

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-7116-2015

Date of Decision: 25.04.2023

Kulwant Singh & Ors.

... Petitioners

VS.

State of Punjab & Ors.

... Respondents

CORAM: HON'BLE MR.JUSTICE SANDEEP MOUDGIL

Present: Mr. KS Kang, Advocate for the petitioners

Mr. Mohit Chaudhary, AAG Punjab

None for private respondents

Sandeep Moudgil, J.

(1). This petition under Section 482 CrPC has been filed by the petitioners seeking quashing of the order dated 10.10.2013 (Annexure P14) passed by Addl. Sessions Judge, Patiala vide which the order dated 17.08.2012 (Annexure P12) passed by SDM, Samana has been set aside and the case has been remanded back to the lower court for deciding the same after following the proper procedure. The petitioners further seek quashing of the order dated 17.11.2014 (Annexure P15) vide which the petition under Section 133 CrPC filed by the petitioners for removing encroachment in public passage bearing khasra No.98, Tehsil Samana, has been dismissed. Further, a prayer has been made to restore the order dated 17.08.2012 and to direct respondents No.1 to 5 to implement order dated 17.08.2012 and make 5 karam rasta which has been reduced to 2 ft. by unauthorized encroachment by respondents No.6 to 11.

(2). Brief facts of the fact are that petitioner No.1 Kulwant Singh submitted an application for demarcation of the *rasta* to the Deputy

Commissioner, Patiala on 07.05.2010 bringing it to his notice that 5 karam *rasta* in question has been reduced to only 2 ft. *rasta* which cannot be even used by scooterists and motor-cyclists. The said application was forwarded to Tehsildar, Samana on 10.05.2011 who it to Field Kanungo on 17.05.2010 for necessary action. Field Kanungo returned it to Tehsildar asking him to get it done from some other Field Kanungo on 31.05.2010. It was again sent to the Field Kanungo with the direction to complete demarcation within four days. The Field Kanungo again returned it to the Tehsildar with the remarks that *ziri* crop stands sown therefore, demarcation cannot be conducted now.

(3). The petitioner, thereafter, moved an application to the Punjab Human Rights Commission and the said application/complaint was forwarded by the said Commission to the Tehsildar, Samana on 14.09.2011. Thereafter, demarcation was got done by the Tehsildar, Samana from Field Kanungo Samana, Roshan Lal on 10.11.2011 who conducted the demarcation in the presence of the parties and respectable persons of the village without any objection having been raised by any one. As per demarcation report dated 10.11.2011 (Annexure P-2) submitted by Field Kanungo, 4 kanal 14 marla area of the *gair mumkin rasta* bearing khasra No.98 was found to have been encroached upon and taken in possession by private respondents and 12 marla *rasta* was found in the possession of the petitioners. It was also reported that at the time of demarcation, wheat crop had been sown by the respondents No.7 to 11 in the area encroached upon by them. As such, on their request, the said respondents No.7 to 11 were not dispossessed till the reaping of the wheat crop.

(4). Respondents No.6 to 11 Balbir Singh Dhanoa etc. submitted an application dated 15.05.2011 before SDM Samana for cancelling demarcation report dated 10.11.2011 stating that their actual area has been reduced. Notice of application was not issued to the petitioners for cancelling demarcation and the SDM, vide his order (Annexure P4) written on the application itself, ordered Naib Tehsildar, Samana to get demarcation conducted again. The Naib Tehsildar, Samana ordered Field Kanugo Roshan Lal to conduct demarcation who also refrained to conduct demarcation stating that crop is standing on the spot because of which demarcation cannot be conducted and since he has already conducted the demarcation of the said land, fresh demarcation may be got conducted from some other kanungo.

(5). When the respondents No.7 to 11 did not vacate the rasta encroached upon by them even after cutting of wheat crop, one of the petitioners - Jarnail singh submitted an application to Deputy Commissioner Patiala for getting the rasta vacated on 11.05.2012 (Annexure P-6).

(6). Thereafter, respondents No.7 to 11 filed a suit for permanent injunction and obtained *ex parte* stay order vide order dated 16.05.2012 (Annexure P-7). The said suit was, however, ultimately dismissed as withdrawn vide order dated 09.10.2013 (Annexure P-8). The respondents No.7 to 11 further submitted an application dated 23.05.2012 (Annexure P9) before the Deputy Commissioner for demarcation of rasta going from village Khudadpur to village Danipur comprised in Khasra nos. 98 & 66 allegedly without disclosing and deliberately concealing application (Annexure P-4) filed before SDM. The Deputy Commissioner vide his order dated 23.05.2012 written on the application itself ordered SDM Samana to get

demarcation conducted under Right to Service Act in time bound manner. The demarcation as such was got conducted by Field Kanungo, Samana and no notice of application (Annexure P-9) was served on the petitioners.

(7). Since no action was taken to vacate encroachment made by the respondents even after orders of Deputy Commissioner, Patiala passed on application (Annexure P-6) on 15.05.2012, the petitioners approached the SDM, Samana by filing a petition under Section 133 CrPC on 21.05.2012 (Annexure P10). Meanwhile, the respondents manipulated demarcation by Field Kanungo Roshan Lal on 02.06.2012 in the absence of the petitioners and got submitted a demarcation report dated 02.06.2012 (Annexure P11). The petition under 133 CrPC was allowed by the SDM vide order dated 17.08.2012 (Annexure P12) and the respondents were directed to vacate the encroachment made by them on the *gair mumkin rasta* in Khasra no 98 (35-10).

(8). The said order dated 17.08.2012 was challenged by respondents No. 6 to 11 by filing Criminal Revision No.76/2012 before Addl. Sessions Judge Patiala. However, the said revision petition filed by respondents No.6 to 11 has been allowed vide order dated 10.10.2013 (Annexure P14) and the case was remanded back to SDM Samana to hear the case again.

(9). Thereafter, in pursuance to the order dated 10.10.2013 (Annexure P14), the SDM heard the parties and ordered the Tehsildar, Samana to conduct demarcation afresh as per rules on the ground that parties have differences with respect to demarcations vide order dated 27.11.2014. It is against these orders (Annexure P14 & P15) that the petitioners have approached this Court.

(10). The petitioners have also filed an application (CRM-12606-2023) for placing on record the photographs as Annexure P16, which is taken on record.

(11). Learned counsel of petitioners contended that application (Annexure P-1) for demarcation was given on 07.05.2010. It was sent by the Deputy Commissioner to Tehsildar, Samana for taking appropriate action as per rules on 10.05.2010. Tehsildar Samana took no action thereon. Various other applications were made but revenue authorities at Samana simply threw them in waste paper basket. Petitioners approached Human Rights Commission Punjab whereafter demarcation report P-2 was made on 10.11.2011. It does not reduce the area of respondents Balbir Singh etc. by even an inch. It is not the case of the respondents No.6 to 11, in their earliest application P-4 or any other application or petition filed by them in any court/authority and therefore they can neither have any grievance against it nor any cause of action to challenge it because it does not visit them with civil consequences.

(12). Further, it is contended that when the petitioners were given notice by the Field Kanungo and they were present at the time of demarcation (Annexure P-2) as is evident from a reading of their averments in paras 3 & 4 of their application (Annexure P-4), the demarcation report (Annexure P-2) cannot be faulted. It cannot be faulted even if no notice had been given to them because it does not visit them with civil consequences in any manner. Although over 4 years and 9 months have passed since the filing of application (Annexure P-1) for demarcation and more than three years and three months have passed since demarcation (Annexure P-2) was conducted

which has not been set aside to date by any authority and is holding the field to date yet *rasta* has not been got vacated by respondents No.1 to 5 to accommodate Balbir Singh Dhanoa, Advocate and to satisfy his ego. Impugned orders (Annexures P-14 & P-15) have also been passed for the same reasons. It is averred that rule of law mandates that demarcation (Annexure P-2) made by competent officer which does not reduce area owned by respondents No. 7 to 11 in any manner be executed and public path be restored.

(13). Notice of motion was issued on 09.03.2015 and the operation of impugned order dated 27.11.2014 was stayed.

(14). Replies have been filed by the official respondents No.1 to 4 as well as respondent No.5 Roshan Lal, Field Kanungo, Samana stating that the matter is between the private parties and as such, no interest of the State is involved in the present petition.

(15). Respondents No.7 to 11 have filed their reply wherein it has been averred that the order (Annexure P12) passed by SDM, Samana cannot be restored as no conditional order has been passed in petition under Section 133 CrPC and show cause notice is required to be issued to the person who is causing any nuisance and no show cause notice was issued to the respondents No.7 to 11 so that they could lead evidence as required under Section 138 CrPC. As such, the petition deserves to be dismissed.

(16). It is further pointed out that the demarcation report (Annexure P2) dated 10.11.2011 cannot be implemented as this is not being done as per procedure "Hadd Shikni" as enumerated in Punjab and Haryana High Court Rules, Vol.I, Chap-I, Part-M(i) which prescribes a procedure for conducting

demarcation which cannot be made unless all the concerned parties are having due notice by the authorities conducting demarcation, revenue records.

(17). Further, learned counsel for respondents No.7 to 11 urged that the SDM, in compliance to the order (Annexure P14) has only ordered re-demarcation by visiting on the spot vide order dated (Annexure P15) dated 17.11.2014 as both the parties are not agreeing to the demarcation carried out by the revenue authorities and no prejudice has been caused to the petitioners because fresh demarcation is to be carried out by Tehsildar on the spot in the presence of the petitioners and respondents on the spot as per the 'Hadd Shikni'. As such, the demarcation has been carried out as per High Court Rules.

(18). I have heard learned counsel for the parties and gone through the record.

(19). In order to appreciate the contentions made by the learned counsel for the parties, it is necessary to refer to the relevant provisions of Sections 133(1), 137 and 138 Cr.P.C.

"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 (f) ..Omitted..

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 (vi) ..Omitted..

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."

xxxx xxxx xxxx

"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."

(20). The provisions contained in Chapter X of the Code came to be interpreted in several decisions of the Supreme Court. In [**Kachrural Bhagirath Agrawal v. State of Maharashtra \[\(2005\) 9 SCC 36\]**](#), the Supreme Court dealt with Chapter X of the Code of Criminal Procedure. Speaking for the Bench, Arijit Pasayat, J., in paragraphs 10 and 11, observed as follows:-

*"... The provisions of Chapter X of the Code should be so worked as not to become themselves a nuisance to the community at large. Although every person is bound to so use his property that it may not work legal damage or harm to his neighbour, yet on the other hand, no one has a right to interfere with the free and full enjoyment by such person of his property, except on clear and absolute proof that such use of it by him is producing such legal damage or harm. Therefore, a lawful and necessary trade ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community. Proceedings under [**Section 133**](#) are not intended to settle private disputes between different members of the public. They are in fact intended to protect the public as a whole against*

inconvenience. A comparison between the provisions of [Sections 133 and 144](#) of the Code shows that while the former is more specific, the latter is more general. Therefore, nuisance specially provided for in the former section is taken out of the general provisions of the latter section. The proceedings under [Section 133](#) are more in the nature of civil proceedings than of criminal nature...."

"11. There must, at any rate, be an imminent danger to the health or the physical comfort of the community in the locality in which the trade or occupation is conducted. Unless there is such imminent danger to the health or physical comfort of that community or the conduct of the trade and occupation is in fact injurious to the health or the physical comfort of that community, an order under [Section 133](#) cannot be passed...."

(21). Even earlier, the Supreme Court in [Vasant Manga Nikumba v. Baburao Bhikanna Naidu](#) [1995 Supp (4) SCC 54], had opined as follows:-

".... The object and public purpose behind [Section 133](#) is to prevent public nuisance that if the Magistrate fails to take immediate recourse to [Section 133](#) irreparable damage would be done to the public. The exercise of the power should be one of judicious discretions objectively exercised on pragmatic consideration of the given facts and circumstances from evidence on record. The proceedings under [Section 133](#) is not intended to settle private disputes or a substitute to settle civil disputes though the proceeding under [Section 133](#) is more in the nature of civil proceedings in a summary nature."

".... No action can be taken under this section where the obstruction or nuisance has been in existence for a long period and the only remedy open to the aggrieved party was to move the civil court. It was also held that [Section 133](#) is attracted only in cases of emergency and immediate danger to the health or physical comfort of the community. Accordingly on the facts in

that case, it was held that there was no immediate danger or emergency for the removal of the structure offending in that case. It is also settled law that recourse to [Section 133](#) could not be a substitute for the civil proceedings and the parties should have recourse to the civil remedy available and should not be encourage (sic encouraged) to taking recourse to the provisions of [Section 133](#) of the Code.”

(22). In [State of M.P. v. Kedia Leather & Liquor Ltd. \[\(2003\) 7 SCC 389\]](#), the Supreme Court dealt with the scope of [Section 133](#) Cr.P.C. It held that [Section 133](#) deals with maintenance of public order and tranquillity. It is a part of the heading ‘Public nuisance’. The term ‘nuisance’ as used in law is not a term capable of exact definition and it has been pointed out in Halsbury’s Laws of England that “even in the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort. The Supreme Court further held that for application of [Section 133](#) of the Code, there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc. The object and purpose behind [Section 133](#) of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable damage would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time.

(23). In another important judgment, the High Court of Madras in the case of *the Manager v. the Sub Divisional Magistrate, [Criminal Revision Case Nos. 1486 and 1504 of 2007]* decided on 28.04.2008, by a reading of Sections 133 CrPC and as interpreted by various High Courts as well as the Supreme Court, enunciate the following guidelines to followed which read as under:-

- (a) The order under Section 133 Cr.P.C. must be based upon material factors;
- (b) The order should be reasonable restriction and it must not be arbitrary or excessive and the procedure and the manner of imposition of restriction must be fair and just;
- (c) Proceedings under Section 133 Cr.P.C. are not intended to settle private disputes between different members of public.
- (d) Unless there is imminent danger to the physical comfort of the community, the order under Section 133 Cr.P.C. cannot be passed.
- (e) No action can be taken when the obstruction has been in existence for a long period and Section 133 Cr.P.C. is attracted only in case of emergency and imminent danger.
- (f) The proceedings under Section 133 Cr.P.C. is not a substitute for the civil proceedings.
- (g) For invoking Section 133 Cr.P.C., there must be imminent danger to the property and consequential nuisance to the public.

(h) The exercise of the power should be one of judicious discretion objectively exercised on pragmatic consideration of the given facts and circumstances from evidence on record.

(24). It is trite that while dealing with any unlawful obstruction or nuisance from any public place, the magistrate on receiving the application has to make conditional order requiring the person causing such obstruction or nuisance to remove the same and in case he objects to do so, he is bound to appear before the SDM and to show cause as to why that order be not made absolute. While passing the said order, proper procedure has to be followed.

(25). In the present case, there is omission on the part of the Sub Divisional Magistrate to draw up a preliminary order under Section 133 Cr.PC and any order in contravention of the procedure provided by Section 138 Cr.P.C., makes the same unsustainable and vitiated.

(26). The trial court has rightly observed that the impugned order has been assailed on the ground that a Magistrate was required first to pass a conditional order and then to ask the petitioners to show cause as to why conditional order be not made absolute but in the case in hand, no conditional order was passed at the first instance and the Magistrate straightway handed down the final order which is directly in the teeth of Section 133 CrPC.

(27). In my opinion, the omission on the part of the Sub-Divisional Magistrate to draw up a preliminary order, which is a *sine qua non* for initiating proceedings under Section 133 CrPC and without following the procedure provided for under Section 138 CrPC, the order made by the Sub-Divisional Magistrate on 17.08.2012 is unsustainable and is vitiated. The SDM fell in error in not properly appreciating the effect of non-compliance

with the mandatory requirements of drawing up a preliminary order before proceedings under Section 133 CrPC. Therefore, no fault can be found with the order dated 10.10.2013 passed by the Revisional Court in remanding matter for afresh decision after following the proper procedure.

(28). This petition is thus dismissed.

25.04.2023

V. Vishal

(Sandeep Moudgil)
Judge

1. Whether speaking/reasoned?
2. Whether reportable?

Yes/No
Yes/No