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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. 1946/2011

NARESH

.....Petitioner

Through: Mr. Saurabh Pandey, Advocate.
versus

STATE & ORS

.....Respondents

Through: Mr. Mukesh Kumar, APP for State
Mr. Siddharth Shankar, Advocate for
R-2 to 4.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

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04.08.2025

1. The present petition under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (corresponding to Section 482 of the Code of Criminal Procedure, 1973¹) read with Article 227 of the Constitution of India, assails order dated 7th April, 2010² passed by the ASJ (NW-II), Rohini Courts. Through the impugned order, the ASJ dismissed the revision petition No. 326/2009 preferred by the Petitioner against the order dated 21st May, 2009 of the Sub-Divisional Magistrate (SDM), Saraswati Vihar, Kanjhawala, Delhi, in Case No. 2162/2004, whereby proceedings initiated under Section 133 of the Cr.P.C., on the complaint of the Petitioner, were dropped.

2. Briefly the facts of the case are as follows:

2.1. The Petitioner lodged a complaint alleging that Respondents No.2 to 4 had constructed a septic tank on public land at *Khasra* Nos. 1180, 1181,

¹ "Cr.P.C."

² "the impugned order"



1182, 1194/2 and 1196/2, situated within the extended Lal Dora Abadi of Village Karala, thereby causing public nuisance.

2.2. Acting on the complaint, the SHO, P.S. Kanjhawala, forwarded a *kalandra* dated 22nd August, 2004 to the SDM, Saraswati Vihar. By order dated 20th February, 2007, the then SDM noted that no conditional order under Section 133 Cr.P.C. had been passed earlier, and accordingly directed the *Halqa Patwari* to furnish a detailed report on the alleged encroachment. The matter was listed for 9th April, 2007, though no order sheet for that date is on record.

2.3. The *Halqa Patwari* submitted his report on 20th June, 2007 indicating that a bathroom and septic tank had been constructed within the passage on *Khasra* No. 1182.

2.4 On 2nd August, 2007, the successor SDM recorded that a conditional order under Section 133 of Cr.P.C. had to be issued on the basis of the said report.

2.5. However, on 9th August, 2007, instead of issuing the conditional order as envisaged, the successor SDM proceeded to pass an absolute order under Section 133 of Cr.P.C., directing removal of the structure in *Khasra* No. 1182 within seven days.

2.6. Against the said order, Respondents No. 2 to 4 preferred a revision petition before the ASJ, Rohini Courts, Delhi (Rev. Petition 15/2008). The said petition was decided by judgement dated 12th January, 2009, holding that the order dated 9th August, 2007 was contrary to law, having been passed in absolute terms, without following the mandatory procedure under Section 138 Cr.P.C. Consequently, the said order was set aside and the matter was remanded back for reconsideration and passing of a conditional



order to the concerned SDM. The relevant portion of the judgement dated 12th January, 2009, reads as follows:

“However, in the present case, the perusal of the order of SDM reveals that vide order dated 20.2.07, the Ld. SDM (S.V.) had passed an order that the perusal of the case file, revealed that no conditional order u/s 133 Cr.P.C. was passed by the then SDM directing the respondent to remove the alleged unlawful obstruction made by them on public path/road and the case was continuing for the last two years on the strength of notices and orders on the proceeding sheets and therefore vide said order the said SDM directed the Halqa Patwari to submit a detailed report regarding the alleged encroachment on the public path/road adjacent to plot/khasra no.1181-82/1194, 1183-1195 in the revenue estate of village Karala, Delhi and the Halqa Patwari was directed to submit his report before 15.3.2007 and the case was listed for 9.4.2007 for further proceedings.

However, a perusal of the case file reveals that there is no order sheet dated 9.4.2007 on the record and it seems that the case after 20.2.2007 has been taken up straightway on 2.8.08 on which date it had been ordered that conditional order u/s 133 Cr.P.C. has to be issued on the basis of the report of Halqa Patwari dated 20.6.07 regarding Khasra No.1181, 1185, 1194, 1195/10 and the matter be put up with conditional order. However, it appears that instead of passing of a conditional order as directed by Ld. SDM in his order dated 20.2.07, the Ld. S.D.M. proceeded to pass a absolute order dated 9.8.2001, thereby directing the respondents (petitioners herein) u/s 133 of Cr.P.C. to remove the structure built up in Khasra No.1182 coming in public way within seven days and it was further directed that the said structure was to be used as latrine, bathroom and septic tank. It is not clear how the Ld. SDM who passed the order dated 9.8.07 passed the said order in absolute terms without following the procedures laid down in section 138 Cr.P.C. as he at the most could have passed an conditional order requiring the petitions to remove the said structure built up in khasra no.1182 coming in public way or to show cause why the conditional order passed should not be made absolute.

Whereas in the present case from the order dated 9.8.07, it appears that instead of passing any conditional order as was previously envisaged by the SDM vide order dated 20.2.2107, the learned successor instead of passing an conditional order made the said order absolute, without resorting to provisions of 138 Cr.P.C. Further from the perusal of the case file it appears that there is no order dated 9.4.07 on the record. Therefore, it was incumbent upon the learned successor of the SDM who had passed the order dated 9.8.07 to have issued a show cause notice to the present petitioners, when he took up the matter on 2.8.07 especially when there is no whisper about the fate of proceedings which were taken up on 9.4.2007 on record. Further though the SDM may pass conditional order should have



been passed after considering the reply filed by one of the present petitioners namely Ajay Singh which is already on the record of the said file and from the perusal of the order dated 9.8.07, it nowhere appears that the said reply was taken into consideration before passing the said order dated 9.8.07, which should have been done as per the principles of the natural justice.

In view of the above discussion, the order dated 9.8.07 is contrary to law, as vide the said order the conditional order which was sought to be passed vide order dated 20.2.2007 has been made absolute without following the provisions of section 138 of the Cr.P.C. and for the detailed reason as discussed aforesaid. Consequently, the present revision petition is allowed and the order dated 9.8.07 of the Ld. SDM is hereby set aside and the matter is remanded back to the SDM concerned to pass a reasoned conditional order, as envisaged in the order dated 20.2.2007 and thereafter the concerned SDM, will proceed further, strictly as per provisions of section 137 to 138 of Cr.P.C. Parties are hereby directed to appear before the concerned SDM on 5.2.2009 at 2.00 p.m. for further proceedings. With these orders, the revision petition stands disposed off.”

“sic”

2.7. Pursuant to these directions, the SDM directed the Halqa Patwari to inspect the disputed portion and submit a report. On consideration of the report dated 24th February, 2009, the SDM concluded that the dispute between the parties did not involve any public right. Since public rights were not involved, the SDM found no occasion to issue a conditional order under Section 133 Cr.P.C., and accordingly, by order dated 21st May, 2009, dropped the proceedings.

2.8. Against the said order, the Petitioner preferred a revision petition which was dismissed *vide* the impugned order dated 7th April, 2010 affirming the order of the SDM.

3. The present petition assails the impugned order on the following grounds:

3.1 The impugned order suffers from errors apparent on the face of the record, both in its application of law and appreciation of facts, rendering it



unsustainable.

3.2 The ASJ failed to appreciate that the SDM did not comply with the specific directions in the order dated 12th January, 2009 in Criminal Revision No. 15/2008, which required passing a reasoned conditional order. The *Halqa Patwari's* report dated 20th June, 2007 furnished adequate material for such an order, yet no conditional order was passed.

3.3 The ASJ failed to consider that the procedure under Section 137 Cr.P.C. is triggered only after issuance of a conditional order under Section 133 Cr.P.C. The SDM was obliged to pass a conditional order first, and only thereafter proceed under Sections 137-138 Cr.P.C., if warranted.

3.4 The SDM dropped the proceedings under Section 133 Cr.P.C. hastily, without applying his mind properly and without affording the complainant an opportunity to produce evidence.

3.5 The ASJ failed to appreciate that the disputed area is public land, and it is incorrect to state that the general public and the Petitioner have no interest in the passage in question.

3.6 The ASJ also failed to consider that any encroachment on public land, such as the septic tank, constitutes a public nuisance and must be dealt with according to law, regardless of how long the encroachment has existed.

3.7 The ASJ misinterpreted the Petitioner's submission incorrectly recording that the Petitioner had admitted that the dispute was private and the passage was used only for the septic tank. This misrepresentation affects the correctness of the impugned order.

4. The Court has considered the aforementioned contentions but finds no merit in the same. The impugned order reads as follows:

"I have gone through the record of the present case. After receiving the



order from the Ld. ASJ, the L.d. SDM directed inquiry u/s 137 Cr. PC as the respondent had denied the allegations made by the complainant / revisionists. Therefore, in exercise of the powers provided in Sec. 151/39 Cr.PC, he directed the Halqa Patwari to carryout the inspection of the disputed portion of the property. It is evident that the Halqa Patwari thereafter visited the premises and gave his detailed report dated 24.2.2009 submitting that the passage in dispute ends at the house of the respondent and general public has nothing to do with the said passage. It was also reported that the width of the passage available on the spot is 15.3 feet and the septic tank is not on the public passage. The complainant had sufficient opportunity and had also questioned the said report. It is evident from the complaint of the complainant / revisionist that the septic tank had been constructed about 15 years ago. In the Kalandra given by the police it was reported that the septic tank existed from 15-20 years and the, street come to end at the house of the respondent. Ld. SDM in my view has rightly opined that the complainant had never made any grievances with regard to the septic tank which was in existence for last 15-20 years and it appears that the grievances arose only when the height of the septic tank was increased by two to three feet as evident from the complaint of the complainant and the police report vide DD No. 26A. The proceeding sheet dated 21.5.2009 of the Ld. SDM also shows that the revisionist Naresh was present in person before the Ld. SDM and had made a submission before the SDM that the dispute between the parties had no concern with the public and he also submitted that the passage in question was being used only for septic tank. This being so, where then was a danger of irreparable harm and the urgency requiring the immediate intervention of the SDM u/s 133 Cr.PC. The said provision can only be invoked in case of grave urgency where an irreparable damage is being caused on account of nuisance. In a case where allegations are of existing and continuing circumstances which allegations are denied by the other party, a detail trial is required to be conducted and Section 133 Cr.PC cannot be invoked and the remedy for the complainant would lie before a Civil Court.

The septic tank had been in existence for the last 15-20 years as admitted by the revisionist/complainant himself. It is settled law that the concerned SDM is required to act on the basis of the report received from the police officials or other information. The provisions do not make it mandatory for the SDM to direct leading of evidence. The evidence can be taken by the SDM only in cases where he finds it necessary. The rights of the parties under these circumstances cannot be adjudicated upon in the proceedings u/s 133 Cr.PC. I find no merit in the revision petition which is hereby dismissed without prejudice to the rights of petitioner to approach regular Civil Court with regard to redressal of their grievances.

The record of Ld. SDM be sent back alongwith copy of this order. Revision file be consigned to Record Room."



5. The Revisional Court, after reviewing the record and the updated report submitted by the *Halqa Patwari* on 24th February, 2009, affirmed the findings of the SDM. The report clarified that the disputed passage ended at the Respondent's house, that public rights were not involved, and that the septic tank in question had been in place for approximately 15 to 20 years. The report further confirmed that the width of the passage between the tank and Plot No. 1194/1 was 15.3 feet and so, the tank was not obstructing any public passage.

6. The Revisional Court, therefore, rightly observed that the SDM had acted within his statutory discretion in concluding that no urgency or imminent irreparable harm warranted action under Section 133 of Cr.P.C. As held by Supreme Court in *State of M.P. v. Kedia Leather & Liquor Ltd. & Ors.*,³ the object and purpose underlying Section 133 is essentially to prevent public nuisance, and is intended to meet a situation of pressing urgency where prompt action is essential to avert irreparable injury to the public. Absent such urgency, the provision cannot be used as a substitute for a detailed adjudication of private disputes.

7. In the present case, the septic tank's long-standing existence, coupled with the absence of obstruction to a public way, makes it evident that the alleged nuisance did not require immediate removal under Section 133. The preventive and summary nature of the provision cannot be stretched to resolve questions better suited for civil adjudication, especially when the factual dispute relates to private rights and title. The Revisional Court's view that the Petitioner's grievance, if any, could be addressed through civil proceedings is therefore consistent with law. Remedies such as a permanent



or mandatory injunction or a claim for damages remain available to the Petitioner before a competent civil court.

8. The Petitioner's emphasis on the *Halqa Patwari's* earlier 2007 report also overlooks that, upon remand, the SDM was bound to assess the position as it stood in 2009, not merely on the basis of earlier and outdated material. The later inspection and report formed the factual basis for the SDM's conclusion. Once that report found that no public right and obstruction existed, the statutory precondition for exercising power under Section 133 was absent. As such, even if earlier observations suggested issuance of a conditional order, the changed or clarified factual position justified the SDM's decision to drop the proceedings.

9. Therefore, in the opinion of the Court, the reasoning in the impugned order does not merit interference. Both authorities reached findings consistent with the object and scope of Section 133 Cr.P.C. The Petitioner may pursue his remedies, if any, before a Civil Court in accordance with law.

10. Accordingly, the petition is dismissed.

SANJEEV NARULA, J

AUGUST 4, 2025

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³ (2009) 5 SCC 586