

Neutral Citation No. 2024:PHHC:025994
IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-43321 of 2020
Reserved on:22.02.2024
Pronounced on: 26.02.2024

Arshad Khan	Vs.	Petitioner
State of Punjab and another		Respondents

CORAM:- HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. M.S. Yadav, Advocate
for the petitioner.
Mr. Sahil R. Bakshi, AAG, Punjab.
Mr. Sameydeen, Advocate for
respondent No.2.

DEEPAK GUPTA, J.

By way of present petition filed under Section 482 Cr.P.C, petitioner has challenged order dated 20.11.2020 (Annexure P.2) passed by learned Additional Sessions Judge, Sangrur, whereby order dated 11.09.2020 passed by learned SDM, Ahmedgarh has been set aside in a case bearing File No.8/SDM titled “Arshad Khan Vs. Bhim Khan”, under Section 133 of Cr.P.C.

2.1 Petitioner – Arshad Khan and respondent No.2 – Bhim Khan are neighbours. A complaint was moved by the petitioner to SDM, Ahmedgarh alleging that respondent - Bhim Khan had installed a heavy hammer machine and a coal fire kiln in his house and that after heating the iron in the coal fire kiln, when he presses the same with heavy hammer, it results in vibrations, sound and black smoke, endangering the breaking out of some disease. It was further stated that the area in question was residential and that no permission had been taken from the concerned authorities. The act of the respondent was causing sound and air pollution

and thus, a hazard to the environment.

2.2 SDM, Ahmedgarh called for a report from Executive Officer, Municipal Council, Ahmedgarh and based thereon, passed a conditional order dated 24.09.2019 under Section 133 Cr.P.C for removal of the nuisance. Respondent was directed to stop the hammer machine and coal fire kiln before 26.09.2019 and to show cause as to why the conditional order be not made absolute.

2.3 Respondent appeared before SDM, Ahmedgarh and submitted his reply, as per which he was doing his work for the last ten years; that building was around 30-35 years old; that when he had started the work, he had obtained permission in writing from all the neighbours and residents of the area including the father of petitioner; that he had installed a commercial meter and that at the time of installing the machine, no trade licence was required to be obtained from Municipal Council and that except for the petitioner, no other resident of the area had any objection to his work. He also submitted that hammer installed by him was quite small, which was not causing any sound pollution and that it was far away from the wall of the complainant- petitioner and that the coal fire kiln did not emit any smoke or dangerous gas.

2.4 In the rejoinder, petitioner reiterated his allegations.

2.5 On 11.09.2020, statements of Superintendent of the Office of Nagar Council, Ahmedgarh and that of the Junior Assistant, Nagar Council, Ahmedgarh were recorded, as per which, the respondent was running hammer machine and fire kiln from his house situated in the residential area, for which no licence had been issued nor any NOC had been obtained. After recording these statements, the SDM vide his order dated 11.09.2020 made the conditional order absolute.

2.6 Aggrieved by the afore-said order, respondent – Bhim Khan filed a revision before the Court of Sessions. Vide impugned order dated 20.11.2020, the learned Additional Sessions Judge, Sangrur remanded the matter to the SDM, Ahmedgarh with direction to decide the same afresh by following due procedure provided under the Cr.P.C.

3. Assailing the afore-said order, the complainant Arshad Khan has approached this Court by way of present petition. It is contended that respondent No.2 – Bhim Khan had admitted to have installed a hammer machine and coal fire kiln in the residential area, regarding which report had also been made by Assistant Executive Engineer, Municipal Council, Ahmedgarh and, therefore, in view of the said documentary evidence, it could not be stated that no opportunity of hearing was given to the respondent. Prayer is made for setting aside the impugned order passed by learned Additional Sessions Judge, Sangrur.

5. Learned State Counsel appearing for respondent No.1 as well as counsel for respondent No.2 opposed the petition and submitted that there is no justification to set aside the well-reasoned order passed by learned Additional Sessions Judge.

6. Submissions considered.

7. 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.”

8. 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.

9. In the present case, the relevant portion of the impugned order dated 20.11.2020 passed by learned Additional Sessions Judge, Sangrur reads as under:-

“7. Adverting now to the case in hand, the perusal of the entire file and the zimni orders passed by learned SDM, Ahmedgarh, shows that evidence was neither recorded by him, nor any opportunity was granted to either the complainant or the respondents to lead evidence. Section 138 Cr.P.C clearly lays down that 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. In the case in hand, revision petitioner Bhim Khan appeared before the learned SDM, Ahmedgarh after a conditional order under Section 133 Cr.P.C was passed against him and even filed a detailed reply. However, as per the mandate of Section 138 Cr.P.C., the learned SDM, Ahmedgarh has not taken any evidence in the matter and simply passed the impugned order dated 11.09.2020 without any sort of evidence on the file and has not followed the provisions of Section 138 Cr.P.C.

8. In view of the above discussion, this Court is of the considered view that the impugned order dated 11.09.2020 is not sustainable and the same is set aside and the present revision petition is allowed. The matter is remitted back to the learned SDM, Ahmedgarh with direction to decide the same afresh by following due procedure provided under the Cr.P.C.”

10. Learned Additional Sessions Judge, Sangrur in his impugned order has rightly observed that in the present case, neither any evidence was recorded by the SDM nor any opportunity had been granted to any of the parties to lead evidence, despite the fact that respondent had opposed the making of the conditional order as absolute by filing a detailed reply. Whether the reply filed by the respondent contained merit or not, he was required to be given an opportunity

to lead evidence. The SDM proceeded simply on the basis of report submitted by the officials of the Municipal Council.

11. Learned counsel for petitioner has referred to ***Ranjit Singh Vs. Bhup Singh, 1996(2) R.C.R. (Criminal) 42***, so as to contend that if the parties produced documentary evidence and did not produce any oral evidence and the order of the SDM is based upon documentary evidence, it cannot be said that no opportunity was given to the parties as required under Section 137/138 of Cr.P.C.

12. There can be no dispute to the afore-said legal proposition but it is not applicable in this case, because in ***Ranjit Singh's case (supra)***, dispute was regarding the encroachment on the Shamlat Deh land, which could have been established by producing the documentary evidence. It is not so in the present case.

13. Learned counsel also refers to ***Rambabu Sharma Vs. Santosh Kumar and another, 2005(4) R.C.R. (Criminal) 183***, wherein it has been held by Madhya Pradesh High Court that it is not incumbent upon the Magistrate to record evidence before making an order under Section 133 of Cr.P.C and that order passed without recording evidence cannot be said to be illegal.

14. Again the cited authority is not applicable to the facts of the present case. It is true that no evidence is required to be recorded while passing a conditional order under Section 133 Cr.P.C but in the present case, the respondent had made appearance before learned SDM and had filed his reply, opposing the conditional order to be made absolute and, therefore, in those circumstances, SDM was required to provide opportunity to the parties to produce their evidence as per Section 138 of Cr.P.C. As such, no advantage of the cited authority can be given to the petitioner.

15. In view of above discussion, this Court does not find any illegality in the impugned order dated 20.11.2020 passed by learned Additional Sessions Judge, Sangrur, so as to call for any interference.

Dismissed.

February 26, 2024
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(DEEPAK GUPTA)
JUDGE

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No