

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6941 of 2015

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1. Narendra Ram, son of Late Suba ram, resident of village-
Ghusiyar, Police Station - Sangrampur, District - East
Champaran at Motihari

.... Petitioner

Versus

1. The State of Bihar through the Principal Secretary,
Human Resources Development Department, Govt. of
Bihar, Patna
2. The District Magistrate, East Champaran at Motihari
3. The District Education Officer, East Champaran at
Motihari
4. The Sub Divisional Officer, Areraj, East champaran at
Motihari
5. The Circle Officer, Sangrampur, East Champaran at
Motihari
6. The Officer-in-Charge, Sangrampur, Police Station- East
Champaran at Motihari

.... Respondents

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Appearance :

For the Petitioner : Mr. Dhurendra Kumar
For the Respondents : Ms. Shilpa Singh, GA 12

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CORAM: HONOURABLE THE CHIEF JUSTICE

AND

**HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

JUDGMENT AND ORDER

ORAL

**(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)**

Date: 05-09-2016

It is apparent failure on the part of the authorities
to exercise their powers, coupled with duties, available under
Section 133 of the Code of Criminal Procedure,
1973(hereinafter referred to as the Code), which has made the

petitioner to approach this Court in the present proceeding in the shape of Public Interest Litigation filed under Article 226 of the Constitution of India.

2. We have heard Mr. Dhurendra Kumar, learned Counsel for the petitioner, and Ms. Shilpa Singh, learned Government Advocate No. 12, appearing on behalf of the respondents.

3. The petitioner has a grievance that a poultry farm has been established over public land near newly created Primary School, Panchbhirba, Nuniya Tola, Sangrampur, appertaining to Khata No. 139, Khesra No. 1278, area 45 decimals. It is the case of the petitioner that the said poultry farm and other encroachment over public land near the school are nuisance for the students as well as the teachers of the school and are causes for eminent danger and threat to their proper hygiene and health. The petitioner is the Headmaster of the said Primary School.

4. It transpires from the materials on record that way back, on 23.06.2011, the then Headmaster of the School had written to the District Magistrate, East Champaran, for removal of the encroachments from the public land, in question, consequent upon which, a local inspection was made and measurement was done by the Anchal Amin. The Anchal Aqmin appears to have reported that out of 45 decimals of

land, 13 decimals had been encroached upon by the encroachers. Let alone removal of the encroachments, yet another encroachment in the form of poultry farm came over the land, which is adjacent to the school building. Complaints were again made to the District Magistrate in the year 2015, but without any concrete result.

5. In the said background, the present case, in the nature of Public Interest Litigation, came to be filed on 01.05.2015, after serving a copy of the writ application on the Office of the Advocate General, Bihar, on 21.04.2015.

6. From the counter affidavit filed in the present proceeding by the Circle Officer, Sangrampur, it appears that after filing of the writ application in this Court, the Circle Officer, Sangrampur, initiated Encroachment Case No. 01/2015-16 and called for report from the Amin in respect of encroachment of land of the school. The Amin found and reported existence of encroachment over the land caused by the few persons, namely, Rajendra Mahto, Mahendra Mahto, Kailash Mahto and Paras Mahto. They were noticed. Only Rajendra Mahto appeared in the encroachment proceedings and he, voluntarily, agreed to remove the encroachment. Others, however, did not participate in the encroachment proceeding, leading to passing of final order on 20.02.2016.

7. The pleadings and material on record, however,

go to suggest that encroachments from the public land have not been removed so far.

8. This is noteworthy that in one of the proceedings before this Court, in the case of **Sanjay Jha v. The State of Bihar and Others**, reported in **2016 (1) PLJR 248**, we had noticed that because of failure on the part of the executive to exercise powers under Section 133 of the Code the said provision was being rendered redundant and otiose. The said case related to encroachment on public road.

9. Considering various aspects of the matter, statutory provisions and Supreme Court's decision, in the case of **Municipal Council, Ratlam v. Vardhichand and Others (AIR 1980 SC 1622)**, we have issued general directions, in the case of **Sanjay Jha** (supra), at paragraph 25, to be followed by all concerned, which read thus:-

"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."

10. We are, for the purpose of present case, find it apposite to extract hereinbelow relevant provisions of Section 133 of the Code of Criminal Procedure, 1973, which read thus:-

"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) xx xx xx

(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) xx xx xx

(d) xx xx xx

(e) xx xx xx

(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, 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) xx xx xx

(iv) xx xx xx

(v) xx xx xx

(vi) xx xx xx

(2) xx xx xx”

11. We find that sub-Section (1) of Section 133 of the Code clearly lays down 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 provided therein, 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. In the case of **Vardhichand** (supra), the Supreme Court held that whenever there is public nuisance, the provisions, as contained in Section 133 of the Code of Criminal Procedure, 1973, must go into action inasmuch as public power of the Magistrate, as conferred to him under Section 133 of the Code of Criminal Procedure, 1973, is a public duty to the members of the public, who are victims of the nuisance.

21. The Supreme Court further laid down in clear terms, in **Vardhichand** (supra), that a Municipal Commissioner and other Executive Authorities are bound by an order, which may be passed by a Magistrate, under Section 133 of the Code of Criminal Procedure, 1973, and in any case of disobedience of the 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.

22. The relevant portion from the decision of the Supreme Court, in **Vardhichand** (supra), is being extracted hereinbelow:-

"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. In the case of **Sanjay Jha** (supra), upon consideration of various provisions in Chapter X of the Code of Criminal Procedure, 1973, and the decision of the Supreme Court, in the case of **Vardhichand** (supra), we laid down the law, in paragraphs 23 and 24, as follows:

"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."

24. While laying down the law, as above, we had issued a general direction, in the case of **Sanjay Jha** (supra), in paragraph 25, to be followed by every concerned, which has

already been quoted in the present judgment and order.

25. We are compelled to observe that the said general direction is not being followed in its letters and spirit.

26. In the present case, no dispute is being raised that public land has been encroached. This is also not being disputed that operating a poultry farm, at the place in question, is nuisance for the students and teachers of the adjacent school and is a health hazard too. We have failed to understand as to why the Magistrate has not proceeded in accordance with the provisions of Section 133 of the Code of Criminal Procedure, 1973, and in view of the general directions issued by us in the case of **Sanjay Jha** (supra).

27. Considering the fact that the respondents have not disputed the claim of the petitioner, as regards existence of encroachment and public nuisance, at the place in question, we dispose of the present application with a direction to the respondents, particularly, respondents 2 and 4, to proceed strictly in accordance with the direction issued by us, in the case of **Sanjay Jha** (supra), so as to ensure that encroachments/public nuisance are removed, failing which the consequence, as prescribed in the said decision, in the case of **Sanjay Jha** (supra), shall follow, making the concerned Officers liable for disciplinary action.

28. This application stands disposed of with a

liberty to the petitioner to approach this Court again, if situation so warrants in future.



(I. A. Ansari, CJ.)

(Chakradhari Sharan Singh, J)

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