

Andreza

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 67 OF 2020
WITH
STAMP APPLICATION NO. 1220 OF 2020**

1. SAIRAJ SATYAWAN PARAB AND ...PETITIONERS
ANR.,

Versus

1.STATE OF GOA, THR. PUBLIC
PROSECUTOR AND 2 ORS.

...RESPONDENTS

Mr. Deepak Gaonkar, Advocate for the Petitioners.

**Mr. G. Nagvenkar, Additonal Public Prosecutor for the
Respondent no.1-State.**

Mr. G. Teles, Advocate for the Respondent no.3.

CORAM: MANISH PITALE, J

DATED: 7th October 2021

ORAL ORDER

1. By this Writ Petition, the Petitioners have challenged the order dated 24.02.2020, passed by the Executive Magistrate, whereby a conditional order passed under Section 133 of the Code of Criminal Procedure (Cr.P.C.), was made absolute.

2. It is contended on behalf of the Petitioners that the procedure contemplated under Section 133 read with Section 138 of the CrP.C., was not followed and that, therefore, the impugned order suffers from procedural flaw and demonstrates a jurisdictional error committed by the Magistrate.

3. In the present case, Respondent no.3 submitted a complaint against the Petitioners before the Police Authorities,

stating that the Petitioners on 14.02.2020, had dumped a truck load of red soil on the road which is the only access to the house of Respondent no.3. It was contended that this act was not only illegal but it was causing stress to Respondent no.3.

4. On the basis of the aforesaid complaint, on 17.02.2020, the Executive Magistrate initiated proceedings under Section 133 of the Cr.P.C. and issued a conditional order against the Petitioners. On the same day, the Executive Magistrate issued the conditional order and communicated the same to the Petitioners and asked them to show cause by 22.02.2020 as to why the said order should not be enforced. The Petitioners filed a detailed reply on 21.02.2020, in response to the said show cause notice. The Petitioners denied that dumping of the red soil had caused any sort of public nuisance and it was indicated that the dispute sought to be raised by Respondent no.3 was a private dispute. It was further stated that the road in question led only to the house of Respondent no.3, where she was allegedly illegally running a hotel.

5. On 24.02.2020, the Executive Magistrate passed the impugned order making the conditional order dated 17.02.2020 absolute. It was further directed that the Petitioners shall remove the red soil on or before 25.02.2020 failing which, they would be liable to face proceedings under Section 188 of the Indian Penal Code (IPC).

6. Aggrieved by the aforesaid order, the Petitioners filed the present Writ Petition. On 25.02.2020, this Court issued notice

in the Writ Petition. The Respondents have entered appearance through Counsel.

7. Mr. Gaonkar, the learned Counsel appearing for the Petitioners, submitted that the impugned order suffered from procedural flaw as the Executive Magistrate failed to abide by the requirements of Section 138 of Cr.P.C. Upon issuing the conditional order and in the face of dispute raised by the Petitioners, the Magistrate under Section 138 of Cr.P.C., ought to have taken evidence in the matter as in a summons case and upon being satisfied that the original conditional order itself is reasonable or subject to such modification as would be necessary, make the conditional order absolute. The learned Counsel also placed emphasis on the fact that if the Magistrate was not satisfied about making the order absolute in its original form or upon modification, no further proceedings could be undertaken. It was submitted that despite the detailed reply filed on behalf of the Petitioners denying the claims of the Respondent no. 3, the Executive Magistrate proceeded to pass the impugned order under Section 133 of Cr.P.C., making the conditional order absolute in the absence of compliance with the procedure under Section 138 of Cr.P.C. On this basis, it was submitted that the order was rendered without jurisdiction and, therefore, the present Petition was maintainable before this Court.

8. It was further submitted that in the facts of the present case, on a proper interpretation of Section 133(1)(a) of the Cr.P.C., the dumping of red soil by the Petitioners could not be said to be a public nuisance. Reliance was placed on the judgment of this Court in the case of *Vasudeo s/o Bhavalal*

Malu vs. The Sub-Divisional Officer/Sub Divisional Magistrate, Wani¹.

9. On the other hand, Mr. G. Teles, the learned Counsel appearing for the contesting Respondent no.3, submitted that since the impugned order making the conditional order absolute was a final order, the Petitioners ought to have filed a revision application under Section 397 of the Cr.P.C. before the competent Court instead of rushing to this Court to invoke jurisdiction under Article 227 of the Constitution of India and Section 482 of the Cr.P.C. It was contended that the present Petition was not maintainable in the face of availability of an efficacious alternative remedy. On the merits of the matter, it was submitted that the procedure contemplated under Section 138 of Cr.P.C. was not required to be followed in the facts of the present case, because the impugned order records that upon being questioned, the Petitioners agreed that they had dumped red soil on the public road. By inviting the attention of this Court to Section 137 of the Cr.P.C., it was submitted that when there was no dispute raised on behalf of the Petitioners, there was no necessity to proceed to hold an inquiry by recording evidence as contemplated under Section 138 of the Cr.P.C. It was further submitted that even if the road in question led to the house of only Respondent no.3, it could still be covered under the expression of public nuisance, for which reliance was placed on the judgment in the case of ***Somnath V. Poui Dhungat vs. State and Anr.***².

¹ 2015 ALL MR (Cri) 4765.

² 1974 CRI.L.J. 522.

10. Mr. Nagvenkar, the learned Additional Public Prosecutor, appeared on behalf of Respondent nos. 1 and 2.

11. Heard learned Counsel for the rival parties and perused the material on record. A perusal of the complaint shows that according to Respondent no.3, the Petitioners had caused public nuisance as contemplated under Section 133 of Cr.P.C. and that appropriate orders were solicited. The Petitioners filed a detailed reply to the said contentions raised on behalf of Respondent no.3. It was contended that the act alleged against the Petitioners did not amount to public nuisance as contemplated under Section 133 of Cr.P.C. It was specifically denied that dumping of red soil by the Petitioners amounted to any sort of public nuisance. The Petitioners specifically challenged the exercise of jurisdiction on the part of the Executive Magistrate in the facts and circumstances of the present case.

12. The record shows that after issuing the conditional order on 17.02.2020, the Executive Magistrate did follow the procedure contemplated under Section 134 of Cr.P.C., by serving the said conditional order on the Petitioners. A perusal of Sections 137 and 138 of Cr.P.C. shows that when the persons against whom a complaint of public nuisance is made, deny any such wrongdoing, the Magistrate is expected to proceed under Section 138 of Cr.P.C. The language of the said provision demonstrates that the Magistrate is necessarily required to take evidence in the matter as in a summons case. Thereafter, upon being satisfied that the conditional order already passed needs to be made absolute in its original form or upon modification, such an order making the order absolute can be issued. If the Magistrate is

satisfied that no case is made out for making the conditional order absolute, the proceedings would be dropped. Therefore, it is evident that before a conditional order issued under Section 138 of Cr.P.C. for removal of nuisance is made absolute, the procedure contemplated under Section 138 of Cr.P.C. must necessarily be followed.

13. In the facts of the present case, a perusal of the impugned order would show that on 24.02.2020, while making the conditional order absolute, there is no reference to an inquiry and procedure of taking evidence as mandated under Section 138 of Cr.P.C. The opening paragraph of the impugned order records that the Petitioners agreed that they had dumped red soil on the public road. It is for this reason that the learned Counsel appearing for Respondent no.3 emphasized upon Section 137 of Cr.P.C. to contend that once the Petitioners agreed to have dumped the soil on the public road, there was no question of holding an inquiry contemplated under Section 138 of Cr.P.C.

14. But, the aforesaid observations made in the opening paragraph of the impugned order, are contrary to the contents of the reply filed by the Petitioners in response to the show cause notice issued by the Executive Magistrate. A perusal of the contents of the said reply would show that the Petitioners vehemently denied the claims made by Respondent no.3. In the face of such denial, the Executive Magistrate ought to have conducted an inquiry, as contemplated under Section 138 of Cr.P.C. by recording evidence as in a summons case. It is clear from the record that no such procedure was followed and, therefore, the Petitioners are justified in contending that the

impugned order dated 24.02.2020 suffered from serious illegality and jurisdictional error on the part of the Executive Magistrate.

15. The record shows that the manner in which the impugned order dated 24.02.2020 was passed, it was without jurisdiction for the reason that there was a complete failure to follow the mandate of law. In such a situation, the present Writ Petition filed by the Petitioners is certainly maintainable. Therefore, the contentions raised on behalf of Respondent no.3 that the Petition deserves to be dismissed due to the availability of an efficacious alternative remedy, cannot be accepted.

16. As this Court has found that mandatory procedure was not followed by the Executive Magistrate while passing the impugned order, the present Writ Petition deserves to be allowed. But, at the same time, this Court has not gone into the rival claims made on behalf of the parties on the question as to whether the act of the Petitioners could be said to be amounting to public nuisance or whether the road on which the red soil was dumped, was a public road. Therefore, this Court is not dealing with the judgment on which the learned Counsel appearing for the Respondent no.3 has placed reliance. On the other hand, the judgment on which the learned Counsel appearing for the Petitioners has placed reliance i.e. ***Vassudeo Bhavalal Malu*** (supra), shows that it has clearly laid down that if the mandatory procedure under Section 138 of Cr.P.C. is not followed, an order making a conditional order absolute is rendered illegal and unsustainable. The said judgment supports the contentions raised on behalf of the Petitioners.

17. For all the above reasons, the Writ Petition is allowed. The impugned order is quashed and set aside. It is made clear that the order passed by this Court will not come in the way of the Executive Magistrate to proceed strictly in accordance with law.

MANISH PITALE, J.

ANDREZA PEREIRA Digitally signed by ANDREZA PEREIRA
Date: 2021.10.08 12:51:48 +05'30'