

(2013) 07 AHC CK 0249

In the Allahabad High Court

Case No : Criminal Miscellaneous Writ Petition No. 17236 of 2010

Shakeel Ahmad and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 12-07-2013

Acts Referred:

Citation : (2013) 8 ADJ 225 : (2013) 83 ALLCC 412 : (2014) 4 EFLT 11

Hon'ble Judges : Mohammad Tahir, J

Bench : Single Bench

Advocate : Naushad Siddiqui, Amar Nath Tewari and R. Nath Tiwari, for the Appellant; Vinod Kumar, for the Respondent

Judgement

Mohammad Tahir, J.—By means of this writ petition the petitioners have invoked the extraordinary jurisdiction of this Court with the prayer

that the orders dated 30.10.2009 and 15.5.2010 passed by the Sub Divisional Magistrate, Sadar District Chandauli in Criminal Case No. 20 of

2009 State v. Shakeel Ahmad and others, u/s 133 Cr.P.C. and the order dated 7.7.2010 passed by the Sessions Judge, Chandauli in Criminal

Revision No. 65/2010 Shakeel Ahmad and others v. State of U.P., be quashed and the respondents be restrained from disturbing the peaceful

functioning of the godown of the petitioners and from demolishing the same. For the purpose of disposal of this writ petition the relevant and

essential facts are as such that one Abdul Rashid had moved an application before the S.H.O., P.S. Mughal Sarai, District Chandauli against the

petitioners Shakil Ahmad, Parvez Ahmad and Sirajul Haque to the effect that they are doing the business of flesh, leather and bones of dead

animals in Mohalla Kasab Muhal, Mughal Sarai, District Chandauli. Their business are polluting the atmosphere of the locality and it has become

very difficult for the persons of that locality to live in that area due to foul smell. On that application, Raju Diwakar Incharge Outpost Kuda Bazar

P.S. Mughal Sarai went to the spot and after inspection he submitted his report to the S.D.M. Sadar Chandauli confirming the averments made in

the application moved by Abdul Rashid and requested the S.D.M. Sadar to initiate proceedings u/s 133 Cr.P.C. against the petitioners. On

receiving that report, the S.D.M. concerned issued notice dated 30.10.2009 to the petitioners u/s 133 Cr.P.C. asking them to remove the

aforesaid nuisance or to show-cause against the notice on the date fixed. In response to the notice, the petitioners through their counsel sought time

for filing the objection and further 5.3.2010, 26.3.2010, 15.4.2010 dates were fixed on the application of the petitioners but no objection against

the notice was filed by the petitioners. Further, 3.5.2010 was fixed for hearing but on that date none turned up from the side of the petitioners. So,

after giving sufficient opportunity S.D.M. Sadar has passed the impugned order dated 15.5.2010 whereby the conditional order was made

absolute. Against that order, the petitioners filed Criminal Revision No. 65 of 2010, Shakil Ahmad and others v. State of U.P. In the Court of

Sessions Judge, Chandauli. The Sessions Judge, Chandauli after hearing the counsel for both the parties dismissed the revision vide his order dated

7.7.2010 and confirmed the order dated 15.5.2010 passed by the S.D.M. Sadar, District Chandauli. Aggrieved by the said orders, the petitioners

have preferred this writ petition before this Court.

2. I have heard learned counsel for the petitioners as well as learned counsel for the respondents and perused the record.

3. The counsel for the petitioners has submitted that the conditional order of the S.D.M. dated 30.10.2009 under which the notice u/s 133 Cr.P.C.

was issued to the petitioners, suffers from illegality as the same was passed without taking evidence. In this regard, the counsel for the petitioners

has referred Section 133(1) Cr.P.C. and submitted that according to this Section, a District Magistrate or a Sub Divisional Magistrate 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, may make a conditional order requiring the person concerned to remove obstruction or nuisance or to desist from carrying on

objectionable trade or occupation. But, in the present case the conditional order u/s 133(1) Cr.P.C. was passed without taking any evidence, so

the whole proceeding initiated u/s 133(1) Cr.P.C. is vitiated.

4. I find no force in the contention of the counsel for the petitioners because for initiation of proceedings u/s 133(1) Cr.P.C. it is the satisfaction of

the Magistrate concerned as to whether any public nuisance exists. The relevant portion of Section 133(1) Cr.P.C. reads as hereunder:

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) *****

(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to 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) *****

(d) *****

(e) *****

(f) *****

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) *****

(iv) *****

(v) *****

(vi) *****

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him 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.

5. The words occurring in Section 133(1) Cr.P.C. ""and on taking such evidence (if any) as he thinks fit"" indicate that recording or taking of

evidence before passing a conditional order u/s 133(1) Cr.P.C. is discretionary and not mandatory. In this regard, my opinion finds support from

the view taken by the Bombay High Court in the case of Tejmal Punamchand Burad Vs. State of Maharashtra and others, . In that case, the

Bombay High Court has held that the Magistrate is not required to record evidence when he passes the conditional order. The trade or business of

storing bones and leather of dead animals certainly emits foul smell and injurious to public health and comfort. So in such a case in the interest of

public immediate action is necessary and the conditional order for removal of such public nuisance can be passed by the Magistrate without taking

or recording evidence. In this regard, my view further finds support from the view taken by the Punjab and Haryana High Court in the case of Ram

Pal Vs. State of Punjab and Others, , in which it has been held that illegal Hada Rori operation near National High way emitting foul smell and

causing pollution and discomfort to the travellers, is public nuisance and in such a case conditional order can be passed without recording evidence.

In the present case, the S.D.M. concerned proceeded u/s 133(1) Cr.P.C. against the petitioners on the basis of the report submitted by the police

officer. There is nothing on record to show that the said police officer had some enmity with the petitioners or he in collusion with the opposite

party submitted the report against the petitioners. So, in these circumstances, the non-taking or recording of evidence by the Magistrate before

passing the conditional order does not, in any manner, adversely affect the proceeding of the present case.

6. The counsel for the petitioners has further submitted that this business of storing bones and leather of dead animals is being carried on by the

petitioners on that place for a long time and prior to that their ancestors were doing this business on that place. He has further submitted that the

petitioners are paying business tax also to the Municipality and in that regard, the photocopies of tax paying receipts have been filed from their side.

So the impugned order of the Magistrate disturbing the business of the petitioners is unjust and improper and accordingly, the revisional Court's

order confirming the said order of the Magistrate is also unjust and improper. In support of his contention, the counsel for the petitioners has cited

the following rulings:

(I) Vasant Manga Nikumba v. Baburao Bhikanna Naidu

(II) Makhan Lal, Suresh Kumar and Chhajju Ram Vs. Buta Singh,

7. I find no force in this contention also because long standing user or business which creates public nuisance and which is injurious to health and

physical comfort of the persons of the community and from which there is strong apprehension of spreading the serious diseases, cannot be

legalised on the basis of its long existence. In the present case, there is clear report of the police officer concerned that the petitioners are running

the business of storing the bones and leather etc. in their godowns, in the thickly populated locality of Mohalla Kasab Muhal, P.S. Mughal Sarai,

District Chandauli, as a result of which foul smell spreads out all around and it has become very difficult for the persons of that locality to live there.

This report is of the date of 1.9.2009. Prior to this report, on 19.7.2007 petitioners Shakeel Ahmad, Parvez Ahmad and Sirajul Haque had given

written undertaking (Tehrir) to the Additional Superintendent of Police to the effect that they would shift their godowns of bones and leather

outside the Abadi by 30.9.2007. This report clearly shows that the petitioners were operating this noxious business inside the Abadi and further it

shows that they promised to shift this business outside the Abadi before 2 years of the said police report. The report of the committee, dated

19.5.2010, consisting of S.D.M. Sadar, C.O. Sadar and Chief Veterinary Officer, Additional Chief Medical Officer submitted to the District

Magistrate, Chandauli also further fortifies this fact that this business was being carried on inside the Abadi and the said godown of bones etc. was

emitting unbearable smell and was creating health hazards to the people of that locality. The photocopies of the aforesaid two papers have been

filed alongwith the counter-affidavit filed by the private respondent and these two papers have not been challenged by the petitioners. So, such a business which creates health hazards to the community of the locality and from which there is strong apprehension of spreading serious diseases in the locality, cannot be allowed to continue on the basis of its long existence. Therefore, no length of enjoyment can legalise a public nuisance involving danger to the health of the community. In this regard, my view finds support from the view expressed by the Division Bench of Patna High Court in the case of Maksood Ali and Others Vs. President, Union Board, . In the cases relating to the rulings cited by the counsel for the petitioners the public nuisance was not proved but in the case at hand the public nuisance undisputedly and by its nature is very well proved, so the rulings cited by the counsel for the petitioners are distinguishable on facts and circumstances of the matter, so they are not applicable in the present case.

8. It is also pertinent to mention here that the petitioners in the revision memo filed by them in the revisional Court have admitted that they have no licence to run the business in question. So, the business tax payment receipts are of no help to the petitioners. In that view of the matter also, the impugned order of the Magistrate concerned is fully just and proper and the revisional Court has rightly dismissed the revision filed against that order.

9. The counsel for the petitioners has further challenged the order dated 15.5.2010 of the Magistrate concerned on this ground also that this order is an ex parte order and on the date, this order was passed, the Advocates of Chandauli Court were on strike, so in the absence of the parties or their counsel this order ought not to have been passed by the Magistrate concerned and in this regard, the copy of the Resolution of Bar Association has been filed by the petitioners. This contention is also bereft of any force because there was no such resolution of Bar Association that the Magistrate or any other officer would not pass any order on that date and moreover, there is no law that the Magistrate or any other officer cannot pass any order on the day of strike of the advocates. The impugned order of the Magistrate concerned indicates that the petitioners were given about 5 dates for filing their objections against the conditional order

but no objection was filed by the petitioners against the conditional order and the petitioners even remained regularly absent on two dates from the Court. So, sufficient opportunity was given to the petitioners by the Magistrate concerned to file objection against the conditional order but they failed to file the objection against the same, as a consequence thereof the conditional order was made absolute by the Magistrate concerned under the provisions of Section 136 Cr.P.C. In this regard, the reference of Sections 135 and 136 Cr.P.C. appears essential. Sections 135 Cr.P.C. reads as follows:

135. Person to whom order is addressed to obey or show-cause.--The person against whom such order is made shall--

(a) perform, within the time and in the manner specified in the order, the act directed thereby; or

(b) appear in accordance with such order and show-cause against the same.

Section 136 Cr.P.C. reads as follows:

136. Consequences of his failing to do so.--If such person does not perform such act or appear and show-cause, he shall be liable to the penalty

prescribed in that behalf in Section 188 of the Indian Penal Code (45 of 1860,) and the order shall be made absolute.

10. According to the conjoint reading of Sections 135 and 136 Cr.P.C., it is clear that if the person to whom the conditional order is addressed,

does not perform the acts within the time as directed by the conditional order or fails to appear and to show-cause, the conditional order is made

absolute. In the present case, the petitioners neither performed the act as directed by the conditional order nor showed any cause against the said

order inspite of availing sufficient opportunity for the same. So the Magistrate concerned rightly made the conditional order absolute and the

revisional Court rightly confirmed the same.

11. In view of the above, I find no illegality or impropriety or jurisdictional or procedural error in the impugned orders of both the Courts below

and therefore, these orders call for no interference. For the foregoing reasons, the writ petition is dismissed and the impugned orders of both the

Courts below are confirmed.