

**HIGH COURT OF ORISSA,  
CUTTACK**

**CRLREV NO. 648 OF 2004**

From an order dated 28.08.2004 passed by Sub-Divisional Magistrate, Sadar, Sundargarh in Misc. Criminal Case No.414 of 2002.

Ghasia Naik .....  
Petitioner

Versus

State of Orissa & others ..... Opp. parties

For petitioner : M/s J.R. Dash, K.L. Dash &  
C.N. Jena.

For Opp. parties : Addl. Standing Counsel  
(for O.P. No.1)  
and  
Mr. P.C. Acharya  
(for O.P.Nos.2 to 5)

**PRESENT :**

**THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY**

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Date of judgment : 16.05.2008  
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***PRADIP MOHANTY, J.*** This revision is directed against the order dated 28.08.2004 passed by the Sub-Divisional Magistrate, Sadar, Sundargarh in Misc. Case No.414 of 2002.

2. The gist of the case is that a mass petition was presented before the Tahasildar, Sadar, Sundargarh by the villagers of Kepse against the present petitioner for obstructing natural flow of

water to the agricultural field from the 'Munda', a water body, located over plot no.635 and thereby causing nuisance to the public. On receipt of such petition, the Tahasildar and I.I.C. Sundargarh Sadar P.S. visited the spot to take stock of the situation. After enquiry, the Tahasildar submitted a report to the Sub-Divisional Magistrate to the effect that the present petitioner has unlawfully obstructed the flow of water by making ridges and due to such obstruction, the excess water of the 'Munda' could not be utilized for agriculture purpose, which amounts to public nuisance. On receipt of such report, Misc. Criminal Case No.414 of 2002 was instituted and notice was issued to the petitioner under Section 133, Cr.P.C. to show cause.

After receipt of the notice, the petitioner appeared and submitted his cause stating therein that the report of the Tahasildar is partially correct. His specific case was that adequate surplus water of the 'Munda' usually flows over Plot No.637, 636, 670, 673 and 674, crosses the road, enters upon plot no.857 and thereafter proceeds towards the eastern side of the said plot, which is situated at a down level. It was also stated in the said show-cause that the aforesaid was the usual flow of water as because a vast area of cultivable land gets water from that 'Munda' and the canal of Surguda MIP runs from west to east over Plot No.856, which is a raiyat plot of the petitioner, and the water flows towards eastern portion of the paddy field. To safeguard the canal, the ridges of the said canal have been raised on either side of the canal running west to east. Some persons with ulterior motive had cut the ridges of the said canal and thereby wanted to misutilise the water by diverting its flow towards northern side. Opposite parties 2 to 5 are trying to create a situation so as to raise a claim over the raiyat land of the petitioner for a water passage, which was never in existence at any time, and no water passage exists in the village map prepared by the

settlement authorities. It was further stated in the show-cause that opposite parties 2 to 5 obstructed the water flow by raising ridges on the eastern side of Plot No.857 through which the water was flowing from the time immemorial and for such obstruction the road has been damaged. A complaint case was instituted against the opposite parties for cutting the ridges, but they were acquitted by the appellate court. In T.S. No.36 of 1990 the present petitioner got a decree in respect of plot no.857/1246 and such ridges exist in between plot no.857 and plot no.1246 and the above dispute was purely of civil nature. As such, the proceeding was not maintainable.

The Sub-Divisional Magistrate after hearing the parties, examining the witnesses and going through the report of the Tahasildar, by his order dated 28.08.2004 directed the petitioner to remove the unlawful obstruction of natural flow of water on the northern side of plot no.635 within a month. Against that order, the petitioner has preferred this revision.

3. Mr. Dash, learned counsel for the petitioner submitted that the dispute is nothing but a private one to be adjudicated upon by the competent civil court. There was no existence of any public road at any point of time. Over and above, there exists no public nuisance. He further submitted that the Sub-Divisional Magistrate has committed an error in passing the final order without passing any conditional order as provided under Section 133, Cr.P.C. The Sub-Divisional Magistrate also did not question the petitioner as to whether he denies the existence of any public road as contemplated under Section 137(1), Cr.P.C. Lastly, he submitted that no enquiry as contemplated by Sections 137, 138 and 139 Cr.P.C. was conducted by the Sub-Divisional Magistrate.

5. Mr. Acharya, learned counsel for the opposite parties, contended that the Sub-Divisional Magistrate has passed the impugned order on the basis of the oral evidence of the parties as well as the inquiry report of the Tahasildar dated 13.09.2002. The Sub-Divisional Magistrate in the impugned order dated 28.08.2004 made a wrong mention of the plot number as Plot No.635, which was subsequently corrected as Plot No.1246 on 03.09.2004. From the enquiry report, it can be found that the petitioner has obstructed free flow of 'Valmunda' water channel by putting ridge over plot no.1246.

6. Perused the order dated 28.08.2004, the show-cause filed by the petitioner and the inquiry report of the Tahasildar. It reveals from the order dated 28.11.2002 that a case was initiated basing on the report of the Tahsildar and a show-cause notice was issued. Two witnesses of the village and two witnesses including opposite party no.3 were examined by the Sub-Divisional Magistrate. But none of the witnesses of the petitioner (second party) stated about the denial of any public right and in the notice to show cause, plot no.635 was indicated. None of the second party witnesses stated about plot no.635. The Tahasildar report does not reveal about the above plot which was indicated in the notice. The provisions of Sections 137 and 139 are mandatory in nature. For ready reference, Sections 133, 137 and 139 are quoted hereunder :

**"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 as he thinks fit, considers-

- (a) that any unlawful obstruction or nuisance should be removed from any public place from

any way, river or channel which is or may be lawfully used by the public; or

- (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
- (c) that the construction of any building, or the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or
- (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
- (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
- (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, 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 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.”

**“137. Procedure where existence of public right is denied.”-(1)** Where an order is made under section 113 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.”

“139. Power of Magistrate to direct local investigation and examination of an expert.- The Magistrate may, for the purposes of an inquiry under section 137 or section 138-

- (a) direct a local investigation to be made by such person as he thinks fit; or
- (b) summon and examine an expert.”

From a bare reading of the above provisions, it is clear that when a party appears in pursuance of the order under Section 133, Cr.P.C., the Magistrate is bound under Section 139(a) to ask him whether he denies existence of any public right. If there is denial, the Magistrate will hold inquiry and take evidence. Thereafter, he can pass final order under Section 137, Cr.P.C. It is also clear that the Magistrate can pass an order of removal of obstruction under Section 133 Cr.P.C. only when it relates to public road, river or water channel used by the public. In such a case, the onus is on the complainant to establish that the road, river or water channel is used by the public. Perusal of the impugned order, report of the Tahasildar

and evidence collected by the S.D.M. during trial shows that the revision petitioner is obstructing the natural flow of water by making a ridge over Plot No.1246, which is a public nuisance. The inquiry report of the Tahasildar also reveals about the same. In para 5 of the Tahasildar's report, it has been stated that there is a siphon in the canal for free flow of excess water. The petitioner has blocked the flow of water by putting a ridge on plot no.1246. Previously, the petitioner blocked the water flow by making a ridge over plot no.856, which was removed by the Tahasildar. In view of the above, no illegality or procedural irregularity has been committed by the S.D.M. by passing an order under Section 133 Cr.P.C. for removal of unlawful obstruction of the natural flow of water warranting interference by this Court.

The criminal revision is accordingly dismissed.

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**PRADIP MOHANTY,J.**

Orissa High Court, Cuttack  
 May 16, 2008/**G.D.Samal**