

# **Abhimanyu Prasad Ojha And Ors. vs State Of U.P. Thru. D.M. Gonda And Ors. on 16 April, 2025**

**Author: Rajnish Kumar**

**Bench: Rajnish Kumar**

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

Neutral Citation No. - 2025:AHC-LK0:21466

AFR

Court No. - 11

Case :- CRIMINAL MISC. WRIT PETITION No. - 15379 of 2019

Petitioner :- Abhimanyu Prasad Ojha And Ors.

Respondent :- State Of U.P. Thru. D.M. Gonda And Ors.

Counsel for Petitioner :- Anil Kumar Tripathi, Anil Kumar Tripathi

Counsel for Respondent :- G.A., Faiz Ahmad Khan, Indrajeet Shukla, Santosh Kumar Gupta

AND

Case :- CRIMINAL MISC. WRIT PETITION No. - 17172 of 2019

Petitioner :- Abhimanyu Prasad Ojha And Ors.

Respondent :- State Of U.P. Thru-D.M. Gonda And Ors.

Counsel for Petitioner :- Sanjay Tripathi

Counsel for Respondent :- G.A., Faiz Ahmad Khan, Indrajeet Shukla, Santosh Kumar Gupta

Hon'ble Rajnish Kumar, J.

1. Heard Shri Sanjay Tripathi, Advocate holding brief of Shri Anil Kumar Tripathi, learned counsel for the petitioners in Criminal Misc. Writ Petition No.- 15379 of 2019 and learned counsel for the petitioners in Criminal Misc. Writ Petition No.- 171721 of 2019, Shri Rajesh Kumar Shukla, learned State Counsel and Shri Santosh Kumar Gupta, learned counsel for the private respondent in both the petitions.

2. Criminal Misc. Writ Petition No. 15379 of 2019 has been filed assailing the order dated 30.11.2018 passed in Case No. 80 under Section 133 of Code of Criminal Procedure (hereinafter referred as Cr.P.C.) by Sub-Divisional Magistrate, Tarabganj, District-Gonda and the judgment and order dated 21.05.2019 passed in Criminal Revision No. 318 of 2018; Rajkishore Ojha (Deceased) substituted by legal heirs Abhimanyu Prasad Ojha and others vs. State of U.P. and another and Criminal Misc. Writ Petition No. 17172 of 2019 has been filed assailing the order dated 30.05.2019 passed by the Sub Divisional Magistrate, Tehsil-Tarabganj, District-Gonda, by means of which he has directed to the In-charge Inspector, Dehat Kotwali, Gonda for compliance of the order dated 30.11.2018 in pursuance of the order dated 21.05.2019 passed by the Session Judge Gonda. Thus, both the petitions have been clubbed together and are being decided by this common judgment and order.

3. Learned counsel for the petitioners submitted that in view of the report submitted by the Tehsildar, Tarabganj, District Gonda, there was no dispute between the petitioners and the private respondent and the public way was not restrained by the petitioners, but without considering it, the learned Sub-Divisional Magistrate passed the impugned order dated 30.11.2018 on the ground that in case in future any construction is raised by the predecessor-in-interest of the petitioners i.e. Rajkishore Ojha, then the public way will be disturbed. Thus, the order has been passed merely on presumption that the public way will be disturbed in future, whereas on the basis of mere presumption that the public may be disturbed in future, the order cannot be passed under Section 133 Cr.P.C. He further submits that during pendency of the revision, the revisional court also passed the impugned judgment and order dated 21.05.2019, without considering the grounds raised by the petitioners. He further submitted that during pendency of the Criminal Misc. Writ Petition No. 15379 of 2019, the order passed by the learned Sub Divisional Magistrate and learned Sessions Judge, the Sub-Divisional Magistrate, Tarabganj, District-Gonda directed to the In-charge Inspector for compliance of the order passed by him, whereas the same could not have been issued, therefore Criminal Misc. Writ Petition No. 17172 of 2019 was filed. Thus, the submission is that the impugned judgment and orders are not sustainable in the eyes of law and liable to be set aside by this Court.

4. Per contra, learned counsel for the private respondent in both the petitions submitted that the impugned judgment and orders have rightly been passed in accordance with law after considering the report of the Tehsildar and the evidence on record and the admission of the witnesses of the petitioners that the petitioners had constructed a wall on public land, which was being used as a way, therefore, merely because the report indicates that in case, he constructs further wall in future the public way may be disturbed, it cannot be said that the impugned judgment and orders have been passed merely on presumption of happening in future. Thus, the writ petitions have been filed on misconceived and baseless grounds and the same are liable to be dismissed. He relied on Jagpal Singh and others vs. State of Punjab and others; AIR 2011 SC 1123, judgment and order dated 02.03.2021 passed in Public Interest Litigation (PIL) No. 1474 of 2020; Sri Krishna vs. State of U.P.

and 4 others by a co-ordinate Bench of this Court and judgment and order dated 09.09.2021 passed in CWP No. 17706 of 2021; Gurmukh Singh vs. State of Punjab and others by the High Court of Punjab and Haryana at Chandigarh.

5. I have considered the submissions of learned counsel for the parties and perused the records.

6. The application was filed by Shri Balak Ram Tiwari resident of Madhavpur (Gajadharpurwa), Police Station Kotwali Dehat, District Gonda on 08.12.2017 under Section 133 Cr.P.C. for removal of the wall constructed by the predecessor-in-interest of the petitioners i.e. Raj kishore Ojha on public land. It was stated in the application that on 18.09.2017 adjacent to the plot of the applicant in 0.08 dismil land of Bhumidhari Gata No. 202/48, a wall was constructed by Raj kishore, predecessor-in-interest of the petitioners, obstructing the way of the applicant because the main way and sehan is on the western side towards the pond. He has filled the pond and claiming right over it. There is unconstructed way in the just western side of Gata No. 225 and 0.60 acre land is in the shape of pond and belongs to Gram Sabha, which is a government land. The allegations made in the application were got inquired from the Tehsildar Tarabganj. On account of consolidation process, the inquiry was made jointly by the revenue and consolidation departments. In the report, it was stated that it has been alleged by the applicant that the wall has been constructed on Gata No. 225, which is a pond land. The total area of Gata No. 225 is 5.30 acre, out of which 0.15 dismil land i.e. 0.5 dismil each was recorded in the name of three tenure holders having transferable rights. No part of it is in water or recorded as pond adjacent to Gata No.225/5.15 acre and Gata No. 202 is situated, which is a transferable land, in which Balak Ram Tiwari has purchased a plot on the western side of the said plot. There is a public way in the gata of abadi, which connects Majre Gajadharpurwa, therefore the said constructed road is being used by the parties as well as the villagers for commutation. On the eastern side of the public way adjacent to the plot of the applicant, the respondent has constructed a wall, which is about 30 feet long and 6 feet height. The place where the wall has been constructed, it is not justifiable to construct a wall because the said land is neither near to the house of the respondent nor to the sehan. In case, in future the respondent makes any construction adjacent to the same, then the public way may also be obstructed and on account of construction of wall in front of the plot of Balak Ram Tiwari, (which is on way on the land of abadi), the applicant-Balak Ram Tiwari and other villagers would have difficulty in reaching on the way, therefore the same is liable to be removed. Taking cognizance of the said report dated 19.04.2018 submitted by Tehsildar Tarabganj, the proceedings under Section 133 Cr.P.C. were initiated and the conditional order (notice) was issued.

7. The respondent i.e. the predecessor-in-interest of the petitioners filed an objection dated 14.05.2018 against the said notice stating therein that the Gata No. 225 situated in Village-Madhavpur, Police Station Kotwali Dehat, District Gonda is abadi land since a long time, in which the house of the applicant-the objector and other villagers are situated, in the east of abadi Gata No. 202, which was earlier in the shape of grove and the applicant-objector is a co-tenure holder. The house of the objector is situated in Gata No. 225 on the boundary of Gata No. 202, in which the wall of the objector is standing from north to south since a long time. There was no way of going from this wall and sehan land of the applicant. The applicant-Balak Ram Tiwari is a co-tenure holder in Gata No. 202. He has got filled the plinth on the same without any partition, in which

there is no wall or roof. He also does not reside in the same. On the eastern boundary of Gata No. 202, khadanja has been constructed and the applicant has way for his commutation to his plinth from the same. The land in dispute has never been a public way, thus, the proceedings are liable to be quashed.

8. Shri Balak Ram Tiwari, the private respondent filed a reply dated 11.06.2018 to the objection admitting that he is co-tenure holder of Gata No. 202 and the predecessor-in-interest of the petitioners i.e. Raj kishore has no concern with the said land. He has constructed the wall with an intention to close the public way. The construction has been made obstructing the way to the pond from the front of the applicant, thus, the objection is liable to be rejected.

9. The additional objection was filed by the predecessor-in-interest of the petitioners i.e. Rajkishore on 23.7.2018 stating therein that in the map of Gata No. 225, there is no way. The affidavits of Arjun Prasad, Harish, Dwarikanath, Lalji, Vijaynath, Basdev, Mata Prasad, Rambaran, Ashok Kumar, Radheyshyam Ojha, Omprakash, Rameshchandra, Dinesh Kumar, Shivanand and Indrabhushan Ojha dated 13.08.2018 were filed on behalf of the applicant-Raj Kishore i.e. the petitioners. The cross-examination of Arjun Prasad, Indrabhushan Ojha, Mishrilal Ojha, Vijaynath and Omprakash were recorded. Though the witnesses mainly stated that the Gata No. 225 has always been recorded as abadi in the revenue records and not pond and it has also been stated that the way of anybody has not been obstructed on account of construction of wall in Gata No. 225, but Shri Mishri Lal Ojha son of the objector-Raj Kishore stated in his cross-examination dated 03.10.2018 that he has not constructed the wall in the public way but the wall has been constructed by Raj Kishore i.e. his father.

10. The affidavit dated 15.10.2018 of Gangasaran Ojha, Virendra Kumar, Ramprakash Ojha and Phoolchandra were filed on behalf of Balak Ram Tiwari i.e. private respondent and cross objection of Phoolchandra Ojha, Virendra Kumar and Ramprakash Ojha were also recorded. They stated that Raj Kishore had constructed a wall adjacent to the plot of Balak Ram on the eastern side of the public way, which is not adjacent to his house and sehan and there is no justification of the said land. In case, any construction is made on the said wall, then public way would be obstructed. In the cross-examination of Phoolchandra Ojha, Virendra Kumar and Ramprakash Ojha, they have stated that the wall has been constructed on the part of public way, on account of which, the way of Balak Ram Tiwari and other villagers is obstructed.

11. In view of above, it is apparent that a wall has been constructed by the predecessor-in-interest of the petitioners i.e. Raj Kishore on a part of public land on Gata No. 225, which is being used as a public way.

12. Section 133 Cr.P.C. provides that whenever a report or other information is received, the District Magistrate or Sub-Divisional Magistrate or any other Executive Magistrate specifically empowered in this behalf by the State Government on taking such evidence, (if any), it is found that 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, such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance etc. to remove such obstruction or

nuisance etc. within a time to be fixed in the order or if he objects so to do, then to show cause why the order should not be made absolute. Thereafter, after following the procedure prescribed under Section 141 Cr.P.C., the order may be made absolute under Section 138 of Cr.P.C.

13. Section 134 Cr.P.C. provides the manner of service on the person against whom it is made and modification of order. Section 135 Cr.P.C. provides that the person against whom such order is made shall perform the act directed thereby within the time specified or show cause against the same. Section 136 provides the procedure where existence of public right is denied. It provides that where an order is made under Section 133 Cr.P.C., the Magistrate shall, or on the appearance before him of the person against whom the order was made inquire into the matter before proceeding under Section 138 Cr.P.C. Sub-section (2) of Section 137 provides that 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. Section 138 provides the procedure where the person against whom the order/notice has been issued appears to show cause and if the person shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case. Sub-section (2) provides that 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. Sub-section (3) provides that if the Magistrate is not satisfied, no further proceedings shall be taken in the case. Section 139 provides the power of Magistrate to direct local investigation and examination of an expert for the purposes of inquiry under Section 137 Cr.P.C. Section 140 provides the power of Magistrate to furnish written instructions etc. for investigation under Section 139 Cr.P.C. Section 141 provides the procedure on order being made absolute under Section 136 Cr.P.C. or Section 138 Cr.P.C. and consequences of disobedience. Section 142 provides that if a Magistrate making an order under Section 133 Cr.P.C. considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may issue an injunction pending determination of the matter. Section 143 Cr.P.C. provides that the Magistrate may prohibit repetition of public nuisance.

14. The Hon'ble Supreme Court, in the case of Jagpal Singh and others vs. State of Punjab and others (Supra), has held that the trespassers, who have illegally encroached on the Gram Panchayat land by using muscle power or money power and in collusion with the officials and even with the Gram Panchayat, such kind of blatant illegalities must not be condoned and even if the appellants have built houses on the land in question they must be ordered to remove their constructions and possession of the land in question must be handed back to the Gram Panchayat. The relevant paragraphs 13 to 23 are reproduced herein:-

"13. We find no merit in this appeal. The appellants herein were trespassers who illegally encroached on to the Gram Panchayat land by using muscle power/money power and in collusion with the officials and even with the Gram Panchayat. We are of the opinion that such kind of blatant illegalities must not be condoned. Even if the appellants have built houses on the land in question they must be ordered to remove their constructions, and possession of the land in question must be handed back to

the Gram Panchayat. Regularizing such illegalities must not be permitted because it is Gram Sabha land which must be kept for the common use of villagers of the village. The letter dated 26.9.2007 of the Government of Punjab permitting regularization of possession of these unauthorized occupants is not valid. We are of the opinion that such letters are wholly illegal and without jurisdiction. In our opinion such illegalities cannot be regularized. We cannot allow the common interest of the villagers to suffer merely because the unauthorized occupation has subsisted for many years.

14. In *M.I. Builders (P) Ltd. vs. Radhey Shyam Sahu*, 1999(6) SCC 464 the Supreme Court ordered restoration of a park after demolition of a shopping complex constructed at the cost of over Rs.100 crores. In *Friends Colony Development Committee vs. State of Orissa*, 2004 (8) SCC 733 this Court held that even where the law permits compounding of unsanctioned constructions, such compounding should only be by way of an exception. In our opinion this decision will apply with even greater force in cases of encroachment of village common land. Ordinarily, compounding in such cases should only be allowed where the land has been leased to landless labourers or members of Scheduled Castes/Scheduled Tribes, or the land is actually being used for a public purpose of the village e.g. running a school for the villagers, or a dispensary for them.

15. In many states Government orders have been issued by the State Government permitting allotment of Gram Sabha land to private persons and commercial enterprises on payment of some money. In our opinion all such Government orders are illegal, and should be ignored.

16. The present is a case of land recorded as a village pond. This Court in *Hinch Lal Tiwari vs. Kamala Devi*, AIR 2001 SC 3215 (followed by the Madras High Court in *L. Krishnan vs. State of Tamil Nadu*, 2005(4) CTC 1 Madras) held that land recorded as a pond must not be allowed to be allotted to anybody for construction of a house or any allied purpose. The Court ordered the respondents to vacate the land they had illegally occupied, after taking away the material of the house. We pass a similar order in this case.

17. In this connection we wish to say that our ancestors were not fools. They knew that in certain years there may be droughts or water shortages for some other reason, and water was also required for cattle to drink and bathe in etc. Hence they built a pond attached to every village, a tank attached to every temple, etc. These were their traditional rain water harvesting methods, which served them for thousands of years.

18. Over the last few decades, however, most of these ponds in our country have been filled with earth and built upon by greedy people, thus destroying their original character. This has contributed to the water shortages in the country.

19. Also, many ponds are auctioned off at throw away prices to businessmen for fisheries in collusion with authorities/Gram Panchayat officials, and even this money collected from these so called auctions are not used for the common benefit of the villagers but misappropriated by certain individuals. The time has come when these malpractices must stop.

20. In Uttar Pradesh the U.P. Consolidation of Holdings Act, 1954 was widely misused to usurp Gram Sabha lands either with connivance of the Consolidation Authorities, or by forging orders purported to have been passed by Consolidation Officers in the long past so that they may not be compared with the original revenue record showing the land as Gram Sabha land, as these revenue records had been weeded out. Similar may have been the practice in other States. The time has now come to review all these orders by which the common village land has been grabbed by such fraudulent practices.

21. For the reasons given above there is no merit in this appeal and it is dismissed.

22. Before parting with this case we give directions to all the State Governments in the country that they should prepare schemes for eviction of illegal/unauthorized occupants of Gram Sabha/Gram Panchayat/Poramboke/Shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularizing the illegal possession. Regularization should only be permitted in exceptional cases e.g. where lease has been granted under some Government notification to landless labourers or members of Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land.

23. Let a copy of this order be sent to all Chief Secretaries of all States and Union Territories in India who will ensure strict and prompt compliance of this order and submit compliance reports to this Court from time to time."

15. A co-ordinate Bench of this Court, in the case of Sri Krishna vs. State of U.P. and others (Supra) and a Division Bench of Punjab and Haryana at Chandigarh, in the case of Gurmukh Singh vs. State of Punjab and others (Supra), relying on Jagpal Singh and others vs. State of Punjab and others (Supra), have passed the orders.

16. The aforesaid proposition has been reiterated by the Hon'ble Apex Court in the case of Joginder Singh vs. State of Haryana and others; 2021 (2) R.C.R. (Civil) 109.

17. Adverting to the facts of the present case, it is apparent that a wall has been constructed on a public land by the predecessor-in-interest of the petitioners, which is being used as a way to come on the main way. The petitioner no. 2-Mishri Lal Ojha has admitted in his evidence/cross-examination that the wall was constructed by predecessor-in-interest of the petitioners. The only plea has been taken that since the finding has been recorded that in case adjacent to the same if construction is made in future, the public way may be obstructed, whereas, the order could not have been passed merely on the basis of presumption of happening in the future, but it cannot be disputed that the wall has been constructed on a public land and as per Section 133 Cr.P.C., the unlawful obstruction or nuisance over any public place or over any way, river or channel which is or may be lawfully used by the public is required to be removed. Thus, any person cannot unlawfully obstruct or create nuisance on a public place or over any way and if it has been done or construction is raised, the same is liable to be removed under Section 133 Cr.P.C. Merely because it may not have completely created obstruction to the public, it cannot be said that the person, who has created such an obstruction or nuisance, can be allowed to continue with the same. Since the orders challenged in earlier writ petition were neither stayed nor modified, therefore, the learned Magistrate had rightly and in accordance with law directed for their execution. Learned Magistrate as well as the Revisional Court have passed the orders in accordance with law on the basis of pleadings, evidence and material on record, which does not suffer from any illegality or error. Thus, it does not call for any interference by this Court. Both the writ petitions have been filed on misconceived and baseless grounds, which lack merit and are liable to be dismissed.

18. In view of above, both the writ petitions i.e. Criminal Misc. Writ Petition No. 15379 of 2019 and Criminal Misc. Writ Petition No. 17172 of 2019 are dismissed. No order as to costs.

Order Date :- 16.04.2025/Raj