

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL REVISION No.865 of 2016

Arising Out of PS. Case No.- Year-1111 Thana- District-

Nanhaku Sah son of Late Haridwar Sah, Resident of Village- Kochas, P.S.-
Kochas, District- Rohtas. Petitioner

Versus

1. State Of Bihar
2. Shashikant Singh alias Ravi Kumar son of Late Ram Kinkar Singh, Resident
of Village- Kochas, P.O. and P.S- Kochas, District- Rohtas.
... .. Respondents

Appearance :

For the Petitioner/s : Mr.Rajani Kant Singh, Advocate
For the Respondent/s : Mr.Sri Asharaf Ansari, APP
For the Res. No. 2 : Mr. Surendra Kumar Mishra, Advocate

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL ORDER

6 03-02-2020 Heard learned counsel for the petitioner and learned
counsel representing opposite party no. 2. Learned APP is also
present.

This application has been preferred for setting aside
the order dated 19.05.2016 passed by learned Sub-Divisional
Magistrate, Sasaram in Case No. 607 of 2015 whereby and
whereunder the learned S.D.M., Sasaram has directed the
petitioner to remove his encroachment from Khata No. 362, Plot
No. 1172 area 4 decimals situated at Mauza- Kochas, P.S.-
Kochas district- Rohtas.

Learned counsel for the petitioner submits that earlier
while issuing notice to opposite party no. 2 vide order dated
15.12.2016. the learned co-ordinate Bench of this Court had



taken a *prima-facie* view of the matter which reads as under:

“Issue notice to the Opposite Party No. 2 to show cause as to why this criminal revision application be not heard and preferably be disposed of at the time of admission itself, for which, requisites etc., under both processes, i.e., ordinary as well as registered post with A/D, must be filed within a period of one week from today, failing which this criminal revision application, as against the concerned Opposite Party No. 2, shall stand rejected without further reference to a Bench.

Rule is made returnable within four weeks.

While assailing the order, dated 19.05.2016, passed, in Case No. 607 of 2015, by the leaned Sub Divisional Magistrate, Sasaram, learned Counsel appearing on behalf of the petitioner has submitted that the said order has been passed without following the mandatory procedure prescribed under Section 137 of the Code of Criminal Procedure, 1973. This is to be noted that by the impugned order, learned Magistrate has directed the petitioner to remove his encroachment from khata no. 362, plot no. 1172, area 4 decimals, situated at mouza Kochas, Police Station Kochas, in the district of Rohtas. A submission is being made that denying the existence of public road, the petitioner, after having received notice, had filed his show cause. According to him, there is no dispute that the land, in question, is not a public land. In such circumstance, without following the procedure prescribed under Section 137 of the Code of Criminal Procedure, 1973, learned



Magistrate ought not to have proceeded.

On perusal of the impugned order, I find substance in the submissions advanced on behalf of the petitioner that the procedure for passing an order under Section 133 of the Code of Criminal Procedure, 1973, has not been followed.

Considering the above, till further orders, the operation of the order impugned, dated 19.05.2016, passed, in Case No. 607 of 2015, by the learned Sub Divisional Magistrate, Sasaram, shall remain stayed.”

Thereafter, attention of this Court has been drawn towards Section 133 Cr.P.C. and it is submitted that in the present case there is no finding in the impugned order that the disputed land is either a public land or that is being used as way by the public. It is submitted that in absence of there being any such finding provision of Section 133 Cr.P.C. would not be attracted.

Learned counsel further submits that earlier the opposite party no. 2 had filed an application before the Circle officer, Kochas, Rohtas in which he had claimed a right to way over the land. The said application was disposed of vide order dated 05.02.2013 (Annexure -4/1) taking a view that there is a land dispute between the parties, the land is a raiyati land and the parties may get



their dispute adjudicated before a competent court of law. It is submitted that thereafter, the present application under Section 133 Cr.P.C. was filed before the court of learned Sub-Divisional Magistrate, Sasaram giving rise to case No. 607 of 2015 and the learned Sub-Divisional Magistrate has passed the impugned order by simply going through the fact that the sale deed of the opposite party no. 2 was showing a road from one side of the boundary of the land. The S.D.M. though noticed that in the sale deed executed in favour of this petitioner there was no road from any side with the boundary therefore, in the submission of learned counsel for the petitioner the dispute being that of the road to the party claiming over a portion of the land belonging to the petitioner which he wanted to use by way of a way, in absence of any finding that the said portion was being used as a public road by public, the Sub-Divisional Magistrate had no authority of law to pass the impugned order.

Learned counsel for the opposite party no. 2 has opposed this application has submitted that since the sale deed of the opposite party no. 2 is showing road from one side of the boundary of the land purchased by opposite



party no. 2, the petitioner is obliged to leave that portion and the same is to be used as road by the opposite party no. 2. According to him there is no illegality or infirmity in the impugned order.

Having heard learned counsel for the parties and on perusal of the records, this Court finds that earlier while issuing notice to opposite party no. 2 the learned co-ordinate Bench of this Court had taken note of the submission of the petitioner that the land in question is not a public land and the learned Sub-Divisional Magistrate had passed the impugned order without following the procedure established under Section 137 Cr.P.C. which reads as follows:

“137. Procedure where existence of public right is denied.- (1) Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall before proceeding under section 138, inquire into the matter.



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

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

From a bare reading of the aforesaid provisions it would appear that the Sub-Divisional Magistrate could have entertain an application under Section 133 Cr.P.C. and would have passed conditional order for removal of nuisance on the basis of an information and upon taking such evidence that any unlawful obstruction or nuisance is to be removed from any public place or from any way, river or channel which is or may be lawfully used by the public.

In this case there is no pleading that the portion of land which is being claimed by the opposite party no. 2 is being used as way by the public. It is not disputed that the land is raiyati land and further this Court finds that the



learned Sub-Divisional Magistrate has proceeded to pass the impugned order on the basis of the pleadings without following the procedure established under Section 137 of the Code of Criminal Procedure.

In the aforesaid view of the matter, the impugned order cannot sustain the test of law, it is hereby set-aside. The matter is remitted to the Sub-Divisional Magistrate, Sasaram for a fresh consideration of the matter after following the established procedure of law and in accordance with law within a period of six months from the date of receipt/production of a copy of this order.

The application stands disposed of accordingly.

(Rajeev Ranjan Prasad, J)

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