
(2002) 03 P&H CK 0006

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous No. 26139-M of 1999

Ram Lal

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 15-03-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 137

Citation : (2002) 2 CriminalCC 689 : (2002) 2 RCR(Criminal) 840

Hon'ble Judges : R.C. Kathuria, J

Bench : Single Bench

Advocate : Arvind Singh, for the Appellant; Rakesh Gupta, for the Respondent

Final Decision : Allowed

Judgement

R.C. Kathuria, J.—The petitioners seek quashing of the orders dated 4.2.1998 (Annexure-P.3) passed by the Sub Divisional Officer (Civil), Pehowa whereby on an application/complaint filed u/s 133 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") by the respondents direction had been given to the petitioners to remove the hurdles created by sowing gram crop in the passage provided in the revenue record and thus restricting the movements of the respondents as well as other villagers through that passage and also the order dated 6.7.1999 (Annexure-P.4)) of the Additional Sessions Judge, Kurukshetra in Criminal Revision No.9 of 1998 affirming the aforesaid order of the Sub Divisional Officer.

2. Fakir Singh, Balwant Singh and Arjun Singh, applicants (respondents herein) claimed to be the permanent residents of Village Ramgarh Ror, Tehsil Pehowa, District Kurukshetra. According to them Gohar No. 176 (passage) as per revenue record of Village Ramgarh Ror had been in existence since consolidation. Ram Lal and Baru Ram, respondents (petitioners herein), who owned the land comprised in Khasra Nos.3/1 and 3/2 of Khewat No. 125, Khatauni No. 309 in which abuts the Rectangle No.91 on both sides of the path had dismantled the Gohar on 20.7.1997 by lifting the earth from the Gohar and filling the same with water as

a result of which it was made unusable as a passage and caused hindrance to the movements of the applicants and other villagers. On these allegations jurisdiction of the Sub Divisional Officer (Civil), Pehowa was invoked u/s 133 of the Code. It was also alleged that the Gram Panchayat, Ramgarh Ror through Subhash Chander, Sarpanch, who was cousin of Ram Lal and Baru Ram had colluded with them. On these premises prayer was made that the water from the above said path be got removed and earth be put back on the same passage for necessary use by the respondents as well as other residents.

3. On 5.8.1998, a conditional order was passed by the Sub Divisional Officer and notice to show cause was issued to the petitioners.

4. This application was contested by the petitioners on the ground that there were passages located towards west and south of their land which had been in existence for the last 40 years and a civil suit had also been filed by them in the Court of Sub Divisional Magistrate, Pehowa in which the parties had been directed to maintain status quo regarding the passage, consequently the present application was not maintainable. At the same time, it was admitted that their land was abutting the passage as stated in the application. In respect of the land mentioned in para 1 of the application, it was explained that passage located on the southern side of the above mentioned land extends upto the canal while the other passage located on the western side extends upto Village Ramgarh Ror. As there is no bridge on the canal, the passage closes at the canal and for that reason the stand of the applicants that they cross through this passage is incorrect. They denied that they had lifted any earth from the passage on 20.7.1997.

5. On 27.10.1997, written statement on behalf of the Panchayat was filed. Thereafter the case was fixed for spot inspection.

6. On 16.6.1998 at 5.00 p.m., spot inspection was carried out by the Sub Divisional Officer (Civil), Pehowa in the presence of Halqa Patwari, who had brought the record, Mam Chand Lambardar, Mange Ram, Sahib Singh, Bharat Singh, Ram Kala, Arjun Singh and the Sarpanch of Gram Panchayat, Ramgarh. Thereafter the case was posted for arguments on 4.2.1998 but none appeared on behalf of the petitioners and for that reason they were ordered to be proceeded ex-parte. After hearing the counsel for the respondents, their application was accepted and the petitioners were directed as per the order dated 4.2.1998 to remove the hurdle from the aforesaid passage within period of one month by the Sub Divisional Officer. Criminal Revision against that order was preferred by the petitioners which was dismissed as per order dated 6.7.1999 passed by the Additional Sessions Judge, Kurukshetra. It is these orders which have been assailed in the present petition.

7. I have heard Learned Counsel for the parties.

8. Learned Counsel representing the petitioners has challenged the legality of the above mentioned orders of the Courts below on three grounds. Firstly that the

procedure prescribed under Sections 133, 137 and 138 of the Code has not been followed and without recording any evidence the dispute had been decided on the basis of the spot inspection dated 16.1.1998 by the Sub Divisional Officer (Civil) which recourse is unwarranted under the law, Secondly, that there was no evidence before the Sub Divisional Officer even with regard to the existence of the passage at the spot as alleged by the respondents-applicants. Thirdly, Civil Suit No.280 of 1997 was filed by the petitioners on 28.6.1997 in respect of the path in question and order of status quo had been passed by the said Court and for that reason proceedings initiated u/s 133 of the Code were not maintainable.

9. These submissions have been refuted from the side of the respondents for the reasons stated in the order of the Courts below. At the same time, a preliminary objection had been taken with regard to the maintainability of the petition filed after both the Courts below had rejected the stand of the petitioners.

10. At the first the preliminary objection taken from the side of the respondents has to be dealt with. It is manifest from the order dated 4.2.1998 passed by the Sub Divisional Officer (Civil), Pehowa that he had accepted the stand of the respondents and for that reason directed the petitioners to remove the hurdle from the approved passage within a period of one month so that it may be made available to the persons using the same. This order was upheld in revision as per order dated 6.7.1999 by the Additional Sessions Judge, Kurukshetra. this Court in *Pritam Singh v. Dalip Singh and others*, 1997(3) RCR (Cri.) 92, observed that the Court should be slow in exercising its jurisdiction u/s 482 of the Code where a second revision is barred u/s 397 of the Code. It was further laid down that it would only interfere to prevent abuse of the process of the Court or where interest of justice otherwise so required. For coming to this conclusion reliance was placed on *Ganesh Narayan Hegde Vs. S. Bangarappa and Others*, . The question of second revision before the High Court in exercise of its inherent powers u/s 482 of the Code came up for discussion in *Krishanan v. Krishnaveni and another*, 1997(1) RCR 724 wherein it was held that it was maintainable. Basically, the controversy has to be decided on the facts of each case because they would reveal whether abuse of process of the Court has resulted and for that reason interest of justice requires that the High Court should intervene into the matter.

11. In the present case as would be noticed hereinafter, the learned Sub Divisional Officer (Civil), Pehowa had totally ignored the provisions of Sections 133 and 138 of the Code. Section 133 of the Code has engrafted a speedy and summary remedy to deal with the unlawful obstruction or nuisance caused on any public place. Exceptional jurisdiction has been vested under this section upon the Magistrate to deal with the matter where public interest is involved. In this case, Faquir Chand etc. respondents had filed application u/s 133 of the Code with the definite allegation that Ram Lal and Baru Ram on 20.7.1997 had lifted the earth from the path bearing Gohar No. 176 as per revenue record of Village Ramgarh Ror, which had been in existence since the time of consolidation and

had filled the same with water so as to render it unusable and they had done so in connivance with Gram Panchayat Ramgarh Ror through its Sarpanch. After hearing counsel for the petitioners on 5.8.1997, conditional order was passed and thereafter the petitioners were summoned in terms of the requirement of Section 133(1) of the Code. The petitioners as well as the Gram Panchayat, Ramgarh Ror through its Law Officer had filed replies to the application moved by the respondents. On 4.2.1998, the petitioners had failed to appear and for that reason ex-parte proceedings were ordered to be taken against them. Having not participated in the proceedings at the proper stage the petitioners had not shown as to why the conditional order be not made absolute in terms of the requirement of Section 137 of the Code. The Sub Divisional Officer was thus not left with any alternative but to proceed in accordance with the requirement of Section 133 of the Code. It is this stage the Sub Divisional Officer failed to comply with the requirement of law. It would be relevant to notice the provisions of Section 138 of the Code which read as under:-

"138. Procedure where he appears to show cause.-(1) If the person against whom an order u/s 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 consider 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."

12. Reading of the above provisions will leave no manner of doubt that subsection (1) of Section 138 of the Code casts a duty upon the Magistrate to take evidence so as to enable him to make the conditional order passed u/s 133 of the Code absolute. Non-compliance of the procedure laid down in Section 138(1) of the Code would vitiate the entire proceedings. In this case, no doubt the petitioners had not pursued their objections and led no evidence, having chosen not to take part in the proceedings after they had filed their written statement. That did not absolve the Magistrate from complying with the above noted mandatory provisions of law. The well settled principle in this regard is that where a statute directs anything to be done in a particular way, that would include in itself, that it shall not be done otherwise. This has been laid down in Balakrishna Rao Vs. State of Mysore and Others, Definite objection was taken on behalf of the petitioners before the Additional Sessions Judge, Kurukshetra that no evidence had been recorded by the Sub Divisional Officer and no opportunity to adduce evidence had been given to them and only on the basis of affidavit, the case had been decided. While rejecting the stand of the petitioners it was observed that no sufficient cause had been shown by them for their non-appearance on 4.2.1998 before the Sub Divisional Officer (Civil), Pehowa, as a result of which the Magistrate chose to consider the affidavit filed and spot

inspection report of the Sub Divisional Officer and accepted the stand of the respondents with regard to the existence of the passage as pleaded by them and for that reason ordered its restoration.

13. While coming to the conclusion it has been totally ignored by the Additional Sessions Judge that as evidence is required to be taken by the Magistrate in a manner as in a summons case, there was no justification with the Sub Divisional Officer to accept the affidavit of the respondents in order to decide the dispute raised by them. It cannot be ignored that it is not permissible to adduce evidence by way of affidavit in the proceedings u/s 138 of the Code and the Magistrate is bound to record evidence in the same manner as is recorded in a summons case was held in Banta Singh Vs. Sohawa Singh and Others, . The relevant observations in this regard read as under:-

"It is not permissible to adduce evidence by way of affidavits in proceedings u/s 133, and the Magistrate is bound to record evidence in the same manner as is recorded in a summons case.

Wherever the Legislature thought that the evidence may be adduced by way of affidavits, it permitted in the Code the parties to lead evidence by filing affidavits. There being no such provision as regards the proceedings initiated u/s 133, and the procedure in such cases having been prescribed u/s 137 to be that of summons cases, there is no option with the trial Magistrate to accept the affidavits of the parties to adjudicate the dispute".

14. Therefore, the order of the Sub Divisional Officer suffers from patent illegality because he had taken into consideration the affidavit filed by the respondents and had not followed the procedure of a summons case as required under law.

15. It is also apparent from the order of the Sub Divisional Officer that he had carried the spot inspection on 16.1.1998 in the presence of Halqa Patwari along with Mam Chand Lambardar, Mange Ram, Sahib Singh, Bharat Singh, Ram Kala, Arjun Singh and Sarpanch Gram Panchayat, Ramgarh Ror. Thereafter he had fixed the case for arguments on 4.2.1998 and as the petitioners had not put in appearance on that day, ex-parte order was passed against them. What he had noticed during the spot inspection had been recorded in his order and the same reads as under:-

"During the spot inspection of the land in dispute held on 16.1.98 is found that gram crop is sown on killa Nos.3/1 and 3/2 of Khewat No.125 Khatoni No.309 min khasra No.91 due to which there is hindrance on the passage. During spot inspection it is also found that at the spot it runs through killa Nos.2, 9, 8 of khasra No.91 to approach the main passage. But this passage is not in accordance with the revenue record. As per the revenue record the passage is provided in Killa Nos.3/1 and 3/2 where the respondent has sown the gram crop due to which the applicant and other persons are facing hurdle because at the spot applicant and other people told that they had to approach their field through a long passage. The passage provided in revenue record is stopped by

respondents."

16. In view of the position noticed by him in the spot inspection he came to the conclusion that the petitioners had created hurdle in the passage provided in the revenue record by sowing gram crop and had created nuisance for the respondents as well as other villagers. It has been contended by the counsel for the petitioners that on the basis of the spot inspection alone the order against them could not be recorded. It was urged that order under this section was made upon no legal evidence and was based only on information gathered by the local commissioner and is thus illegal despite the fact that the parties were present at the time of the spot inspection. According to him the provisions of Section 138 of the Code being mandatory, no waiver on the part of the parties can confer power on the Magistrate to act in a manner not permissible under the law. u/s 139 of the Code for the purpose of enquiry under Sections 137 and 138 of the Code, the Magistrate can direct local investigation to be made by such person as he thinks fit or summon and examine an expert. Even in Section 310 of the Code, a local inspection can be carried out by the Magistrate for the purpose of properly appreciating the evidence led in the case but such inspection report cannot take the place of evidence itself and for that reason an absolute order can not be made by the Magistrate without recording evidence merely on the basis of the local inspection carried out by him.

17. On behalf of the respondents reference was made too *Raj Mal v. Joginder Ram*, 1991(1) RCR (Cr.) 335, wherein it was laid down that where the Magistrate passes an order after personally inspecting the spot for proper appreciation of the evidence the same is not vitiated. There cannot be any dispute with the law laid down in the above mentioned case because it would appear from the facts of that case that both the parties had also produced their evidence and for the appreciation of the same, the learned Magistrate inspected the spot in presence of both the parties and thereafter he made the conditional order absolute. The facts of the present case are thus distinguishable because in this case, the Sub Divisional Officer had taken into account the affidavit filed on behalf of the respondents without recording any evidence. Therefore, the impugned orders passed by the Sub Divisional Officer and the learned Additional Sessions Judge cannot be sustained.

18. Coming to the last submission merely because a civil suit is pending would not per se bar the jurisdiction of the Magistrate to decide the dispute raised. This position is so because the Magistrate's order is not a conclusive determination of question of title.

For the aforesaid reasons, I accept the petition and set aside the impugned orders of the Courts below.