

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4309 of 2015

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1. Sanjay Jha Son of Late Chandrika Jha resident of Village- Kahua, P.O. - Kahua, P.S. - Biraul, District- Darbhanga in the Capacity of Public representation as Ex- Up Mukhiya of Gram Panchayat Raj Kahua, Block- Biraul, District- Darbhanga.

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The District Magistrate cum Collector, Darbhanga.
3. The Sub Divisional Officer, Biraul, District-Darbhangha.
4. The Circle Officer, Biraul Anchal, District- Darbhanga.
5. The Superintendent of Police, Darbhanga.
6. The Deputy Superintendent of Police , Darbhanga.
7. The Thanadhyahsh, Biraul, Police, Station, District- Darbhanga.
8. Sadhu Sahu Son of Late Dhodhai Sahu resident of Kahua, Police Station- Biraul , District- Darbhanga.
9. Satto Sahani Son of Dahaur Sahani resident of Village- Kahua, P.O. - Kahua, P.S. - Biraul, District- Darbhanga
10. Lal Sahani Son of Bhuller Sahani resident of Village- Kahuar, P.s. Biraul, District- Darbhanga.

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Gajendra Prasad Yadav, Advocate

For the Respondent/s : Mr. Shivendra Kishore, AAG-7

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

And

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

C.A.V. JUDGMENT

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date: 24-11-2015

This *Public Interest Litigation* reminds us that a power, conferred on a functionary of a State, casts on him corresponding duty to exercise the power inasmuch as he becomes a repository of trust of the State. No wonder, therefore, that V. Krishna Aiyer, J., in his classical style, observed, in ***Municipal Council, Ratlam v. Vardhichand and Ors.***, [***AIR 1980 S.C. 1622***], thus :

. "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." (1) Discretion becomes a duty when

the beneficiary brings home the circumstances for its benign exercised."

2. Considering the fact that same as the present one, writ petitions, in the shape of Public Interest Litigation, are being filed, in this State, in a large number, invoking *extraordinary jurisdiction* of this Court, under Article 226 of the Constitution of India, seeking direction for removal of encroachment from public places or removal of obstruction or nuisance from public places and also for removal of substances, injurious to health, maintenance of hygiene, etc., coupled with admitted inaction, in majority of cases, on the part of officials of the State Government and local bodies, we have formed an impression, in our mind, that these officials of the State of Bihar are either unaware of the powers conferred upon them by Section 133 of the Code of Criminal Procedure (hereinafter referred to as "the Code") or are ignorant of the corresponding duty cast upon them by Section 133 of the Code.

3. By miserably failing to exercise powers under Section 133 of the Code and thereby omitting to perform their corresponding duties imposed on them by Section 133 of the Code, the concerned officers have made Section 133 of the Code of Criminal Procedure *irrelevant, redundant* and *otiose*.



4. Consequently, the litigants, who could have, otherwise, approached the District Magistrate, the Sub-Divisional Magistrate concerned seeking to invoke their powers, under Section 133 of the Code, which deals with removal of unlawful obstructions and nuisances, etc., are, thus, being, advertently or inadvertently, made to approach this Court for exercise of extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India. Being extra-ordinary in nature, exercise of jurisdiction, under Article 226 of the Constitution of India, cannot be made a routine affair, when alternative efficacious remedy is, otherwise, statutorily available.

5. Section 133 of the Code lays down a well structured system, which, if invoked properly, is an effective statutory mechanism for removal of obstructions or public nuisance from public places. Lest the officials, authorized under these statutory provisions to take action, allow the said provisions, out of disuse, to become dead letter, we have decided to lay down general guidelines to be followed scrupulously by all concerned.

This case is illustrative in nature.

6. Claiming to be the former Up Mukhiya of Gram Panchayat Raj, Kahua, of Darbhanga district, the petitioner



has filed the present writ application, under Article 226 of the Constitution of India, seeking a direction to the State respondents, more particularly, officials of the said district, to remove certain encroachments from the public path having the description of Khata No. 844, Plot No. 136 (New)/854 (Old), measuring 5 decimals of land. It is his case that the private respondent Nos. 8 and 9 have encroached upon the said land by constructing a *pucca wall*, which has caused much inconvenience to the general public in their movement. It is his further case that his co-villagers had approached the Circle Officer and the Sub-Divisional Officer, Biraul, for removal of the encroachment, whereupon the *Halka Karamchari*, in his report, dated 10.07.2013, submitted that the said public land had been encroached upon by respondent No.8. The *Anchal Amin* is also said to have, in his report, dated 23.09.2013, mentioned that the land, in question, though public, has been encroached upon by the respondent Nos. 8 and 9.

7. In substance, the contention of the petitioner herein is that the said encroachment has so far not been removed despite requests made by the Circle Officer and specific order passed by the Sub Divisional Officer for removal of encroachment.



8. Our attention has been drawn to an order, dated 21.05.2015, passed by the Sub-Divisional Officer, Biraul, whereby he, while appointing the Circle Officer, Biraul, as Executive Magistrate, had directed the Officer-in-Charge of the concerned Police Station to take action in the matter so as to ensure that the public path, in question, is made and kept free from encroachment so as to enable the public, in general, use the said path.

9. In the backdrop of the facts of the case at hand, let us, now, consider, a little elaborately, the scheme of the Code as reflected by Section 133 of the Code and other provisions relating thereto.

10. The relevant provisions of Section 133 of the Code are extracted hereinbelow:-

“133. Conditional order for removal of nuisance.-(1) Whenever a District Magistrate or a 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)
- (c)
- (d)
- (e)
- (f)

Such Magistrate may make a *conditional order* requiring the person, causing such obstruction or nuisance, within a time to be fixed in the order,-

- (i) *to remove such obstruction or nuisance;*
- or
- (ii)
- (iii)
- (iv)
- (v)
- (vi)

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."

11. We find that sub-Section (1) of Section 133 of the Code lays down clear that whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate, specially empowered in this behalf by the State Government, considers, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, 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, the Magistrate may make a *conditional order* requiring the person, causing such obstruction or nuisance, to remove such obstruction or nuisance within a time to be fixed by the order and, if he (i.e., the person proceeded against) objects to do so, then, to appear before the Magistrate, or any other 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 *conditional order* should not be made *absolute*.

12. It is manifest from the provisions of Section 133 of the Code that before the District Magistrate, Sub-Divisional Officer or any other Executive Officer, duly empowered in this behalf by the State Government, makes a *final order* requiring removal of obstruction or nuisance from a public place, he is required to call upon the person against whom the order is being passed to either remove the obstruction or nuisance, as the case may be, or show cause against the direction for removal of such obstruction.

13. We may pause here to point out that according to Section 134 of the Code, service of notice of the *conditional order*, passed by virtue of the provision of sub-section (1) of Section 133 of the Code, shall be in the manner provided for service of summons or notified by proclamation, published in such manner as the State Government may, by rules, direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

14. What the person, against whom a *conditional order* is made, shall do is embodied in Section 135 of the Code,



which lays down that the person against whom a *conditional order* is made shall (a) perform, within the time and in the manner specified in the *conditional order*, the act directed thereby; or (b) appear in accordance with such *conditional order* and show cause against the same.

15. Thus, Section 135 of the Code obliges the proceedee to either obey the *conditional order*, which has been passed by the Magistrate, or appear, in accordance with such order and show cause as to why the *conditional order* be not made *absolute*, that is to say, why the *conditional order* shall not be forced to be complied with. If a proceedee fails to obey the *conditional order* and does not also appear in the proceeding and shows cause against a *conditional order* will, in the light of the provisions of Section 136 of the Code, expose himself to prosecution under Section 188 of the Indian Penal Code. In the event of failure of a proceedee to appear and show cause, the Magistrate concerned shall make *absolute* the *conditional order*.

16. What follows from the above discussion is that if a proceedee does not perform the act as warranted by the *conditional order* or appears and shows cause against the *conditional order*, he shall be liable to the prosecution under Section 188 of the Indian Penal Code and the *conditional*

order shall be made *absolute*.

17. Section 137 of the Code, while prescribing the procedure, when existence of public right is denied by a proceedee, states that where a *conditional 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 *conditional order* was made, question him as to whether he (i.e., the proceedee) 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 and, 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; but if the Magistrate finds that there is no such *reliable evidence*, he (Magistrate) shall proceed as laid down in Section 138 of the Code.

18. When Section 133 and Section 137 of the Code are read together, the scheme becomes clear that when a District Magistrate or a Sub Divisional Magistrate or any other Executive Magistrate, specially empowered in this behalf by



the State Government, on the basis of report of a police officer or on the basis of other information and on taking such evidence, if any, as the Magistrate thinks fit, considers that any unlawful obstruction or nuisance should be removed from any public place or any way, river or channel, which is or may be lawfully used by the public, the Magistrate may make a *conditional order* requiring the person, who is alleged to have caused obstruction or nuisance, to remove the obstruction or nuisance or to appear before the Magistrate at the time and place to be fixed by the *conditional order* and show cause as to why the *conditional order* should not be made *absolute*. On receiving the notice of the *conditional order*, the proceedee shall appear before the Magistrate, who shall question the proceedee as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if the proceedee so denies, the Magistrate shall hold an enquiry and, if the Magistrate finds, in the enquiry, that there is any *reliable evidence* in support of such denial, then, he shall stay the further proceedings until the matter is decided by a competent court. However, if the Magistrate finds that there is no *reliable evidence* in support of the proceedee's denial as regards encroachment or obstruction in respect of any way, river, channel or place, he (Magistrate) shall proceed in the manner as provided in Section 138 of the Code, which



provides that the Magistrate shall, in such a case, take evidence in the matter as in a *summons-case* and, if the Magistrate is satisfied that the *conditional order*, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the *conditional order* shall be made absolute without modification or, as the case may be, with such modification as deemed necessary, but if the Magistrate is not so satisfied, no further proceedings shall be taken in the case.

19. Section 141 of the Code makes it clear that when a *conditional order* has been made *absolute*, the Magistrate shall give notice of the same to the proceedee and require him to perform the act directed by the order within a time to be fixed in the notice and also inform the proceedee that in case of disobedience, he (proceedee) shall be liable to be prosecuted under Section 188 of the Indian Penal Code. If such an act is not performed by the proceedee within the time fixed, Section 141 of the Code empowers the Magistrate to get the work performed and recover the costs of performing the act in the manner, which has been provided in Section 141 of the Code. Sub-section (3) of Section 141 of the Code also makes it crystal clear that no suit shall lie in respect of anything done in good faith under this section.



20. We may pause here to point out that according to Section 142 of the Code, if a Magistrate, who makes a *conditional order*, considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter and, in default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury, but no suit shall lie in respect of anything done in good faith by a Magistrate under this section.

21. It was way back in the year 1980 that the Supreme Court, in ***Municipal Council, Ratlam Vs. Vardhichand and Ors. (AIR 1980 S.C. 1622)***, in clear terms, laid down that the provisions, embodied in Section 133 of the Code, must go into action, whenever there is public nuisance inasmuch as the public power of the Magistrate, as conferred on him under Section 133 of the Code, is a public duty to the members of the public, who are victims of the nuisance, and the Magistrate must, therefore, exercise his power under Section 133, when the jurisdictional facts are present. The relevant observations, appearing, in this regard,

at Paragraph 9, in ***Municipal Council, Ratlam*** (supra), read thus:

"9. So 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 as here. "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." (1) Discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercised."

(Emphasis is added)

22. Under the same very decision, in case of ***Municipal Council, Ratlam*** (supra), the Supreme Court has made it abundantly clear that a Municipal Commissioner or other Executive Authorities are bound by an order, which may be passed by a Magistrate under Section 133 of the Code, and in case of any disobedience of such order either by the Municipal Commissioner or any other Executive authorities, penal consequences, as embodied in Section 188 of the Indian

Penal Code, shall follow. The relevant observations, made, in this regard, at Paragraph 13, in **Municipal Council, Ratlam** (supra), run as follows:

"13. The Magistrate's responsibility under S. 133 Cr.P.C. is to order removal of such nuisance within a time to be fixed in the order. This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. Failure to comply with the direction will be visited with a punishment contemplated by S. 188, I.P.C. Therefore, the Municipal Commissioner or other executive authority bound by the order under S. 133, Cr.P.C. shall obey the direction because disobedience, if it causes obstruction or annoyance or injury to any persons lawfully pursuing their employment, shall be punished with simple imprisonment or fine as prescribed in the Section. The offence is aggravated if the disobedience tends to cause danger to human health or safety. The imperative tone of S. 133, Cr.P.C. read with the punitive temper of S. 188, I.P.C. makes the prohibitory act a mandatory

duty.”

(Emphasis is supplied)

23. What crystallizes from the above discussion is that under Section 133 of the Code, a Magistrate has the duty to proceed to make a *conditional order*, as contemplated by sub-section (i) of Section 133 of the Code, if the report of a police officer or other information requires exercise of the powers under sub-Section (i) of Section 133 of the Code. “Other information”, occurring in Section 133 of the Code, would obviously mean an information given to the Magistrate by any person, or taken cognizance of by the Magistrate *suo motu*, as regards existence of public nuisance/unlawful obstruction causing annoyance or injuries to health or physical comfort of a community or other factors as enumerated in Section 133 of the Code.

24. In our opinion, once it is brought to the notice of the Magistrate, or if he, otherwise, comes to know about existence of obstruction/public nuisance, etc., as enumerated in Section 133 of the Code, he (Magistrate) is legally duty bound to swing into action at once inasmuch as his duties, in this regard, are directly concerned with public nuisance/unlawful obstruction, which may be injurious to

health or physical comfort of public.

25. We, accordingly, issue general directions to be followed by all concerned, in the State of Bihar, in following terms:-

(i) Once a District Magistrate or Sub-Divisional Magistrate or any other Executive Magistrate, specially empowered in this regard by the State Government, receives an information, on the basis of a report of a police officer or otherwise, that condition precedent for exercise of power under sub-Section (i) of Section 133 of the Code are present, the Magistrate shall at once make a *conditional order* for removal of obstruction or nuisance from public place and it will be the bounden duty of the person -- who may be a natural person or a juristic person, such as, a Municipal Body or a Gram Panchayat -- to either comply with the order or appear in the proceeding and, upon appearance of the proceedee, the Magistrate shall be duty bound to ask the proceedee if he (the proceedee) wishes to deny the existence of facts leading to the *conditional order* and if the proceedee denies existence of any unlawful obstruction or nuisance on any public place or from



any way, river or channel, which is or may be lawfully used by the public, and gives *reliable evidence* in support of such denial, the Magistrate shall stay further proceedings until a competent court decides; but if the proceedee fails to give any *reliable evidence* in respect of denial of the existence of the facts leading to making of *conditional order*, the Magistrate shall order the proceedee to comply with the *conditional order* and, if the *conditional order* is not complied with and obeyed, penal consequences, as embodied in Section 188 of the Penal Code, shall follow.

(ii) It will be the duty of the Chief Executive Officer or any other Officer, specially authorized by him/Head of the local body, by whatever name he may be called, to inform or cause to be informed the District Magistrate, Sub-Divisional Magistrate or any other Magistrate, specially empowered in this behalf by the State Government, as regards existence of obstruction/nuisance and other factors, enumerated under Section 133 (1) of the Code. The Officer-In-Charge of the concerned police station shall also have similar duty to inform the Magistrate concerned under Section 133 of the Code. In the event, any public



nuisance or unlawful obstruction of the nature, as provided under Section 133 (1) of the Code, is found to be existing without any information to the concerned Magistrate, the Officer-in-Charge of the concerned police station and the Chief Executive Officer or any other Officer, authorized on his behalf of the local body, shall be jointly responsible for inaction and will be liable for disciplinary action accordingly.

(iii) The Magistrate, upon receiving information, in the manner as aforesaid, shall proceed at once in accordance with Section 133 (1) of the Code and pass appropriate order as required of him under the said provision. Any inaction or dereliction of duty by the Magistrate in this regard shall make him liable for disciplinary action.

(iv) A *conditional order*, if not objected to, or an order, which has been made *absolute*, shall have to be obeyed by all concerned and any disobedience of the order shall attract penal provisions of Section 188 of the Indian Penal Code.

(v) This order must be followed with utmost scruples and without any demur. Any person, who is found to

be not complying with the present order, shall be liable for disciplinary/criminal action apart from contempt of this Court.

26. In our view, so far as the present case is concerned, the petitioner has, in the light of what we have discussed above, alternative and efficacious remedy available under the Code of Criminal Procedure, 1973, as envisaged under Chapter X (B) of the Code and the Magistrate, under the said Chapter, has sufficient authority to deal with the situation, as complained by the petitioner in the present writ application. We do not, therefore, find any reason to exercise extraordinary writ jurisdiction under Article 226 of the Constitution of India in the present facts and circumstances of the case.

27. We do not find any exceptional circumstance in the present case to exercise extraordinary writ jurisdiction, when a legislative statutory enactment provides specific procedure and jurisdiction to deal with a situation, such as, the present one.

28. In the result and for the reasons discussed above, we dispose of the present writ petition with observation that the petitioner shall remain at liberty to invoke the provisions embodied under Chapter X (B) of the Code of Criminal

Procedure, 1973 and if he does so, it goes without saying that the concerned Magistrate shall proceed in accordance with law in the light of what have been discussed and held in the preceding paragraphs of this judgment and order.

29. Let a copy of this judgment and order be communicated to the Chief Secretary of Bihar, who shall, forthwith, communicate this order to all District Magistrates, Sub Divisional Magistrates, the Police Officers and the Chief Executive Officers of the local bodies in the State of Bihar, for strict compliance of what have been discussed and directed above.

30. With the above observations and directions, this writ application shall stand disposed of.

(I.A. Ansari, ACJ)

Chakradhari Sharan Singh, J : I agree.

(Chakradhari Sharan Singh, J)

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