

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

247

CRM-M-44147-2018 (O&M)

Date of decision: 11.01.2023

BIRBAL

....Petitioner(s)

Versus

STATE OF HARYANA AND OTHERS

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. Subhash Rana, Advocate for the petitioner.

Ms. Aditi Girdhar, AAG Haryana.

Mr. Dharampal Singh Bajwa, Advocate
respondent Nos.2 to 4.

AMAN CHAUDHARY. J.

Present petition has been filed under Section 482 CrPC for quashing of impugned order dated 20.09.2016, Annexure P-2 passed in Case No.878/10.07.2015 by the learned Sub Divisional Magistrate, Narwana vide which application under Section 133 CrPC has been allowed and impugned order dated 13.09.2018, Annexure P-4 passed in CRR No.81/14.10.2016 by learned Additional Sessions Judge, Jind, whereby revision petition filed by the petitioner against order dated 20.09.2016 has been dismissed.

Briefly put, the facts of the case are that while presenting one application under section 133 CrPC, respondent Nos.2 to 4 have requested that the petitioner while constructing the alleged chabutra (platform) and ramp has created obstacle in the common street, whereby the complainant-

respondents and other residents of the village are facing difficulty in passing. The petitioner is blocking the flow of the water in the nalli and has linked it with the nalli of culvert constructed on its northern side, which is too narrow due to which the water does not flow properly. As such, the water stays in the street after overflowing from the nalli, for which reason there is stench and fear of spread of disease.

Learned counsel for the petitioner contends that Courts below have committed grave error while allowing the application filed by the respondents under Section 133 CrPC, which was not maintainable in the eyes of law. The alleged chabutra is not an encroachment as the constructed portion is falling within *Lal Dora Abadi Deh* and for more than 20 years old the petitioner is owner in possession of the land in question. The width of street at the site of chabutra is more than that of the other portion of the street. Section 133 CrPC is only attracted in cases of emergency and immediate danger to the health or physical comfort of the community. No nuisance has been caused due to the said Chabutra and there is no over flow of the water as stated by the respondents.

On the other hand, learned counsel for the State assisted by learned counsel for the private respondents submits that it is a public street wherein the petitioner has unauthorizedly raised a chabutra. It is causing nuisance to the local people and despite the order dated 20.09.2016, the petitioner has not removed the same. There is a report, Ex.C-3, of Block Development and Panchayat Officer and by the police, Ex.C-4 relying whereupon, the learned Sub Divisional Magistrate has observed that there is

unlawful obstruction or nuisance by raising construction of Chabutra measuring 10x25 feet as reflected in the site plan Ex.CW4/A.

Heard.

It is apposite to make a reference to Section 133 Cr.P.C., 1973, which reads thus:-

"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) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(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 to f) xx xx xx xx

Such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order-

(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii to vi) xx xx xx xx

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the Order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation- A " public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes."

The Sub Divisional Magistrate, Narwana, while allowing the application under Section 133 CrPC, vide impugned order dated 20.09.2016, observed thus:

“The pleas taken by the Ld. Advocates of both the parties were considered and the record was gone through carefully. In order to know the actual position, the site inspection report of the spot was taken from the Tehsildar, Narwana. The Tehsildar, Narwana in his report has mentioned that respondent Birbal son of Dariya, out of his constructed house has constructed 10x12 feet platform and 7x3 feet stair, due to which the water course approaching from eastern side has blocked. Rounding the watercourse from north side, has been linked with eastern side. This land falls in red line. It has been claimed by the respondent that his platform falls in the

land under his ownership. The width of the street is 12 feet, whereas 16 feet wide street has been left on the spot. No entry is being made in the revenue record of the land falling in red line, but from the spot report of the Tehsildar, Narwana and after the perusal of the record this considered fact has come to light that due to platform constructed by the respondent the flow of water from the houses of the complainants has blocked, due to which nuisance has been created certainly. Therefore, order is hereby passed for the immediate removal of nuisance caused by the respondent by blocking of the disposal of water so that water is disposed of smoothly, so that we could survive from stench with the storage of water in the street and spreading of disease.”

On a revision filed by the petitioner, the learned Court affirmed the order of learned SDM after taking into consideration the factum of according of requisite opportunities to the parties to lead their evidence and only after perusing the inspection report of Tehsildar, Narwana, had found unlawful obstruction or nuisance by raising construction as reflected in the site plan Ex.CW4/A.

The public power of the Magistrate envisaged under Section 133 must be exercised after conducting an enquiry, in case a public nuisance is brought to the notice, which is detrimental to the health and physical comfort of the community, be it conduct of a trade, *injurious in presenti*, was held by Hon’ble The Supreme Court of India in the case of **Suhelkhan Khudyarkhan and another vs. State of Maharashtra and others**, 2009(3) RCR (Crl.) 36, which as is evident from the order dated 20.09.2016 passed by the SDM, Narwana was exercised in consonance with the provision by

relying on the reports Ex.C-3, of BDPO submitted after site inspection and police Report Ex.C-4, by SHO Police Station Garhi and having found that due to the chabutra (platform) constructed over the street, there was blocking of watercourse from the houses of the complainants' side, creating nuisance to the public while going through the said street, leading to stench with storage of water and fear of spread of disease, direction for immediate removal of nuisance created by the petitioner was issued.

A workshop in the residential area, creating pollution and nuisance and was health hazard, air pollution, vibration and noise, which were disturbing the study of the children was directed to be removed by the SDM and the said order was affirmed by this Court, in the case of **Manoj and others vs. Prem Lal** 2006(3) RCR (Crl.) 941, while dismissing the petition filed under Section 482 CrPC. The view that was reiterated in the case of **Naveen Kumar vs. Narinder Singh**, 2020(2) RCR (Crl.) 432, whereby closure of the workshop was ordered.

Moreover, the petitioner having already availed of his remedy by filing a criminal revision, though unsuccessfully before the learned Additional Sessions Judge, this petition would also amount to a second revision petition under the guise of a petition under Section 482 Cr.P.C., the view of this Court finds support from the judgments by Hon'ble The Supreme Court of India in the cases of **Krishnan vs. Krishnaveni and another** 1997(4) SCC 241, reiterated in **Kailash Verma v. Punjab State Civil Supplies Corporation and another**, 2005(1) RCR (Criminal) 727 and **Krishnan and Shakuntala Devi and others vs. Chamru Mahto and another**, 2009(2) SCC (Crl) 8, wherein it was held that the object of the

introduction of sub-section (3) in Section 397 Cr.P.C. was to prevent a second revision so as to avoid frivolous litigation, but, at the same time, the doors to the High Court to a litigant, who had lost before the Sessions Judge, were not completely closed and in special cases the bar under Section 397(3) Cr.P.C. could be lifted, power under Section 482 of the Criminal Procedure Code has to be exercised sparingly when there is serious miscarriage of justice and abuse of the process of the Court or when mandatory provisions of law are not complied with and when the High Court feels that the inherent jurisdiction is to be exercised to correct the mistake committed by the revisional Court.

No other point has been urged by the petitioner.

In view of the foregoing discussion, this Court finds no illegality or perversity in the orders passed by the Courts below, warranting any intervention. As such, the present petition sans merit and is hereby dismissed.

(AMAN CHAUDHARY)
JUDGE

January 11, 2023

M.Kamra/gsv

Whether speaking/reasoned : *Yes/No*

Whether reportable : *Yes/No*