

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of decision: 07.07.2017

CRM-M No.5115 of 2017

Bijender & others

...Petitioners

Vs.

State of Haryana & others

...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Arun Luthra & Mr. Akshay Jindal, Advocates,
for the petitioners.

Mr. Vikas Chopra, Sr. DAG, Haryana.

Mr. Shamsher Singh, Advocate, for respondents 4 & 5.

Mr. Sumit Gupta, Advocate, for respondents 6 to 8.

RAJIV NARAIN RAINA, J.

The petitioners have preferred the instant petition under Section 482 Cr.P.C. for quashing the order dated 03.02.2017 passed by the Additional Sessions Judge, Sonapat, whereby the revision petition preferred by the petitioners against the order dated 25.07.2016 passed by the Sub Divisional Magistrate, Gohana in proceedings under Section 133 Cr.P.C., has been dismissed.

The contention of the petitioners is that the basic order passed under Section 133 Cr.P.C. suffers from a legal infirmity inasmuch as the conditional order was not passed before passing the final order regarding the demolition of the brick wall in dispute. When the matter was taken up by the Sub Divisional Magistrate on 10.08.2015 and notice was issued to the respondents for 12.08.2015, the petitioners – revisionists appeared and the

case was adjourned to 19.08.2015 for issuing conditional notice. On the next date, the Sub Divisional Magistrate observed that conditional order was not required and the case was adjourned to 25.08.2015 for reply. No reply was filed by the petitioners and, therefore, police report was called from the Station House Officer concerned for 09.09.2015. After obtaining police report and inspecting the spot, the Sub Divisional Magistrate passed the impugned order against which the petitioners went up in revision. The Sub Divisional Officer inspected the property in dispute on 21.07.2016 and found that a brick wall had been constructed in the middle of the street by the revisionists. The street was a public passage serving not only the parties to the lis, but others living in the vicinity, who used it for passing to and from their residences and for parking tractors etc.

It is not disputed by the petitioners that the passage was paved by the Gram Panchayat for common use. The Additional Sessions Judge has on the contention that a conditional order was a pre-requisite for final order has taken the view that such an order could have been passed before passing the absolute order, but at the same time, the impugned order cannot be set aside on this technical ground when it was not. The need for passing conditional order is to provide time to the opposing party to remove the encroachment himself. It has been recorded by the Additional Sessions Judge that in the present case the impugned order was passed on 04.08.2016 and the revisionists had already availed six months time, but had not removed the encroachment. The Court has taken the view that no prejudice had been caused to the revisionists by not passing a conditional order before passing absolute order.

One of the petitioners appeared in person in Court at the hearing of this petition and was identified by the counsel for the petitioners, admitted that the petitioners had raised the wall about three years ago. On a query, whether they own the land beneath the wall, he is unable to produce any proof except to say that land record was not maintained within the *Lal Dora* of the village. It is one thing to say that land record is not maintained within *lal laqir* of a village, but it is another to assert a right of private use as against easementary rights of the residents of the mohalla.

It is not only disputed, but it has been admitted that the common passage was paved by the Gram Panchayat at its expense, which could not have been only for the private use of the petitioners. The residences of the petitioners and the respondents face each other with the open passage in between. Any encroachment on a public street is liable for removal as it obstructs free flow of traffic and causes public nuisance and diminishes utility of the stake holders to access their land and residences.

Proceedings under Section 133 Cr.P.C. are summary in nature and if the Sub Divisional Magistrate depended on the police report and made a personal visit on the spot, I would go by his vision. The petitioners clearly had no right to raise construction on the passage. In Suhelkhan Khudyarkhan & another Vs. State of Maharashtra & others, 2009 (3) RCR (Criminal) 36, the Supreme Court has held that the object and purpose behind Section 133 Cr.P.C. 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 danger would be done to the public. The provision is addressed to nuisance in existence, and the Supreme Court clarified that sometimes there is confusion between Section 133 and Section 144 of the Cr.P.C. and

the latter is a more general provision while the former is more specific. While the order under Section 133 is conditional, the order under Section 144 is absolute. The proceedings are more in the nature of civil proceedings than criminal proceedings.

Where the residences of entire locality are involved, an obstruction created by the wall is a public nuisance, which causes physical discomfort to the community. If an obstruction causes hardship to the general public, it must be removed to maintain public order and tranquility.

I would, therefore, have no reason to interfere with the order passed by the Additional Sessions Judge on 03.02.2017 confirming the order passed by the Sub Divisional Magistrate on 25.07.2016 on a mere technicality that conditional order was not passed.

Consequently, the instant petition is dismissed.

07.07.2017
Vimal

[RAJIV NARAIN RAINA]
JUDGE

<i>Whether speaking/reasoned:</i>	<i>Yes</i>
<i>Whether Reportable:</i>	<i>No</i>