

Neutral Citation No. - 2024:AHC-LKO:21040

AFR

Reserved on 07.12.2023

Delivered on 11.03.2024

Court No. - 07

Case :- APPLICATION U/S 482 No. - 11082 of 2023

Applicant :- Prem Narayan Tiwari And Another

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home Lko. And Another

Counsel for Applicant :- Purnendu Chakravarty, Abhishek Awasthi, Pranjal Jain

Counsel for Opposite Party :- G.A., Rakesh Chandra Tewari

Hon'ble Saurabh Lavania, J.

Heard learned counsel for the applicant, learned AGA for the State of U.P. and perused the record.

By means of the instant application under Section 482 Cr.P.C., the applicants have assailed the order dated 07.05.2022 passed by Sub-Divisional Magistrate, Dalmau, Raebareli (hereinafter referred to as "Magistrate") in exercise of power under Section 138 of Cr.P.C. in Case No. 745 of 2022, Computerized Case No. T202210580500745, under Section 133 of Cr.P.C. as also the order dated 05.09.2023 passed by Additional District and Sessions Judge, IV, Raebareli (hereinafter referred to as "revisional court") in Criminal Revision No. 129 of 2022 (Prem Narayan Tiwari another vs. Dharmendra Kumar Shukla & another).

Brief facts of the case are to the effect that an application under Section 133 Cr.P.C. was preferred by one Dharmendra Kumar Shukla, which was registered as Case No. 745 of 2022, in which, the Magistrate concerned issued notice to the opposite parties and in response to the same, applicants herein namely Prem Narayan Tiwari and Manoj Kumar Tiwari put in appearance and filed their response on 28.04.2022. The response filed by the applicants are as under:-

"धारा 1:- यह कि श्रीमान उप निरीक्षक थाना गदागंज द्वारा दी गई रिपोर्ट दि० 21-3-2022 बेबुनियाद तथा विधि व्यवस्था के विरुद्ध होने के कारण निरस्त होने योग्य है।

धारा 2:- यह कि थाना गदागंज के द्वारा किसी प्रकार का कोई मौके पर मुआइना नहीं किया गया है प्रथम पक्ष के दबाववश फर्जी हैरान व परेशान करने की नियत से फर्जी रिपोर्ट दिखाकर वाद दायर कर दिया है जो गलत है, निरस्त होने योग्य है।

धारा 3:- यह कि प्रथम पक्ष धर्मेन्द्र कुमार के पिता स्व० श्यामसुन्दर शुक्ला से मुझ द्वितीय पक्ष प्रेम नारायण तिवारी से न्यायालय सिविल जज के यहाँ वाद सन 1997 से चल रहा था जिसमें दि० 15-2-2020 को आदेश मुझ द्वितीय पक्ष के हक में हो गया है इसी रंजिश को लेकर यह दूसरा वाद चलाया गया है।

धारा 4:- यह कि प्रथम पक्ष के पिता द्वारा बाउन्ड्री बनवाई जा रही था जिसमें विवाद होने पर प्रथम पक्ष के पिता स्व० श्यामसुन्दर द्वारा 17 फिट का रास्ता छोड़ा गया था सुलहनामा की छायाप्रति संलग्न कर रहे हैं।

धारा 5- यह कि मौके पर जो रास्ता है उसमें कोई अवरोध द्वितीय पक्ष द्वारा नहीं किया गया है अतः रास्ता नाली है जिसको मौके पर देखा जा सकता है।

धारा 6:- यह कि बरसात के कारण गलियारा ऊंचा नीचा हो जाता है इस लिए रास्ते में गड्ढों का बराबर करवाया है द्वितीय पक्ष कोई अवरोध रास्ते में नहीं किया गया है चूंकि द्वितीय पक्ष विकलांग है इसलिए गड्ढा होने से उसे दिक्कत होती है।

धारा 7:- यह कि प्रथम पक्ष द्वारा सुलहनामा होने के बावजूद भी रास्ते के बगल में ईंट गिट्टी लगाकर रास्ता सकरा किया गया है वह स्वयं ही दोषी है।

धारा 8-यह कि प्रथम पक्ष ने व्यक्तिगत रूप से द्वितीय पक्ष गलत दोषारोपण किया है जो कतई माफी योग्य नहीं है।

धारा 9:-यह कि द्वितीय पक्ष निर्दोष है थाना गदागंज की रिपोर्ट गलत-तथ्यों पर आधारित है द्वितीय पक्ष ने कोई अवरोध नहीं किया है।

अतः श्रीमान् जी से प्रार्थना है कि श्रीमान जी स्वयं मौका मुआइना करके वाद समाप्त करने तथा प्रथम पक्ष के विरुद्ध विधिक कार्यवाही करने की कृपा करें।"

From the above quoted portion of the response dated 28.04.2022 filed by the applicants, it is apparent that admittedly the disputed pertains to 'public way' and that the applicants prayed for spot inspection by the concerned Magistrate.

From the undisputed orders particularly the orders passed by the Magistrate concerned on 28.04.2022 and 30.04.2022, it appears that Magistrate concerned visited the spot, however, from the record, it appears that the spot memo/inspection report was not prepared on 30.04.2022.

It also appears from the record that a report dated 02.05.2022 was submitted by the Lekhpal concerned and the case was fixed for the arguments on 02.05.2022 and thereafter again on 04.05.2022 and thereafter the matter was heard on 05.05.2022 and final order was pronounced on 07.05.2022, impugned herein. The relevant portion of the impugned order dated 07.05.2022 reads as under:-

"उपरोक्त परिप्रेक्ष्य में क्षेत्रीय लेखपाल द्वारा प्रकरण में आख्या दिनांक 02.05.2022 प्रेषित की गयी है, जिसमें उल्लिखित किया गया है कि ग्राम बरारा बुजुर्ग आबादी के अन्तर्गत धर्मेन्द्र शुक्ल का मकान स्थित है। उक्त मकान के सहन

की सीध में सम्पर्क मार्ग, आगे बने हुए आर०सी०सी० सड़क तक जाता है। प्रार्थी के मकान के उत्तर-पश्चिम में प्रतिपक्षी प्रेमनरायन तिवारी पुत्र चन्द्रदेव द्वारा अपने मकान के सहन के सामने बने हुए सम्पर्क मार्ग में मिट्टी डालकर ऊँचा कर दिया गया है जिससे प्रार्थी धर्मेन्द्र शुक्ल द्वारा आपत्ति प्रस्तुत की गयी है। प्रार्थी का कहना है कि उसके सीध में जो आगे आर०सी०सी० मार्ग बना हुआ है वह नीचा है वहाँ तक पहुँचने के लिए प्रार्थी द्वारा पूर्व से ही समतलीकरण करते हुए मिट्टी डाली गयी थी। अब वहाँ तक पहुँचने में सम्पर्क मार्ग ऊँचा नीचा हो रहा है जिससे चार पहिया वाहन आदि निकलने में भविष्य में दिक्कत हो सकती है। इस प्रकार स्थलीय निरीक्षण में विदित होता है कि प्रतिपक्षी द्वारा रास्ते में मिट्टी डालकर ऊँचा करना कोई औचित्यपूर्ण नहीं है। थानाध्यक्ष गदागंज द्वारा भी अपनी आख्या में प्रश्रुत रास्ते को मिट्टी डालकर अवरोध उत्पन्न करने का उल्लेख किये जाने संबंधी रिपोर्ट प्रेषित की गयी है, जिसके क्रम में 113(1) द०प्र०सं० की नोटिस निर्गत की गयी है। मौके का मेरे द्वारा भी निरीक्षण किया गया। निरीक्षण में उपरोक्त सम्पर्क मार्ग में मिट्टी डालकर काफी ऊँचा कर दिया गया है, जिससे वाहनों के आवागमन में बाधा उत्पन्न हो गयी है।

पत्रावली पर उपलब्ध आख्याओं एवं अभिलेखीय साक्ष्यों का अवलोकन एवं परीशीलन किया गया। पत्रावली के अवलोकन से स्पष्ट होता है कि द्वितीय पक्ष प्रेमनरायन तिवारी द्वारा प्रश्रुत रास्ते में मिट्टी डाल कर अवरोध उत्पन्न किया गया है एवं सार्वजनिक रास्ते में अवरोध से सार्वजनिक उपताप का स्वरूप हो गया है। अतः उक्त अवरोध को हटाया जाना विधिक दृष्टिकोण से सर्वथा उचित एवं न्यायसंगत है। एतद्द्वारा निम्नलिखित आदेश पारित किये जाते हैं।

आदेश

श्री प्रेमनरायन तिवारी आदि के विरुद्ध दण्ड प्रक्रिया संहिता की धारा 133(1) के अन्तर्गत पारित आदेश दिनांक 08.04.2022 को अन्तिम किया जाता है और विपक्षी श्री प्रेमनरायण तिवारी आदि को निर्देशित किया जाता है कि उपरोक्त रास्ते में अनाधिकृत रूप से मिट्टी डालकर किये गये अवरोध को हटा दें। ऐसा न करने पर वे धारा 188 भारतीय दण्ड संहिता के अन्तर्गत दण्डनीय अपराध के लिए दोषी होंगे। इस आदेश की प्रतिलिपि थानाध्यक्ष गदागंज जनपद रायबरेली को इस निर्देश के साथ प्रेषित की जाय कि दिनांक 14.05.2022 तक विपक्षी द्वारा इस आदेश का अनुपालन न किये जाने की दशा में उक्त सार्वजनिक अपदूषण को हटवाकर अनुपालन आख्या तथा अपदूषण हटाने में हुए व्यय के विवरण के साथ इस न्यायालय में दिनांक 18.05.2022 को प्रस्तुत करें।"

A perusal of impugned order dated 07.05.2022 indicates that the same is based upon the report of Lekhpal dated 02.05.2022 as also the actual position/aspect of the place in dispute observed by the Magistrate concerned himself while making inspection and the Magistrate after taking note of the same observed that the applicants have obstructed the 'public way' and thereafter, passed the order dated 07.05.2022 directing the applicants to remove the obstructions.

The fact that the Magistrate concerned visited the spot has not been refuted by the applicants.

Being aggrieved by the order dated 07.05.2022, the applicants preferred the Criminal Revision No. 129 of 2022. A perusal of memo of revision indicates that the order dated 07.05.2022 was assailed before the District and Sessions Judge, Raebareli on the following grounds:-

"(a) That the impugned order dated 07-05-2022 passed by the learned lower court being against the law and facts and not sustainable in the eye of law and liable to be quashed.

(b) That after passing the conditional order dated 08-04-2022 under section 133(1) Cr.P.C. the learned lower court not adopted the proceeding under section 138 Cr.P.C. and passed the impugned order without adopting the procedure under section 138 Cr.P.C. hence the impugned order is bad in law.

(c) That after passing the conditional order and after filing the objection by the revisionists neither the date for taking evidence under section 138 Cr.P.C. was fixed before the learned lower court nor any opportunity of evidence was given by the learned lower court to the parties concerned, violating the procedure laid down under section 138 Cr.P.C. in arbitrary manner. Hence the impugned order dated 07-05-2022 is not sustainable in the eye of law and liable to be quashed.

(d) That needless to say here that under section 133(1) Cr.P.C., after passing the conditional order section 133(1) Cr.P.C., the further procedure under section 138 Cr.P.C. must be followed by the court concerned before passing any final order but in this case the learned lower court was very much hurried to pass the final order in favour of respondent number 1 and the learned lower court passed the impugned order without followed the law of procedure under section 138 Cr.P.C. hence impugned order is not sustainable in the eye of law as passed and liable to be quashed.

(e) That the impugned order has been passed by the learned lower court on the basis of Lekhpal report summoned after passing the conditional order though it is prejudice and one sided, inspite of this fact, it do not disclose any encroachment on the spot, but the

report above have not been examined under the law, which would not be taken as evidence by the learned lower court, hence the learned lower court has committed manifest error by passing the impugned order on basis of unreliable in evidence inexamined the reports above, hence the impugned order is bad in law.

(f) That the learned lower court neither perused nor considered the objections and arguments adduced by revisionists, hence impugned order is bad in law.

(g) That by passing the impugned order the learned lower court has committed the jurisdictional error and material irregularity.

(h) That the learned lower court has failed to exercise its jurisdiction so vested in it under the law by passing the impugned order."

The revision filed by the applicants was dismissed by the revisional court on 05.09.2023 with the following observations:-

"उपरोक्त प्रावधानों के परिशीलन से यह स्पष्ट है कि यदि धारा 133 सी०आर०पी०सी० के अन्तर्गत कोई प्रार्थनापत्र प्रस्तुत किया जाता है, तो मजिस्ट्रेट ऐसे साक्ष्य लेने पर जैसा वह ठीक समझे ऐसी बाधा या न्यूसेंस पैदा करने वाले व्यक्ति से यह अपेक्षा करते हुए कि सशर्त आदेश दे सकता है कि वह नियत समय के भीतर ऐसी बाधा या न्यूसेंस को हटा दे अथवा नियत तिथि पर उपस्थित होकर कारण दर्शित करें कि उस आदेश को अंतिम क्यों न कर दिया जाये। धारा 135 दं०प्र०स० ऐसे सशक्त आदेश के सम्बन्ध में नोटिस जारी करने या नियत तिथि को मजिस्ट्रेट के समक्ष उपस्थित होकर कारण दर्शित करने से सम्बन्धित है। यदि ऐसा व्यक्ति मजिस्ट्रेट के समक्ष उपस्थित होता है और वह प्रश्नगत स्थान के सम्बन्ध में लोकाधिकार के अस्तित्व से इंकार करता है, तो मजिस्ट्रेट उसकी जांच करेगा। ऐसी जांच में यदि मजिस्ट्रेट को कोई विश्वसनीय साक्ष्य मिलता है तो वह कार्यवाही को रोक देगा, परन्तु यदि कोई साक्ष्य नहीं मिलता है तो मजिस्ट्रेट के लिए यह आवश्यक है कि धारा 138 के अनुसार मामले में उसप्रकार साक्ष्य ले जैसे सम्मन मामले में लिया जाता है। धारा 139 मजिस्ट्रेट को धारा 137 व 138 के अधीन जांच के प्रयोजनों के लिए स्थानीय अन्वेषण के लिए निर्देशित करने एवं किसी विशेषज्ञ को तलब करने की शक्ति प्रदान करती है।

प्रस्तुत प्रकरण में प्रार्थी धर्मेन्द्र कुमार शुक्ला के प्रार्थनापत्र एवं थानाध्यक्ष गदागंज जनपद रायबरेली की रिपोर्ट के आधार पर उप-जिला मजिस्ट्रेट, डलमऊ, जनपद रायबरेली द्वारा निगरानीकर्ता प्रेम नारायन तिवारी एवं मनोज कुमार तिवारी के विरुद्ध धारा 133 की उपधारा (1) के अन्तर्गत सशक्त आदेश पारित किया गया तथा उन्हें सार्वजनिक रास्ते में किये गये अवरोध को तुरन्त हटाने या दिनांक 16.04.2022 को उस न्यायालय में स्वयं अथवा अधिवक्ता के माध्यम से उपस्थित होकर कारण दर्शित करने हेतु आदेशित किया गया। दिनांक 28.04.2022 को निगरानीकर्तागण प्रेम नारायन तिवारी एवं मनोज कुमार तिवारी द्वारा उपरोक्त वाद में बयान तहरीरी प्रस्तुत की गयी एवं यह कथन किया गया कि

प्रथम पक्ष धर्मेन्द्र कुमार के पिता से द्वितीय पक्ष से सिविल जज के यहां वाद चल रहा है जिसमें दिनांक 15.02.2020 को द्वितीय पक्ष के हक में आदेश हो गया। प्रथम पक्ष के पिता द्वारा बाउण्ड्री बनवायी जा रही थी जिसमें विवाद होने पर प्रथम पक्ष के पिता द्वारा 17 फिट का रास्ता छोड़ा गया था मौके पर जो रास्ता है उसमें कोई अवरोध द्वितीय पक्ष द्वारा नहीं किया गया है। आम रास्ता खाली है। जिसको मौके पर देखा जा सकता है। बरसात के कारण गलियारा ऊंचा-नीचा हो जाता है इसलिए रास्ते में गड़कों को बराबर करवाया है। विपक्षी/निगरानीकर्तागण द्वारा प्रस्तुत बयान तहरीरी उपरोक्त के अवलोकन से यह स्पष्ट होता है कि इनके द्वारा विवादित भूमि का आम रास्ता होने के तथ्य से इंकार नहीं किया गया था तथा मात्र यह कथन किया गया था कि आम रास्ता खाली है एवं बरसात के कारण भूमि को ऊंचा-नीचा हो जाने के कारण गड़कों को बराबर करवाया गया है। विपक्षी/निगरानीकर्तागण द्वारा अपने बयान तहरीरी में मजिस्ट्रेट से स्वयं मौका मुआइना करके वाद समाप्त करने का भी कथन किया गया था। विद्वान मजिस्ट्रेट द्वारा दिनांक 20.04.2022 को यह आदेश किया गया कि स्थलीय निरीक्षण हेतु उभयपक्ष दिनांक 30.04.2022 को दो बजे अपरान्ह उपस्थित रहे। दिनांक 30.04.2022 को उभयपक्ष की उपस्थिति में स्थलीय निरीक्षण किया गया। मामले में क्षेत्रीय लेखपाल की आख्या भी प्रस्तुत की गयी है, जो पत्रावली पर संलग्न है। लेखपाल की आख्या निम्नवत है:-

"ग्राम बरारा बुजुर्ग आबादी के अन्तर्गत प्रार्थी धर्मेन्द्र शुक्ला का माकान स्थित पाया गया, उक्त माकान के सहन की सीधा में सम्पर्क मार्ग, आगे बने हुए आर०सी०सी० सड़क तक जाता है। प्रार्थी के माकान के उत्तर पश्चिम में प्रतिपक्षी प्रेम नारायण तिवारी पुत्र चन्द्रदेव द्वारा अपने मकान के सहन के सामने बने हुए सम्पर्क मार्ग में मिट्टी डालकर ऊंचा कर दिया गया है जिससे प्रार्थी धर्मेन्द्र शुक्ला द्वारा आपत्ति प्रस्तुत की गयी है। प्रार्थी का कहना है कि उसके सीध में जो आगे आर०सी०सी० मार्ग बना हुआ है वह नीचा है वहां तक पहुंचने के लिए प्रार्थी द्वारा पूर्व से ही समतलीकरण करते हुए मिट्टी डाली गयी थी। अब वहां तक पहुंचने में सम्पर्क मार्ग ऊंचा-नीचा हो रहा है। जिससे चार पहिया वाहन आदि निकलने में भविष्य में दिक्कत हो सकती है। इस प्रकार स्थलीय निरीक्षण से विदित होता है कि प्रतिपक्षी द्वारा रास्ते में मिट्टी डालकर ऊंचा करना कोई औचित्यपूर्ण कार्य नहीं है।"

विद्वान मजिस्ट्रेट द्वारा प्रार्थी धर्मेन्द्र कुमार शुक्ला प्रथम पक्ष के प्रार्थनापत्र तथा थानाध्यक्ष गदागंज की रिपोर्ट के आधार पर प्रस्तुत प्रकरण में विपक्षी को सशर्त आदेश जारी कर कारण बताने हेतु निर्देशित किया गया था, जिसमें अपनी बयान तहरीरी में एवं विपक्षी/निगरानीकर्तागण ने वादग्रस्त भूमि को आम रास्ता होना स्वीकार किया था। ऐसी दशा में यह प्रश्न विवादित नहीं रह जाता कि क्या विवादित स्थल आम रास्ता है अथवा नहीं चूंकि स्वयं विपक्षी ने उपरोक्त भूमि को आम रास्ता होना स्वीकार किया है, अतः अब मजिस्ट्रेट को इस तथ्य की जांच करनी थी कि क्या उपरोक्त भूमि पर विपक्षी / निगरानीकर्तागण द्वारा कोई अवरोध उत्पन्न किया गया अथवा नहीं, इस सम्बन्ध में मजिस्ट्रेट द्वारा पारित आदेश एवं पत्रावली के अवलोकन से स्पष्ट है कि मजिस्ट्रेट द्वारा उभयपक्ष की उपस्थिति में किये गये स्थलीय निरीक्षण एवं क्षेत्रीय लेखपाल की रिपोर्ट के आधार पर प्रश्नगत आदेश दिनांक 18.05.2022 पारित किया गया था। क्षेत्रीय लेखपाल की आख्या एवं विपक्षी द्वारा की गयी स्वीकृति से संतुष्ट होने पर कि प्रश्नगत सार्वजनिक रास्ते की भूमि पर विपक्षी द्वारा मिट्टी डालकर अवरोध उत्पन्न किया गया है, विद्वान मजिस्ट्रेट द्वारा दिनांक 18.05.2022 को अन्तिम आदेश पारित किया गया जो पूर्णतः विधिक है। प्रश्नगत आदेश में कोई विधिक त्रुटि नहीं है और न ही विद्वान

अवर न्यायालय द्वारा प्रश्नगत आदेश पारित करने में अपने क्षेत्राधिकार का अतिक्रमण किया गया है।

अतः उक्त समस्त विश्लेषण से यह स्पष्ट है कि विद्वान अवर न्यायालय द्वारा पारित प्रश्नगत आदेश में कोई अवैधानिकता, अनियमितता या विधिक त्रुटि नहीं है न ही उसमें कोई विकृति दर्शित होती है। प्रश्नगत आदेश पूर्णतः विधिक व न्यायसंगत है, अतः पुष्ट किये जाने योग्य है। निगरानी बलहीन होने के कारण निरस्त होने योग्य है।

आदेश

प्रस्तुत दायित्व निगरानी निरस्त की जाती है। अवर न्यायालय द्वारा पारित आदेश दिनांकित 07.05.2022 पुष्ट किया जाता है।

अवर न्यायालय की पत्रावली इस आदेश की प्रति के साथ अविलम्ब प्रति प्रेषित की जाये।"

Assailing the impugned orders dated 07.05.2022 and 05.09.2023, the applicants' counsel submitted as under:-

(i) The report as required under Section 310 Cr.P.C. was not prepared by the Magistrate concerned.

(ii) There is no order/direction to the Lekhpal concerned to submit the report and despite this, the Lekhpal submitted a report before the Magistrate concerned and accordingly, this report ought not to have been considered while passing the impugned orders.

(iii) The alleged way is not a public way, as such, use of Section 133 Cr.P.C. by the complainant was nothing but an abuse of process of law.

(iv) A private dispute cannot be settled by way of preferring an application under Section 133 Cr.P.C.

(v) Notice as required under Section 137 was not given by the Magistrate concerned to the applicants (alleged encroachers) and as such, the impugned orders are unsustainable in the eye of law. In this regard, reliance has been placed on the judgment dated 03.12.2012 passed by this Court in ***APPLICATION U/S 482 No. 40888 of 2012 (Arun Kumar And Another vs. State of U.P. And Others)***, relevant portion of which is extracted hereunder:-

"The learned counsel for the applicant submitted that when the applicant had pleaded that the land in suit is not a public way on spot, the learned Executive Magistrate was bound to decide that question before holding the proceeding under section 138 CrPC. In this

connection, the learned counsel for the applicant placed reliance on the provisions of section 137 CrPC, which provides:

"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 subsection (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."

A perusal of the aforesaid provision reveals that if the person against whom the order under section 133 CrPC has been made, appears before the Executive Magistrate, the Executive Magistrate is bound to question him as to whether he denies the existence of any public right in respect of the subject matter of the case and if he denies existence of any such right, the proper course for the Executive Magistrate is to inquire into that matter before holding a proceeding under section 138 CrPC. In other words, if the person against whom an order under section 133 has been made, denies the existence of a public right in respect of the subject matter of the case, the Executive Magistrate has to hold an inquiry to find out whether or not there is any reliable evidence in support of such denial. If there is reliable evidence in support of the denial, the Magistrate has to stay the proceedings of the case until the matter of existence of the public right has been decided by the competent Court. The Executive Magistrate has jurisdiction to proceed under section 138 CrPC, only when there is no reliable evidence to show that the alleged right is a public right or there is no denial of existence of any public right. It may also be mentioned that if the person concerned fails to deny the existence of public right or fails to adduce reliable evidence in support of such right, he will not be permitted to make any such denial in any subsequent proceeding. In view of the legal position as emerged from the provisions of section 137 CrPC, the proper course for the Executive Magistrate was to hold an inquiry to find out whether or not there is reliable evidence in support of the plea that there exists no public way on the disputed land, specially when the applicant had specifically denied the existence of such right."

Opposing the present application, Dr. L.P. Mishra, learned Senior Member of Bar assisted by Sri Rakesh Chandra Tewari, submitted as under:-

(i) It is an admission of the applicants that the way in dispute is a 'public way' and the admission is best piece of evidence as held in the judgment of Hon'ble Apex Court passed in the case of ***Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi***, 1959 SCC OnLine SC 54 : (1960) 1 SCR 773 : AIR 1960 SC 100 and accordingly, Magistrate has not committed any illegality in passing the impugned order dated 07.05.2022 affirmed vide order impugned dated 05.09.2023.

(ii) Undisputedly, the Magistrate himself visited the spot and in the order dated 07.05.2022, the Magistrate himself observed that encroachment exists on the way and as such even if the report of Lekhpal is ignored the undisputed fact would be that 'public way' has been obstructed by the applicants.

(iii) It is settled position of law that if the opposite party admits the existence of public right, the Magistrate is not required to hold any inquiry rather he may straightaway proceed under Section 138 of the Code to pass the final order and as the applicants have admitted the existence of 'public way' before the SDM by filing response dated 28.04.2022, the SDM was not required to make any inquiry under Section 137. Under the law the further inquiry is only with regard to ascertain the fact as to whether the opposite party has encroached on the 'public way' or not. The SDM has proceeded correctly in the procedure and the Revisional Court also records its satisfaction. In this regard, reliance has been placed on the judgment passed in the case of ***Shri Thaneswar Bora Vs. Shri Kumud Sharmah***, 1986(2) Gauhati Law Reports 161.

(iv) The Parliament has provided a specific chapter containing summary procedure in the matter of Maintenance of public order and Tranquility (From Section 133 to 143) of Cr.P.C. which is a complete code in regard to the said issue and thus, the other provisions of the Code pertaining to inquiry and trial are not applicable in the subject matter. On this aspect, reliance has been placed on the judgment passed in the case of ***Shri Thaneswar Bora (supra)*** and judgment dated 03.03.2017 passed in 482 petition No.956 of 2002 (***Ramvriksha Vs. State of U.P.***).

(v) The judgment relied upon by the applicant namely Arun Kumar v state of up dated 03.12.2012 passed in 482 petition No. 40888 of 2012 is not applicable as it pertains to the fact where 'public way' was denied.

(vi) The magistrate is not required to ask the applicant about the fact that he denies the existence of the 'public way' or not where written reply is filed admitting the existence of 'public way'. On this aspect, reliance has been placed on the judgment dated 18.09.1992 passed by Bombay High Court in the case of ***ALAX Fernandes v state and others***.

Considered the aforesaid and perused the record.

In order to decide the present application, this Court finds it appropriate to refer some authorities, in addition to the authorities referred above, wherein the scope of relevant provision of Cr.P.C. i.e. Section 133 to 143 have been taken note of.

In the case of ***Raghubar Dutt v. Suresh Chandra, 1987 ACR 566***, this Court has discussed the scope of Section-137 of Cr.P.C. and observed as follows:-

“5. A bare reading of Section 137 would indicate that the provisions therein are to prevent the Magistrate from arrogating himself the power of civil court. Further the Magistrate need not hold an elaborate enquiry regarding the rights of the parties. The ambit of the enquiry is to find out if there is some prima facie reliable evidence in support of the denial of public right. The Magistrate is not called upon to weigh the evidence in order to determine the rights and title or truth of the denial. But he has just to be satisfied as to whether there is some evidence which could indicate prima facie that it was possible for a competent court to place reliance upon the same. It does not obviously mean that evidence of such a character would definitely establish title of the land. Otherwise in that case the legislature would not have used the words ‘just reliable evidence’, rather the words used would have been that the Magistrate would decide on the basis of evidence being led as to whether the person against whom the said order has been passed, has a right in the land to create unlawful obstruction in the public way. The language of Section 137(2) of the Code is couched in such a way that the reliable evidence would depend upon the circumstances of each case. To put it differently, it only connotes where the evidence was such that if unrebutted, it would prove the non-existence of public right as alleged by the person against whom conditional order was passed See *Lala Bissoomal v. State*, 1957 AWR 551, T.N. *Sudhakaran v. Dr. L.M. George*, 1977 Cri LJ 542 and *Jaswant Singh v. Jagir Singh*, [1971 SCC OnLine P&H 217](#) : [1972 Cri LJ 792](#). Further the legislature did not use the word ‘evidence’ which definitely establishes the right to claim. In other words, reliable evidence can be taken to be a form of evidence which is not the basis of unreliable or forged evidence. The duty of a Magistrate is merely to see whether the evidence in support of denial of public right is reliable.

6. In the instant case it is better to refer to the evidence led by the opposite parties to prove the denial of public way or the unlawful

obstruction created. It was alleged by the opposite parties that plot No. 394 did not contain public way and there was no such entry like public way in plot No. 394 in revenue papers. Similarly in Khatauni for 1387 to 1392F an area of 8 biswa of plot No. 394 was entered as Goth and there was no mention about any public way or Rasta. Similarly extract of Khasra for the years 1374 to 1379 F also mentions the area of 8 biswa of plot No. 394A as Goth. There was no mention of any public way or Rasta. It was for the applicant to move an application Under Section 133 to explain as to how this entry of Goth was converted into Rasta. This was the question pertaining to right and title. The aforesaid extracts of Khasra and Khatauni were certainly reliable evidence within the meaning of Section 137(2) of the Code. On the basis of such evidence the Magistrate ought to have stayed the proceedings until the matter of existence of such right of public way was decided by a competent court. The Sessions Judge has correctly allowed the revision by the impugned order.”

In *Wali Uddin v. State of U.P., 1988 (12) ACR 1*, this Court has elaborated the language of Section-137(1) of Cr.P.C. and concluded in following terms:-

“23. It is also to be noticed that under Section 137(1) the Legislature has used the word “that after the denial of such right by opposite party the Magistrate shall inquire into the matter” and not that the Magistrate shall adjudicate upon or decide the matter or controversy between the parties. The word ‘inquire’, means eager, to acquire information. The word ‘inquire’, according to *Shorter Oxford English Dictionary* means to search into, to seek knowledge, to make inquisition, to make investigation, to seek information by questioning, to seek or to try to find out. The word reliable evidence having been used and the Magistrate having been directed to inquire into the matter and not to decide or adjudicate upon, it is clear that the person denying the public right has to put forward a just and bonafide claim. In case the Magistrate finds that there is some reliable evidence and certainly not a conclusive evidence in support of the denial of any public right to get the matter decided by a competent Court. I am however, of the view that the Section does not make it clear as to who is the person as to whether first party or the second party, who has to approach the Civil Court. One thing more may be clarified that in case the Magistrate finds that there is no such reliable evidence in that event he shall proceed in view of the provisions of Section 138 of the Code. In the instant case what has been done is entirely different. Even though the Magistrate confirmed the conditional order but the revision has been disposed of by the learned Additional Sessions Judge in total disregard of the provisions of Section 133 read with Section 137 of the Code. The learned Sessions Judge was exercising the same jurisdiction as was to be exercised by the learned Magistrate. He must have also proceeded to decide the case just with a view to make an enquiry as to whether there was some reliable evidence led by the opposite party No. 2 who denied the existence of such right and in case he found that there was reliable evidence his jurisdiction ceases and it was for the civil Court to decide the same.”

The Calcutta High Court in the case of *Md. Basar Ali Molla v. State of West Bengal*, [2006 SCC OnLine Cal 444](#) has considered the aspect of emergency attached with the dispute regarding public nuisance and has held that it does not apply to private nuisance and private dispute and it is never intended to settle a private dispute. The relevant paragraphs of *Md. Basar Ali Molla's case* (supra) are being reproduced herein below:-

“7. Section 133 Cr. PC relates to passing of order for removal of public nuisance in case of emergency. It does not apply to private nuisance and private dispute and it is never intended to settle a private dispute.

8. It has been laid down in the case reported in [1957 SCC OnLine MP 149](#) : [AIR 1958 MP 350](#) that Chapter X of the Code of Criminal Procedure deals with “Public Nuisances” and not with private nuisances. The remedy for the latter is the civil suit although what constitutes nuisance may be common to both classes. Section 133 Cr. PC provides a speedy and summary remedy in case of urgency where danger to public interest or public health is concerned. In all other cases the party should be referred to the remedy under the ordinary law.

9. Reference may also be made in the case reported in [1963 SCC OnLine Ker 160](#) : [AIR 1964 Ker 252](#) where it has been held that Section 133 Cr. PC can be used only where there has been an invasion of public rights. The case reported in [1957 SCC OnLine Pat 135](#) : [AIR 1958 Pat 210](#) is also relevant in this case’ where it has been held that Section 133 Cr. PC cannot be used as a short cut to achieve what one would like to achieve in a Civil Court. The whole object of Section 133 Cr. PC is that the public should not suffer and that such dangers or obstructions caused by the members of the public should be removed at the earliest possible moment.

10. In that case a decision of Allahabad High Court reported in *Farzand Ali v. Hakim Ali*, [1914 SCC OnLine All 261](#) was referred. In that case it was held now it is certainly expedient that in all proceedings initiated under Section 133 of the Code of Criminal Procedure the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public and should be on his guard against tendency to use this section as substitute for litigation in the Civil Courts in order to the settlement of a private dispute.

11. In the case reported in [1942 SCC OnLine All 103](#) : [AIR 1943 All 19](#) it has been stated that the proceedings under Section 133 Cr. PC is not intended to settle private dispute between two members of the public.

12. Reference can also be made in the case reported in *Tejmal Punamchand Burad v. State of Maharashtra*, [1991 SCC OnLine Bom 679](#) where it has been held that Chapter XB of Criminal Procedure Code deals with “public nuisances” and provides a speedy and summary method for dealing with them, in cases of great emergency and where there is imminent danger to the public interest.

13. In the instant case there are no dependable materials to hold that the disputed pathway was being used by the public at large but it appears that the same was used by the students and teachers of Sisu Siksha Kendra from 2003 to last week of February, 2005 and the same was not being used from the last week of February, 2005 as existence from the said pathway was destroyed and the same merged with the fishery. So, it does not appear that the public at large is being affected and there was any obstruction of public way or public way has been destroyed and the same requires repair. So, no case of sufferance of public is made out and it does not appear that the Magistrate had to act purely in the interest of the public. There is no invasion of public right. If it assumed that obstruction is caused to the use of the pathway in question by the students, teachers and guardians of students of Sisu Siksha Kendra by the petitioners then it is an obstruction not to the public at large but to a handful of persons and remedy for said obstruction cannot be had by resorting to provision of Section 133 Cr.PC. If there is any nuisance the same is purely a private nuisance for which Civil Court may be approached for appropriate remedy according to law. There is room for contention that Section 133 Cr.PC also does not contemplate any order for repairing of road which has been abolished and also any order in connection with such repair.

14. In view of my above discussions I hold that both the impugned orders dated 17.1.2006 and 7.7.2006 cannot stand and the same are liable to be set aside. In the result, the instant applications succeed and the same are allowed. The impugned orders passed by the learned Executive Magistrate are hereby set aside. I make no order as to costs.”

The crux of above quoted statutory law and the precedents is that the authority under section 133 of Cr.P.C. can be exercised by the executive magistrate, when any unlawful obstruction or nuisance is alleged on any public place or on any way, which is or may be lawfully used by the public, as is the controversy in the present case. However, to ascertain the justification of such allegation, the executive magistrate is required to see as to whether the person against whom the show cause has been issued under Section 133(1) of Cr.P.C. has placed “any reliable evidence” in denial of such allegation or not. While doing so, the executive magistrate is not required to ask for any conclusive evidence and he has to consider the evidence brought on record by the person denying existence of unlawful obstruction or nuisance with an understanding as to whether such evidence can be said to be reliable enough. If that is so, the executive magistrate should not proceed further in the matter and should relegate the parties to the competent civil court for determination of their rights. Even otherwise, the entry in government record regarding the land or passage in question has a direct bearing upon the claim of existence of “any public place” or “any way, which is or may be lawfully used by the public”. When the person denying existence of unlawful obstruction or nuisance comes with an explanation that the land or passage in question is actually the land purchased by him through registered sale-deed and such land is not entered in the revenue or municipal record as “public place or public way or government/municipal land”, the executive magistrate should not casually brush aside such counter claim or explanation without giving any convincing reason in that regard and proceed only on the basis of some unsubstantiated statements of a few persons.

The proceedings under section 133 of Cr.P.C. are summary in nature and are meant for the cases of imminent danger to the public tranquility and peace and the same should not be used or rather misused to scuttle the valuable right of owner of property and that is why, the legislature has in its wisdom used the words “any reliable evidence” in support of such denial, in the event and in case of which he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court as provided under Section 137(2) of Cr.P.C., which is certainly having a different import and connotation than the word ‘conclusive evidence’. This language used by the legislature has a limiting influence and works as a guideline while exercising authority under section 133 of Cr.P.C.

Upon due consideration of the aforesaid facts of the case and the law enunciated above, this Court is of the view that in the instant application, no interference is required and the same is liable to be denied. It is for the following reasons:-

(i) In para 5 of the response dated 28.04.2022, the applicants have admitted existence of 'public way'. However, they denied the allegation of creating obstruction over the same.

(ii) In view of admission of existence of 'public way', to the view of this Court, the Magistrate was not under obligation to hold an enquiry as required under Section 137 Cr.P.C. Thus, the the reliance placed on the judgment passed in the case of *Arun Kumar (supra)*, wherein, the existence of public way was refuted, is misplaced.

(iii) The fact that the Magistrate visited the spot is not in dispute and as per his observation, while making spot inspection, the 'public way' in issue (existence of which is admitted) was found obstructed and recitals in this regard in the impugned order dated 07.05.2022 have not been refuted by the applicants in the memo of revision and accordingly, there would be no justification for disbelieving the said recitals in the impugned order dated 07.05.2022 passed in a summary proceeding under Section 133 Cr.P.C. affirmed vide impugned order dated 05.09.2023, even on the ground that no report as per Section 310 of Cr.P.C. was prepared by the Magistrate.

It would be apt to note that in the judgment passed in the case of ***State of Maharashtra v. Admane Anita Moti, (1994) 6 SCC 109***, the Hon'ble Apex Court observed that *"It is well established that the factual recitals or observations made in a judgment or order are taken to be correct unless rebutted. The burden to rebut it is on the person who challenges it. One of the methods to rebut such observation is to file the affidavit of the person who was present in the Court and to produce such material which may satisfy the Court that the recital in the judgment crept in inadvertently or it was erroneous"*.

Further, in the case of ***Bhagwati Prasad v. Delhi State Mineral Development Corpn., (1990) 1 SCC 361***, the Hon'ble Apex Court observed that *"It is now settled law that the statement of facts recorded by a court or quasi-judicial tribunal in its proceedings as regards the matters which transpired during the hearing before it would not be permitted to be assailed as incorrect unless steps are taken before the same forum. It may be open to a party to bring such statement to the notice of the court/tribunal and to have it deleted or amended. It is not, therefore, open to the parties or the counsel to say that the proceedings recorded by the Tribunal are incorrect"*.

Thus, for the reasons aforesaid, ignoring the report of Lekhpal dated 02.05.2022, this Court is of the view that on account of obstruction created by the applicants over 'public way' in dispute, the Magistrate passed the order dated 07.05.2022 affirmed vide order dated 05.09.2023 and as such, the impugned orders dated 07.05.2022 and 05.09.2023 are not liable to be interfered with.

For the reasons aforesaid, the instant application has no force. It is accordingly ***dismissed***.

Order Date :- 11.03.2024

Raj/Vinay/Arun