

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-28106-2018

Reserved on : January 04, 2023

Date of Decision: January 11, 2023

Bhana Ram

...Petitioner

Versus

Raj Kumar and others

...Respondents

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Babbar Bhan, Advocate for the petitioner.

Mr. Ajay Jain, Advocate for respondent Nos.1 and 2.

Ms. Harpreet Kaur, AAG, Haryana.

DEEPAK GUPTA, J.(Oral)

This petition is directed against the order dated 13.02.2018 (Annexure P-1) passed by learned Sub Divisional Magistrate, Siwani District Bhiwani in case under Section 133 of the Code of Criminal Procedure directing the petitioner to remove the alleged encroachment of passage within 10 days; and also the order dated 11.06.2018 (Annexure P-3) passed by learned Additional Sessions Judge, Bhiwani, whereby revision against the above said order 13.02.2018 has been dismissed.

2. On perusal of the paper book, it emerges that a complaint was made by Raj Kumar & Gulab Singh (respondent Nos.1 and 2 herein) before Sub Divisional Magistrate, Siwani alleging that Bhana Ram (now petitioner) had made unauthorized encroachment over a passage comprised in Khasra No.586 measuring 4 kanal 4 Marla, which was causing obstructions to the complainant and other villagers in accessing their fields.

3. Upon notice of the complaint, respondent Bhana Ram (petitioner herein) appeared through his counsel and sought time of 15

days for removal of the encroachment. On the basis of said stand and on finding that passage had been encroached upon by the petitioner, which was causing obstruction to the complainant and other villagers in accessing their fields, the application was allowed and petitioner was directed to remove the encroachment within 10 days, vide impugned order dated 13.02.2018. Revision against the said order has been dismissed by the learned Additional Sessions Judge, Bhiwani vide order dated 11.06.2018.

4. Assailing the aforesaid orders, it is contended by the petitioner that alleged passage was left for his personal use, in which nobody else has the right to use as a passage; that he did not make any encroachment; that patent illegality has been committed by the Courts below in passing the impugned orders, as counsel for the petitioner had never admitted the encroachment nor had sought time of 15 days for removal of the same. In this regard, affidavit of the counsel for the petitioner is annexed as Annexure P-4. It is further submitted that no proper opportunity was provided to the petitioner to adduce evidence in order to show that there existed no passage and that no public right in respect of the property was involved in the matter. No mandatory procedure under Section 137 Cr.P.C. was followed. Not only this, the alleged passage was left only for the fields of the petitioner and proforma respondents, inasmuch as the land of respondent Nos.1 and 2 abuts to other *Rasta* bearing khasra No.597 and that the complaint was made under Section 133 Cr.P.C. with malafide intention. Petitioner further submitted that he along with proforma respondents are cultivating the land, alleged to be the passage, since long time and so, proceedings under

Section 133 Cr.P.C. could not be launched and only the Civil Court had the jurisdiction to adjudicate the rights of the parties. Petitioner had already filed a suit for permanent injunction against respondent Nos.1 & 2 titled as ***Bhana Ram vs Gulab Singh etc.*** in which status quo was directed to be maintained and once the civil proceedings are pending regarding same subject matter, proceedings under Section 133 Cr.P.C. could not come into play to determine the rights of the parties. It is also contended that when there is old obstruction to the passage, proceedings cannot be initiated under Section 133 Cr.P.C. With all these submissions, prayer is made for setting aside the impugned orders.

5. Upon notice, appearance has been made on behalf of respondents, who defended the impugned orders. It is pointed out that in the grounds of revision filed before learned Additional Sessions Judge, Bhiwani, it was nowhere pleaded that counsel for the petitioner had not conceded that obstruction shall be removed within 15 days and that this ground has been taken for the first time before this Court and so, the same is not admissible. It is further contended that since encroachment has been conceded to by the petitioner through his counsel, so no further inquiry was required nor any evidence was required to be adduced.

6. I have considered submissions of both the sides and have perused the record carefully.

7. Section 133 Cr.P.C. reads as under:-

“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) to (g) xxxxxxxxxxxx (not relevant)
such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or, within a time to be fixed in the order—
(i) to remove such obstruction or nuisance; or
(ii) to (vi) xxxxxxxxxxxxxxxxxxxx (not relevant)
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.”

8. As is evident from the above said provision, on receiving a report of the police officer or on the basis of other information regarding unlawful obstruction in any way, the District Magistrate or the Sub Divisional Magistrate or any Executive Magistrate empowered in this behalf by the State of Government may make a conditional order requiring the person causing such obstruction, within a time to be fixed in the order, to remove such obstruction. Section also provides for taking of the evidence, in case it is required. Taking of the evidence is not necessary.

9. In the present case, respondent Nos.1 and 2 herein alleged obstructions to the passage comprised in khasra No.586 measuring 4 kanal 4 marlas by the petitioner Bhana Ram, which was causing obstructions to access the fields of complainant and other villagers. Since upon notice to the respondent of the complainant i.e. petitioner Bhana Ram, he appeared through his counsel and conceded the obstruction and sought time of 15 days to remove the same, so there was no necessity for

the SDM concerned to take evidence regarding the alleged encroachment. In view of the stand taken by the petitioner through his counsel, direction was given by SDM, Siwani to remove the illegal encroachment within 10 days; as is evident from impugned order dated 13.02.2018 (Annexure P-1)

10. Annexure P-2 is the copy of the revision petition, which was filed by petitioner Bhana Ram before learned Sessions Judge, Bhiwani, against the order dated 13.02.2018. A perusal of the grounds taken in the said revision petition would reveal that although order dated 13.02.2018 was challenged on various grounds but it was nowhere pleaded that the petitioner through his counsel had not taken the stand before the SDM, Siwani, seeking time of 15 days to remove the encroachment. In view of the said fact, it does not lie in the mouth of the petitioner to plead before this Court that no such statement had been made by his counsel before the Sessions Court. Therefore, the affidavit of counsel for the petitioner before the Sessions Court as placed on record, is not at all reliable.

11. Moving further, Sections 137 and 138 Cr.P.C. read as under:-

“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.

138. Procedure where he appears to show cause.—*(1) If the person against whom an order under section 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case.*

(2) If the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.

(3) If the Magistrate is not so satisfied, no further proceedings shall be taken in the case.”

12. As the language of Section 137 Cr.P.C. reveals that in case the person against whom order was made under Section 133 Cr.P.C. denies the existence of any public right in respect of any way, river, channel etc., then the Magistrate is required to initiate proceedings under Section 138 Cr.P.C. and enquire into the matter. If the Magistrate finds that there is any reliable evidence in support of denial, he may even stay proceedings till the matter of existence of the right is decided by the competent Court. However, if he finds that there is no such evidence, he shall proceed as per Section 138 Cr.P.C. Section 137(3) Cr.P.C. also makes it clear that if the person on being questioned by the Magistrate fails to deny the existence of the public right of the nature referred to in Section 133 Cr.P.C. and who to having made such denial failed to adduce reliable evidence in support thereof, he cannot be permitted in the

subsequent proceedings to make such a denial. As per Section 138 Cr.P.C. if the person against whom order under Section 133 Cr.P.C. is made, appears and show causes against the order, then Magistrate is required to take evidence in the matter as in the summons case.

13. It is, thus, evident that procedure as per Sections 137 and 138 Cr.P.C. is required to be followed by the Magistrate only when there is denial of the obstruction in the passage.

14. In the present case, as after being show cause, the petitioner appeared before the Magistrate through his counsel and sought time of 15 days to remove the obstruction, which clearly indicated his admission that there was encroachment on the passage, for removal of which he sought time of 15 days, therefore, now petitioner cannot be allowed to plead that passage in question was left as a private passage for him or that he is using the said passage for growing crops since long time; or that no procedure under Section 137 and 138 Cr.P.C. has been followed.

15. Learned counsel for the petitioner to buttress his contention has relied upon the judgment of a co-ordinate Bench of this Court in case ***“Darshan Singh and anr. vs Malkiat Chand and ors.”*** reported as 1990(1) R.C.R. (Criminal) 462, in which it is was held that if the encroachment existed for 2/3 years on the public place, then rights are to be adjudicated by the Civil Courts. Section 133 Cr.P.C. is applicable for unlawful obstruction recently built on the public road. Further reliance is placed upon ***“Banwari Lal and ors. vs Kanwar Lal and anr.”*** reported as 1993(3) R.C.R. (Criminal) 106, wherein it was held by this Court that Section 133 Cr.P.C. is applicable only in cases of emergency or in urgency; otherwise the aggrieved party is to pursue the remedy in the

Civil Courts. Same view was taken in cases of ***“Zorawar Singh vs Rajinder Singh alias Sher Singh and anr.”***, reported as 1990(1) R.C.R. (Criminal) 467 and ***“Ajaib Singh vs Sant Singh”*** reported as 1997(2) R.C.R. (Criminal) 221.

16. No doubt that as per the legal position, Section 133 Cr.P.C. is applicable in the urgent conditions but in the present matter, when the petitioner appeared before the SDM through his counsel, no such stand was taken by him that obstruction on the passage was old or that he was growing crops on that passage since long time. As already noticed, he sought time of 15 days to remove the encroachment and so he is now estopped from pleading that obstruction on the passage is quite old.

17. Another contention of the petitioner that he had filed civil suit before the Court and so no order under Section 133 Cr.P.C. can continue to exist, has no merit.

18. Learned counsel for the respondents has placed on record copy of the order dated 18.02.2019 passed in Civil Suit titled ***“Bhana Ram and another vs Gulab Singh and another”*** (CNR No.HRBHC0-000009-2018), whereby suit of the petitioner Bhana Ram etc. seeking decree of permanent injunction alleging interference in his land or the adjoining passage comprised in khasra No.586, was dismissed as withdrawn. Another suit titled ***“Hoshiyar Singh vs Sarpanch Municipal Counsel Mandholi Khurd and others”*** bearing CNR No.HRBHC0-000217-2018 was filed not to cause any obstruction in the disputed passage comprised in khasra No.586 till the case filed under Section 42 of the Consolidation Act, 1948 was decided. However, said suit was also dismissed as withdrawn vide order dated 22.04.2019 of learned

Additional Civil Judge (Sr. Divn.), Siwani.

19. Counsel for respondent Nos.1 and 2 also placed on record certified copy of the order dated 11.09.2018 passed by the Commissioner, Rohtak, Division Rohtak exercising powers under Section 42 of the Consolidation Act, 1948, which reveal that petition had been made before the Consolidation Officer stating therein that passage comprising khasra No.586 was not functional and so, another passage be carved out on the northern side of Rect. No.144 Khasra No.11/2-12-13-14/1-14/2-15 and Rect. No.15 Khasra No.11-12. It was found that consolidation had taken place in the village in 1979-80. The application to change the passage was moved after 37 years in February, 2018. After taking into consideration these facts, the petition was dismissed by the Consolidation Officer and order was upheld by the Commissioner, Rohtak.

20. Having regard to all the aforesaid facts and circumstances, I find absolutely no merit in this petition. There is no illegality or perversity in the impugned orders passed by the SDM, Siwani and learned Additional Sessions Judge, Bhiwani.

21. As such, present petition is hereby dismissed.

January 11, 2023
sarita

(DEEPAK GUPTA)
JUDGE

Whether reasoned/speaking: Yes/No
Whether reportable: Yes/No