



OFFICE OF THE SUB DIVISIONAL MAGISTRATE (SAKET)
DISTRICT – SOUTH : REVENUE DEPARTMENT : GOVT. OF NCT OF DELHI
OLD TRAFFIC COURT COMPLEX ; M. B. ROAD : SAKET : NEW DELHI

No. 149

Dated, 16/02/2016

CASE NO. 2373/RA/HK/2010

STATE
VS
SHRI HAR KISHAN YADAV

ORDER

This order shall dispose-off the proceedings u/s 133 Criminal Procedure Code, 1973 in the above-mentioned case instituted in the year 2010 by the Court of the then RA/SDM (Hauz Khas), on receipt of a complaint from Shri Surender Singh alleging public nuisance by way of obstruction / illegal encroachment on the public land comprised in Khasra No. 278 of Village – Saidulajab, New Delhi.

Whereas, the present case was taken up for hearing by the Court of Ex-SDM's on several occasions and on 06.01.2014, a Conditional Order was issued thereby directing Shri Har Kishan Yadav to immediately remove the illegal construction/obstruction/nuisance and to appear on 31.01.2014 to file compliance or to show-cause as to why the order should not be enforced. Shri Har Kishan Yadav preferred to contend the proceedings. After due adjudication of the matter, a Final Order was passed by the Court of the then SDM (Saket) on 17.12.2014, wherein, the Conditional Order issued on 06.01.2014 requiring the respondent to remove the illegal construction/ obstruction on the public chowk (disputed land) in Khasra No. 278, Village Saidulajab, New Delhi was found to be reasonable and proper. Accordingly, the Conditional Order dated 06.01.2014 was made absolute and Shri Har Kishan Yadav was directed to obey the said order within 15 days of the issue of the order, on peril of the penalty provided under the Indian Penal Code for disobedience thereto. Further, a Corrigendum dated 13.01.2015 was also issued to correct the typographical mistakes in 'para 3' of the Final Order dated 17.12.2014.

And whereas, Shri Har Kishan Yadav, instead of complying with the directions contained in the Final Order dated 17.12.2014 preferred a revision petition before the Court of Shri Sanjeev Jain, Addl. Session Judge, Saket Court, New Delhi vide Criminal Revision No. 02/2015. The said revision petition was disposed-off vide order dated 28.01.2015 with the direction/ observation that **“impugned order dated 17.12.2014 is hereby set aside. Ld. SDM is directed to conduct a fresh enquiry from the stage of Section 137 of Cr. PC. He is further directed to**

Handwritten signature



first record a finding about the plea of denial of the public right by the Petitioner and thereafter may proceed in accordance with Section 137 & 138 of Cr. PC. It is clarified that conditional order dated 06.01.2014 passed by the Ld. SDM will remain in force till the final decision is taken by him.”

And whereas, it would be appropriate to quote the relevant provisions of Criminal Procedure Code, 1973 here, which are as under :-

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 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 neighborhood 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 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.

134. Service or notification of order.

(1) The order shall, if practicable, be served on the person against whom it is made, in the manner herein provided for service of a summons.

(2) If such order cannot be so served, it shall be notified by proclamation, published in such manner as the State Government may, by rules, direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such persons.

135. Person to whom order is addressed to obey or show cause.

The person against whom such order is made shall —

(a) perform within the time and in the manner specified in the order, the act directed thereby; or

(b) appear in accordance with such order and show cause against the same.

136. Consequences of his failing to do so.

If such person does not perform such act or appear and show cause, he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code (45 of 1860,) and the order shall be made absolute.

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.

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.

And whereas, on receipt of the above discussed directions from the Court of Addl. Session Judge, Saket Court, New Delhi, fresh notices were issued to the concerned and the proceedings were initiated again. The respondent again denied the existence of public rights vide their detailed written submissions and pointed out his objections as under :-

- a). The rough site plan submitted by the MCD forming part of the record clearly shows that the public path way is clear and the subject land is in a triangular form in the built-up area of the village.
- b). The site plan prepared by M/s Arora Associates, Architect & Engineers shows the existing road and galis in red colour. The disputed plot in question shown in green. A telephone pillar installed by the MTNL abutting the pathway confirms that the subject land does not form part of public way.
- c). The report of the revenue authority itself states that as per the record the subject land forms part of Khasra No. 278min of Village Saidulajab, which is a private land and the respondent is one of the land holder.
- d). The respondent had a small room built on the disputed plot which he had demolished in order to make a better accommodation for himself when the complainant out of sheer vengeance and village rivalry filed this complaint just to harass the answering respondent and to prevent him from making any construction thereon.
- e). That just behind the subject matter of dispute a plot of land forming part of Khasra No. 278min belonging to Master Raghbir which has recently been constructed without any interference.

And whereas, before proceeding any further, it would be imperative to deal with the denial/ objections filed by Respondent, Shri Har Kishan Yadav. The respondent has claimed joint

ownership of the Khasra of land, on which the disputed portion/site is situated. The revenue records show that the share of respondent in Khasra No. 278 is only (00-05) i.e. 200 sq. yds., while it has already been reported that the respondent along with his brother is in occupation of land measuring much more than their legal share. The objections filed by the respondent, do not merit consideration, as via the objections, the respondents have tried hard to show that the disputed site is not a part of a public pathway. The material placed on record and facts/arguments of both the parties i.e. complainant & respondents show that the disputed site although is not a part of the public pathway but is a small piece of triangular shape of land, which was being used as a public chowk by the residents of the area for last several years. The maps & drawings submitted by both the parties makes it abundantly clear that the construction on the disputed site is definitely obstructing the usage of the said site by the general public. The respondent has thus failed to present any reliable evidence against the public use/character of the disputed site/ chowk.

And whereas, in compliance of the directions issued by the Court of Addl. Session Judge, Saket Court, an enquiry as envisaged u/s 137 Cr. PC was got conducted, wherein, the Tehsildar/ Executive Magistrate (Saket), GNCTD was directed to furnish a detailed report on the following points :-

- a). whether there exists a public right on suit land or not ?
- b). whether any chowk exists on the suit land ?
- c). status of suit land as per the revenue records available in this office ?
- d). any other observation to facilitate the court in deciding the matter ?

And whereas, a detailed report dated 05.10.2015 was submitted by the Tehsildar / Executive Magistrate (Saket), GNCTD reporting therein that a fresh field survey was carried out by him and there is no change in status of the land / issues as reported by him in his earlier reports dated 21.03.2014 & 01.07.2014. Thus, in the nutshell, the status as reported by the Officer is as under:-

- a). the dispute site is part of the land comprising Khasra No. 278, Village Saidulajab, New Delhi.
- b). on the site, there exists a 'Y' shape of public pathway, as shown in the photographs annexed.
- c). the public pathway separates the property / house of Shri Har Kishan Yadav from the disputed site.
- d). disputed site seems to be a part of open chowk on which right side has been blocked by a wall raised by Shri Har Kishan Yadav.

And whereas, the oral/written arguments & other material placed on record including the report of the Tehsildar/Executive Magistrate (Saket) u/s 137 Cr. PC and other reports, have been considered/examined and following observations are made :-

- a). The dispute raised before this court in the present matter squarely falls under the provisions of Section 133(1)(a) Cr. P C, hence, the legality of the cognizance taken in the present case is again re-affirmed.
- b). The report of the Tehsildar / Executive Magistrate (Saket), GNCTD u/s 137 Cr. P.C. reveals that “the disputed land forms part of Khasra No. 278, Village – Saidulajab, New Delhi. On the site there exists a Y-Shape public pathway. The public pathway separates the property of Shri Har Kishan Yadav from the disputed site. The disputed site seems to be a part of open chowk on which right side has been blocked by a small wall raised by Shri Har Kishan Yadav”.
- c). In the present matter, it is undisputed that the disputed site is a part of Khasra No. 278, out of which the respondent being a co-sharer has some land under his occupation. The sizra of the site available on record (not denied by the respondent) show that the disputed site is separated from the ownership of the respondent by a pathway. The ownership of the respondent has to be contiguous and cannot be accepted to be scattered in bits and pieces. Besides, the existence of Y-Shape pathway has not been denied by both the parties.
- d). With time, the use of land by public, transforms into a right. In the present case, although there is no record to show that the disputed land is recorded as public chowk but the testimony of around 10 people on affidavit and local enquiry by the revenue officials reveal that the disputed land was being used as public chowk since a very long time.
- e). Further, during the proceedings dated 21.05.2012, the respondent had himself agreed to the encroachment alleged against him and even agreed that the encroachment shall be removed, but, later he chose to contest the proceedings, which shows that the respondent have been blowing hot & cold, as per his convenience and using the technicalities of the related provisions of law to his benefit.
- f). The present proceedings are covered under Chapter X of the Criminal Procedure Code, 1973 under the title ‘MAINTENANCE OF PUBLIC ORDER & TRANQUILITY’. It has not been the intention of the lawmakers to deal with the issues of ‘title & right to use’ under the present proceedings. Rather, the present proceedings have been meant to be the summary proceedings to remove any obstruction/nuisance from any place which is being used by public for public purposes.

Handwritten signature



In light of the above discussions/findings, Shri Har Kishan Yadav, Respondent is

remove the illegal construction / obstruction on the public chowk (disputed land) in Khasra No. 278, Village Saidulajab, New Delhi is found to be reasonable and proper. The Conditional Order dated 06.01.2014 is hereby made absolute and, I, Vikas Ahlawat, SDM (Saket), hereby direct and require you to obey the said order within 15 days of the issue of this Order, on peril of the penalty provided by the Indian Penal Code for disobedience thereto.

Let a copy of this order be served to the SHO (Mehrauli), Delhi police to ensure compliance of this order by the respondent. In case of disobedience by the respondents, the SHO (Mehrauli) will get the nuisance removed within 07 days after lapsing of 15 days period given to the respondent from today at the cost and perils of the respondent herein and file compliance report before this court.

Given under my hand & seal of this court on this 16th day of February, 2016.



Vikas Ahlawat
(VIKAS AHLAWAT)
S.D.M. (SAKET)
VIKAS AHLAWAT, DANICS
Sub-Divisional Magistrate
New Delhi. (Saket)
M. B. Road, Saket, New Delhi-68

To:-

- 1). Shri Har Kishan S/o Late Shri Bhagwan Sahai R/o Village – Saidulajab, New Delhi.
- 2). The SHO, PS-Mehrauli, Delhi Police, New Delhi.

Copy to :-

Shri Surender Singh S/o Shri Swarup Singh R/o Village – Saidulajab, New Delhi.

Copy for information to :-

- 1). Reader to District Magistrate (South), GNCTD, Saket, New Delhi.
- 2). The Programmer, NIC, District – South, with the request to upload the present order on the official website of District – South.