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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

COCp-715-2011 (O&M)
Date of decision: 10.03.2023

Ram Kumar

... Petitioner

Vs.

K.P.S. Mahi and another

.. Respondents

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Vipul Goel, Advocate for
Mr. A.S. Ahluwalia, Advocate
for the petitioner.

Mr. Teevar Sharma, AAG, Punjab.

ARVIND SINGH SANGWAN, J. (ORAL)

The petitioner alleges violation of the order dated 26.03.2003 passed by the Sub Divisional Magistrate, Bathinda in proceedings under Section 133 Cr.P.C. as well as for filing a false affidavit (Annexure P-2) filed in Crl. Misc. No.24805 of 2009.

Brief facts of the case are that the petitioner filed a complaint under Section 133 Cr.P.C. regarding khasra No.77/1 measuring 10 kanals 09 marlas, which is a passage. The Sub Divisional Magistrate, vide order dated 26.03.2003, held that disputed land is a passage and at spot, houses have been

constructed on it and the private respondents have no proof/evidence regarding their ownership, which falls within the abadi of the village, therefore, a direction was issued for removal of the encroachment invoking Section 133 Cr.P.C. The petitioner thereafter filed CRM-M-24805-2009 against then Sub Divisional Magistrate alleging that despite the order passed under Section 133 Cr.P.C., no action was taken for removal of the encroachment. In the said petition, aforesaid affidavit was filed by then Sub Divisional Magistrate on 02.02.2010 that the order has been implemented, as per report of the Tehsildar dated 10.12.2009. Accordingly, observing that the order has been complied with, said petition was dismissed as infructuous on 06.07.2010.

The petitioner filed present petition alleging that there is still encroachment at the spot at khasra No.77/1, which is a passage.

Separate replies by way of affidavits of Avtar Singh, the then Tehsildar, Bathinda-respondent No.2 as well as of KPS Mahi, the then Sub Divisional Magistrate, Bathinda are on record. In both the affidavits, it is stated that there is no encroachment at the spot and the site plan prepared by the Municipal Corporation as well as photographs of demolition work, while removing the encroachment, are attached with the affidavit. It is further stated that houses are constructed abutting the passage and width of the passage vary from 24 feet to 35 feet. House of petitioner Ram Kumar is constructed on backside of house of Mohan Lal and there is a passage provided for the ingress and egress to house of the petitioner to the main passage, however, he wants

a separate passage on the land adjoining the main passage and the respondents have encroached upon the passage. It is also stated that the petitioner filed another CRM-M-38308-2010 with similar prayer, which was dismissed as withdrawn on 12.01.2011.

In the affidavit of SDM, Bathinda, identical pleas are taken. It is also stated that an FIR No.556 dated 22.09.2005 under Sections 308, 325, 323, 148, 149 IPC was registered at Police Station Kotwali, District Bathinda against some persons.

Counter affidavit has been filed by the petitioner that defence set up by the Tehsildar as well as SDM is not correct. Thereafter, vide order dated 09.08.2012, Chief Judicial Magistrate, Bathinda was directed to visit the spot regarding demarcation of khasra No.77/2 and to submit a report. As per report dated 15.10.2012, it is stated that he visited the spot along with revenue officials and found that as per revenue record, khasra No.77/2 is a passage, but the same is not in existence and some portion is under the possession of Mohan Lal, Sukh Ram, Ram Parkash, Raj Kumar and Nathu Ram, who are neighbours of petitioner Ram Kumar **“but sufficient passage in front of the houses of all the persons named above is in existence at the spot and some portion of khasra No.77/2 is in possession and unauthorized construction is not removed”**. Thereafter, this Court again directed the Chief Judicial Magistrate to give further clarification and as per report dated 07.03.2013, it was stated that as per record, khasra No.77/2 is Gair Mumkin Firni (passage) having an

area of 10 kanals 09 marlas as per jamabandi for the year 2009-2010. Thereafter, additional affidavit of Tehsildar, Bathinda was also filed, in which it is stated that khasra No.77/2 is located in densely populated area with constructions existing for more than 40-50 years. It is further stated that the land in question belongs to Punjab Wakf Board and falls within the jurisdiction of Municipal Corporation, Bathinda. It is also stated that because of thickly populated area, it is not possible to locate/demarcate khasra No.77/2 due to haphazard development and original survey pillars installed by the revenue/consolidation department are neither in existence nor traceable and in the absence of these pillars/points, no demarcation of any khasra number can be made.

Learned counsel for the petitioner submits that as per report of the CJM, still there is an unauthorized construction over khasra No.77/2.

Learned State counsel, however, submits that all the possible unauthorized constructions have been removed and the petitioner and all other persons, who have their houses abutting khasra No.77/2, have sufficient passage for ingress and egress.

From the above, following points emerged to be considered: -

- (a) As per report of Tehsildar, Bathinda and SDM, Bathinda, khasra No.77/2 belongs to Punjab Wakf Board and falls within the area of Municipal Corporation, Bathinda. At no point of time, Punjab Wakf Board has filed any application for removal of any

unauthorized occupation. It is also admitted fact that construction over this khasra number is more than 40-50 years old.

- (b) In the judgment of Hon'ble Supreme Court in **Vasant Manga Nikumba Vs. Baburao Bhikanna Naidu, 1996 SCC (Cri) 27**, it is held that before initiating any proceeding under Section 133 Cr.P.C. for removal of any unauthorized construction over a public passage, if the construction is found to be old, Section 133 Cr.P.C. cannot be resorted and remedy would lie before the Civil Court, therefore, entire proceedings initiated at the instance of the petitioner stand vitiated, as in the order dated 26.03.2003, SDM has not recorded any finding about age of the construction, which is mandatory before passing an order of demolition.

This Court also held in **Makhan Lal Vs. Buta Singh, 2003 (2) RCR (Crl.) 416** that nuisance, which is 9 years old, cannot be removed under Section 133 Cr.P.C. and only remedy is before the Civil Court.

Be whatsoever, it is not disputed by either of the parties that sufficient area for passage is available for house of the petitioner and private respondents and demolition has already been undertaken by majority of the people, in order to clear the passage, which is feasible from the photographs as well as site plan.

- (c) The house of the petitioner has a clear passage for ingress and egress and his own statement is that he wants separate passage for the adjoining plot, which is a disputed fact and cannot be adjudicated in contempt.
- (d) In view of report of the CJM, only a part of khasra No.77/2 is unauthorized construction, however, it is not stated in report of the CJM that demarcation was conducted at the spot, though a categorical stand is taken by the Tehsildar, Bathinda that none of the consolidation pillars is available at the spot and the area is thickly populated as very old construction is existing at the spot, therefore, report of the CJM is based only on field book and jamabandi.

In view of the above, no willful disobedience is made out.

Dismissed.

[ARVIND SINGH SANGWAN]
JUDGE

10.03.2023
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Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No