IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.36635 of 2016

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

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Kashi Kant Jha, Son of late Bhullar Jha, Resident of Village- Ranway, Police Station- Keoti, District - Darbhanga.

... ... Petitioner/s

Versus

1. State Of Bihar
2. Girindra Mohan Jha Son of late Laxami Kant Jha Resident of Village- Ranway, P.O + P.S. Keoti, District - Darbhanga.

... ... Opposite Party/s

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Appearance :
For the Petitioner/s : Mr. Satish Chandra Jha-3, Advocate
For the State : Smt. Sucheta Yadav, APP
For the O.P. No. 2 : None

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CORAM: HONOURABLE MR. JUSTICE JITENDRA KUMAR

ORAL ORDER

11 **27-09-2024** The present petition has been preferred by the petitioner under Section 482 Cr.PC seeking quashing and setting aside the order dated 02.04.2016 passed by Ld. 1st Additional Sessions Judge, Darbhanga in Criminal Revision No.72 of 2014, and the order dated 16.08.2013 passed by Ld. S.D.M, Sadar Darbhanga in M.R. Case No. 3225 of 2013, whereby Ld. S.D.M had directed for removal of the obstruction caused by the petitioner to the flow of dirty water from the house of the Opposite Party No. 2 - Girindra Mohan Jha.

2. The relevant facts leading to filing of the present petition before this Court is that O.P. No. 2/Girindra Mohan Jha filed a complaint to S.D.M, Sadar Darbhanga for removal of

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obstruction created by the petitioner herein (Kashi Kant Jha) to the flow of dirty water from the house of the Complainant/Opposite Party No. 2 - Girindra Mohan Jha pleading that the dirty water from his house is flowing on Government land and the petitioner/Kashi Kant Jha has no right to obstruct it. It was further pleaded that on account of his obstruction, there was public nuisance being created. On such complaint, Ld. S.D.M, Darbhanga after getting report from Circle Officer and Revenue Karamchari in regard to the land in question, passed the order dated 16.08.2013, whereby he directed the petitioner/Kashi Kant Jha to remove the obstruction to the flow of dirty water coming from the house of the O.P. No. 2 - Girindra Mohan Jha. Order passed by learned S.D.M. is as follows:-

> "Perused the record. Applicant Girindra Mohan Jha, son of late Laxami Jha, resident of Gram Keoti, P.S. Keoti, District - Dharbhaga has prayed in his application that the land bearing khata no. 1258, khesra no. 398, Raqba 8 decimal being registered as Anabad Bihar Sarkar in khatian, whereupon dirty water from the house of the applicant was flowing. On 12.11.2012, O.P. Kashi Kant Jha, Son of late Bhullar Jha forcibly blocked the drainage. Consequently, dirty water has assembled in the courtyard of the applicant on account of which, there is possibility of breaking out epidemic and on account of storage of dirty water in the house, it has become difficult to live for the applicant, therefore, the obstruction of the drainage should be removed.
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> In the light of the facts on the record, it appears to be necessary to remove the obstruction of the drainage in the interest of justice because on account of storage of dirty water, there is apprehension of breaking out epidemic in the neighborhood. Therefore, Circle Officer and Officer-in-Charge, Keoti are ordered to remove the obstruction to the drainage

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coming from the courtyard of the applicant.

A copy of the order be sent to Officer-in-Charge/Circle Officer for compliance of the order immediately.

Record be put up on 26.02.2013."

3. Being aggrieved by the order dated 16.08.2013 passed by Ld. S.D.M, Darbhanga in M.R. Case No. 3225 of 2013, he preferred Criminal Revision bearing no. 72 of 2014 before Ld. Sessions Court, Darbhanga, wherein the aforesaid order of the Ld. S.D.M. was challenged. However, Ld. Additional Sessions Judge-Ist, Darbhanga dismissed the said Revision Petition of the petitioner by the order dated 02.04.2016 passed in Criminal Revision no. 72 of 2014 holding as follows:-

"From perusal of Section 133 Cr. P.C. it appears that any unlawful obstruction or nuisance should be removed from any public place or from any way river, channel which is or may be lawfully used by the public. In the case at hand the disputed land is entered in Khatiyan as Anabad Bihar Sarkar as per report of Anchal Adhikari Keoti and learned SDM passed order under section 133 Cr. P.C. in accordance with law. The revisionist challenged order dated 16.08.2013 which is an interlocutory order in view of section 397 (2) of the Cr.P.C. Wherein it is mentioned that power of revision shall not be exercised in relation to any interlocutory order.

In the result, I find no merit in this application and accordingly this criminal revision application is hereby dismissed."

4. Hence, the present petition has been preferred by the petitioner.

5. I heard Ld. Counsel for the petitioner and Ld. APP for the State. However, nobody is present on behalf of O.P. No. 2, despite valid service of notice.

6. Ld. Counsel for the petitioner submits that learned

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both the Courts below – learned S.D.M as well as learned Revisional Court have committed error of facts as well as law. To substantiate his submissions, he submits that land on which dirty water from the house of the complainant/O.P. No. 2 herein was flowing is not a public land. In fact, it is exclusive private property of the petitioner herein and it is in his exclusive possession and the O.P. No. 2/complainant has no right to interfere in his peaceful possession and enjoyment of his property, nor the complainant/O.P. No. 2 has any right to use his own property to illegal damage to the property of the petitioner. Hence, the drainage of the complainant coming out from his house and flowing on the land of the petitioner has been rightly blocked by the petitioner, because the complainant/O.P. No. 2 was causing nuisance to the petitioner by allowing the dirty water of his house on his private property. In fact, the complainant himself should have been prohibited by learned S.D.M. from flowing dirty water from his house causing nuisance to the petitioner and the neighboring people, because the complainant has no right to use his property in such a way which could cause nuisance to the petitioner and other neighboring people.

7. He further submits that the land of the petitioner

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has been inadvertently shown as Anabad Bihar Sarkar as admitted by Ciricle Officer, Keoti and D.C.L.R., because land of the complainant and that of the petitioner were part of the same khesra and both of them had purchased their land from the common land owner and admittedly, the land of the complainant has been shown as Raiyati land in the khatiyan, whereas the land of the petitioner has been inadvertently shown as Anabad Bihar Sarkar. However, such facts and circumstances have not been considered by learned S.D.M. and learned Revisional Court, committing error of facts, holding that land in question is public land, whereas the land in question is exclusive property of the petitioner and it is in his exclusive possession.

8. He further submits that in the alleged facts and circumstances of the case, learned S.D.M. has no occasion to invoke the jurisdiction under Section 133 Cr.PC, because Section 133 Cr.PC can be resorted to by learned S.D.M. only in case of public nuisance at public place. But as per the facts and circumstances of the case, there was no public nuisance because no public at large are affected by the alleged act on the part of the petitioner. At most, it was inconvenience to the complainant.

9. He further submits that learned S.D.M. also committed error of law by passing absolute order under Section

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133 Cr.PC directing the petitioner to remove the obstruction. Learned S.D.M. should have passed only conditional order, giving opportunity to the petitioner to show cause why the order should not be made absolute. But instead of passing such conditional order, learned S.D.M. had passed absolute order, which is not permissible under Section 133 Cr.PC.

10. He further submits that even learned Revisional Court has committed error of law by upholding the order passed by learned S.D.M. It also erroneously held that order passed by learned S.D.M. was interim in nature, whereas the order passed by learned S.D.M. was absolute and final against the petitioner and he had no option but to prefer a revision petition against the order passed by learned S.D.M.

11. As such, in view of learned counsel for the petitioner, the impugned order passed by learned Revisional Court as well as the order passed by learned S.D.M. are not sustainable in the eye of law and liable to be quashed and set aside under Section 482 Cr.PC to prevent the abuse of the process of the Court and to secure the ends of justice.

12. However, learned APP for the State defends the impugned order submitting that there is no illegality or infirmity in it and hence the present petition is liable to be dismissed.

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13. Before I consider the rival submission of the parties and peruse the material on record, it would be pertinent to refer to Section 133 Cr.PC and the relevant judicial precedents relating to the subject.

14. Section 133 Cr.PC reads as follows:-

> **"133. Conditional order for removal of nuisance.** (1) Whenever a District Magistrate or 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 -
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> (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
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> (b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or
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> (c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration to explosion, should be prevented or stopped; or
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> (d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or
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> (e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or
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> (f) that any dangerous animal should be destroyed, confined or otherwise disposed of, 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 or 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 -

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(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order, 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.

Explanation. - A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes."

(Emphasis Supplied)

15. The scheme, scope and mandate of Section 133 Cr.PC has been explained by Hon'ble Supreme Court on several occasions. In the landmark judgment of **Kachrulal Bhagirath Agrawal Vs. State of Maharashtra, (2005) 9 SCC 36, Hon'ble Supreme Court** has held that the proceeding under Section 133 Cr.PC is of a summary nature. It was further held that Section 133 Cr.PC is a part of Chapter X of the Code which relates to maintenance of public order and tranquility. The chapter has been classified into four categories. Sections 129 to 132 come under the category of "unlawful assemblies". Sections

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133 to 143 come under the category of “public nuisance”. Section 144 comes under the category of “urgent cases of nuisance or apprehended danger” and the last category covers Sections 145 to 149 relating to “disputes as to immovable property”.

16. Explaining nuisance, **Hon'ble Apex Court** in **Kachrulal Bhagirath Agrawal (supra)** has held that nuisances are of two kinds i.e. (*i*) public; and (*ii*) private. “Public nuisance” or “common nuisance” as defined in Section 268 of the Penal Code, 1860 (in short “IPC”) is an offence against the public either by doing a thing which tends to the annoyance of the whole community in general or by neglecting to do anything which the common good requires. It is an act or omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity. “Private nuisance” on the other hand, affects some individuals as distinguished from the public at large. The remedies are of two kinds — civil and criminal. The remedies under the civil law are of two kinds. One is under Section 91 of the Code of Civil Procedure, 1908 (in short “CPC”). Under it a suit lies and the plaintiffs need not prove that they have sustained any special damage. The second remedy is a suit by a

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private individual for a special damage suffered by him. There are three remedies under the criminal law. The first relates to the prosecution under Chapter XIV of IPC. The second provides for summary proceedings under Sections 133 to 144 of the Code, and the third relates to remedies under special or local laws. Sub-section (2) of Section 133 postulates that no order duly made by a Magistrate under this section shall be called in question in any civil court.

17. **Hon'ble Supreme Court** further held in **Kachrulal Bhagirath Agrawal (supra)** that 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 neighbor, 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

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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.

18. **Hon'ble Supreme Court** has further held in **Kachrulal Bhagirath Agrawal (supra)** that the guns of Section 133 go into action wherever there is public nuisance. The public power of the Magistrate under the Code is a public duty to the members of the public who are victims of the nuisance, and so he shall exercise it when the jurisdictional facts are present. All power is a trust that we are accountable for its exercise that, from the people, and for the people, all springs and all must exist. The conduct of the trade must be injurious in praesenti to the health or physical comfort of the community. 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. A conjoint reading of Sections 133 and 138 of the Code discloses that it is the function of the

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Magistrate to conduct an enquiry and to decide as to whether there was reliable evidence or not to come to the conclusion to act under Section 133.

19. In **Vasant Manga Nikumba Vs. Baburao Bhikanna Naidu, [1995 Supp (4) SCC 54] Hon'ble Supreme Court** has held that 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.

20. From the statutory provisions and the case laws as referred to hereinabove, it clearly emerges that Sections 133 to 143 Cr.PC intend to protect the public as a whole against public nuisance/inconvenience. However, they are not intended to adjudicate private or civil disputes between different members of the public. Adjudication of civil disputes come within the exclusive jurisdiction of Civil Court.

21. It also emerges that condition precedent for invoking jurisdiction under Section 133 Cr.PC by an Executive

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Magistrate is existence of public nuisance or obstruction causing inconvenience and discomfort to the public at large. The opinion of the executive Magistrate regarding the existence of public nuisance or obstruction must be based on report, information or evidence. It further emerges that under Section 133 Cr.PC., the Executive Magistrate is required only to pass a conditional order giving opportunity to the person adversely affected to show cause why the conditional order should not be made absolute against him, and if the person appears and shows cause, the Executive Magistrate is required to conduct further enquiry and pass order as per the procedure as stipulated under Section 138 Cr.PC.

22. It also emerges that right to property is a constitutional right of any person enshrined under Article 300-A of the Constitution and everybody is entitled to free and full enjoyment of his property. But at the same time, he is also bound to use his property without causing any illegal damage or harm to his neighbor or the community at large.

23. Coming to the case on hand, I find that learned S.D.M. had directed the petitioner to remove the obstruction/blockage without giving him any opportunity to appear and show cause. As such, the order passed by learned

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S.D.M. was a final one and not an interim one. Hence, the petitioner herein being aggrieved had rightly invoked revisional jurisdiction of Sessions Court. But learned Sessions Court has erroneously held that the impugned order passed by learned S.D.M. was interim one.

24. I further find that the land of the petitioner on which dirty water was flowing from the courtyard of complainant/O.P. No. 2 is his *raiyati* land as admitted by Circle Officer and D.C.L.R and hence, the complainant/O.P. No. 2 had no right to flow his dirty water from his courtyard on the land of the petitioner, because no one can use his property to illegal harm, damage or nuisance to the neighbor. The petitioner was right to block the drainage coming from the courtyard of the complainant/O.P. No. 2, because he has right to use his property without any nuisance or illegal harm from any neighboring people. In fact, the complainant should have taken measure to see that no dirty water flows from his house on the private property of the neighbor, because he cannot enjoy his property to harm or nuisance to the neighbor.

25. If the Complainant/O.P. No.2 claims any easementry or other right against the land of the Petitioner, he has remedy in civil law and he may move Civil Court.

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26. Hence, instead of directing the petitioner to remove the obstruction/blockage to the drainage, the complainant/O.P. No. 2 should have been prohibited by learned Executive Magistrate from flowing dirty water from his courtyard, causing nuisance to the neighbors and the public at large.

27. I also find that the alleged facts and circumstances constitute at most only a private nuisance or inconvenience affecting only two neighbors. The public at large are no way affected by the alleged acts. As such, there was no occasion for learned Executive Magistrate to invoke jurisdiction under Section 133 Cr.PC. Hence, invoking power under Section 133 Cr.PC in the given facts and circumstances of the case by learned S.D.M. was nothing but abuse of the process of the Court and the whole proceeding arising out of M.R. Case No. 3225 of 2013 is liable to be quashed and set aside. Learned Revisional Court has committed error by upholding the order passed by learned S.D.M. It has also erroneously held that the order passed by learned S.D.M. was interim one.

28. Hence, the impugned order passed by learned Revisional Court as well as order passed by learned S.D.M. are liable to be quashed and set aside to prevent the abuse of the

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process of the Court and to secure the ends of the justice.

29. Accordingly, the present petition is allowed quashing and setting aside the impugned order dated 02.04.2016 passed by learned 1st Additional Sessions Judge, Darbhanga and the criminal proceeding arising out of M.R. Case No. 3225 of 2013 pending before learned S.D.M., Sadar Darbhanga including the order dated 16.08.2013 passed therein.

(Jitendra Kumar, J.)

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