



2026:AHC:99370

A.F.R.

RESERVED JUDGMENT

HIGH COURT OF JUDICATURE AT ALLAHABAD

MATTERS UNDER ARTICLE 227 No. - 4842 of 2025

Shambhu Singh

.....Petitioner(s)

Versus

State of U.P. and another

.....Respondent(s)

Counsel for Petitioner(s) : Rajesh Kumar Singh

Counsel for Respondent(s) : Ashwani Kumar Singh, G.A.

In Chamber

HON'BLE DR. AJAY KUMAR-II, J.

1. Heard Sri Rajesh Kumar Singh, learned counsel for the petitioner, learned A.G.A. for the State, Sri Ashwani Kumar Singh, learned counsel for the respondent no. 2 and perused the record.

2. The present petition under Article 227 of the Constitution of India has been filed with a prayer to set-aside the order dated 19.03.2025, passed by Additional Session/Special Judge, SC/ST Act, Kushinagar at Padrauna, passed in Criminal Revision No. 200/2024, under Section 133 Cr.P.C., Police Station Kaptanganj, District Kushinagar.

3. Learned counsel for the petitioner submitted that the respondent no. 2 filed a case under Section 133 Cr.P.C. against the petitioner on 4.6.2018 before Sub Divisional Magistrate, Hata, Kushinagar for removal of ladder in question. On direction of concerned SDM, SHO, Kaptanganj, Kushinagar submitted a report dated 13.9.2018 and SDM vide his preliminary order dated 22.10.2018 directed the petitioner to file his objection. Notice whatsoever, was not served upon the petitioner, Therefore, he could not file his objection in compliance of the order dated 22.10.2018. Therefore, SDM sought report from concerned Halka Lekhpal and he submitted his report dated 6.4.2022. SDM passed the order dated 11.4.2022 while confirming preliminary order dated 22.10.2018 and directed SHO, Kaptanganj to remove encroachment. The aforesaid order dated 22.10.2018 was challenged by the petitioner by

way of filing Criminal Revision No. 111 of 2002 before the Sessions Judge, Kushinagar, which was allowed vide judgment and order dated 22.10.2022, while setting aside the impugned order dated 22.10.2022. Thereafter, the petitioner filed his objection in the said case. SDM Hata again sought report from the Revenue Inspector, who submitted his report on 14.10.2024. On receipt of aforesaid report, SDM, Hata passed impugned order dated 12.11.2024 directing the petitioner to remove the encroachment. The petitioner challenged the aforesaid order dated 12.11.2024 before the Sessions Judge, Kushi Nagar, however, his criminal revision was rejected vide judgment and order dated 19.3.2025.

4. It was strenuously argued by learned counsel for the petitioner that the ladder in question was constructed by the petitioner in his share (Sahan) 30 years ago. The disputed land was received by the petitioner in a family settlement and aforesaid construction has been made only in his share. There is no public pathway. Gram Pradhan has already given a certificate regarding the street in question that the same is not being used as a public pathway, but is used for flow of the rain water, while affirming stand of the petitioner that the said construction has been made by the petitioner in his own share (Sahan). Revenue authorities have submitted a false report in collusion with the respondent no. 2. The nuisance, if any, is caused only to the family of the respondents, the proceeding under Section 133 Cr.P.C. cannot be invoked. The impugned order dated 12.11.2024 passed by the SDM, is against the provisions of law and has been passed without complying the procedure prescribed under Sections, 133, 137, 138, 139, 140 Cr.P.C. Both the Courts below have not considered the factual prospective in the light of statutory provisions and procedure prescribed under the law, therefore, both the impugned orders are bad in law.

5. Per contra, learned A.G.A. for the State and learned counsel for the respondent no. 2 have opposed the above submissions of the learned counsel for the petitioner by contending that the impugned orders are well reasoned and have been passed in accordance with law. Learned A.G.A. thus, urges for dismissal of the present petition.

6. The relevant statutory provisions of Sections 133, 137, 138, 139 and 140 Cr.P.C., are reproduced herein below:

Sec 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) 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 configuration 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.

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

Sec 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.

Sec 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.

Sec 139- Power of Magistrate to direct local investigation and examination of an expert.—

The Magistrate may, bfor 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.

Sec 140- Power of Magistrate to furnish written instructions, etc.—

(1) Where the Magistrate directs a local investigation by any person under section 139, the Magistrate may—

(a) furnish such person with such written instructions as may seem necessary for his guidance;

(b) declare by whom the whole or any part of the necessary expenses of the local investigation shall be paid.

(2) The report of such person may be read as evidence in the case.

(3) Where the Magistrate summons and examines an expert under section 139, the Magistrate may direct by whom the costs of such summoning and examination shall be paid."

7. It would be relevant at this juncture to notice the Supreme Court's observation in the case of **Municipal Council, Ratlam vs. Vardhichand and Ors. (supra)**, wherein the Apex Court held that the provisions, embodied under Section 133 of the Code, must go into action, whenever there is public nuisance inasmuch as the public power of the Magistrate, as conferred upon him under Section 133 of the Code, is a public duty to the members of the public, who are victims of the nuisance, and the Magistrate must, therefore, exercise his power under Section 133, when the jurisdictional facts are present. Paragraph 9 of the said decision is reproduced herein below:

"9. So 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 as here. "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." (1) Discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise."

(Emphasis is added)

8. In **Wali Uddin v. State of U.P., 1988 (12) ACR 1**, this Court has elaborated the language of Section-137(1) of Cr.P.C. and concluded in following terms:-

"23. It is also to be noticed that under Section 137(1) the Legislature has used the word "that after the denial of such right by opposite party the Magistrate shall inquire into the matter" and not that the Magistrate shall adjudicate upon or decide the matter or controversy between the parties. The word 'inquire', means eager, to acquire information. The word 'inquire', according to Shorter Oxford English Dictionary means to search into, to seek knowledge, to make inquisition, to make investigation, to seek information by questioning, to seek or to try to find out. The word reliable evidence having been used and the Magistrate having been directed to inquire into the matter and not to decide or adjudicate upon, it is clear that the person denying the public right has to put forward a just and bonafide claim. In case the Magistrate finds that there is some reliable evidence and certainly not a conclusive evidence in support of the denial of any public right to get the matter decided by a competent Court. I am however, of the view that the Section does not make it clear as to who is the person as to whether first party or the second party, who has to approach the Civil Court. One thing more may be clarified that in case the Magistrate finds that there is no such reliable evidence in that event he shall proceed in view of the provisions of Section 138 of the Code. In the instant case what has been done is entirely different. Even though the Magistrate confirmed the conditional order but the revision has been disposed of by the learned Additional Sessions Judge in total disregard of the provisions of Section 133 read with Section 137 of the Code. The learned Sessions Judge

was exercising the same jurisdiction as was to be exercised by the learned Magistrate. He must have also proceeded to decide the case just with a view to make an enquiry as to whether there was some reliable evidence led by the opposite party No. 2 who denied the existence of such right and in case he found that there was reliable evidence his jurisdiction ceases and it was for the civil Court to decide the same."

9. Therefore, the authority under section 133 of Cr.P.C. can be exercised by the executive magistrate, when any unlawful obstruction or nuisance is alleged on any public place or on any way, which is or may be lawfully used by the public. However, to ascertain the justification of such allegation, the executive magistrate is required to see as to whether the person against whom the show cause has been issued under Section 133(1) of Cr.P.C. has placed "any reliable evidence" in denial of such allegation or not. While doing so, the executive magistrate is not required to ask for any conclusive evidence and he has to consider the evidence brought on record by the person denying existence of unlawful obstruction or nuisance with an understanding as to whether such evidence can be said to be reliable enough. If that is so, the executive magistrate should not proceed further in the matter and should relegate the parties to the competent civil court for determination of their rights.

10. The proceedings under section 133 of Cr.P.C. are summary in nature and are meant for the cases of imminent danger to the public tranquility and peace and the same should not be used or rather misused to scuttle the valuable right of owner of property and that is why, the legislature has in its wisdom used the words "any reliable evidence" in support of such denial, in the event and in case of which he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court as provided under Section 137(2) of Cr.P.C., which is certainly having a different import and connotation than the word 'conclusive evidence'. This language used by the legislature has a limiting influence and works as a guideline while exercising authority under Section 133 of Cr.P.C.

11. When Section 133 and Section 137 of the Code are read together, the scheme becomes clear that when a District Magistrate or a Sub Divisional Magistrate or any other Executive Magistrate, specially empowered in this behalf by the State Government, on the basis of report of a police officer or on the basis of other information and on taking such evidence, if any, as the Magistrate thinks fit, considers that any unlawful obstruction or nuisance should be removed from any public place or any way, river or channel, which is or may be lawfully used by the public, the Magistrate may make a conditional order requiring the

person, who is alleged to have caused obstruction or nuisance, to remove the obstruction or nuisance or to appear before the Magistrate at the time and place to be fixed by the conditional order and show cause as to why the conditional order should not be made absolute. On receiving the notice of the conditional order, the proceedee shall appear before the Magistrate, who shall question the proceedee as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if the proceedee so denies, the Magistrate shall hold an enquiry and, if the Magistrate finds, in the enquiry, that there is any reliable evidence in support of such denial, then, he shall stay the further proceedings until the matter is decided by a competent court. However, if the Magistrate finds that there is no reliable evidence in support of the proceedee's denial as regards encroachment or obstruction in respect of any way, river, channel or place, he (Magistrate) shall proceed in the manner as provided in Section 138 of the Code, which provides that the Magistrate shall, in such a case, take evidence in the matter as in a summons-case and, if the Magistrate is satisfied that the conditional order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the conditional order shall be made absolute without modification or, as the case may be, with such modification as deemed necessary, but if the Magistrate is not so satisfied, no further proceedings shall be taken in the case.

12. Delhi High Court in the case of **Shri Ram Lal And Another Vs. Shri Dharam Vir, 2001 Cri.L.J., 4507** held:

*"Law in this regard is well settled. Section 133 Cr.P.C. provides summary remedy for removal of specific public nuisances or obstructions etc. It is not intended to settle private dispute between the two members of the right of the public to approach a civil court for determining the question of title. The Magistrate's jurisdiction under this Section can be invoked even by a private individual despite availability of an alternative remedy. **The encroachment on the public road, however small, would inevitably result in obstruction to the persons, who may have the occasion to use the same.** The expression in Section 133 Cr.P.C. "which is or may be lawfully used by the public" clearly shows that all that is required to be shown is that the land in dispute is the public way etc. which can be lawfully used by the public. The expression "public way" has not been defined in the Cr.P.C. or the Penal Code. Public way is the place where the public has a right to go or to which public can have an access by way of right either by admission, usage or otherwise. It is not necessary that the title of the place should be in the public. It would depend upon the character of the place and the usage actually made of it in the past or at a given point of time. These are all questions of fact which can only be determined after proper adjudication."*

13. The petitioner in present case has filed his objection dated 24.11.2023 in the Court of SDM, Hata, Kushinagar. In para-2 of his objection, he has specifically admitted the existence of 2 ft wide street/gali between the houses of petitioner and respondent no. 2. In para-3 of his objection, he has stated that he has not raised any stairs etc. and said street/gali is completely vacant. In para-4 of his objection, he has stated that stairs in question were constructed by him 30 years ago in his courtyard. **In para-5 of his objection, he has stated that the aforesaid street/gali is not used as a public pathway and is used for flowing rain water only.** Therefore, from the averments taken in his objection dated 24.01.2023, it is clear that existence of a street/gali is admitted by petitioner himself. However, he has denied that the aforesaid street/gali is being ever used as public pathway, but has admitted that the same is used for flowing of rain water. The admission of existence of 2 ft. wide street/gali between the houses of petitioner and respondent no. 2 is an admission of public pathway, more so, when the petitioner himself is admitted that from the aforesaid street/gali, rain water flows, therefore, same cannot be obstructed at all. The petitioner himself in para-6 has admitted that there is no stairs in the aforesaid street/gali and same is completely vacant, meaning thereby the aforesaid street/gali is being used as a public pathway and that is why the same is stated to be completely vacant. Moreover, it is the admission of petitioner that aforesaid street/gali is used for flowing of rain water and therefore, on this account also, the same cannot be obstructed being a channel for rain water drainage.

14. Revenue authorities in it's report dated 14.10.2024 has also found that stairs has been constructed by the petitioner in the street situated between the houses of petitioner and respondent no. 2. In the aforesaid report dated 14.10.2024, existence of a street is specifically found. A site plan was also prepared, which was annexed with the aforesaid report and a copy of which, is available in the paper-book as Paper No. 49. A perusal of the same reveals that the aforesaid street, which is a public pathway, has been blocked by constructing stairs and thereby the public pathway has been obstructed.

15. A perusal of the impugned order dated 12.11.2024 reveals that concerned SDM himself inspected the spot on 06.11.2024 and has found the existence of stair and therefore, he found that in view of the report of Tehsildar dated 14.10.2024, the aforesaid stair has obstructed the

public pathway, i.e. street/gali in question and therefore, is required to be removed.

16. It would be apt to note that in the judgment passed in the case of State of Maharashtra vs. **Admane Anita Moti, (1994) 6 SCC 109**, the Hon'ble Apex Court observed that:

"It is well established that the factual recitals or observations made in a judgment or order are taken to be correct unless rebutted. The burden to rebut it is on the person who challenges it. One of the methods to rebut such observation is to file the affidavit of the person who was present in the Court and to produce such material which may satisfy the Court that the recital in the judgment crept in inadvertently or it was erroneous".

17. Further, in the case of Bhagwati Prasad v. Delhi State Mineral Development Corpn., **(1990) 1 SCC 361**, the Hon'ble Apex Court observed that:

"It is now settled law that the statement of facts recorded by a court or quasi-judicial tribunal in its proceedings as regards the matters which transpired during the hearing before it would not be permitted to be assailed as incorrect unless steps are taken before the same forum. It may be open to a party to bring such statement to the notice of the court/tribunal and to have it deleted or amended. It is not, therefore, open to the parties or the counsel to say that the proceedings recorded by the Tribunal are incorrect".

18. When the record of the present case is perused in the light of the above principles of law with respect to a petition instituted under section 133 Cr.P.C., it is clear that petitioner himself has admitted in his petition the existence of two ft. wide street/gali on the spot. Therefore, in the present case, in view of the above admission of existence of public way, the Executive Magistrate was not under obligation to hold an inquiry as required under section 137 Cr.P.C. Moreover, the Executive Magistrate, visited the spot and visit of Executive Magistrate is not in dispute, which has been recorded in the impugned order dated 12.11.2024. The aforesaid fact of visiting spot, is a factual recital as well as an observation made by him in it's order, which is taken to be correct, because the same is not rebutted at all by the petitioner. The site plan enclosed with the Revenue Report dated 17.11.2025, also make it clear that there is an illegal obstruction in the public way, which was required to be removed. For the aforesaid reasons, this Court is of the view that there was obstructions created by the petitioner over public way in dispute, which is admittedly, a street/gali between the houses of the petitioner and respondent no. 2, therefore, the impugned order dated

12.11.2024 passed by the Magistrate, does not suffer any perversity or illegality.

19. Learned Additional Sessions Judge/Special Judge, SC./S.T., Act, himself vide it's judgment and order dated 19.03.2025 has considered all the grounds taken by the petitioner in his criminal revision and has found that present impugned order dated 12.11.2024 has been passed on the basis of inspection report submitted by the Tehsildar and on the basis of inspection of concerned SDM, himself. Therefore, finding no illegality in the impugned order, the aforesaid criminal revision has been rightly dismissed by Revisional Court.

20. It is well settled that power under Article 227 is of the judicial superintendence, which cannot be used to up-set conclusions of facts, howsoever erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could ever have reached them. (**Chandra Bhushan Vs. Beni Prasad & ors., (1999) 1 SCC 70; Savitrabai Bhausaheb Kevate & ors. Vs. Raichand Dhanraj Lunja, (1999) 2 SCC 171**).

21. In **Indian Overseas Bank Vs. Indian Overseas Bank Staff Canteen Workers' Union (2000) 4 SCC 245**, the Apex Court observed that it is impermissible for the Writ Court to re-appreciate evidence liberally and drawing conclusions on its own on pure questions of fact for the reason that it is not exercising appellate jurisdiction over the awards passed by Tribunal. The findings of fact recorded by the fact finding authority duly constituted for the purpose ordinarily should be considered to have become final. The same cannot be disturbed for the mere reason of having based on materials or evidence not sufficient or credible in the opinion of Writ Court to warrant those findings. At any rate, as long as they are based upon some material which are relevant for the purpose, no interference is called for. Even on the ground that there is yet another view which can reasonably and possibly be taken the High Court can not interfere.

22. In case of **Jasbir Singh Vs. State of Punjab (2006) 8 SCC 294**, it was held that while invoking the provisions of Article 227 of the Constitution, it is provided that the High Court would exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. The power of superintendence exercised over the subordinate courts and tribunals

does not imply that the High Court can intervene in the judicial functions of the lower judiciary. The independence of the subordinate courts in the discharge of their judicial functions is of paramount importance, just as the independence of the superior courts in the discharge of their judicial functions.

23. In the light of above well settled principles of law and after having considered the rival submissions advanced by learned counsel for the petitioner, as well as upon careful perusal of the record, this Court finds that both the learned Additional Chief Judicial Magistrate and Revisional Court have passed reasoned and speaking orders, which reflect due application of judicial mind.

24. Thus, it is apparent that the power under article 227 of the Constitution is to be exercised sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. This Power is not in the nature of power of appellate authority enabling re-appreciation of evidence.

25. Thus, no prima facie, perversity or illegality is found in the impugned judgment of Revisional Court and impugned order of trial Court, so as to warrant interference by this Court. Therefore, no ground for interference by this Court in exercise of it's writ jurisdiction under Article 227 of the Constitution of India is made out.

26. Accordingly, the writ petition is found to be devoid of merit and is hereby **dismissed**.

(Dr. Ajay Kumar-II,J.)

May 01, 2026

Monika