

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-7583-2012 (O&M)
Decided on: 20.03.2024
2024:PHHC: 040531

KRISHAN LAL BHUTANI

. . . . Petitioner

Vs.

Municipal Corporation Rohtak and another

. . . . Respondents

CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

Present:- Mr. Sandeep Sharma, Advocate, for the petitioner.

Mr. Rajesh Lamba, Advocate, for respondent No.1.

Mr. Randhir Singh, Addl. A.G., Haryana, for respondent No.2.

DEEPAK GUPTA, J.

By way of the present petition filed under Section 482 CrPC, petitioner prays for setting aside order dated 17.02.2012 (Annexure P4) passed by Id. Additional Sessions Judge/Fast Track Court, Rohtak, dismissing the revision against the order dated 05.09.2011 (Annexure P3), passed by Id. Sub Divisional Magistrate, Rohtak, whereby petitioner was directed to close down his shop of fodder cutting machine under Section 133 CrPC.

2. Perusal of the paper-book would reveal that an application under Section 133 CrPC (Annexure P1) was made by Municipal Corporation, Rohtak (*respondent No.1 herein*) against Krishan Bhutani (*petitioner herein*) alleging therein that petitioner-Krishan Bhutani was running a fodder cutter unauthorizedly in the residential area, which was causing nuisance, as he was storing and throwing garbage of green fodder on

the street, drain and putting the same in the sewerage. Prayer was made to prohibit the petitioner from running the said fodder cutter and from throwing garbage etc. on the public street, drain and sewer etc. and restraining him from creating public nuisance.

3. In reply (*Annexure P2*) filed by the petitioner, he raised preliminary objection that the petition was not maintainable, since he was running his fodder cutting machine in purely commercial market, where lots of other shops, restaurants, vegetables and fruits business were already running. It was further submitted by him that his fodder cutter machine was existing for the last 20 years and as such, a right had been created in his favor so as to run his business smoothly. Petitioner also referred to Article 19 of the Constitution of India submitting that he had the fundamental right to carry on any profession or trade.

4. Vide order dated 05.09.2011, Sub Divisional Magistrate, Rohtak allowed the application. Conditional order passed by him, whereby petitioner had been granted time to remove the nuisance, was confirmed. Revision against the said order was dismissed by Id. Additional Sessions Judge, Rohtak on 17.02.2021, copy of which is Annexure P4.

5. Challenging the aforesaid orders, the sole submission made before this Court by Id. counsel is that since the petitioner had raised objection against the conditional order, so opportunity to produce evidence was required to be given to him under Section 138 CrPC, which was not afforded to him. Petitioner even moved an application bearing CRM-47308-2013, so as to place on record the current photographs showing the present state of affairs of his shop located in Gandhi Camp, Rohtak and also prayed

for appointment of Local Commissioner to verify the actual state of affairs.

Ld. counsel also referred to photographs (Annexure P5) so as to contend that his shop of fodder cutting machine is existing in the commercial area, where lots of other shops are existing which are visible in the photographs itself.

6. Ld. counsel for the respondents could not refute the aforesaid contention to the effect that opportunity under Section 138 CrPC was not afforded to the petitioner to produce his evidence.

7. Submissions considered.

8. Relevant part of Section 133 and Section 138 Cr.P.C read as under:

“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) xxxxxxxxxxxx

(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) xxxxxxxxxxxx

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) xxxxxxxxxxxx

(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) xxxxxxxxxxxx

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.

138. Procedure where he appears to show cause.—(1) *If the person against whom an order under section 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case.*

(2) *If the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.*

(3) *If the Magistrate is not so satisfied, no further proceedings shall be taken in the case.”*

9. Bare perusal of above provisions would make it clear that Section 133 Cr.P.C provides for issuance of conditional order only for removal of the nuisance. By way of the conditional order, the opposite party is asked to show cause as to why the said order should not be made absolute. Once such a conditional order is passed, Section 138 of the Code of Criminal Procedure clearly provides that upon appearance of the person, against whom conditional order has been passed under Section 133 Cr.P.C. and who show causes against the order, the Magistrate is required to take evidence in the matter as in summons case.

10. In the present case, conditional order had been passed against the petitioner. He had appeared before the SDM, Rohtak against the said show cause. He had filed his objections. Despite the same, opportunity of producing evidence was not given to him as required under Section 138 CrPC.

11. Consequently, impugned order dated 17.02.2012 (Annexure P4) passed by Id. Additional Sessions Judge/Fast Track Court, Rohtak dismissing the revision against the order dated 05.09.2011 (Annexure P3), passed by Id. Sub Divisional Magistrate, Rohtak, whereby petitioner was

directed to close down his shop of fodder cutting machine under Section 133 CrPC, is hereby set aside. The matter is remanded back to the Court of SDM, Rohtak with the direction to provide opportunity to the parties, so as to produce evidence as per Section 138 CrPC and then dispose of the matter in accordance with law.

Pending application (s), if any, also stand disposed of.

20.03.2024

Vivek

(DEEPAK GUPTA)

JUDGE

Whether speaking/reasoned?	Yes
Whether reportable?	No