

(1993) 11 P&H CK 0030
In the Punjab And Haryana At Chandigarh
Case No : Criminal Revision No. 349 of 1992

Sham Lal

APPELLANT

Vs

Harmail Singh and ors.

RESPONDENT

Date of Decision : 17-11-1993

Acts Referred:

Citation : (1994) 2 AICLR 502 : (1994) 1 RCR(Criminal) 245

Hon'ble Judges : A.S.Nehra, J

Advocate : S.R.S Malhi, Kasturi Lal, Advocates for appearing Parties

Judgement

A. S. Nehra, J.

1. This revision petition under Section 401 of the Code of Criminal Procedure (hereinafter referred to as the Code) is directed against the order

dated 23rd January, 1992 passed by the Sub Divisional Magistrate, Panchkula by which Sham Lal petitioner and two others have been issued

direction under Section 133 of the Code to allow the flow of water in the direction it flows.

2. Briefly stated the facts of the case are that Harmel Singh and 12 others, residents of village Saketri, Tehsil Panchkula, District Ambala filed a

petition under Section 133 of the Code against Sham Lal petitioner, Charan Singh son of Shri Mukhtiar Singh and Surti widow of late Shri Chetu

stating that village Saketri is situated on Shivalik Foot Hills and most of the rain water from Hills side passes through the drains constructed

underneath the houses in the Abadi Deh. It was further averred in that petition that in the attached map Exhibit P1, GH is a water course flowing

from Shivalik side through the village and K is a culvert constructed by the P.W.D. (B&R), Haryana on the road passing through the village for

passage of water and L is the house of Shri Kishan Singh son of Shri Raja Singh underneath whose house is passage of water constructed by him.

It is further stated in that petition that Smt. Surti had sold her land in the Abadi Deh and Sham Lal is erecting a structure on the piece of land

changing the direction of water from point GH to point IJ and Charan Singh is also constructing a wall at point AFDE blocking the natural course

of water. It was further stated in that petition that while changing the course of water the public in general and the petitioners whose Baras and

houses along with some cultivated land are likely to be affected would be put in great nuisance as the road leading to Mahadev Mandir passes

through the village and it will be washed away in case, the course of water GH is changed towards the points IJ. It was further stated in that

petition on 7.6.1991 the villagers filed an application before the Gram Panchayat who inspected the site and persuaded the respondents to stay the

construction blocking the flow of water that respondents agreed to stop the erection of the structure intended to be raised on the course of water

but later on defendant No. 1 raised it wall on the same site to block the passage of water and that the act of the respondents is intentional and is a

nuisance as described under Section 133 of the Code. A prayer was made in the petition that a conditional order be passed to restrain the

respondents from raising unlawful construction and to remove the encroachment already made. This petition was filed on 26th June, 1991 and on

26th of June, 1991 Sub Divisional Magistrate Panchkula ordered for summoning the respondents for 1171991. On 27th June, 1991 Sub

Divisional Magistrate, Panchkula also ordered that the flow of the nala should not be obstructed.

3. Notice were issued to the respondents for 11th July, 1991 but no conditional order under Section 133 of the Code was passed. On 22nd

August, 1992 Sham Lal and Smt. Surti were proceeded ex parte and Tehsildar Panchkula was directed to inspect the spot and submit a report.

On 25.7.1991 respondent No 3 in her written reply stated that the water coming from the Hills used to pass through her land and used to pass

underneath many houses. Respondent No. 2 Charan Singh also stated in his reply that he would not stop the Nala about which Harmel Singh had

filed the case and that he would not divert the flow of water. On 1991991 respondents were proceeded against exparte for their nonappearance.

On 10th December, 1991 Sham Lal made an application for setting aside the order, proceeding ex parte against him, stating that he may be

permitted to join the proceeding in the case. His application was allowed and the case was adjourned to 23rd of January, 1992 for arguments on

the report of the Tehsildar. After hearing arguments on both sides and agreeing with the report of the Tehsildar, Sub Divisional Magistrate,

Panchkula issued directions to allow the flow of the water in the direction it flows.

4. It is stated in the written reply before the Sub Divisional Magistrate, that the petition filed by the petitioner is malafide and has been moved with

ulterior motive although no cause of action whatsoever has arisen to the petitioner against the respondents. It has been further stated in the written

reply that no case under Section 133 of the Code as alleged is made out. It is further stated that as per averments made in the petition, he is raising

construction in his own land, therefore, it could not be termed to be an unlawful construction. It is further stated that the land, however, on which

he is raising construction is neither a public place nor is a channel which is being used by the public, therefore, the petition filed by the respondents

is liable to be dismissed.

5. Learned counsel for the petitioner has contended that no conditional order as required under Section 133 of the Code has been passed against

Sham Lal petitioner and therefore, the impugned order is liable to be set aside. Learned counsel for the petitioner has further contended that the

Sub Divisional Magistrate was bound to record the evidence in the case in the manner as in a summons case. Section 244 of the Code of Criminal

Procedure, which governs summons cases, provides that when the accused does not admit the guilt, the Magistrate is bound to hear the petitioner

and take all such evidence as may be produced in support of the prosecution and also to hear the accused and take all such evidence as he

produces in his defence. So, when the said procedure was applicable to the instant case by virtue of Section 138 of the Code, it was essential for

the Sub Divisional Magistrate to have recorded the statement of any one of the applicants viz. Harmel Singh etc. and then he should have recorded

the evidence of the witnesses, who were produced by the petitioner and thereafter he should have recorded the statements of Sham Lal and

recorded the evidence of persons whom he (Sham Lal) wanted to examine in his

defence. As indicated above, nothing of the sort was done by the Sub Divisional Magistrate in the matter of recording evidence. Therefore, there can be no escape from the conclusion that there has been no trial of the case as required by statute, i. e. Section 138 read with Section 244 of the Code. In that view of the matter, when there is no trial or proper enquiry in the case as contemplated by statute, it cannot be gain said that the final order has been recorded by the Sub Divisional Magistrate on no evidence. The report of the Naib Tehsildar cannot, in my opinion, take the place of evidence which was to be given by witnesses to be examined by them in the Court. As soon as it is held, as I do, that there had been no valid trial or proper enquiry, the final order recorded by the Sub Divisional Magistrate cannot be upheld.

Section 138 of the Code reads as under :

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.

6. Learned counsel for the petitioner in support of his argument has relied upon Gian Chand v. Khushi Ram and others, 1974 Chandigarh Law

Reporter (Vol. 2) 462, which is fully applicable to the facts of the present case,

7. In view of the above discussion, I hold that the impugned order passed by Sub Divisional Magistrate, Panchkula dated 23rd January, 1992 is

void and without jurisdiction and the same is set aside. The case is remanded back to the Sub Divisional Magistrate, Panchkula with a direction

that he should proceed with the case in accordance with law and decide the same within two months from the date of the record.

8. Before parting with the judgment, it is made clear that Sham Lal petitioner, Charan Singh and Smt. Surfi shall not obstruct the flow of the water

till the decision of the case by the Sub Divisional Magistrate, Panchkula.

JUDGMENT accordingly.