

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 845 OF 2015

KUSUM BHAVANJI BHATE
VERSUS
SUB. DIVISIONAL OFFICER, AMALNER AND ORS

...
Advocate for Petitioner : Mrs Almas Abdul Quader
APP for Respondent-state: Mr S W Mundhe
Advocate for Respondent 3 : Mr B R Warma

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CORAM : V.K. JADHAV, J.
Dated: November 18, 2016

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PER COURT :-

1. Heard finally with the consent of the parties, at admission stage.
2. Being aggrieved by the judgment and order passed by the S.D.O., Amalner dated 8.1.2013 in a case bearing Cr.P.C./133/SR/02/2012 and the judgment and order passed by the Additional Sessions Judge, Amalner dated 17.6.2015 in criminal revision no.16/2013 confirming thereby the order passed by the S.D.O., the original applicant preferred this writ petition.
3. Brief facts, giving rise to the present writ petition are as follows :-

The petitioner had filed an application bearing no.2/2012 under the provisions of section 133 (1) (b) of Cr.P.C. for removal of the nuisance caused due to running of a flour mill by the respondent, adjacent to the complainant's dwelling, house which is injurious to the health and physical comfort of the petitioner as well as public at large. The learned S.D.O. has issued notice to respondent and after hearing both the parties by impugned judgment and order dated 8.1.2013 dismissed said application. Being aggrieved by the same, the applicant has preferred criminal revision before the Sessions Court and the Learned Additional Sessions Judge, Amalner by its impugned judgment and order dated 17.6.2015 in criminal revision no.16/2013 dismissed revision petition by confirming the order passed by the S.D.O. Hence, this writ petition.

4. The learned counsel for the petitioner submits that in terms of provisions of section 133 (1) (b), the Sub Divisional Officer on receiving report of the police officer or any other information and on taking such evidence as he thinks fit, consider that conduct of any trade or

occupation, or keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequences such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated. Learned counsel submits that, in view of the provisions of Section 138 of Cr.P.C. wherein the procedure is prescribed, the learned S.D.O. is required to take evidence in the matter as in a summons case. The learned S.D.O. ought to have recorded the finding about nuisance as complained by the petitioner. On the other hand, the learned S.D.O. has tried to examine whether the permission to run Flour Mill to the respondent was rightfully granted and whether at the time of publication of the notice calling objections for running Flour Mill, if anybody including the petitioner has taken any objection. Learned counsel submits that inquiry in that regard is out of the scope of section 133 and the entire exercise was futile, unnecessary and unwarranted. Learned counsel submits that Additional Sessions Judge has not gone through the provisions of section 133 (1) (b) and 138 of Cr.P.C. Learned counsel

for petitioner submits that, even though a permission was granted to run a mini Flour Mill, respondent is running a big Flour Mill with various attachments, causing thereby the sound nuisance as well as air pollution in the vicinity.

5. Learned counsel for respondent no.3 submits that respondent had purchased plot no.79/3 which is adjacent to the dwelling house of the petitioner from her relatives and therefore, civil litigation was going on between the petitioner and respondent no.3 in the court. Learned counsel submits that, neighbours have not taken any objection and even petitioner herself had not taken any objection when competent authority has called upon the persons residing in the said area to submit their objections if any by publishing a public notice in a daily newspaper. Learned counsel submits that, due to said civil litigation in order to harass and pressurize the respondent, petitioner has filed a false complaint.

6. I have also heard the learned APP for the

respondent State.

7. On careful perusal of the impugned judgment and order passed by the S.D.O. it is manifest that S.D.O. has not recorded finding in respect of the nuisance as alleged by the petitioner in her complaint. On the other hand, S.D.O. has examined whether permission to run Flour Mill granted in favour of the respondent was rightfully granted or not. Learned S.D.O. has observed that the neighbours have not taken any objection for running of the said Flour Mill. None of the neighbours have raised any objection with regard to the said nuisance and that petitioner in order to settle her score with respondent filed a false complaint.

8. On perusal of the record and proceeding, it appears that, permission to run a Flour Mill granted in favour of the respondent is placed on record and it appears from the said permission and application submitted for obtaining said permission that respondent wanted to run a mini Flour Mill and accordingly permission was granted on his application. The learned

S.D.O. has not taken recourse to the provisions of section 138 of Cr.P.C. nor bothered to inspect locally himself or through any officer to find out whether respondent in fact runs or running a big Flour Mill contrary to the permission granted by the authority.

9. For the sake of present discussion, Section 133 (1) (b) and section 138 of Cr.P.C. are reproduced herein below :-

Section 133 (1) (b)

“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).....

(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).....

(d).....

(e)....
(f)....
(2)....”

Section 138 of Cr.,P.C.

“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.”

10. In light of the provisions of section 133 (1) (b), the S.D.O. is bound to record the finding about nuisance and in view of the provisions of sub section (1) of section 138 of Cr.P.C., the S.D.O. is required to take evidence in the matter as in summons case. In the instant case, S.D.O. has not granted such opportunity to the petitioner to adduce evidence to substantiate allegations levelled in the complaint. The learned Additional Sessions Judge has also not considered this aspect and

dismissed the revision solely on the ground that at the time of publication of the notice for granting permission to run a Flour Mill petitioner had not raised any objection. It thus appears that entire approach of the S.D.O. and Additional Sessions Judge is not legal, proper and correct. Consequently, this Court left with no other choice/alternative but to remand the matter. Hence, following order is passed.

O R D E R

- I] Criminal Writ Petition is hereby partly allowed.
- II] The Judgment and Order passed by the S.D.O., Amalner Division, Amalner dated 8.1.2013 in Case No. Cr.P.C./133/SR/02/2012 and the Judgment and Order passed by the Additional Sessions Judge, Amalner on 17.6.2015 in Criminal Revision No.16/2013 confirming thereby the order passed by the S.D.O. are hereby quashed and set aside.
- III] The Complaint No. Cr.P.C./133/SR/02/2012 filed by the petitioner is restored to its original number with the following directions :-

a] The S.D.O., Amalner shall dispose off the complaint in the light of the observations made herein above and in accordance with the provisions of section 133 (1) (b) read with section 138 of Cr.P.C.

b] The S.D.O. shall dispose off the complaint as expeditiously as possible preferably within a period of ONE MONTH from the date of receipt of record and proceeding.

IV] The parties shall appear before the S.D.O., Amalner on 2.12.2016.

V] Record and proceeding be returned forthwith.

VI] Criminal Writ Petition is accordingly disposed off.

(V.K. JADHAV, J.)

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aaa/-