
(2008) 04 MAD CK 0172

In the Madras High Court

Case No : Criminal Revision Case No's. 1486 and 1504 of 2007 and M.P. No. 1 to 3 of 2007 in respective Criminal R.Cs.

The Manager, Kodanad Estate

APPELLANT

Vs

The Sub-Divisional Magistrate and the Assistant Collector,
Coonoor, The Nilgiris District

RESPONDENT

Date of Decision : 28-04-2008

Acts Referred:

Citation : (2008) 04 MAD CK 0172

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : B. Sriramulu, SC for Mr. A. Navaneethakrishnan, for the Appellant; G. Masilamani, AG for Respondent and Mr. Babu Muthu Meeran, Addl. PP Mr. P. Wilson, ASGI for Interveners, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—Heard the arguments of Mr. B. Sriramulu, learned Senior Counsel representing Mr. A. Navaneethakrishnan for the petitioner, Mr. G. Masilamani, learned Advocate General leading Mr. Babu Muthu Meeran, Additional Public Prosecutor and Mr. P. Wilson, learned Assistant Solicitor General of India appearing for the Interveners and have perused the records.

2. The petitioner Kodanad Estate, which is having Tea Plantations, represented by its Manager, has filed the pre-sent Criminal Revision Petitions challenging the order passed by the Sub-Divisional Magistrate [for short, "SDM"], Coonoor. While Cri. R.C. No. 1486 of 2007 challenges the notice issued u/s 141 (1) Cr. P.C. dated 20.9.2007 issued pursuant to the order dated 20.9.2007 in Petition No. 1 of 2007 and Cri. R.C. No. 1504 of 2007 challenges the final order dated 20.9.1997 passed by the SDM in Petition No. 1 of 2007.

3. At the time of admission of the Criminal Revision Petitions, an order of status quo was granted starting from 21.9.2007 which was thereafter extended from

time to time. Subsequently, on 27.11.2007, the interim order was extended until further orders.

4. Backdrop:-

4.1. There are around 179 families living in the hamlets known as Kamaraj Nagar and Anna Nagar situated in one side of the Kodanad Estate. It is claimed that those hamlets are in existence for over four decades and the only passage by which they can have access to the outside world was taking the service road situated inside the Kodanad Estate. Admittedly, the service road is situated within the Kodanad limits and it is a patta land belonging to the estate. Over the years, the residents of the two hamlets were allowed to go through the road running through the Estate for a length of 2.5 Kms. approximately.

4.2. However, restrictions were imposed on the vehicles plying through the road and that can be done only after getting written permission of the Estate Management and after paying a small fee as toll charges. For various security and other reasons, the gates situated at both ends of the road were closed during the night. It is seen that such collection of toll charges from the vehicles passing through the Estate was taking place for the last one decade. A gate pass marked as Ex. A.9 series before the respondent SDM shows the first gate pass having 29.9.1997 as its date of issue.

4.3. It transpires that the people of the two hamlets were irked over the delay in getting the gate pass for taking the vehicle and also the closure of gates during night time which was creating difficulties in case of travel for medical exigencies. They petitioned to the Kodanad Panchayat for finding permanent solution to the problem. Therefore, lead by a Ward Councilor of the Vth Ward, by name, S. Kavitha, through a letter dated 21.7.2007, (marked as Ex. A.3 by the SDM) and also signed by several other people, they petitioned to the President of the Grama Sabha. In the subject column of the petition, it was stated that the petition was regarding the denial of vehicle transport to their village through the Estate road. In the prayer portion of the petition, it was stated that earlier it was free toll and that obtaining permission has become difficult and time consuming and, therefore, the Grama Sabha should find a permanent solution to the issue so as to enable the villagers to travel in their vehicles through the Estate Road.

4.4. The meeting of the Grama Sabha of the Pedugalmamdu village was convened on 21.7.2007 itself and a resolution was also stated to have been passed in the said meeting. The agenda of the meeting was stated to consider the representation received from the residents of the Anna Nagar and Kamaraj Nagar hamlets and also to decide the issue relating to setting up of the gates by the Kodanad Estate Management and preventing the people from traveling in their vehicles and to consider the complaint in public interest and to petition the District Collector. (This agenda was marked as Ex. A.2 by the SDM). The resolution (marked as Ex. A.3) alleged to have been passed reads as follows:

Resolved to request the Government to acquire the road and entrust the same to

the Panchayat.

4.5. The Grama Sabha for a village is provided u/s 3 of the Tamil Nadu Panchayat Act 1994 [for short, "Panchayat Act"]. By virtue of Section 3(4) of the Panchayat Act, it is mandatory that the village panchayat shall give due consideration to the recommendations and suggestions of the Grama Sabha. In terms of Section 3(5) of the Panchayat Act, the quorum for a meeting of the Grama Sabha and the procedure for convening and conducting such meetings of the Grama Sabha was to be prescribed by the Government.

4.6. The State Government, by virtue of the Rules framed known as Tamil Nadu Grama Sabha (Quorum and Procedure for Convening and Conducting of Meeting) Rules, 1998 [for short, "Rules"], had prescribed the procedure for convening of meetings. Under Rule 2 of the Rules, the meeting should be held only on official working days and in case it was to be held on public holidays, then it must be notified by the Inspector or by the Government. In the present case, a meeting was held on a Saturday, which was not an official working day for the Government.

4.7. Likewise, under Rule 3, for holding a meeting of the Grama Sabha, not less than 7 clear days notice prior to the date and time of the meeting is required and of the subjects to be deliberated should be given in the manner specified therein. The Rule also requires the manner of publication of the notice and copy of the notice and the agenda shall be sent to the Inspector. In the present case, the petition, by a section of people, was given on 21.7.2007 and the meeting seems to have been convened on the very same day and it is obvious that no notice as contemplated under Rule 3, was given. These factors raise some suspicion in the convening of the Grama Sabha meeting without following the procedure prescribed by law.

4.8. Be that as it may. There is nothing wrong either on the Panchayat or the Grama Sabha in demanding a provision for a road linking the two hamlets to the main road.

4.9. In so far as the resolution demanded and as approved by the Grama Sabha meeting is concerned, it can be said to be a legitimate desire of a section of people and petitioning the Collector for the purpose of acquiring the land for laying down the road, can also be a lawful demand. This letter received from the group of people from the two hamlets in question along with Grama Sabha resolution were forwarded to the District Collector on the same day, viz., 21.7.2007, by the President of the Kodanad Panchayat. In the covering letter enclosing the resolution, he requested the District Collector to take action so that the people can use the road in their vehicles without any hardship.

5. Nemesis:-

5.1. From the original file produced by the learned Public Prosecutor from the SDM Court, there is nothing to indicate as to when these letters were received by

the District Collector and as to what action was taken on the representations. But, however, it is seen from the notes file of the SDM in Re. BI No. 8390 of 2007 where he had recorded that the Revenue Divisional Officer, Nilgiris District had instructed him to take necessary action to provide pathway to the residents of Anna Nagar and Kamaraj Nagar. It was thereafter the issue was taken care of by the SDM by invoking his power u/s 133 Cr. P.C. In that view of the matter, the then SDM, Coonoor, recorded the statements of the President of Kodanad Panchayat Union, Tmt. S. Kavitha, Member of Ward V, Kodanad Panchayat, Gopal, Member, Ward II, Kothagiri Town Panchayat and some public of Anna Nagar and Kamaraj Nagar hamlets.

5.2. The substance of the statement recorded was that the persons, who purchased the petitioner estate, have stopped vehicles from entering the Estate road without permission and due to delay in getting prior permission, people were put to hardship. Therefore, relief is required so that the people can use the Estate Road at all times along with the vehicle. It is seen from the statements that before the present owners came into possession, the passage through the Estate Road was toll free. After the present owners came into possession, they were collecting toll from the vehicles and the road was closed during the night. Hence, a plea was made so that the Estate Road can be used by them on all 24 hours and it must be made toll free.

5.3. The respondent SDM, on the basis of these statements and after perusing the Topo sketch showing the private road passing through R.S. Nos. 139/1,155/3, 4,159,160/1,4,5 & 6, purporting to exercise powers u/s 133 (I)(a), by his order dated 01.8.2007, made the following order:

...The evidence of the President of the Kodanad Panchayat prima-facie shows that the roads under reference is used by the public at large from a very long time in order to reach Anna Nagar, Kamaraj Na-gar, etc.. The road under reference is a detailed road. As such any obstructions to the same by any person is unlawful obstruction within the meaning of Section 133 Cr. P.C. The public are stated to be put to inconvenience and hardship by the arbitrary action of the Management of Kodanad Estate by preventing access over the said road. The obstruction still exists.

As stated above, the road in question is a detailed road as in old and new survey records. The Topo sketch which was finalized is still in force. It is evident that Kodanad Estate Management have obstructed detailed road without proper authority of law.

The public have the right to use the detailed road at any time. The interests of public, fairly and justice require that, the Kodanad Estate Management is restrained from levying fees for entry of vehicles or issuing of passes and are restrained from obstructing the public from using the road either by foot or by vehicle at any time.

I do hereby direct and require you to remove obstruction in the detailed road in

R.S. No. 139/1,155/3, 4,159, 160/1, 4, 5 and 6 connecting the Kodanad - Kotagiri road to the hamlets referred above within 15 days.

If you have any objection, you are called upon to appear before me by 11.00 AM on 17.08.2007 to show cause why this order should not be made absolute.

5.4. On receipt of the said notice, the petitioner, by a letter dated 04.8.2007, questioned the right of the public over the Estate road as well as the basis on which the order of the SDM u/s 133(I)(a) Cr. P.C. was passed. In paragraph 5, it was stated by them that the concerned road is a private property wholly owned by the Kodanad Estate, which is serving as a service road to have ingress and egress to certain parts of the Estate. It was also stated that it was neither a "public road" nor a public thoroughfare. Through that letter, they also demanded copies of all documents which formed the basis for the present order. In paragraphs 11 and 12 of the said reply, they also questioned the bona fides of the Government in invoking the powers under Cr. P.C. They also stated that the President of Kodanad Panchayat Union was having enmity and animosity with the Estate.

5.5. The SDM, by his proceedings dated 03.9.2007, gave the copies of the petitions received from the public, the resolution of the Grama Sabha as well as the statements recorded from the public. With reference to the survey records and village maps, etc., he directed the petitioner to approach appropriate authorities and get certified copies. He also stated that it was only a provisional order passed u/s 133(I)(a) Cr. P.C.

5.6. The petitioners, through their counsel, filed a memo of objection dated 19.9.1997 stating that the invocation of Section 133 Cr. P.C. by the SDM was vexatious since the power u/s 133 Cr. P.C. can be exercised only in respect of a public road and there was no material to show that the SDM had satisfied himself for invoking power u/s 133 Cr. P.C. A further objection dated 20.9.2007 was also raised stating that it was not a public way and that before passing the preliminary order dated 01.8.2007, no opportunity was given to the petitioner and since they have lost confidence in the SDM, he should desist from hearing the case. They also sought for time to move this Court challenging his provisional order.

5.7. However, brushing aside these objections, the SDM, on 20.9.2007, went ahead with his enquiry and recorded the statements of three witnesses. P.W.I Ponthose was the President of the Village Panchayat and through him, documents Exs. A.1 to A.8 including Topo sketch as Ex. A.4 and the sketch maps Ex. A.5 series were marked. A statement of estimates for having provided amounts by the Panchayat Union for developing the road was also filed and marked through him as Ex. A.6 series. The notice issued by SDM was marked as Ex. A.7 and the acknowledgment was marked as Ex. A.8. It must be stated that while Exs. A. 1 to A.3 were in the knowledge of the Panchayat President but for Exs. A. 4 to A.8, he was neither its author nor had officially dealt with those

documents. But, yet, these documents were allowed to be marked through him. At the end of the deposition of P.W.I Ponthose, the SDM recorded that the petitioner's side refused to cross-examine him.

5.8. Similarly P.W.2, Arumugam, who was a resident of the hamlet, was also examined. For the first time, it was stated by him that the obstructions in the Estate Road were created by the petitioner Estate Management and the same must be removed. Ex. A.9 series, which are five receipts regarding toll paid to the Estate, was marked through P.W.2.

5.9. P.W.3 Subburaj was the Village Administrative Officer of the Kodanad Village and in his evidence, he heard from the people of the two hamlets that they are being prevented from taking their jeeps and lorries without paying the toll and the vehicles are permitted only from 6 AM to 6 PM and that the obstruction must be removed. At the end of the deposition of P.W.3, the SDM noted that no documents were marked through him.

5.10. On the strength of these materials, the SDM passed a final order dated 20.9.2007 confirming the earlier order passed u/s 133(I)(a) Cr. P.C. He also issued a consequential order u/s 141 Cr. P.C. to remove the obstruction within 24 hours failing which penalty will be imposed in terms of the Indian Penal Code. In the speaking order, he came to the conclusion that there was sufficient materials to indicate the existence of a public way and the field map shows that there was a public road. He also rejected the defence taken by the petitioner about there being no material available on this file.

5.11. In the final order dated 20.9.1997, the SDM, while considering the deposition of P.W.3, recorded as follows:

P.W.3: Subburaj, VAO of Kodanad: He said about the resistance shown by the Kodanad Estate Management for holding village panchayat meetings and also the reckless attitude of the Kodanad Estate Management.

He has deposed about the existence of the road and has produced topo sketches of the old and new survey records as well as the field measurement book (FMB) which are marked as Ex A5 series. He said that the road is a plan marked road.

[Emphasis added]

6. SDM Order under Attack:-

6.1. Mr. B. Sriramulu, learned Senior Counsel leading Mr. A. Navaneetha Krishnan, counsel for the petitioner, submitted that the SDM did not follow the procedure prescribed under Sections 133, 137 and 138 Cr. P.C. under Chapter X of the Cr. P.C. He contended that the road was situated in patta lands, which is not disputed. The present owners, from the date of purchase of the property in the year 1995, have been in full control over the Estate including the Estate Road. They permitted the public of the two hamlets the usage of the road. In so far as the vehicles passing through the Estate Road is concerned, necessarily,

they will have to pay toll for using the road maintained at their cost. When there is a permissive usage given to third parties, it is only a license. The Estate owners, in order to save the properties of the Estate, and for personal security are entitled to close the gates during night hours. He also stated that the practice of collecting toll did not start over night and it has been in existence ever since the Estate was taken over in the year 1995. He also filed certain documents in the form of typed book showing that such practices are adopted by many Estate Managements in the Nilgiris District. In that paper book, various photographs were filed to show that many Estate Managements in their Estate Roads, have imposed restrictions on the right of passage by public.

6.2. The first receipt in Ex. A.9 series was of the year 1997. The practice adopted by the Estate Management was never objected to over the last 12 years and, therefore, there was no immediate provocation for exercising emergency powers u/s 133 Cr. P.C. He also submitted that there was no public nuisance in the form of an obstruction in a public road and invocation of power u/s 133 Cr. P.C. was a clear abuse of process of law.

6.3. Further, he submitted that the SDM did not state in the impugned order as to when the nuisance was created. He also submitted that the present action of the respondent was part of a larger design to restabilise the Estate Management and to give constant pin pricks so that they cannot enjoy the benefits from the Estate. Apart from the allegation of mala fides, he also submitted that the demand of the people including the resolution passed by the Grama Sabha, marked Exs. A.1 to A.3, will clearly show that the people only wanted acquisition of the Estate Road for a free passage at all times as a permanent solution.

6.4. Further, the learned Senior Counsel contended that the substance of the three documents clearly shows that there was no obstruction which requires the invocation of powers under Chapter X of the Code of Criminal Procedure. For invoking powers u/s 33(I)(a) Cr. P.C. there must have been a public nuisance created so as to attract the provision. The SDM did not render any finding with reference to the starting point of the nuisance for invoking the emergency power.

6.5. He further submitted that the demand for a free passage by any person through a private land is not contemplated in law and if it is permitted, it will be licensing trespass into a private land, which, otherwise, is an illegal act as per the penal laws. Further, by invoking the powers u/s 133 Cr. P.C. a new right cannot be created, viz., free right of passage inside a private land. He also submitted that if there is any serious dispute with reference to claim or entitlement of party, then that party must be directed to approach the Civil Court to establish their rights. In this case, by an interim response filed by the petitioner Management before the SDM, they had clearly pointed out that the petitioner is a private estate and the road exclusively belonged to them. When such denial of a right is made by a party before the SDM and in the absence of the other party establishing their right by credible materials, the SDM should have stayed his order u/s 137(2) Cr. P.C. and relegated the parties to the Civil

Court and should have stayed his own preliminary order dated 01.8.2007 as contemplated under the said provision.

6.6. The learned Senior Counsel also submitted that a reading of the impugned order does not show that the SDM had not exercised any discretion enjoined upon him by the statute. Apart from this, he also took exception to the SDM taking cognizance of a matter upon certain representations, which were never addressed to him and even in Exs. A.1 to A.3, there was no endorsement of the Collector referring the matter for an action by the SDM. Further, he took serious exception to the order passed by the SDM. He argued that while recording the deposition of P.W.3, though it was recorded that no documents were marked through him but, in the final order, it is found that Ex. A.5, topo sketch and the survey records were produced by him. This will clearly give a falsity to the impugned order as well as raise doubts about the genuineness of the evidence recorded by the SDM. He also referred to certain decisions of several High Courts and the Supreme Court dealing with Section 133 Cr. P.C.

6.7. The learned Senior Counsel also submitted that the petitioners have not been given reasonable opportunities for defending themselves either at the stage of preliminary enquiry or at the stage of final order despite requests having been sought. He also submitted that the SDM who belongs to the Indian Administrative service, was a North Indian and unfamiliar with Tamil and was yet to pass the Tamil language test for getting his probation declared. But yet in the end of depositions of P.Ws. 1 to 3, he had noted down with his own hand writing, which is as follows:

Taken down by my PA to my dictation in open court. Read over and interpreted to witness and admitted by the witness to be correct.

He questioned as to how a person who does not know Tamil, can record such a statement. He submitted that this will show that he was dancing to the tunes of some other forces working behind him.

6.8. The learned Senior Counsel further submitted that Ex. A.6 series is a Panchayat Union document regarding estimate of expenditure spent on laying various roads during the year 1995-96 under the JVVT scheme. The caption of the document shows that it was only an estimate for up-keeping the roads. The relevant endorsement shows that it refers to the expenditure for laying approach road to Anna Nagar. But that does not mean that it was done in the private road belonged to the Estate and till date, it was the Estate which was maintaining the Road. But the SDM had placed reliance upon the said document for the purpose of holding that it was a "public road".

6.9. He contended that such a sweeping conclusion reached without there being any material evidence, is a clear case of perversity. Further, the SDM had failed to see that the FMB and topo sketch are not documents showing any ownership of property and they only show the prior existence of a road and it was not a case of any of the party to the dispute that it was a "public road" within the

meaning of Section 2(28) of the Panchayat Act. The conclusion reached by the SDM in the impugned order is a special plea taken by him on behalf of the persons, who set the petition in motion. In that view of the matter, even the materials gathered by the SDM, including oral and documentary evidence taken together, either prove the existence of any public road or that a public nuisance was created recently by blockage of the road justifying the imperative invocation of Section 133 Cr. P.C.

6.10. He contended that in fact, the demand of the local people was for a permanent solution to the problem and they were seeking for a toll free road opened to public at all times. This is essentially a political demand which the Government will have to address and must solve it on a long term basis in terms of the legal provisions available and there was no emergency situation to invoke Section 133 Cr. P.C. so as to render justice to a problem which was in existence at least for 12 years even as per the petition sent by the same villagers.

7. Defence put up by the State:-

7.1. Mr. G. Masilamani, learned Advocate General leading Mr. Babu Muthu Meeran, learned Additional Public Prosecutor, submitted that the Estate Road was situated in patta lands having access to the public and there are nearly 120 families in two hamlets and they were also cultivating Tea Plantations in 200 acres of poramboke lands and this is the only access to their hamlet. The Estate was in existence for more than 100 years and in the last 40 years, the people who made in the two hamlets as their home, did not have any problem. Only during 1995, the present owners, after coming into possession, started setting up obstructions on the two ends of the road and blocked free passage for the people to go in their vehicles.

7.2. He submitted that when the people of the village gave complaints about the obstructions of a free way, the authorities cannot keep quiet and, therefore, the SDM had, rightly, invoked powers u/s 133 Cr. P.C. The road, on the face of the materials produced, was clearly a thoroughfare and de hors the fact that it was on the patta land, it is the only access to the people to cover a distance of 2.5 Kms. The SDM, invoking his power u/s 133 Cr. P.C. must necessarily act with equity and justice and he cannot shirk his responsibilities when serious complaints of obstruction of a way was erected by the petitioner. He also submitted that the materials on record justify the conclusions reached by the SDM. With reference to observation in the order impugned that documents were marked through P.W.3, it was only a mistake found in the order of the SDM. He also submitted that the petitioners, despite grant of opportunities, have not utilised the same and were kept on asking for documents, which are irrelevant for determination of the present case. During the hearing, they had also misbehaved with the authority which necessitated in filing a First Information Report against one lawyer appearing for the petitioner.

7.3. Learned Advocate General further submitted that though a finality is

attached to the order passed by the SDM u/s 133(2) Cr. P.C. it does not prevent the Estate Management from moving a Civil Court to establish their exclusive proprietary right and to prevent the people from entering into their private property. He also submitted that the revisional jurisdiction conferred on this Court is very limited and this Court should not interfere with the order passed by the SDM.

7.4. With reference to the SDM not referring the case for adjudication by a Civil Court in terms of Section 137(2) Cr. P.C. he submitted that except for a bald denial by the petitioner management about the right of the complainants, they have not produced any credible materials before the SDM so as to arrive at a satisfaction as required u/s 137(2) Cr. P.C. and, therefore, the case has not been rightly sent to the Civil Court. In this regard, he also cited decisions of various High Courts and Supreme Court.

8. Interveners' submissions:-

8.1. Mr. P. Wilson, learned Assistant Solicitor General of India filed two sets of impleading applications for impleading certain villagers residing in the hamlets as party respondents to these Criminal Revision Petitions. This was on the basis that they were the original complainants and, therefore, they were entitled to be heard on this matter.

8.2. Though names of 12 residents of the two hamlets were pointed out in Criminal M.P. Nos. 2 and 3 of 2007, in both the Criminal Revision Petitions, no vakalat has been filed on their behalf. One Arumugam, son of Palaniappan, who had sworn to the affidavit in support of the petition, was not a signatory to the complaint in Exs. A.1 to A.3. Further, for impleading third parties in a revision petition u/s 397 Cr. P.C. prior role and serious interest must be shown. Therefore, the learned counsel was informed that if he wanted to make submissions on legal issues, he was at liberty to do the same. Accordingly, he submitted some more decisions of the various High Courts and Supreme Court which are more repetitive in nature. He also submitted that he will adopt the arguments of the learned Advocate General appearing for the State.

8.3. He also submitted that the term "way" found u/s 133 (1)(a) Cr. P.C. will mean that anyway which may be lawfully used by the public. Lawful use by the public will bring even a private property within the ambit of the section. The expression public or public place should be understood in a larger sense. It is in this context, this Court have to examine the rival contentions made by the parties.

9. Constitutional issues raised:-

9.1. Before going into the provisions of the Code of Criminal Procedure, it is relevant to refer to the constitutional issues raised by the counsel for the Interveners regarding the right of a citizen to hold private property and to enjoy the rights without being affected by any restriction imposed by the State.

9.2. Mr. Wilson, learned Assistant Solicitor General of India representing the Interveners submitted that access to Road and its usable right is a fundamental right guaranteed under Article 19 (1) read with 21 of the Constitution and for this purpose, he relied upon the judgment of the Supreme Court State of Himachal Pradesh v. Umed Ram Sharma [(1986 X2 SCC 68] and particularly, referred to the following passage found paragraph 11 of the judgment:

Para 11: It appears to us that in the facts of this case, the controversy lies within a short compass. It is well settled that the persons who have applied to the High Court by the letter are persons affected by the absence of usable road because they are poor Harijan residents of the area, their access by communication, indeed to life outside is obstructed and/or prevented by the absence of road. The entire State of Himachal Pradesh is in hills and without workable roads, no communication is possible. Every person is entitled to life as enjoined in Article 21 of the Constitution and in the facts of this case read in conjunction with Article 19(1)(d) of the Constitution and in the background of Article 38(2) of the Constitution every person has right under Article 19(1)(d) to move freely throughout the territory of India and he has also the right under Article 21 to his life and that right under Article 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself. These propositions are well settled. We accept the proposition that there should be road for communication in reasonable conditions in view of our constitutional imperatives and denial of that right would be denial of the life as understood in its richness and fullness by the ambit of the Constitution. To the residents of the hilly areas as far as feasible and possible society has constitutional obligation to provide roads for communication.

9.3. This Court is unable to understand as to how this judgment is relevant to the facts of the present case. In that decision, the direction was given to the State to provide funds for laying a road after taking note of the fact that certain people were living in the hilly terrains were not having access to outside road. In fact, in that case, the question also arose as to how far the Constitution of India is governed by the Montesquieu system of separation of powers.

9.4. In paragraph 40 of the said judgment, the question was not answered as it Was not relevant to that case. However, in the recent past, in more than one judgment, the Supreme Court had reemphasized the Montesquieu doctrine as being applicable to constitutional review by Courts and it is unnecessary to cite any decisions in this regard.

9.5. In any event, whether the law applicable to public sphere is available to the private sphere and how far they are amenable to writ jurisdiction came to be considered by the Supreme Court in Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, .

9.6. In that decision of the Supreme Court, in his concurring opinion, Mathew, J. referred to the decision of the U.S. Supreme Court in *Marsh v. Alabama* [(1946) 326 US 501] and discussed the effect of that decision in respect of a private Corporation in our Constitutional scheme. The relevant passages found in paragraphs 94 and 95 are extracted below:

Para 94: "In *Marsh v. Alabama* a corporation owned a "company town". Marsh, a Jeho Vah's witness offered his pamphlets and preached his doctrine on one of the town corners. He was arrested for trespassing by one of the company guards, was fined five dollars and the case went all the way up to the Supreme Court. On straight property logic, Marsh, of course was trespassing; he was an unwanted visitor on company's real estate. But, Court said, operation of a town is a public function. Although private in the property sense, it was public in the functional sense. The substance of the doctrine there laid down is that where a corporation is privately performing a "public function" it is held to the constitutional standards regarding civil rights and equal protection of the laws that apply to the State itself. The Court held that administration of private property of such a town, though privately carried on, was, nevertheless, in the nature of a "public function", that the private rights of the corporation must therefore be exercised within constitutional limitations, and the conviction for trespass was reversed.

Para 95: But how far can this expansion go? Except in very few cases, our Constitution does not, through its own force, set any limitation upon private action. Article 13(2) provides that no State shall make any law which takes away or abridges the rights guaranteed by Part III. It is the State action of a particular character that is prohibited. Individual invasion of individual right is not, generally speaking, covered by Article 13(2). In other words, it is against State action that fundamental rights are guaranteed. Wrongful individual acts unsupported by State authority in the shape of laws, customs, or judicial or executive proceeding are not prohibited.

Hence, the submission made on behalf of the Interveners that this Court must invoke some constitutional powers to provide access to a private road is not valid.

10. The Scope of the revisional powers of the High Court:-

10.1. It was argued on behalf of the State that the revisional powers vested on this Court u/s 397 Cr. P.C. is Limited and this Court should not invoke such jurisdiction when the authority had rendered justice to parties and the petitioner had not shown that the order resulted in a "failure of justice" had occasioned due to irregularities in the proceedings. He also referred to judgments of various High Courts and it is not necessary to refer to them since the said issues have been authoritatively concluded by the decisions of the Supreme Court which are reported hereunder.

10.2. The learned Advocate General, after referring to the decision of the Supreme Court in *State of Madhya Pradesh Vs. Bhooraji and Others*, , stated that

the procedural irregularity found in the order of the Magistrate is covered by Section 465 Cr. P.C. and unless failure of justice is shown, any irregularity in the proceedings of the trial Court will remain unaffected by procedural lapses. This case has no relevance to the case on hand. It is not a mere procedural violation that is complained of but a substantive violation by the SDM in taking cognizance of a petition u/s 133 is questioned before this Court.

10.3. The Constitution Bench of the Supreme Court in its decision reported in *Babulal Parate Vs. State of Maharashtra and Others*, dealt with the scope of the revisional powers of the High Court. Though the said decision dealt with the case of an order emanating u/s 144 Cr. P.C. the scope of Section 133 Cr. P.C. is almost the same as all those provisions come under Chapter X of the Cr. P.C. The relevant passage found in paragraph 22 may be extracted below:

Para 22: ...Again, though no appeal has been provided in the Code against the Magistrate's order u/s 144, the High Court has power u/s 435 read with Section 439 of the Code to entertain an application for the revision of such an order. The powers of the High Court in dealing with a revision application are wide enough to enable it to quash an order which cannot be supported by the materials upon which it is supposed to be based. We may point out that sub-section (1) of Section 144 requires a Magistrate who makes an order thereunder to state therein the material facts upon which it is based and thus the High Court will have before it relevant material and would be in a position to consider for itself whether that material is adequate or not....

10.4. Similarly, in the decision in *State of Bihar Vs. Kamla Kant Misra and Others*, in paragraph 27, the Supreme Court had observed as follows:

Para 27: ...In other words in order to be a reasonable restriction, the same must not be arbitrary or excessive and the procedure and the manner of imposition of the restriction must also be fair and just. Any restriction which is opposed to the fundamental principles of liberty and justice cannot be considered reasonable.

11. Scope and sweep of Section 133 Cr. P.C.:-

11.1. In order to appreciate the contentions made by the learned counsel for the parties, it is necessary to refer to the relevant provisions of Sections 133(1), 137 and 138 Cr. P.C.

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) to (f).... Omitted.

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 animator tree, within a time to be fixed in the order-

(i) to remove such obstruction or nuisance; or

(ii) to (vi).... Omitted.

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.

137. Procedure where existence of public right is denied. - (1) Where an order is made u/s 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 u/s 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 u/s 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.

11.2. The provisions contained in Chapter X Cr. P.C. came to be interpreted in several decisions of the Supreme Court and those decisions are referred to

hereunder: In the judgment relating to Kachrual Bhagirath Agrawal and Others Vs. State of Maharashtra and Others, , the Supreme Court dealt with Chapter X of the Code of Criminal Procedure. Speaking for the Bench, Arijit Pasayat, J., in paragraphs 10 and 11, observed as follows:

Para 10: ...The provisions of Chapter X of the Code should be so worked as not to become themselves a nuisance to the community at large. Although every person is bound to so use his property that it may not work legal damage or harm to his neighbor, yet on the other hand, no one has a right to interfere with the free and full enjoyment by such person of his property, except on clear and absolute proof that such use of it by him is producing such legal damage or harm. Therefore, a lawful and necessary trade ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community. Proceedings u/s 133 are not intended to settle private disputes between different members of the public. They are in fact intended to protect the public as a whole against inconvenience. A comparison between the provisions of Sections 133 and 144 of the Code shows that while the former is more specific, the latter is more general. Therefore, nuisance specially provided for in the former section is taken out of the general provisions of the latter section. The proceedings u/s 133 are more in the nature of civil proceedings than of criminal nature....

Para 11: ...There must, at any rate, be an imminent danger to the health or the physical comfort of the community in the locality in which the trade or occupation is conducted. Unless there is such imminent danger to the health or physical comfort of that community or the conduct of the trade and occupation is in fact injurious to the health or the physical comfort of that community, an order u/s 133 cannot be passed....

(Emphasis added)

11.3. Even earlier in Vasant Manga Nikumba v. Baburao Bhikanna Naidu , the same learned Judge had opined as follows in paragraphs 3 and 5:

Para 3: ...The object and public purpose behind Section 133 is to prevent public nuisance that if the Magistrate fails to take immediate recourse to Section 133 irreparable damage would be done to the public. The exercise of the power should be one of judicious discretions objectively exercised on pragmatic consideration of the given facts and circumstances from evidence on record. The proceedings u/s 133 is not intended to settle private disputes or a substitute to settle civil disputes though the proceeding u/s 133 is more in the nature of civil proceedings in a summary nature."

Para 5: ...No action can be taken under this section where the obstruction or nuisance has been in existence for a long period and the only remedy open to the aggrieved party was to move the civil court. It was also held that Section 133 is attracted only in cases of emergency and immediate danger to the health or physical comfort of the community. Accordingly on the facts in that case, it was

held that there was no immediate danger or emergency for the removal of the structure offending in that case. It is also settled law that recourse to Section 133 could not be a substitute for the civil proceedings and the parties should have recourse to the civil remedy available and should not be en-course (sic encouraged) to taking recourse to the provisions of Section 133 of the Code.

[Emphasis added]

11.4. In fact, in the Vasant Manga Nikumba's case (cited supra), the Supreme Court quoted with approval a judgment of this Court reported in T.K.S.M. Kalyanasundaram Vs. Kalyani Ammal and Another, .

11.5. Once again, in the decision relating to State of M.P. Vs. Kedia Leather and Liquor Ltd. and Others, , the Supreme Court dealt with the scope of Section 133 Cr. P.C. The relevant passage found in paragraph 8 of the judgment may be reproduced below:

Para 8: Section 133 of the Code appears in Chapter X of the Code which deals with maintenance of public order and tranquility. It is a part of the heading "Public nuisance". The term "nuisance" as used in law is not a term capable of exact definition and it has been pointed out in Halsbury's Laws of England that:

even in the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort.

....To bring in application of Section 133 of the Code, there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc. The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable damage would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time....

[Emphasis added]

11.6. On the question that the road is a private road, the learned Advocate General referred to the judgment of the Delhi High Court reported in Shri Ram Lal and another Vs. Shri Dharam Vir, and contended that even in a private road, if public has access, when such right is obstructed, powers u/s 133 Cr. P.C. can be invoked. He referred to the following passage found in paragraph 5 of the judgment:

Para 5: 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 public. Proceedings under this Section do not affect 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.

11.7. On the contention that the petitioner's evidence was not recorded as required u/s 138 Cr. P.C. Mr. P. Wilson, the learned ASGI appearing for the Interveners countered the same with a judgment of this Court in P. Preman Vs. M.P. Andy, . In that case, this Court held that the party denying the public right has to produce reliable evidence when questioned related to the public rights. That case relates to the existence of a tree which the neighbor had complained that it could fall at any time and it was dangerous to personal safety and will cause damage to the property. In that context, the Executive Magistrate, who visited the spot, directed cutting of some branches which were protruding in the neighbor's property, to allow the tree to continue to exist. It was in that context, on the question whether a Magistrate under Sections 137 and 138 Cr. P.C. is obliged to record evidence, the learned Judge rejected the argument that he must record evidence and then held that since there was a local inspection by the Magistrate, there was no necessity to record any further evidence. 12. Summing up:-

12.1. Thus, by a reading Sections 133 Cr. P.C. and as interpreted by this Court and the Supreme Court through the decisions referred to above, the following proposition of law emerges:-

- (a) The order u/s 133 Cr. P.C. must be based upon material factors;
- (b) The order should be reasonable restriction and it must not be arbitrary or excessive and the procedure and the manner of imposition of restriction must be fair and just;
- (c) Proceedings u/s 133 Cr. P.C. are not intended to settle private disputes between different members of public.
- (d) Unless there is imminent danger to the physical comfort of the community, the order u/s 133 Cr. P.C. cannot be passed.
- (e) No action can be taken when the obstruction has been in existence for a long

period and Section 133 Cr. P.C. is attracted only in case of emergency and imminent danger.

(f) The proceedings u/s 133 Cr. P.C. is not a substitute for the civil proceedings.

(g) For invoking Section 133 Cr. P.C. there must be imminent danger to the property and consequential nuisance to the public.

(h) The exercise of the power should be one of judicious discretion objectively exercised on pragmatic consideration of the given facts and circumstances from evidence on record.

It is in this background, the conclusions arrived at by the SDM will have to be tested.

12.2. In the present case, the action of the SDM in taking cognizance of a complaint which did not address any question of any imminent danger or obstruction of a pathway, ought not to have taken note of by him. In addition, the petition signed by the villagers, which was addressed to the Grama Sabha and the Grama Sabha's resolution sent to the Collector wanted the State to find a permanent solution. There is no imminent threat of any obstruction had arisen.

12.3. A conjoint reading of all the Exhibits including the oral and documentary evidence clearly shows that the people of the two hamlets wanted only a free access to their vehicles and also the road being opened during night times without restriction and, therefore, there was no obstruction of passage as such for the public to use the pathway. The obstructions complained were in existence as stated by the deponents right from the year 1995 when the present management took over the Estate. It is as old as 12 years and hence, there was no occasion to use the emergency power u/s 133 Cr. P.C. by the SDM.

12.4. In any event, the complaint that the toll is being collected is not an issue coming within Section 133 Cr. P.C. and it is open to the private owners to collect toll to allow the Estate Road to be used each time when a vehicle was taken and it establishes that practice was done on license granted by the owners of the property. If it is a dispute over license conditions, then, it only relates to a civil right between the parties and the parties ought to have been relegated to the Civil Court's jurisdiction.

12.5. In the present case, even by the admission of the parties, the road was a private patta land and the public were allowed on a permissive usage of the road over the period and it does not create any public right overnight. Even assuming that such right is claimed in their favour, they should have approached the Civil Court to establish their right to free passage and ought not to have invoked the proceedings u/s 133 Cr. P.C. Further, while the complainants themselves have demanded for providing a public road, by resorting to land acquisition proceedings, in the evidence, they cannot turn back and say that they have a right to use the private road freely and resort to proceedings u/s 133 Cr. P.C. In the guise of exercising an emergency power u/s 133 Cr. P.C. the authorities

cannot create new rights in favour of the so-called complainants.

12.6. In any event, after the preliminary order was passed by the SDM and when an objection was raised in the form of an interim response that the property was a private property, the SDM should have referred the matter for a Civil Court's decision u/s 137(2) Cr. P.C. and must have stayed his own proceedings. On the contrary, in the impugned order, there is no reference to the application of mind with reference to the exercise of discretion u/s 137(2) Cr. P.C. When a valuable right of a owner of a property is at stake, merely because there is a group demand or a mob desire, the power u/s 133 Cr. P.C. cannot be used or rather misused.

12.7. The evidence placed before the SDM does not disclose that there is any imminent danger to public tranquility or peace and the complaint made by the local people is only a petition to the State to acquire the property.

12.8. It is only when the State takes steps in terms of the demand and resort to land acquisition proceedings, then the question of deciding the public purpose behind the acquisition will arise. Therefore, the argument of the learned Advocate General that this Court must read equity and justice in to the order does not hold water while scrutinizing the order u/s 133 Cr. P.C.

12.9. In the same way, the Intervener's prayer that the gates should be kept open by the orders of the Court and it is a fundamental right in terms of Articles 19 and 21 of the Constitution is also to be rejected. Such a right is not available as against a private establishment.

13. Finale:-

After going through the entire materials placed before this Court, this Court expresses its disappointment over the conduct of the respondent SDM. While the people of the locality wanted a permanent and lawful solution, the authorities including the respondent should not have resorted to short-cut solutions by having recourse to the proceedings initiated u/s 133 Cr. P.C. Hence, both the Criminal Revision petitions will stand allowed and the orders of the Sub-Divisional Magistrate dated 01.8.2007 and 20.9.2007 will stand quashed. Connected Miscellaneous Petitions are dismissed.

14. A word of advice:-

It is also needless to mention that the petitioner Estate will not deny access to the villagers of Anna Nagar and Kamaraj Nagar to use the pathway as it was done in the last 13 years with such restrictions and conditions as it may impose for utilising the Estate Road considering that it is the only access to the outside world.