

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 445 of 2017

- Jugal Kishore Dhobi (Rajak) S/o Sunder Lal Dhobhi, Aged About 55 Years Caste Dhobi, Occupation Washer, R/o Behind Soni Dharamshala, Near Ramayan Chowk, Chantidih, Tahsil & District Bilaspur, Chhattisgarh.

---- Petitioner

Versus

1. Ganesh Yadav S/o Late Sunder Lal Yadav, Aged About 47 Years Caste Yadav, Occupation Private Job, R/o Behind Soni Dharamshala, Near Ramayan Chowk, Chantidih, Tahsil & District Bilaspur, Chhattisgarh.
2. Smt. Shail Pandey W/o Shri Gaya Prasad Pandey, Aged About 40 Years Caste Bramhan, R/o Talapara, Tahsil & District Bilaspur, Chhattisgarh.
3. Smt. Sharda Pandey W/o Shri Devilal Pandey, Aged About 45 Years Caste Bramhan, R/o Khaparganj, Musalman Mohalla, Tahsil & District Bilaspur, Chhattisgarh.
4. State Of Chhattisgarh, Through District Magistrate, Bilaspur, Chhattisgarh.

---- Respondents

For Petitioner	:	Shri Sudhir Kumar Bajpai, Advocate.
For Respondents No.1 to 3		Shri Suresh Kumar Pandey, Advocate.
For Respondent No.4/State	:	Shri Anil S. Pandey, Govt. Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Order On Board

28/08/2017

Heard.

1. This petition is brought under Section 482 of Cr.P.C. with a prayer to pass suitable order with respect to the proceeding pending before the Court of Sub-Divisional Magistrate, Bilaspur under Section 133 of Cr.P.C.
2. It is submitted by counsel for petitioner, that respondent No.1 has filed an application under Section 133 of Cr.P.C. against the petitioner, respondents No.2 and No.3 before the Court of SDM, Bilaspur, stating therein that respondent No.1 is the owner of land bearing Khasra No.306/06, area 00.6 acre, situated in Chantideeh, Bilaspur. He had purchased this land from one Smt. Thela Bai through registered sale-

deed dated 3.1.1978. Petitioner is the owner of the land bearing Khasra No.301/46, area 0.02 acre, situate adjacent to the land of respondent No.1. Similarly respondents No.2 and 3 are the owners of land bearing Khasra No.301/18 admeasuring 0.03 acre, situate adjacent to the land of respondent No.1. It is alleged by the respondent No.1 in the application that petitioner, respondents No.2 and 3 have encroached upon his ownership land and raised construction obstructing the path. It is submitted that the right to way, as agreed by respondents No.2 and 3 in compromise with respondent No.1 on 31.12.1989, has been obstructed.

3. After service of notice, the petitioner appeared before the Court of Sub-Divisional Magistrate and raised preliminary objections regarding maintainability of case stating that the dispute raised by respondent No.1 is of civil nature. Secondly, respondent No.1 had filed a civil suit bearing CS No.77A/1996 before the Civil Court at Bilaspur for declaration and possession of the disputed land which has been dismissed in default on 17.8.2005. The learned SDM has cursorily rejected the objections raised by the petitioner by order dated 30.11.2015 without assigning any reason. This order was challenged in Criminal Revision No.20/2016 before the Court of Sessions Judge, Bilaspur and the same has also been dismissed by order dated 20.2.2017 erroneously. Hence, this petition.
4. It is submitted by the counsel for petitioner that the proceeding under Section 133 of Cr.P.C. has been drawn by the Court of SDM without complying the mandatory requirement as provided under Section 133 of Cr.P.C. This fact has been ignored by both the Courts below that respondent No.1 has already moved before the civil Court, hence, he could not have invoked the provision under Section 133 of Cr.P.C. Petitioner has categorically denied the public right as claimed by respondent No.1 as to right of way from the disputed land in question. The right of way claimed by respondent No.1 relates to connected private land and Section 133 of Cr.P.C. can be invoked only in case when obstruction or nuisance is created on any public property. Hence, it is prayed that suitable order be passed directing the Court of SDM, Bilaspur to proceed in accordance with law.

5. Learned counsel for respondent No.1 has opposed the grounds raised in the petition and the submissions made by the counsel for petitioner. It is submitted that the petitioner is in illegal possession of the disputed land and thus, causing obstruction on the right of way. The objection raised by petitioner can be decided only after recording of evidence by the Court of SDM, Bilaspur, hence, no case for admission is made out in favour of the petitioner.
6. Learned counsel for respondent No.4/State has simply opposed the petition and argument placed before the Court on behalf of petitioner and prayed for dismissal of the petition at the admission stage itself.
7. Heard the parties and perused the material on record.
8. Learned counsel for the petitioner has placed reliance on the judgment of Supreme Court in **C.A. Awarachan Vs. C.V. Sreenivasan and another**, reported in **(1996) 7 SCC 71** in which it was held that non-compliance with the mandatory requirement before proceedings under Section 133 of CrPC vitiates the entire proceedings. Another reliance has been placed on the judgment of Supreme Court **Vasant Manga Nikumba and Ors. Vs. Baburao Bhikanna Naidu (deceased) BY LRS. and another**, reported in **1995 Supplementary (4) SCC 54** in which it was held that the proceedings under Section 133 of Cr.P.C. are not intended to settle private disputes or a substitute civil proceedings.
9. Section 133 of Cr.P.C. provides that whenever a District Magistrate or a Sub Divisional Magistrate or any other Executive Magistrate specially empowered by the State Government, on receiving a report of a Police Officer or other information and on taking such evidence, if any, as he thinks fit, considers 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; and if such person objects to do so, he may direct him to appear before himself and to show cause as to why the order should not be made absolute.
10. Section 138 of CrPC provides that if the person against whom an order

under Section 133 is made appears and show cause against the order than the Magistrate shall take evidence and consider on making the order absolute with or without modification.

11. It is clear from the reading of the provisions under Sections 133 and 138 of CrPC that the person, who objects or refuses to comply with the order passed by the Magistrate, may be directed to appear before the Magistrate concerned and on his appearance, the Magistrate shall record evidence and proceed to decide the matter accordingly.

12. In the present case, no preliminary order was passed on the basis of the information received as no evidence was recorded as per the requirement of Section 133 (1) of CrPC before passing of any order of removal of construction. As it appears from the documents on record that simply a notice was served on the petitioner to appear before the Court of SDM, Bilaspur giving dates for hearing. Hence, it is apparent that mandatory requirement of passing a preliminary order under Section 133 (1) of Cr.PC has been skipped in the case in hand. No fault can be found with the order dated 30.11.2015 passed by SDM, Bilaspur as Section 138 of CrPC does not provide for any stage to consider on the objections raised by the person concerned. Hence, in this situation, as the passing of preliminary order under Section 133 (1) of Cr.PC. has been skipped by the Court concerned, therefore, in view of the judgment C.A. Avarachan (supra), said omission on the part of Sub-Divisional Magistrate, which is a *sine qua non* for initiating proceeding under Section 133 of Cr.P.C., vitiates the entire proceeding because the recording of evidence under Section 138 of Cr.P.C. is meant only for the purpose of making the order of removal of a nuisance or obstruction absolute. Since no such order has been passed by the Court of SDM, Bilaspur, the proceedings under Section 138 of Cr.P.C. are erroneous, without any purpose and abuse of process of law.

13. In view of above, this petition is allowed at the motion stage itself. The proceeding against the petitioner and respondents No.2 and 3 pending before the Court of Sub Divisional Magistrate, Bilaspur in the form of Criminal Case No.12/2014, registered on the basis of application made by respondent No.1 herein, is hereby quashed.

14. The petition accordingly, stands disposed off.

Sd/-
(**Rajendra Chandra Singh Samant**)
JUDGE

Nisha