

In the High Court of Punjab and Haryana at Chandigarh

(113)

CWP No. 26983 of 2023 (O&M)

Date of Decision: 05.12.2023

Surjeet Singh and another

.....Petitioners

Versus

State of Punjab and others

.....Respondents

**CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR
HON'BLE MRS. JUSTICE SUDEEPTI SHARMA**

Present: Mr. K.S.Brar, Advocate
for the petitioners.

Mr. Maninder Singh, DAG, Punjab.

SURESHWAR THAKUR, J. (ORAL)

CM-20500-CWP-2023

The application is allowed as prayed for. Annexure P-3 is taken on record.

CWP No. 26983 of 2023

1. The present petitioner has moved Annexure P-2 before the Deputy Commissioner, Fazilka, District Fazilka. The subject of the said annexure, is that, certain illegal encroachments become made upon a street occurring within the abadi deh. In the said annexure, they have named the persons, who have made encroachments, upon, the street or a rasta, rather occurring within the abadi deh.

2. The said open place or a passage, existing within the abadi deh, is not contested by the learned counsels appearing, before this Court, to make it thus fall within the definition of shamlat deh. Therefore, if any proven encroachments are made thereons, resultantly through a lawful order,

being made by the competent authority concerned, thus the said

encroachments, as made upon any passage existing within the abadi deh, rather are required to be removed.

3. Since no action has been drawn on the said annexure, therefore, the learned counsel for the petitioners prays that lawful action be drawn against the errants concerned, by the Deputy Commissioner, Fazilka, to whom Annexure P-2 becomes addressed.

4. Though, the said made prayer before this Court, becomes not amenable for becoming accepted. The reason being that the present petitioners had earlier accessed the learned Executive Magistrate concerned, through theirs filing a petition under the provisions of Section 133 Cr.P.C. On the said petition, an order Annexure P-3, became passed. The learned Sub Divisional Magistrate, Jalalabad after making hearings on the said petition, besides after receiving evidence, thus proceeded to order for the removal of the encroachments, if any, as became made, upon, the gair mumkin passage existing within the abadi deh.

5. Though, in the wake of the above, this Court prima facie may not be led to make any direction, upon the BDPO concerned, or upon the Sarpanch of the Gram Panchayat concerned, to institute a petition, cast under Section 7 of the Punjab Village Common Lands (Regulation) Act, 1961 (for short 'the Act of 1961'), seeking thereby the eviction of the encroachers concerned, viz-a-viz the open passage (supra).

6. Be that as it may, the reason for making the above conclusion becomes sparked from the factum, that a reading of the provisions, as embodied in clause (a) of sub-Section (1) of Section 133 Cr.P.C., provisions whereof become extracted hereinafter, unfolds the factum, that any unlawful obstruction or nuisance, being amenable to become removed by a

conditional order, becoming made by the Sub Divisional Magistrate

concerned, but yet only in the event of such obstruction or nuisance being made upon any public place or from any way.

“Conditional order for removal of nuisance.

(i) Whenever a District Magistrate or a Sub- divisional Magistrate or any other Executive Magistrate specially empowered in this of 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”

7. Therefore, but obviously since the provisions (supra), as occur in the Act of 1961 are complementary, besides are supplementary to the provisions (supra), as engrafted in the Cr.P.C. Therefore, though prima facie, the above made order by the learned Executive Magistrate concerned, was required to be galvanized into the fullest action. Resultantly, as stated (supra), prima facie not mandamus is required to be made upon the BDPO concerned, to institute the petition (supra) before the Collector contemplated under the Act of 1961.

8. Nonetheless, the infirmity in the above order is comprised in the factum, that the jurisdiction invested in the SDM concerned, is a jurisdiction, which empowers him, to only make a conditional order, thus for removal of any encroachment or obstruction made, upon the passage existing within the abadi deh zones. Pre-eminently, when such open places fall, thus fall within the definition of shamilat deh, and, are as such public streets meant for user of the inhabitants of the abadis.

9. However, a reading of Annexure P-3 reveals, that the learned Executive Magistrate concerned, has not adhered to the statutory provisions, as cast in the hereafter extracted statutory coinages.

“x x x x x
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 prevent or stop the construction of such building, or to alter the disposal of such substance; or
- (iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or
- (v) to fence such tank, well or excavation; or
- (vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

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.”

10. Therefore, for the lack of compliance, being made by the learned Executive Magistrate concerned, to the above extracted statutory phraseology(ies) existing in Section 133 Cr.P.C., does constrain this Court, to conclude, that thereby this Court may yet be led to make a direction, upon

the BDPO concerned, to forthwith institute a petition under Section 7 of the Act of 1961, thus before the Collector concerned, so that thereby, the encroachments, if any, made on the purported gair mumkin passage, existing within the abadi deh, are ordered to be removed through a lawful order, being made on the petition (supra), by the Collector concerned.

11. The prime reason for making the above conclusion, ensues from the factum, that the empowerment vested under Section 133 Cr.P.C. in the SDM concerned, does enjoin, upon him to make a conditional order, upon the errant concerned, and, thereafter an opportunity, is required to be assigned to the errant concerned, to raise an objection in respect of making absolute the said made conditional order. Subsequently, on such an objection being raised by the errant concerned, the Executive Magistrate concerned, is bound to make an order for ensuring, that the objector concerned appears, before him or before some other Executive Magistrate subordinate to him, at such a time and place fixed by him, so as to ensure that the errant concerned, show causes as to why the said conditional order be not made absolute.

12. The learned Executive Magistrate concerned, as revealed, on a reading of Annexure P-3, did not make a conditional order for the relevant purpose, nor thereafter he permitted the errant concerned, to raise an objection, nor he proceeded to make a further order requiring the errant concerned, to appear before him or before some other Executive Magistrate subordinate to him, thus on such a time and place, so as to ensure, that thereby the errant concerned, show causes as to why the conditional order, if any, be not made absolute. Contrarily, in the instant case, the order Annexure P-3 is not a conditional order, but rather appears to be a final order for the relevant purpose. Resultantly, thereby too, the learned Executive

Magistrate concerned, has exceeded the jurisdiction, which became vested in

him under Section 133 Cr.P.C. In consequence, no legal worth can become assigned to Annexure P-3.

13. Even otherwise, the jurisdiction vested in the Sub Divisional Magistrate concerned, is to be exercised in a summary manner, whereas, in the event of a petition under Section 11 of the Act of 1961, being filed before the learned Collector concerned, thereupon the errant concerned becomes assigned a privilege to claim or assert a title to the said purported open space existing within the abadi deh zones.

14. Therefore, when the proceedings drawn under Section 133 Cr.P.C., are summary in nature, and though may be supplementary, thus to the provisions engrafted in Section 7 of the Act of 1961, but the fine distinction inter se the two statutory supplementary provisions, is that, the proceedings, as stated (supra), drawn under Section 133 Cr.P.C, rather are summary in nature, whereas, the proceedings drawn under Section 7 of the Act, are required to undergo the entire rigor of a full trial thus becoming entered therein by the learned Collector concerned. The above occurs through the fullest opportunity becoming assigned to the errant concerned, thus to make a challenge to the demarcation report, if any, which becomes placed before the Collector concerned, inasmuch as, there being a requirement, upon the Collector concerned, to ensure the purveying of the ablest proof to the demarcation report, if any, through his ensuring that the author thereof rather steps into the witness box, and, thereafter an opportunity also becoming granted to the errant concerned, to cross-examine the author of the demarcation report. The above opportunity may not become bestowed, upon the errant concerned rather in proceedings drawn under Section 133 Cr.P.C. Consequently, even on the above score, Annexure

concerned, it became passed, and, thus without any opportunity to the errant concerned, to make a cross-examination, upon, the Patwari of the Halqa concerned.

15. Having stated that though the provisions, engrafted in Section 133 Cr.P.C., and, the ones engrafted in the Act of 1961 are complementary. However, when this Court has also in the above manner rather culled out the fine distinction inter se the above provisions, besides has proceeded to conclude, that the opportunity of fullest trial, which is required to be granted to the errant, thus in a petition cast under Section 7 of the Act of 1961, rather may not be permitted to be purveyed to the errant concerned, by the Executive Magistrate concerned, in his making even a conditional order for the relevant purpose.

16. In consequence, the exercisings of jurisdiction by the learned Executive Magistrate concerned, under Section 133 Cr.P.C., may be exercised with grave circumspection, and, in case after the making of a conditional order by the learned Executive Magistrate concerned, an objection is raised with respect to title by the errant concerned, viz-a-viz, the purported passage, existing within the abadi deh zones, thereupon, the Collector concerned, may proceed to relegate, either the Sarpanch of the Gram Panchayat concerned, or the BDPO concerned, to avail the remedy constituted under Section 7 of the Act of 1961, than his proceeding to make any orders in terms of Section 133 Cr.P.C. Moreover, even while making any conditional order, thus the Executive Magistrate concerned, may issue a short notice of hearing to the errant concerned, so that thereby too, prior to the making of the conditional order, thus the principles of natural justice, do become adhered to.

17. In view of the above, and, as consented to by the learned counsel for the petitioner, besides by the counsel for the respondent, a

mandamus is passed upon the BDPO concerned, to forthwith institute a petition under Section 7 of the Act of 1961, before the Collector concerned. On such a petition, being preferred before the Collector concerned, the latter shall proceed to make a speaking lawful decision thereons. However, the said institution shall be preceded by a validly drawn demarcation report, and, only when encroachments are revealed to be made therein, on the purported gair mumkin passage, as, existing within the abadi deh zone, thereupon only the petition (supra) shall be instituted.

18. It is further clarified, that the said petition shall be expeditiously decided, but after granting an opportunity of hearing to all concerned. Lastly, in the wake of the above consented mandamus, being passed upon the supra, this Court does not deem it fit, and, appropriate to thus ensure, that the authorities concerned, enforce Annexure P-3, which otherwise for all the reasons (supra), has caused breaches to the above referred statutory provisions, as are carried in Section 133 Cr.P.C.

19. With the afore observations, the instant petition stands disposed of.

20. A copy of this verdict be forthwith sent to the Secretary, Revenue to the Govt. of Punjab, for onward transmission to the Executive Magistrates concerned.

21. The pending application(s), if any, is/are also disposed of.

(SURESHWAR THAKUR)
JUDGE

(SUDEEPTI SHARMA)
JUDGE

December 05, 2023
Gurpreet

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No