

Court No. - 80

Case :- CRIMINAL MISC. WRIT PETITION No. - 2270 of 2023

Petitioner :- Shiv Kumar Yadav

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Ajay Kumar Singh Yadav, Ram Babu Yadav

Counsel for Respondent :- G.A.

Hon'ble Subhash Chandra Sharma, J.

List revised.

None appeared for the respondents even though service of notice.

Heard learned counsel for the petitioner as well as learned A.G.A. for the State and perused the material on record.

The present writ petition under Article 226 of the Constitution of India has been moved with following prayers :-

I- To issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 17.12.2022 passed by Additional Session Judge, Court No. 01, Azamgarh in Revision No. 181 of 2022, (JO Code UP 5910), (Shiv Kumar Yadav Vs. State of U.P. and Another) as well as order dated 22.08.2022 passed by Sub Divisional Magistrate, Martinganj, Azamgarh in Case No. 1997 of 2021, Computerized No. T20215060801997 (Chintamani and other Vs. Shiv Kumar and other), U/s 133 Cr.P.C., Village Khamhauri, P.S. Vardah, Azamgarh to the writ petition.

II- To issue a writ, order or direction in the nature of mandamus commanding the respondents not to interfere in the peaceful possession of petitioner's aراضي.

III- To issue a writ, order or direction as this Hon'ble Court may deem fit and proper under this circumstances of the case.

In brief an application was moved on the part of respondent Chintamani Yadav before the court of learned S.D.M. on 23.10.2020 on which the Station Officer (Barda) was directed to give its report with site plan within a week, in pursuance to which report of Sub-Inspector Raj Bahadur Yadav dated 12.12.2020/ 14.12.2020 was filed on the basis of which case was registered and notice was issued to the petitioner who appeared before the learned court of S.D.M. and inquiry was conducted. After conclusion of inquiry order dated 22.08.2022 was passed with direction to concerned S.O. to let the villagers pass through the gate which was

installed in the Bhumidhari/ Patta land of the petitioner. Being aggrieved with the order criminal revision was filed before the learned court of Session which was registered as criminal revision No. 181 of 2022 and decided by the learned revisional court by order dated 17.12.2022 while dismissing the revision against which this criminal writ petition has been preferred before this Court.

It is submitted by learned counsel for the petitioner that the land in question on which boundary and gate was installed in pursuance to the order passed by this Court in writ petition No. 15802 of 2020 belong to Bhumidhari/ Patta land of the petitioner. There was no any public way on it. Learned S.D.M. passed the order dated 22.08.2022 without adopting the proper procedure provided under Criminal Procedure Code for inquiry in such cases and without giving proper opportunity of adducing evidence to him an order was passed which cannot be said to be lawful. It is further submitted that during the course of inquiry case was fixed for evidence on 17.05.2022 thereafter there was strike on the part of lawyers till the date of order. Lastly, on 17.08.2022, 31.08.2022 was fixed in the case but it was overwritten later on and made as 18.08.2022, on which the next date was fixed on 22.08.2022 and on that day the order was passed without giving an opportunity of hearing to the petitioner. In this way also the order passed by learned S.D.M. cannot be said to be lawful. All these facts were raised by him before the learned court of Session in revision but learned revisional court also did not consider all these facts and provisions as contained under Section 137 Cr.P.C. regarding procedure where existence of public right is denied but dismissed the criminal revision which can also not be said to be in conformity with law, therefore request to set aside the orders passed by learned S.D.M. as well as the learned revisional court as aforesaid and to allow the petition.

Learned A.G.A. for the State opposed the prayer as aforesaid but could not dispute the fact that procedure as provided under Section 137 Cr.P.C. where existence of public right is denied and also the fact of date overwritten on 31.08.2022 as 18.08.2022 and also the opportunity of hearing to the opposite party prior to passing the order in question.

For proceeding under Section 133 Cr.P.C., where existence of public right is denied the procedure has been given under Section 137 Cr.P.C. which is to be followed by the learned court concerned while deciding the case.

Section 137 in The Code Of Criminal Procedure, 1973 provides that:-

137. Procedure where existence of public right is denied.

(1) Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the

way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under section 138, inquire into the matter.

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court; and, if he finds that there is no such evidence, he shall proceed as laid down in section 138.

(3) A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial.

On considering facts and circumstances of the case, submissions made by learned counsel for the petitioner as well as learned A.G.A. for the State, material on record, the orders passed by learned S.D.M. as well as the revisional court, it appears that an application was moved before the learned S.D.M. for removing the nuisance on the public way regarding Gata No. 427/ 0.039 and 428/ 0.049 Hectare located in Abadi land on which police report was called for, in pursuance to which the Sub-Inspector for concerned police station submitted its report on the basis of which show cause notice was issued to the petitioner and he filed his objection denying the existence of public way on the said land. During the course of proceedings no any evidence was given on the part of the applicant then the case was fixed for the evidence of the petitioner and it was continued to fix the date for rest of the evidence. Lastly, it was fixed for 17.05.2022 and then on account of resolution from the bar no proceeding was made and several dates were fixed and on 17.08.2022 on account of resolution of the bar it was fixed on 31.08.2022 but it was later on overwritten as 18.08.2022. On 18.08.2022 next date was fixed on 12.08.2022 on which order in question was passed. In this way, no proper opportunity of adducing the evidence regarding denial of public right was given to the petitioner before passing the order in question as required in view of provisions as contained under Section 137 Cr.P.C. In this way, the order passed by learned S.D.M. cannot be said to be in conformity with the provisions as contained in law for deciding the case where existence of public right is denied. On the other hand, the case was fixed on 17.08.2022 then it was fixed on 31.08.2022 and the date was overwritten as 18.08.2022 without any information to the petitioner. On 18.08.2022 next date 22.08.2022 was fixed and order in question was passed. It also shows that no opportunity of hearing was given to him before passing the aforesaid order. This also makes the order illegal and inappropriate. It is to note that where existence of public right is denied by the party and inquiry by the Magistrate is made, he is to be given an opportunity to lead evidence in support of his claim and if in such inquiry there is any reliable evidence in support of such denial the proceedings shall be stayed. The matter of existence of such right is to be decided by the competent court and if he finds that there is no such evidence he shall proceed as laid down

under Section 138 Cr.P.C. but this was not done on the part of learned S.D.M. while making the inquiry and passing the order in question. This fact was also not considered by the learned revisional court as a result the orders passed by learned S.D.M. as well as learned revisional court cannot sustain in the eyes of law but are liable to be set aside and this petition is **allowed**.

Thus the order passed by learned S.D.M. on 22.08.2022 as well as learned revisional court on 17.12.2022 are hereby set aside and this petition is **allowed** with direction to the learned court of S.D.M. to decide the claim of the petitioner afresh adopting the procedure as contained under Section 137 Cr.P.C. within a period of 60 days from the production of certified copy of this order without giving any unnecessary adjournment to either of the parties.

Order Date :- 23.11.2023

Suraj Srivastav