



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT  
RESERVED ON : 12.12.2017  
DELIVERED ON: 22.06.2018

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CORAM:

THE HONOURABLE MR.JUSTICE A.M.BASHEER AHAMED

Crl.RC(MD)No.640 of 2016  
and  
CMP(MD)No.8563 of 2016

Shahul Hameed  
Chairman and Managing Director,  
M/s.Hameed Marine Private Ltd.,  
No.2/1D, Irukkandurai Village,  
Radhapuram Taluk,  
Tirunelveli District.

: Petitioner

Vs.

1.The Sub-Collector,  
O/o.the Sub-Collector,  
Cheranmahadevi,  
Tirunelveli.

2.A.Sethuramalingam  
3.S.Nalayiram  
4.A.Senthilkumar  
5.A.Esakkimuthu

: Respondents

\*(R2 to R5 impleaded, as per order  
of this Court dated 22.02.2017.)

Prayer: Revision is filed under Section 397 r/w 401 of Criminal Procedure Code, praying to call for the records pertaining to the order in A4/11920 / 15, dated 01.09.2015 passed by the respondent and to set aside the same.

|                               |                                                         |
|-------------------------------|---------------------------------------------------------|
| For Petitioner                | : Mr.S.M.A.Jinnah                                       |
| For Respondent-1              | : Mr.C.Mayilvahana Rajendiran<br>Addl.Public Prosecutor |
| For Respondents<br>(R2 to R5) | : Ms.J.Ranjani Devi                                     |

O R D E R

This Criminal Revision has been filed praying to set aside the order passed by the respondent in A4/11920/15, dated 01.09.2015.

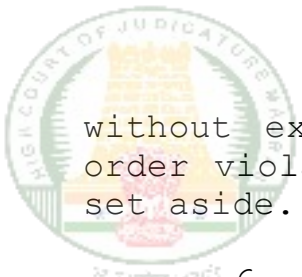


2. The Revision Petitioner herein is running a private company, doing the production of fish foods, fish oil and fish paste in the name of 'M/s.Hameed Marine Private Ltd'., situated at No.2/1D, Irukkandurai Village, Radhapuram Taluk, Tirunelveli District. In support of his business, he obtained permission and approval from the competent authorities, as per the rules and regulations. The Tamil Nadu Pollution Control Board issued a consent order, for establishment of such Industry, as per Section 25 of the Water (Prevention and Control of Pollution) Act, 1974, as amended in 1988 and also issued consent to operate the unit for the year 2016 and renewed it upto 31.03.2019, after inspecting the unit / company. The land and building plan were approved and No Objection Certificates were issued by the competent authorities to run the company. The Deputy Director of Heal Services, Tirunelveli approved the site for manufacturing fish foods holding that the site is found suitable from public health point of view. Whereas, in the meantime, the petitioner was served with a Show-cause Notice, dated 12.03.2016, issued by the first respondent herein, wherein it has been stated that various complaints were received from that public that un-breathable bad smell caused vomiting and dizziness to the people living in Irukkandurai and nearby areas and also death of two goats have also been reported, as per the enquiry report of the Tahsildar, Radhapuram, dated 09.03.2016 and to ensure the safety of public, a conditional order was passed under Section 133(1)(b) of Cr.P.C., requiring the petitioner company to close down the unit or if he objects to do so, appear before the first respondent on 15.03.2016 and show-cause why this order should not be made absolute.

3. In compliance of the show-cause notice with conditional order dated 12.03.2016, the petitioner appeared on 15.03.2016 and filed his objections. Thereafter, the impugned final order has been passed by the first respondent under Section 138 of Cr.P.C., on 01.09.2016, directing the petitioner to stop functioning of 'M/s.Hameed Marine Private Ltd.', Irukkandurai, immediately, on receipt of the order, keeping in view of the imminent threat to the public health and report compliance of the same and any violation of the order will invite action under Section 188 of IPC.

4. Having challenged the above order, the present Revision Petition has been filed against the first respondent at first instance and thereafter, R2 to R5 were impleaded, as per order in CrI.M.P(MD)Nos.10748 & 10747 of 2017, dated 22.02.2017.

5. The main contention of the revision petitioner in this criminal revision is that the impugned order of the first respondent dated 01.09.2016 was passed without affording reasonable opportunity to the petitioner and also without appreciating any of the documents relied by the petitioner and



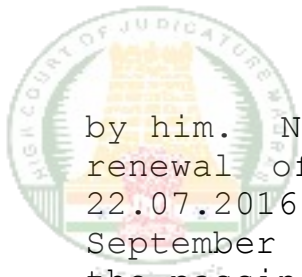
without examining any of the witnesses and hence, the impugned order violating the principles of natural justice is liable to be set aside.

6. Records produced by either side are perused. Rival submissions made by either side is also considered.

7. Based on the complaints received by the District Collector, Tirunelveli, dated 31.08.2015, and on various complaints from the public of Irukkandurai Village and nearby areas and also the enquiry report of the Tahsildar, Radhapuram, dated 09.03.2016 regarding un-breathable bad smell emanating from the petitioner's Unit, caused vomiting and dizziness to the people living in Irukkandurai and nearby areas, a show-cause Notice, dated 12.03.2016 with conditional order under Section 138(1)(b) of Cr.P.C., was issued to the petitioner / marine unit requiring him to close down the functioning of the factory or to appear before the first respondent on 15.03.2016 to show-cause why this order should not be made absolute.

8. Issuance of show-cause notice with conditional order, dated 12.03.2016, by the first respondent against the petitioner marine unit and also appearance of the petitioner and filing his show-cause reply on 15.03.2016 are admitted by either side and thereafter, the impugned final order under Section 138 of Cr.P.C., was passed on 01.09.2016. The impugned order discloses the fact that in the meantime, inspection of unit by the first respondent along with Tahsildar,, Radhapuram, and the Commissioner, Valliyoor Panchayat Union and local enquiry with the villagers and also the public travelling along Irukkandurai were made after 15.03.2016 and a detailed report, dated 19.07.2016 of the Commissioner of Valliyoor Panchayat Union and also the inspection remarks, dated 19.07.2016 of Tahsildar, Radhapuram was received and considered for passing the impugned order.

9. No witnesses was examined for passing the final order. The alleged complainants / public were not examined. No evidence was recorded by the first respondent prior to the passing of the impugned order, except receiving show-cause reply from the petitioner. The documents relied by the petitioner were not perused and considered by the first respondent. The impugned final order was passed by the first respondent by only taking into consideration of the inspection remarks dated 19.07.2016 of Tahsildar, Radhapuram and a report, dated 19.07.2016 of the Commissioner of Valliyoor Panchayat Union. Local residents / complainants were not examined prior to the passing of the impugned order. After receiving the show-cause reply from the petitioner on 15.03.2016, no opportunity was given to the petitioner to put forth his case with records, which were relied on



by him. No opportunity was given to the petitioner to produce the renewal of consent order to run the petitioner's unit, dated 22.07.2016, passed by the Tamil Nadu Pollution Control Board till September 2019 for consideration by the first respondent prior to the passing of the impugned order.

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10. If the person against whom an order under Section 133 of Cr.P.C., appears and show-cause against the order, the Magistrate shall take evidence in the matter as in summons case. The Magistrate, under Section 138 of Cr.P.C., is bound to take evidence in the manner as in a summons case. If the procedure relating to the summons case is not followed, the order will be vitiated. The complainants has to start proceedings by adducing evidence and that the party showing cause may produce his own evidence, if so advised. It would be illegal to make absolute the conditional order without recording the evidence, which requirement is mandatory. Even if the party against whom the order passed does not produce any evidence, it is incumbent on the Magistrate to record the evidence of the complainant prior to making an order absolute. Before making the conditional order final, the recording of the evidence is necessary. Passing the final order without recording the evidence violates Section 138 Cr.P.C., and is liable to be set aside.

11. In terms of Section 138 of Cr.P.C., the Executive Magistrate shall take evidence as in a summons case after the persons appeared to show-cause against the order passed under Section 133 Cr.P.C., On considering the materials available, the Executive Magistrate, shall make the conditional order absolute. In the present case, there is no such recording of evidence of the parties concerned and even at the inception, a final order has been passed without taking evidence. The impugned final order is passed only on the basis of the reports of the officials. No opportunity is given to the petitioner to putforth his objections with records, after passing the conditional order, after filing the show-cause reply by the petitioner on 15.03.2016.

12. The counsel appearing for the revision petitioner, in support of his contentions, relied on an unreported judgment of this Court passed in Writ Appeal in *W.A(MD)No.330 of 2016* and *CMP (MD)No.1904 of 2016*, dated 01.03.2016 in *S.Natarajan Vs. The District Collector and 3 others*.

13. During pendency of this revision petition, the first respondent has inspected the petitioner's Unit to verify the fact about the construction of Effluent Treatment Plant (ETP) and a status report was also filed by the first respondent stating that the petitioner has completed the said construction, since the ETP is functioning in the petitioner's Industry. As per the status report of the first respondent, the Company is not causing any pollution to the public, as rightly contended by the counsel for the petitioner herein.



14. The Tamil Nadu Pollution Control Board has given consent for the industry to run the unit and renew the consent order to operate the unit till September 2019. The above order was also not considered by the first respondent herein, prior to passing of the impugned order. Considering the above facts and circumstances of the case, this Court is inclined to set aside the impugned order of the first respondent, dated 01.09.2016, passed in proceedings in A4/11920/2015.

15. In the result, this Criminal Revision stands allowed by setting aside the impugned order dated 01.09.2016 of the first respondent herein. However, the present order is without prejudice to the authorities concerned, in moving afresh in accordance with law, if such a course is considered appropriate. No costs. Consequently, connected miscellaneous petition is stands closed.

Sd/  
Assistant Registrar (AS)

/True copy/

Sub Assistant Registrar

To

- 1.The Sub-Collector,  
O/o.the Sub-Collector,  
Cheranmahadevi,  
Tirunelveli.
- 2.The Additional Public Prosecutor,  
Madurai Bench of Madras High Court,  
Madurai.
- 3.The Record Keeper,  
Criminal Record Section  
Madurai Bench of Madras High Court,  
Madurai.(2 COPIES)

+1cc to Mr.S.M.A.Jinnah, Advocate, SR.No. 69566

Cr1.RC(MD)No.640 of 2016  
22.06.2018

MPK  
KK/SV/SAR-2/11.07.2018/5P-6C/