

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH

AT SRINAGAR

CRM(M) No. 234/2019

CrlM No. 720/2019

Abdul Gani Hajam

...Appellant/Petitioner(s)

Through: Mr. Shafqat Nazir, Adv. with
Ms. Hina Baqal, Adv.

Vs.

Ab. Aziz Hajam

...Respondent(s)

Through: Mr. Bhat Fayaz, Adv. with
Ms. Nighat Amin, Adv.

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

ORDER

20.12.2024

1. The short controversy involved in this petition is that respondent made an application before Executive Magistrate 1st Class (Tehsildar) D. H. Pora (for short "Executive Magistrate") alleging damage to his trees and house due to flow of water towards his house from the house of petitioner. The Executive Magistrate has treated the allegations mentioned in application as public nuisance and passed the order impugned. The operative portion of which is reproduced as under:-

"The non-applicants has been directed by way of a conditional order vide dated 18.04.2016 to stop the public nuisance but he has not done so and has done repetition of the same which has great threat to the life and property of the applicants besides miscarriage of justice. The case came up for final arguments on 17.03.2018. Counsel for non-applicants reiterated the contentions raised in the objections. Adv. Syed Rouf Geelani, counsel for applicants flouted a suggestion in the open court that in order to ascertain the dispute and to come to a just convulsion of the case, the Presiding Officer and the respective counsels of both the parties should visit the spot. The offer was accepted by the non-applicants also and on 16.03.2018 visited the spot along with counsels for both the parties. The parties were also present. Indeed the contention of the applicants is very true in its entirety. Cracks have developed in the residential houses of the applicants due to the drainage of sewage/waste water of the non-applicants, which

has caused great threat to the life and property of the applicants. Keeping in view of the above facts, circumstances and the mandate of section 133 of Cr.PC, I deem it proper to direct the non-applicants to stop the public nuisance. As such the non-applicant is directed not to create any public nuisance by the drainage of sewage/waste water from his kitchen and washroom into the land and residential houses of applicants. The non-applicant is accordingly directed to construct a concrete pit for the same or allow the drainage of sewage/waste water from the back side of the residential house of Rahman Hajam of the same village within a period of 07 days from the date of receipt of this order.”

2. The petitioner challenged the order of Executive Magistrate before Principal Sessions Judge, Kulgam, in a Revision Petition, who while deciding the same observed in para 11 of the judgement as under:-

“In view of the facts of the case, it does not seem to be a case of civil nature, Neither revisionist herein has ever agitated before the Magistrate or in this Court. “Public nuisance is an act or omission which causes any common injury, danger or annoyance to public or to building in general who dwell or occupy property in vicinity.” It is mandate that before taking any action under Section 133 Cr.P.C, learned Magistrate has to satisfy that there must be a public nuisance and such nuisance should not be a private dispute between different members of the public for which proper forum in civil court. Since act of the revisionists herein thereby constructed a drainage of sewage/waste water from his kitchen and washroom into the land and residential houses of respondents herein”.

3. Principal Sessions Judge, Kulgam, however, despite mentioning that the dispute between parties is a ‘private dispute’, upheld order of Executive Magistrate and dismissed Revision petition vide order dated 15.05.2019.
4. Heard learned counsel for the parties and perused the material on the file.
5. The Executive Magistrate before passing the impugned order ought to have determined whether allegations contained in application of respondent amounted to public nuisance or not, and whether definition of public nuisance given in Criminal Procedure Code was attracted or not. However the Magistrate without examining the contents of application has taken the dispute as public nuisance and passed the order impugned. The petitioner challenged the order of Executive Magistrate in a Revision Petition before Principal Sessions Judge, Kulgam, who while deciding the same has first mentioned dispute being private, but finally dismissed the Revision petition and upheld the order of Executive Magistrate.

6. Perusal of impugned orders reveals that the Executive Magistrate and learned Principal Sessions Judge, without following the provisions of Section 133 Cr.P.C. have passed the impugned orders. Section 133 Cr.P.C., provides complete mechanism how to deal with public nuisance. The conditional order regarding the removal of nuisance under Section 133 Cr.P.C. requires presence of public nuisance at public place; otherwise, the Executive Magistrate has no power to pass such an order.
7. Learned counsel for the petitioner contends that the dispute between the parties being private, therefore, the provisions of Section 133 Cr.P.C. are not applicable. He in support of his contention has placed reliance on *Shiraz Cinema v. Srinagar Municipal Council*, reported in *1987 Legal Eagle 28*. Para 5 of which is profitable to be reproduced as under:

“A perusal of the application would clearly show that the grievance made by the respondent No.2 was a personal grievance and the nuisance complained of a private one. Section 133 of the Criminal Procedure Code provides for the removal of a public nuisance. The purpose and object of Section 133 Cr. P.C. is not intended to settle private disputes between two members of the public but is intended to protect the public as a whole against the alleged inconvenience. The proceedings under section 133, Cr. P.C. can be resorted to in the interests of the public and cannot be made a substituted litigation in the civil courts in order to secure statement of private disputes, which no not affect the members of the public in general. If the alleged abstraction or nuisance exists on some private property resort cannot be had to the provisions of Sections 133 Cr. P.C. Unless and until it is proved that the nuisance complained of was a public nuisance, the District Magistrate or any another Magistrate contemplated by the provisions of Section 133 Cr. P.C. does not get the jurisdiction to proceed with the case. Unless it is proved that the conduct of any trade or occupation was injurious to the health or physical comfort of the community no action can be initiated under Section 133, Cr. P.C. It is not the personal comfort or the health of an individual which, is relevant for the purposes of initiating proceedings under Section 133 Cr. P.C. but the health or physical comfort of the community at large should be alleged to be involved. In the case of private nuisance the remedy available to the aggrieved party may be the remedy of a civil action but no proceedings under Section 133 Cr. P.C. can be initiated. The District Magistrate while dealing with the alleged nuisance has the powers under Section 133 Cr. P.C. alone and in the absence of the alleged inconvenience to the community he would not be justified in initiating or continuing the proceedings under that section. The learned counsel appearing for the respondent No.2 has not been in a position to show as to how the alleged nuisance was a public nuisance

and not a private nuisance to the respondent No.2 alone. Once it was proved on the basis of the facts submitted that the nuisance complained of was a private, the District Magistrate has no jurisdiction to proceed in the matter any further. The proceedings initiated by the District Magistrate for removal of the so called nuisance were, therefore, without jurisdiction and the District Magistrate was not justified in rejecting application of the petitioner.”

8. Having regard to the above legal position and facts and circumstances of the present case, this petition is ***allowed*** and order dated 19.03.2018, passed by Executive Magistrate 1st Class, D. H. Pora, Kulgam, and the order dated 15.05.2019, passed by learned Principals Sessions Judge, Kulgam, are ***set aside***.
9. It may not be out of place to mention here that however, respondent is at liberty to seek redressal of his grievance, if he chooses so.
10. **Disposed of** in terms of above.

(VINOD CHATTERJI KOUL)
JUDGE

SRINAGAR

20.12.2024

Manzoor