

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Cr.M.P. No.2580 of 2021

Sushil Kumar Biswas, aged about 50 years, Son of Late Deodas
Biswas, resident of Meena Bazar Napit Para, Madhupur, P.O.
& P.S. Madhupur, District Deoghar, Jharkhand.

... Petitioner

Versus

1. The State of Jharkhand
2. Abdul Wahid, age not known to the petitioner, son of Late
Md. Sarif @ Baku Mian, resident of Meena Bazar, Napit
Para, Madhupur, P.O. & P.S. Madhupur, District Deoghar,
Jharkhand.
3. Abhijit Chatterjee, age not known to the petitioner, son of
Ajit Kumar Chatterjee, resident of Meena Bazar, Napit Para,
Madhupur, P.O. & P.S. Madhupur, District Deoghar,
Jharkhand.
4. Veena Gupta, age not known to the petitioner, daughter of
Jai Prakash Gupta, resident of Mouza Pathroll, P.O. & P.S.
Madhupur, District Deoghar, Jharkhand.
5. Babita Barnwal, age not known to the petitioner, wife of
Late Sanjay Kumar, resident of Bank Colony Dhanbad, P.O.,
P.S. & District Dhanbad, Jharkhand.

... Opposite Parties

For the Petitioner : Mr. Onkar Nath Tewary, Advocate
For the State : Mrs. Vandana Bharti, Addl.P.P.
For the O.P. No.2 : Mr. Ankit Kumar, Advocate
For the O.P. No.3&4: None
For the O.P. No.5 : Mr. Arvind Kr. Choudhary, Advocate

P R E S E N T

HON'BLE MR. JUSTICE ANIL KUMAR CHOUDHARY

By the Court:-

1. Heard the parties.
2. Though notice has validly been served upon the opposite party No.3 & 4 yet no one turns up on behalf of the opposite party No.3 & 4 in spite of repeated calls.
3. This Criminal Miscellaneous Petition has been filed invoking the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure with the prayer to set aside the order dated 04.09.2021 passed by the learned Additional Sessions Judge-VI, Deoghar in Criminal Revision No. 69 of 2017 as well as to quash the order dated 13.05.2017 passed by the Sub-Divisional Magistrate, Madhupur in Criminal Misc. Case No. 370 of 2015 whereby and where under the Sub-Divisional Magistrate, Madhupur ordered for removal of the obstruction in Thoka No. 220, Holding No. 127 by the petitioner who is the opponent/second-party to the proceeding under Section 133 of the Code of Criminal Procedure instituted by the opposite parties herein; vide Criminal Misc. Case No. 370 of 2015 and directed the opposite parties to remove the said obstruction immediately and positively within 15 days and to report compliance or in default, they will be liable for prosecution under Section 188 of the Indian Penal Code.
4. The brief fact of the case is that opposite party No.2 & 3 herein being the members of the first party, submitted an application to the

Sub-Divisional Magistrate, Madhupur; basing upon which, Criminal Misc. Case No. 370 of 2015 was initiated. Vide order dated 11.09.2015, the Sub-Divisional Magistrate, Madhupur called for a Report from the Circle Officer, Madhupur as to whether the case land is a public land or not. The Circle Officer, Madhupur submitted the report dated 03.10.2015, the copy of which has been kept at page No.54 & 55 of the petition and intimated therein that there is no obstruction of any road. The Sub-Divisional Magistrate, Madhupur without passing any conditional order for removal of nuisance as required under Section 133 of the Code of Criminal Procedure and without following the provisions of Section 137 & 138 of the Code of Criminal Procedure and though the petitioner filed a show-cause dated 04.11.2015 but without giving any opportunity to the members of the second-party to adduce evidence in the matter of a summons case and ignoring the report dated 03.10.2015 submitted by the Circle Officer, Madhupur; taking into consideration the report of the Circle Officer, Madhupur dated 17.03.2005 and *Anchal Amin* dated 24.08.2006, which were much before the institution of the said Criminal Misc. Case No. 370 of 2015, the Sub-Divisional Magistrate, Madhupur came to the conclusion that the way in question is lawfully used by the public and passed the said order dated 13.05.2017 passed in Criminal Misc. Case No. 370 of 2015.

5. Being aggrieved by the said order dated 13.05.2017 passed in Criminal Misc. Case No. 370 of 2015, the petitioner filed Criminal Revision No. 69 of 2017 which is ultimately heard and disposed of by the learned Additional Sessions Judge-VI, Deoghar. The learned

Additional Sessions Judge-VI, Deoghar though noted the grievances of the revision-petitioner before it; but without discussing the same, by observing that the Sub-Divisional Magistrate, Madhupur has dealt very well the alleged dispute and the nuisance mentioned in the original petition/criminal application, went on to find that there is no merit in the criminal revision and dismissed the same.

6. Learned counsel for the petitioner submits that both the impugned orders passed by the learned Additional Sessions Judge-VI, Deoghar as well as the Sub-Divisional Magistrate, Madhupur, are not sustainable in law as the same have been passed in violation of the mandatory provisions of law. In support of his submission, the learned counsel for the petitioner relies upon the judgment of the Hon'ble Supreme Court of India in the case of **C.A. Avarachan vs. C.V. Sreenivasan & Another** reported in **1995 Supreme (SC) 415**, para-04 of which reads as under:-

"4. In our 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 of the Code of Criminal Procedure and without following the procedure provided for by Section 138 CrPC, the order made by the Sub-Divisional Magistrate on 13-1-1988 is unsustainable and is vitiated. The High Court 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. Neither the order of the High Court nor that of the Sub-Divisional Magistrate can therefore be sustained. (Emphasis Supplied)"

and submits that therein, the Hon'ble Supreme Court of India had held that the omission on the part of the Sub-Divisional Magistrate

to draw up a preliminary order, which is *sine-qua-non* for initiating proceedings under Section 133 of the Code of Criminal Procedure and without following the procedure provided for by Section 138 of the Code of Criminal Procedure, the final order made by the Sub-Divisional Magistrate is unsustainable and vitiated. Hence, it is submitted that the prayer as prayed for in this Criminal Miscellaneous Petition be allowed.

7. Learned Addl.P.P. appearing for the State and the learned counsel for the opposite party No.2 on the other hand vehemently oppose the prayer of the petitioner made in this Criminal Miscellaneous Petition but the learned counsel for the opposite party No.5 fairly submits that no preliminary order as envisaged under Section 133 of the Code of Criminal Procedure has, in fact, been made and he supports the contention of the petitioner.

8. Having heard the rival submissions made at the Bar and after carefully going through the materials available in the record, it is pertinent to mention here that it is needless to mention here that it is a *sine-qua-non* for a Sub-Divisional Magistrate or a District Magistrate or any Executive Magistrate to initiate a proceeding under Section 133 of the Code of Criminal Procedure, such Magistrate must draw up a preliminary order as envisaged under Section 133 of the Code of Criminal Procedure. It is also a mandatory provision of law that in case if the person against whom such order under Section 133 of the Code of Criminal Procedure is made, appears and shows cause against the order, the Magistrate is to take evidence in the matter as is done in a summons case.

9. Now coming to the facts of the case, the copy of the entire order sheet of Criminal Misc. Case No. 370 of 2015 has been filed in this case which is kept at page No. 46 to 53 of this criminal miscellaneous petition and the final order has been kept at page No. 56 to 60 of this petition. This Court, after going through the entire order sheets, finds that no preliminary order as envisaged under Section 133 of the Code of Criminal Procedure, has been filed in connection with Criminal Misc. Case No. 370 of 2015 and though the petitioner who was the second party of the said proceeding, filed a show-cause, the copy of which has also been filed in this case as Annexure-1 but no opportunity was given by the Sub-Divisional Magistrate, Madhupur for producing evidence to the parties to the case, in terms of Section 138 of the Code of Criminal Procedure. So, this Court has no hesitation in holding that for non-compliance of the provision of Section 133 as well as Section 138 of the Code of Criminal Procedure, the order dated 13.05.2017 passed by the Sub-Divisional Magistrate, Madhupur in Criminal Misc. Case No. 370 of 2015 is not sustainable in law.

10. So far as the order dated 04.09.2021 passed by the learned Additional Sessions Judge-VI, Deoghar in Criminal Revision No. 69 of 2017 is concerned, this Court finds that the learned Additional Sessions Judge-VI, Deoghar has noted the grievances of the revision-petitioner *inter alia* regarding non-compliance of passing conditional order in terms of Section 133 of the Code of Criminal Procedure and the procedure laid down in Section 138 of the Code of Criminal Procedure and also that the Sub-Divisional Magistrate, Madhupur has failed to

consider the report submitted by the Circle Officer, Madhupur on 03.10.2015 rather he relied upon the report of the Circle Officer, Madhupur dated 17.03.2005 and Anchal *Amin* dated 24.08.2006 which was prior to the institution of the case itself.

11. The learned Additional Sessions Judge-VI, Deoghar does not address the said contention of the petitioner in the criminal revision and without meeting the said grievance of the petitioner, the learned Additional Sessions Judge-VI, Deoghar has committed grave illegally in dismissing the criminal revision. Hence, the said order dated 04.09.2021 passed by the learned Additional Sessions Judge-VI, Deoghar in Criminal Revision No. 69 of 2017 is also not sustainable in law.

12. Under such circumstances, this Court is of the considered view that this is a fit case where the impugned order dated 04.09.2021 passed by the learned Additional Sessions Judge-VI, Deoghar in Criminal Revision No. 69 of 2017 as well as the order dated 13.05.2017 passed by the Sub-Divisional Magistrate, Madhupur in Criminal Misc. Case No. 370 of 2015, be quashed and set aside *qua* the petitioner only.

13. Accordingly, the impugned order dated 04.09.2021 passed by the learned Additional Sessions Judge-VI, Deoghar in Criminal Revision No. 69 of 2017 as well as the order dated 13.05.2017 passed by the Sub-Divisional Magistrate, Madhupur in Criminal Misc. Case No. 370 of 2015, are quashed and set aside *qua* the petitioner only.

14. Criminal Misc. Case No. 370 of 2015 is remitted to the court of the Sub-Divisional Magistrate, Madhupur to pass a fresh order in accordance with law.

15. In the result, this Criminal Miscellaneous Petition is allowed to the aforesaid extent only.

(Anil Kumar Choudhary, J.)

High Court of Jharkhand, Ranchi
Dated the 08th of October, 2026
AFR/ Saroj

Uploaded on 12/10/2026