

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

CRM No.M-10188 of 2012 (O&M)
Date of decision: January 29, 2016.

Digvijay Kumar

... **Petitioner**

v.

Ashok Kumar

... **Respondent**

CORAM: **HON'BLE MR. JUSTICE KULDIP SINGH**

Present: Mr. D.S. Bali, Senior Advocate with
Mr. Aman Vashishth, Advocate for the petitioner.

Mr. Vivek Thakur, Advocate &
Mr. Divanshu Jain, Advocate for the respondent.

1. *Whether Reporters of local papers may be allowed to see the judgment ?*
2. *Whether to be referred to the Reporters or not ?*
3. *Whether the judgment should be reported in the Digest?*

Kuldip Singh, J. (Oral):

Impugned in the present petition is the order dated 1.3.2012 passed by learned Additional Sessions Judge, Yamuna Nagar at Jagadhari affirming the order dated 17.3.2009 passed by learned Sub Divisional Magistrate (C) (SDM), Jagadhari vide which, in an application filed under Section 133 Cr.P.C., the defendant was directed to remove the illegal encroachment/obstructions over the public place, i.e., street with immediate effect, otherwise, the costs to remove the illegal encroachments shall be borne by the defendant.

I have heard learned Counsel for the parties.

The short point raised before this Court is that the SDM, Jagadhari issued the conditional order for the removal of illegal

encroachments. The present petitioner, defendant, filed the written statement taking the objections. On the next date, i.e., 17.3.2009 no body came present on behalf of the defendant and therefore the SDM, relying upon the report of Block Development & Panchayat Officer (BDPO), Jagadhari passed the impugned order.

Learned Counsel for the petitioner has drawn the attention of this Court towards the provisions of Sections 137 and 138 of the Code of Criminal Procedure. It has been argued that when the existence of public road had been denied, the Magistrate was required to record the evidence in the manner as in summons case. Section 138 Cr.P.C. provides as under:-

“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(2) If the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may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.”

In the present case, it comes out that after the filing of written statement, the counsel for the defendant did not appear. Application Annexure P7 shows that on the same date, the counsel for the defendant appeared and moved an application to address the arguments, which was dismissed on the ground that the order has already been passed. Therefore, it is apparent that in this case, procedure laid down in the Code of Criminal Procedure was not

followed. Therefore, the impugned orders passed by the SDM, Jagadhari as also by the learned Additional Sessions Judge, Yamuna Nagar at Jagadhari are not in accordance with law. The same are set aside. Case is remanded back to the court of SDM, Jagadhari. SDM, Jagadhari is directed to follow the procedure as laid down under Sections 137 and 138 of the Code of Criminal Procedure and thereafter decide the matter.

Parties through counsel are directed to appear before the SDM, Jagadhari on 2.3.2016.

SDM, Jagadhari is directed to decide the matter expeditiously.

January 29, 2016.
kadyan

[Kuldip Singh]
Judge