1)(1897) I. L. R. 24 Calc. 395.

*Rampal* (1), that an order under section 133 cannot, even by consent of parties, be based upon information gathered at a local enquiry.

It is further plain that the initial order is not sufficiently specific. When in a proceeding under section 133, instituted against a number of persons, it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order should state accurately, with regard to each person, the specific obstruction made by him, which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned. No person can be called upon, under section 133, to remove an obstruction not caused by himself. In the case before us, there is no allegation that the unlawful obstructions imputed to the opposite party had been caused by all of them jointly; on the other hand, from the report of the President Panchayet it seems that different persons had caused different obstructions. In these circumstances, a joint initial order, which does not specify what obstruction each person called upon to show cause has made, followed by a joint order absolute which does not specify what each member of the opposite party is required thereby to do, cannot be supported. As was pointed out by Jenkins C. J. in *Kali Mohan Kar v. Nakari Chandra Das* (2), an order issued under section 133 should not be vague and indefinite or ambiguous, but must be such that the persons to whom it is directed may be able to learn from its terms what it is that they are to do for the purpose of complying with it. This is no trivial matter, for, under section 140, disobedience to the order renders the defaulter liable to serious penal consequences, namely, to a prosecution under section 188 of the Indian Penal Code.

(1) (1909) 10 C. L. J. 482.

(2) (1909) 11 C. L. J. 114.

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We accordingly accept the recommendation of the Sessions Judge and set aside the order of the Magistrate dated the 24th March 1916.

E. H. M.

## CRIMINAL REFERENCE.

*Before Mookerjee and Sheepshanks JJ.*

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 June 10.

ARFAN ALI

v.

EMPEROR.\*

*Theft—Dishonest intent—Bonâ fide claim of right to property, or mere pretence—Proper question for consideration by the Criminal Courts—Criminal trespass—Evidence of complainant's possession, illusory—Penal Code (Act XLV of 1860) ss. 379, 447.*

The removal of property in the assertion of a *bonâ fide* claim of right, though unfounded in law and fact, does not constitute theft. But a mere colourable pretence to obtain or keep possession of property does not avail as a defence.

Whether the claim is *bonâ fide* or not must be determined upon all the circumstances of the case, and a Court ought not to convict unless it holds that the claim is a mere pretence.

*Rex v. Hall* (1), *Reg. v. Wade* (2), *Rex v. Jenner* (3), *Reg. v. Leppard* (4), *Nassib Chowdhry v. Nannoo Chowdhry* (5), *Rumoo Singh v. Kali Churn Misser* (6), *Mahomed Jan v. Khadi Sheik* (7), *Khetter Nath Dutt v. Indro Jalia* (8), *Empress v. Budh Singh* (9), *In re Madhab Hari* (10), *Pandita v. Rahimulla Akundô* (11), *Emperor v. Sabalsang* (12), *Algarasawmi Tevan v. Emperor* (13), *Hari Bhuimali v. Emperor* (14) followed.

\* Criminal Reference No. 86 of 1916, by H. C. Liddel, Sessions Judge of Sylhet, dated May 30, 1916.

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| (1) (1828) 3 C. & P. 409.            | (8) (1871) 16 W. R. Cr. 78.         |
| (2) (1869) 11 Cox 549.               | (9) (1879) I. L. R. 2 All. 101.     |
| (3) (1829) 7 L. J. M. C. (O. S.) 79. | (10) (1887) I. L. R. 15 Calc. 390n. |
| (4) (1864) 4 F. & F. 51.             | (11) (1900) I. L. R. 27 Calc. 501.  |
| (5) (1871) 15 W. R. Cr. 47.          | (12) (1902) 4 Bom. L. R. 936.       |
| (6) (1871) 16 W. R. Cr. 18.          | (13) (1904) I. L. R. 28 Mad. 304.   |
| (7) (1871) 16 W. R. Cr. 75.          | (14) (1905) 9 C. W. N. 974.         |