

## **Bhola vs Lachman on 24 March, 1950**

**Equivalent citations: AIR1950ALL475**

**Author: Raghubar Dayal**

**Bench: Raghubar Dayal**

ORDER

Raghubar Dayal, J.

1. This is a revision by Bhola against the order of the Sessions Judge, Budaun, confirming the order of a Magistrate, second class, making an order Under Section 133, requiring him to remove a certain obstruction, absolute.
2. Two points were argued in this revision. One was that the learned Magistrate was not right in holding that there was no reliable evidence in support of the applicant's denial of a public right of way over the land in suit. I see no good reason to differ from the findings of the Courts below on this point.
3. The main point urged in this revision is that the Tehsildar Magistrate, second class, was not competent to pass the order under revision in view of the fact that the applicant was not directed by the conditional order passed Under Section 133, Criminal P. C., to appear and show cause against it before this Magistrate. That order required him to appear before the Sub-Divisional Magistrate who had issued the order. The Sub-Divisional Magistrate was incompetent to transfer the proceedings to the second class Magistrate at a stage subsequent to the passing of the conditional order.
4. The record does not contain the original order issued to the applicant. Both the Courts below, however, in their orders indicate that the original order issued to the applicant directed him to appear before the Sub-Divisional Magistrate. The Tehsildar' Magistrate notes in his judgment:

"Accordingly a notice Under Section 133, Criminal P. C., was issued in the Court of Sub-Divisional Magistrate, Data Ganj against Bhola on 23rd April 1948, calling upon him to remove the obstruction. The notice was served, and the accused appeared in the Sub-Divisional Magistrate's Court on 29th May 1948 and the records were transferred to my file for further proceedings."

The learned Sessions Judge's order repeats these facts and adds that on 29th May the applicant was also given a copy of the notice, a copy of which was kept in the file. It was on this basis that this point was raised and decided by the learned Sessions Judge. I must, therefore, hold that the

conditional order issued to Bhola applicant required him to appear before the Sub-Divisional Magistrate to show cause if he objected to comply with the conditional order.

6. In support the learned counsel for the applicant relies on the cases of Umrao Singh v. Kanwar Lal, 39 Cr. L. J. 603 : (A. I. R. (25) 1938 Lah. 323) and Mohammad Baksh v. Emperor, 48 Cr. L. J. 295 : (A. I. R. (35) 1948 Lah. 49). Both these cases are single Judge decisions of the Lahore High Court. In both these cases a first class Magistrate who initiated proceedings Under Section 133, Criminal P. C., transferred them to a second class Magistrate at a late stage, and it was held that the second class Magistrate had no jurisdiction to dispose of the proceedings. It appears that none of these Magistrates was a Sub-Divisional Magistrate. No reference was made to the provisions of Sections 192, 529 (f) and 537, Criminal P. C.

6. On behalf of the opposite party, reliance is placed on the cases of Jagroshan Bharti v. Madan Pande, 6 Pat. 428 : (A. I. R. (14) 1927 Pat. 265 : 28 Cr. L. J. 910), Jagdish Singh v. Baijnath Singh, A. I. R. (30) 1913 Pat. 115 : (44 Cr. L. J. 364) and Chanderdip Mahton v. Emperor, A. I. R. (32) 1945 Pat. 334 : (47 Cr. L. J. 29). There is not any discussion of law in the first two cases. In the case of Chanderdip Mahton v. Emperor, A. I. R. (32) 1945 Pat. 384 : (47 Cr. L. J. 29), it was held that it was irregular on the part of the Sub-Divisional Magistrate to have transferred the case to a second class Magistrate after the party proceeded against Under Section 133, Criminal P. C., had appeared to show cause before the Magistrate who had issued the conditional order, and that this irregularity was cured by the provisions of Sections 529 (f) and 537, Criminal P. C.

7. I am inclined to agree with the view of the Lahore High Court in preference to the view expressed by the Patna High Court.

8. Sections 133 to 134 provide for special procedure with respect to proceedings relating to public nuisances, and special procedure laid down in these sections must be strictly followed. In Nazir Ahmad v. Ring-Emperor, 40 C. W. N. 1221 : (A. I. R. (23) 1986 P. C. 253 : 37 Cr. L. J. 897), their Lordships of the Judicial Committee observed at p. 1227 :

"Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applies is a different and not less well recognised rule, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. This doctrine has often been applied to Courts--Taylor v. Taylor, (1876) 1 Ch. D. 426 and although the Magistrate acting under this group of sections is not acting as a Court, yet he is a judicial officer, and both as a matter of construction and of good sense there are strong reasons for applying the rule in question to Section 164."

Section 133, Sub-section (1) empowers a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class to pass conditional orders against any person, requiring him to act in a certain manner and requiring him, if he objects to act in that manner, to appear before himself or some other Magistrate of the first or second class at a time and place to be fixed by the order and

move to have the order set aside or modified in the manner hereinafter provided. This means that by the conditional order these specified Magistrates have to mention the Magistrate before whom the person proceeded against is to move to have the order set aside or modified in accordance with law. It is to be noticed that such a Magistrate can be either a Magistrate of the first class or second class, though a second class Magistrate had no jurisdiction to pass the conditional order. He is thus given jurisdiction to examine the reasonableness and propriety of the order issued in accordance with the provisions of Section 137, Criminal P. C. The specified Magistrates have, thus, been given a power to transfer the proceedings Under Section 133, Criminal P. C. for a limited purpose to any first class or second class Magistrate.

9. It follows, therefore, that the Magistrate passing the conditional order was to exercise his power of sending the case to another first class Magistrate in the manner set down in Section 133, Criminal P. C., that is, by ordering in the conditional order itself that the person concerned was to appear before the other Magistrate at a certain place and time. If the Magistrate did not exercise this power in that manner, he could not have exercised the power of sending the case to the other Magistrate or of asking the person concerned to appear before another Magistrate in any other manner. He could not have passed such an order at a later stage of the proceedings. He will have no jurisdiction to pass that order and the other Magistrate would get no jurisdiction to proceed with the case on account of an order so made.

10. The same conclusion is to be arrived at in view of case-law relating to the interpretation of provision similar to this one in Section 133, Criminal P. C. Section 106, Criminal P.C., provides for a Court convicting a person of certain offences to order him, if it is considered necessary, at the time of passing sentence on such person, to execute a bond with or without sureties for keeping the peace. If such an order is passed subsequent to the passing of the sentence, that order has been held to be passed without jurisdiction. It was so held by this Court in *Ram Adhin v. Emperor*, 25 Cr. L. J. 965 : (A. I. R. (11) 1924 ALL. 230).

11. Section 250 (1), Criminal P. C. provides that when a Magistrate discharges or acquits an accused he may, by his order of discharge, if he is of that opinion, call upon the complainant or the informant to pay compensation to the accused discharged or acquitted. Prior to the amendment in 1923, this section required the Magistrate to order the payment of compensation in his order of discharge. It was then held in the matter of *Sadur Husain*, 25 ALL. 315 : (1903 A. W. N. 57), that the order for the payment of compensation which was not included in the order of discharge or acquittal was bad, the order being not merely irregular but without jurisdiction. A similar view was expressed with respect to orders passed under the amended section when the order of discharge did not include the order calling upon the complainant or informant to show cause why he should not pay compensation. Such a case is *Emperor v. Maroti*, 34 Cr. L. J. 1163 : (A. I. R. (20) 1933 Nag. 296). It was only when the order calling upon the complainant or informant was passed in such circumstances that it could be deemed to have formed part of the order of discharge that the order was upheld, vide the cases of *Jairaj Singh v. Bansi*, 27 Cr. L. J. 35 : (A. I. R. (13) 1926 ALL. 165), *Ghulam Muhammad v. Vir Bhan*, 28 Cr. L. J. 592 : (A. I. R. (14) 1927 Lah. 515) and *Mangal Chand v. Makhan Goala*, 31 Cr. L. J. 875 : (A.I.R. (17) 1930 Pat 292).

12. A defect of jurisdiction is not cured by Section 537, Criminal P. C., vide *Gokulchand Dwarkadas v. The King*, A. I. R. (35) 1948 P. C. 82 : (49 Cr. L. J. 261), where their Lordships observed at p. 85 : "The defect in the jurisdiction of the Court can never be cured Under Section 537."

13 The order by the Magistrate passing the conditional order directing the person proceeded against to appear before another Magistrate to show cause against the order is not really an order transferring the case Under Section 133, Criminal P. C., to the other Magistrate in the same sense in which Magistrates empowered Under Section 192, Criminal P. C., order transfer of cases to other Magistrates. This power of transfer is independent of the power of transfer given to the specified Magistrates Under Section 192, Criminal P. C. Its nature is also different. There, District Magistrates or Sub-Divisional Magistrates are empowered to transfer cases of which they had taken cognisance for inquiry or trial to any Magistrate subordinate to them. A first class Magistrate can be empowered under that section by the District Magistrate to transfer any case for inquiry or trial to any other specified Magistrate in the district. It means that a first class Magistrate has to be empowered Under Section 192 (2) to transfer a case. On being so empowered, he can transfer a case to the Magistrate who is specified in that order of the District Magistrate. Thirdly, he can only transfer cases dealing with offences, as the Magistrate to whose Court he can transfer should be competent to try the accused or commit him for trial. A District Magistrate or a Sub-Divisional Magistrate can transfer cases only to any Magistrate subordinate to him, while he can transfer proceedings Under Section 133, Criminal P. C., initiated by him to any first class or second class Magistrate, irrespective of the fact whether he is subordinate to him or not. Cases which are transferred Under Section 192 (1) are transferred for inquiry or trial just as cases Under Section 192 (2) are transferred for inquiry or trial. It has been indicated above that under Sub-section (2) cases relating to offences alone could be transferred. It should follow that the same words in Sub-section (1) should also refer to cases relating to offences and not to all criminal proceedings. This is, however, not the view expressed in *King-Emperor v. Munna*, 24 ALL. 151 : (1901 A. W. N. 203) concerning the transfer of cases Under Section 192, Criminal P. C. The determination of this question is, however, not necessary for the decision of this case and I should not, therefore, express any definite opinion on this point.

14. The effect of the transfer of a case Under Section 192, Criminal P. C., is that the Magistrate who transfers the case loses seisin of the case after transfer and that the Court to which the case is transferred becomes in complete charge of that case. It has been so held in *Hafizar Rahaman v. Aimal Haque*, I. L. R. (1941) 1 Cal. 67 : (A. I. R. (28) 1941 Cal. 185 : 42 Cr. L. J. 490). Such is not the case with respect to the case Under Section 133, Criminal P. C., after the Magistrate passing the conditional order directed the person proceeded against by that order to appear before another Magistrate to show cause against the order. The Magistrate who passed the conditional order continues to have jurisdiction in the matter. Section 135 (b) is :

"The person against whom such order is made shall appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try whether the same is reasonable and proper."

He cannot apply to the other Magistrate for the appointment of a jury. He must apply to the Magistrate who passed the conditional order. This provision in fact means that he is given the

liberty to ignore the direction of the Magistrate and to appear in his Court and ask for the appointment of a jury. The Magistrate who passed the conditional order then has to appoint the jury in view of Section 138, Criminal P. C. The jury has to return the verdict to the same Magistrate who is to make the order absolute, if the jury finds the conditional order to be reasonable and proper as originally made or when modified in the manner suggested and the Magistrate accepts the modification. If the Magistrate does not accept the modification suggested by the jury or if the jury does not consider the order of the Magistrate to be reasonable and proper, he is to drop the proceedings. He cannot, to my mind, send the case with the verdict of the jury to the other Magistrate for exercising this discretion and for making the order absolute or for dropping the proceedings.

16. I am, therefore, of opinion that the order directing the person proceeded against to appear before another Magistrate to show cause against the conditional order made by a Magistrate Under Section 133, Criminal P. C., is not an order of transfer of the case Under Section 192, Criminal P. C. Section 529 (f), Criminal P. C., provides that, if any Magistrate not empowered by law to transfer a case Under Section 192, erroneously in good faith transfers the case, his proceedings shall not be set aside merely on the ground of his not being so empowered. This can only cure the irregular transfer of a case which could have been transferred Under Section 192, Criminal P. C., if the transferring Magistrate was competent to pass an order under that section, and does not cure the transferring of a case when the order transferring the case is not covered by Section 192, Criminal P. C., and is an order which a Court has been empowered to make in special circumstances. I am, therefore, of opinion that even if it be taken that the conduct of a Magistrate in directing the person concerned to appear before another Magistrate at a late stage of the proceedings Under Section 133, Criminal P. C., instead of making the direction in the conditional order, amounted to an irregularity, that irregularity could not be cured Under Section 529 (f), Criminal P. C.

16. I, therefore, hold that the Tehsildar Magistrate had no jurisdiction to consider the objection by the applicant and to make the conditional order Under Section 133, Criminal P. C., absolute. I, therefore, allow the revision, set aside the order passed by the Tehsildar Magistrate and send back the case to the Sub-Divisional Magistrate concerned for further proceedings according to law.