

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.32558 of 2016**

Arising Out of PS. Case No.- Year-1111 Thana- District-

1. Smt. Shakuntala Devi Wife of Laxman Pandit,
 2. Laxman Pandit, Son of Late Meghu Pandit
 3. Rakesh Ranjan @ Rakesh Kumar Son of Laxman Pandit
All are Resident of Mohalla- Bari Khagaul, Kumhar Toli, Post Office Police Station- Khagaul, District- Patna
- Petitioner/s

Versus

1. The State Of Bihar Through District Magistrate, Patna, Bihar
 2. District Magistrate, Patna, Bihar
 3. Sub Divisional Magistrate, Danapur, Patna
 4. Officer In Charge Khagaul Police Station
 5. Narain Pandit S/o Sakhichand Pandit Resident of Mohalla- Bari Khagaul, Kumhar Toli, Post Office Police Station- Khagaul, District- Patna
- Opposite Party/s
-

Appearance :

For the Petitioner/s : Mr. Choudhary Shyam Nandan, Advocate
For the State : Mr. Upendra Kumar, APP
For Private Respondent : Mr. Suman Kumar Jha, Advocate

**CORAM: HONOURABLE MR. JUSTICE JITENDRA KUMAR
CAV JUDGMENT**

Date : 23-08-2024

The present petition under Section 482 Cr.PC has been preferred by the Petitioners against the impugned notice and conditional order dated 28.05.2016 issued to the Petitioners in Case bearing No.216/M/2016, pending before Ld. Sub-Divisional Magistrate, Danapur, Patna, whereby proceeding under Section 133 Cr.PC has been initiated and the Petitioners have been directed to remove the obstruction/encroachment from the land in question or in the alternative, they are required



to file show cause by themselves or through their counsel as to why the conditional order should not be made absolute.

2. The proceeding under Section 133 of Cr.PC has been initiated against the Petitioners on report of the officer-in-charge of Khagaul Police Station. The police have submitted the report in view of the complaint of O.P. No. 5, Narayan Pandit. As per the police report, the land in question bearing holding no. 234, Ward No. 16, Circle No.10, is situated in mohalla Bada Khagaul, Millat Colony belonging to the Petitioners. The tenant of the Petitioners is running a *khatal* over the land and in the middle of the land, there is accumulation of animal dung and at the western part of the land, there is storage of bricks. The land of the Complainant is situated to the north of the land of the Petitioners having old house built up over it. However, nobody is inhabiting in the house. The Complainant/O.P. No. 5 demands a pathway over the land of the Petitioners to access the metalled road. However, the Petitioners claim that they have already given pathway from the backside of their land. However, the police have found that the land of the Petitioners is vacant on the eastern side which may be used by the Complainant for ingress and egress to the road, but the Petitioners are not agreeable to allow the Complainant to use



their land as pathway to the metalled road. A litigation is pending between the parties in regard to this dispute between them. Hence, the police was of the view that in view of the dispute between the parties and law and order, initiation of proceeding under Section 133 Cr.PC was required.

3. Being satisfied with the report of the police, learned Executive Magistrate has initiated the proceeding under Section 133 Cr.PC and passed the conditional order to the Petitioners.

4. Being aggrieved by the impugned notice and the conditional order, the Petitioners have preferred the present petition.

5. I heard learned counsel for the Petitioners, learned APP for the State and learned counsel for O.P. No. 5, on whose complaint, the proceeding under Section 133 Cr.PC has been initiated.

6. Learned counsel for the Petitioners submits that initiation of proceeding under Section 133 Cr.PC and passing of conditional order by the learned S.D.M. are not sustainable in the eye of law. For invoking jurisdiction under Section 133 Cr.PC, there must be existence of public nuisance or obstruction in violation of public right. But in the case on hand, even as per the police report, there is no such public nuisance or violation of



any public right by creating obstruction or encroachment on public land. There is no report of the police that there was public nuisance being created on account of accumulation of animal dung or storage of bricks on the land by the Petitioners. Even the Complainant, who is O.P. No. 5, has not made complaint regarding any nuisance being created on account of running of *khatal* and accumulation of animal dung, much less there was any complaint of the public at large. Even the police report discloses that there is dispute between the Complainant and the Petitioners in regard to pathway to approach the metalled road by the Complainant. The land of the Petitioners is situated adjacent to the metalled road to the north and the land of the Complainant/O.P. No. 5 is situated adjacent to the land of the Petitioners to the north. And hence, the Complainant wants the approach pathway from their land to the metalled road through the land of the Petitioners. However, the Petitioners are not agreeable to such demand of the Complainant stating that they have already given pathway to the Complainant from the backside of the land. In regard to the dispute between the parties, there is already civil litigations going on between them.

7. It is further submitted by the learned counsel for the Petitioners that as a matter of fact, there is no public nuisance



or obstruction being created by the Petitioners to the discomfort or inconvenience to the public. In fact, the Complainant wants a pathway through their land to the metalled road which is not acceptable to them and hence, the Complainant has already preferred Title Suit bearing no. 76 of 2001 against the Petitioners claiming his elementary right over the land to approach the metalled road. However, the Suit of the Complainant has been dismissed by the learned Trial Court and thereafter, the Complainant preferred Civil Appeal bearing Title Appeal No. 93 of 2007 in the Court of learned District Judge. Even the Title Appeal has been decided against the Complainant and hence, the Complainant has preferred Second Appeal bearing no. 101 of 2016 before this Court which is pending adjudication.

8. As such, learned counsel for the Petitioners submits that it is a civil dispute between the Complainant and the Petitioners and there was no occasion for initiation of proceeding under Section 133 Cr.PC. Hence, the impugned notice and the conditional order is nothing but abuse of the process of the Court and not sustainable in the eye of law and liable to be quashed under Section 482 Cr.PC.

9. However, learned APP for the State and State



instrumentalities and learned counsel for O.P. No. 5 defend the impugned notice and the conditional order submitting that there is no illegality or infirmity in the impugned notice and the conditional order. On account of accumulation of animal dung and the storage of bricks on the land of the Petitioners, learned S.D.M. has rightly invoked the jurisdiction under Section 133 Cr.PC to prevent public nuisance so as to maintain public order and peace.

10. Before I consider the rival submission of the parties and peruse the material on record, it would be pertinent to refer to Section 133 Cr.PC which reads as follows:-

133. Conditional order for removal of nuisance. (1) Whenever a District Magistrate or Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers -

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion



conflagration to explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of, such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning or possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order -

(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order, or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order and show cause, in



the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation. - A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

11. On several occasions, Hon'ble Supreme Court analyzed the scheme, scope and mandate of Section 133 Cr.PC. In the landmark judgment of **Kachrual Bhagirath Agrawal Vs. State of Maharashtra, (2005) 9 SCC 36, Hon'ble Supreme Court** has held that the proceeding under Section 133 Cr.PC is of a summary nature. It was further held that Section 133 Cr.PC is a part of Chapter X of the Code which relates to maintenance of public order and tranquility. The chapter has been classified into four categories. Sections 129 to 132 come under the category of "unlawful assemblies". Sections 133 to 143 come under the category of "public nuisance". Section 144 comes under the category of "urgent cases of nuisance or apprehended danger" and the last category covers Sections 145 to 149 relating to "disputes as to immovable property".

12. Explaining nuisance, **Hon'ble Apex Court** in **Kachrual Bhagirath Agrawal (supra)** has held that nuisances are of two kinds i.e. (i) public; and (ii) private. "Public nuisance"



or “common nuisance” as defined in Section 268 of the Penal Code, 1860 (in short “IPC”) is an offence against the public either by doing a thing which tends to the annoyance of the whole community in general or by neglecting to do anything which the common good requires. It is an act or omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity. “Private nuisance” on the other hand, affects some individuals as distinguished from the public at large. The remedies are of two kinds — civil and criminal. The remedies under the civil law are of two kinds. One is under Section 91 of the Code of Civil Procedure, 1908 (in short “CPC”). Under it a suit lies and the plaintiffs need not prove that they have sustained any special damage. The second remedy is a suit by a private individual for a special damage suffered by him. There are three remedies under the criminal law. The first relates to the prosecution under Chapter XIV of IPC. The second provides for summary proceedings under Sections 133 to 144 of the Code, and the third relates to remedies under special or local laws. Sub-section (2) of Section 133 postulates that no order duly made by a Magistrate under this section shall be called in question in any civil court.



13. Hon'ble Supreme Court further held in **Kachrulal Bhagirath Agrawal (supra)** that the provisions of Chapter X of the Code should be so worked as not to become themselves a nuisance to the community at large. Although every person is bound to so use his property that it may not work legal damage or harm to his neighbor, yet on the other hand, no one has a right to interfere with the free and full enjoyment by such person of his property, except on clear and absolute proof that such use of it by him is producing such legal damage or harm. Therefore, a lawful and necessary trade ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community. Proceedings under Section 133 are not intended to settle private disputes between different members of the public. They are in fact intended to protect the public as a whole against inconvenience. A comparison between the provisions of Sections 133 and 144 of the Code shows that while the former is more specific, the latter is more general.

14. Hon'ble Supreme Court has further held in **Kachrulal Bhagirath Agrawal (supra)** that the guns of Section 133 go into action wherever there is public nuisance. The public power of the Magistrate under the Code is a public duty to the members of the public who are victims of the nuisance, and so he shall



exercise it when the jurisdictional facts are present. All power is a trust that we are accountable for its exercise that, from the people, and for the people, all springs and all must exist. The conduct of the trade must be injurious in praesenti to the health or physical comfort of the community. There must, at any rate, be an imminent danger to the health or the physical comfort of the community in the locality in which the trade or occupation is conducted. Unless there is such imminent danger to the health or physical comfort of that community or the conduct of the trade and occupation is in fact injurious to the health or the physical comfort of that community, an order under Section 133 cannot be passed. A conjoint reading of Sections 133 and 138 of the Code discloses that it is the function of the Magistrate to conduct an enquiry and to decide as to whether there was reliable evidence or not to come to the conclusion to act under Section 133.

15. In Vasant Manga Nikumba Vs. Baburao Bhikanna Naidu, [1995 Supp (4) SCC 54] Hon'ble Supreme Court has held that the object and public purpose behind Section 133 is to prevent public nuisance that if the Magistrate fails to take immediate recourse to Section 133, irreparable damage would be done to the public. The exercise of the power should be one



of judicious discretions objectively exercised 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.

16. As such, it emerges that the condition precedent for invoking jurisdiction under Section 133 Cr.PC by an Executive Magistrate is existence of public nuisance or obstruction causing inconvenience and discomfort to the public at large. But Section 133 Cr.PC is no way meant to adjudicate the civil dispute between the parties. Adjudication of Civil disputes come within the exclusive jurisdiction of Civil Court.

17. Coming to the case on hand, I find that the impugned conditional order has been passed by learned S.D.M. on the written report of the police. But from perusal of the police report, I do not find that there was any allegation or complaint of public nuisance or any obstruction created by the Petitioners to the public at large in violation of their public rights. Even the Complainant has no such grievance against the Petitioner. Only grievance of the Complainant/O.P. No.5 is that he is not allowed to access the metalled road through the land of the Petitioners. He wants approach pathway from his land to the metalled road through the land of the Petitioners claiming easementary right



over it. But he has no complaint that there is any nuisance from the accumulation of bricks or animal dung or running of *khatal* over the land in question of the Petitioners. Even regarding such pathway, there is no public demand. It is only the Complainant/O.P. No.5 who wants this path way.

18. Hence, the dispute between the Complainant and the Petitioners is private and civil in nature. Public at large are no way affected by such demand for pathway and the Complainant has already moved Civil Court for getting such easementary right over the land of the Petitioners vide Title Suit No. 76 of 2001 and at the present, the matter is pending before this Court by way of Second Appeal bearing no. 101 of 2016, because the Complainant has already lost the case in the Trial Court as well as first Appellate Court and now he is agitating his right by way of Second Appeal.

19. As such, in view of the aforesaid facts and circumstances, I find that there was no occasion for learned S.D.M. to invoke the jurisdiction under Section 133 Cr.PC. Learned S.D.M. has exceeded his jurisdiction usurping the jurisdiction of Civil Court. All State instrumentalities have their own jurisdiction and they are not expected to transgress their jurisdiction to encroach upon that of the others. Colourable



exercise of jurisdiction by learned S.D.M. is not acceptable in our legal system. In fact, learned Magistrate has abused the process of the Court by initiating the proceeding under Section 133 Cr.PC and passing the impugned order. Hence, the impugned notice and the order and the whole proceeding pending before learned Executive Magistrate is not sustainable in the eye of law and liable to be quashed and set aside under Section 482 Cr.PC to prevent the abuse of the process of Court and meet the ends of justice.

20. Accordingly, the whole proceeding arising out of Case bearing No.216/M/2016, pending before Ld. Sub-Divisional Magistrate, Danapur, Patna, including the impugned notice and conditional order are quashed and set aside.

(Jitendra Kumar, J.)

chandan/shoaib-

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