

Balwant v. Jai Singh and another (J. S. Sekhon, J.)

competent but without any change in the circumstances, on the same facts and grounds, no subsequent petition will be competent. It will amount to review of the earlier order. To our mind, the legal position is clear and this second petition on the same facts is not competent and is dismissed. The parties are directed to appear in the trial Court on January 21, 1991 and the trial Court will decide the case on day to day basis.

P.C.G.

Before Jai Singh Sekhon, J.

BALWANT,—Petitioner.

versus

JAI SINGH AND ANOTHER,—Respondents.

Criminal Misc. No. 11884-M of 1990.

26th March, 1991.

Criminal Procedure Code, 1973 (II of 1974)—Ss. 132, 133, 137, 138 & 482—Encroachment on public street denied—Trial Court passing conditional order under Section 133 in absence of evidence and enquiry—Trial Court—Whether can pass such orders—Provisions of S. 137 held mandatory.

Held, that it was incumbent upon the trial Court to have first tried the question of existence or non-existence of such right at the said place, before embarking upon the regular inquiry, in accordance with the provisions of S. 138 of the Code. (Para 4)

Held, that there is a provision for staying the proceedings initiated under S. 133 of the Code, till the existence of such right has been decided by a competent Court, it is clear that the provisions of S. 137 are mandatory and any Magistrate taking cognizance of the nuisance under S. 138, is bound to first adjudge the existence or non-existence of the public right. In the case in hand, admittedly, the trial Court had failed to do so, which has certainly resulted in vitiating the proceedings because a valuable right of the petitioner to get the matter decided from a competent Court has been taken away. (Para 4)

Petition under Section 482 of the Code of Criminal Procedure praying that proceedings Under Section 133 of the Criminal Procedure Code and the impugned orders may kindly be quashed.

It is further prayed that the operation of the impugned order may kindly be stayed during the pendency of this petition.

J. R. Mittal, Senior Advocate, (Baldev Singh, Advocate with him), for the Petitioners.

R. S. Lohan, Advocate, for the Respondent.

JUDGMENT

J. S. Sekhon, J. (oral)

(1) The sole controversy involved in this petition filed under Section 482 of the Code of Criminal Procedure, 1973 (for short the Code), is whether it was incumbent on the trial Court, under Section 137 of the Code, to first hold an inquiry regarding the existence of the right in dispute, i.e. public street, before embarking upon the inquiry on merits of the case under Section 132 of the Code.

(2) The brief resume of facts relevant for the disposal of this petition is that on the application of the present respondents that Balwant petitioner had made encroachment upon a public street by constructing a room, the Magistrate first passed conditional order for removal of nuisance under Section 133 of the Code, and issued notice of (Sic (to)) Balwant. In answer to that notice, Balwant denied the existence of street to the extent of the disputed site. The Executive Magistrate then held an inquiry by treating it as a summons case under the provisions of Section 138 of the Code. On the basis of the evidence led by the complainant and relying upon the report of the Junior Engineer, the trial Magistrate came to the conclusion that it was an encroachment on the public street and made the conditional order absolute. The present petitioner then filed a revision petition before the Sessions Court, Jind, which was dismissed by the learned Additional Sessions Judge,—*vide* order Annexure P-2.

(3) I have heard the learned counsel for the parties besides perusing the records. No doubt, the perusal of the order of the trial Court as well as the revisional Court, reveals that the objection regarding the non-compliance of the provisions of Section 137 of the

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Code, was not taken by the petitioner, yet all the same, it being a legal objection, the petitioner is not barred from urging the same especially when the non-compliance of the provisions of this Section will vitiate the entire proceedings.

(4) The perusal of paragraph 3 of the order of the trial Court (Annexure P1) reveals that the respondent-petitioner Balwant stated as under :—

“The respondent replied to the effect that he has not made any encroachment on the public street and that his house had been there for the last so many years. On the eastern side of his house there lie the houses of the applicants besides a small portion of vacant land and this very vacant land is used as a street by them. It has been further said that on the eastern side there are a ‘talab’, a well and the pucca road by using which the applicants etc. go to their work. It was prayed that the notice be withdrawn.”

A glance through the reply filed by Balwant respondent petitioner on service of notice of conditional order, reveals that he has denied the existence of a public street at the site in question. Thus, it was incumbent upon the trial Court to have first tried the question of existence or non-existence of such right at the said place, before embarking upon the regular inquiry, in accordance with the provisions of Section 138 of the Code. The provisions of Section 137 of the Code provide as under :—

“137. Procedure where existence of public right denied.

(1) Where an order is made under Section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place and if he does so, the Magistrate, shall, before proceeding under Section 138, inquire into the matter.

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such

right has been decided by a competent Court; and, if he finds that there is no such evidence, he shall proceed as laid down in Section 138.

- (3) A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial."

From the factum that in sub-section (2) of this Section reproduced above, there is a provision for staying the proceedings initiated under Section 133 of the Code, till the existence of such right has been decided by a competent Court, it is clear that the provisions of Section 137 are mandatory and any Magistrate taking cognizance of the nuisance under Section 138, is bound to first adjudge the existence or non-existence of the public right. In the case in hand, admittedly, the trial Court had failed to do so, which has certainly resulted in vitiating the proceedings because a valuable right of the petitioner to get the matter decided from a competent Court has been taken away.

(5) Faced with this difficulty, Mr. R. S. Lohan, learned counsel for the respondents maintains that the civil suit filed by Balwant, present petitioner, having been got dismissed in default, clearly shows that he has no sound title to the property in dispute. There appears to be no force in this contention as a perusal of the judgment (annexure R-I) reveals that Balwant had filed a suit for permanent injunction for restraining the respondents from making a passage forcibly and illegally on the land of the plaintiff-petitioner. It was not a suit for declaration of title etc. This suit was got dismissed in default on 1st of May 1990, i.e., after the pronouncement of the impugned order dated 5th of March, 1990, by the Executive Magistrate. Thus, the simple dismissal of the above-referred suit in default would not amount to concluding that Balwant petitioner had no sound title in the property in dispute.

(6) The matter does not rest here, as a perusal of the order of the Executive Magistrate reveals that none of the parties had led any evidence regarding the existence of the passage since the times immemorial what to say of leading any evidence regarding the ownership of the property in dispute. The impugned order is

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simply based on the report of the Junior Engineer, who had issued a certificate on the basis of the Measurement Book No. 7248 at page No. 30-T-5 (4) to the effect that he has paved the passage with *pucca bricks* although the measurement book was not produced in evidence, in order to show as to how the boundaries of the *kutchra* public passage were fixed at the time of the said payment.

(7) In these circumstances there is no option but to accept this petition and quash the impugned order of the trial Court as well as of the revisional Court and direct the trial Court to try this case afresh, by following the procedure laid down under Section 137 of the Code. The parties through their counsel are directed to appear before the trial Court on 23rd April, 1991.

P.C.G.

Before S. S. Sodhi & N. C. Jain, JJ.

JAININDER MOHAN AND OTHERS,—Petitioners.

versus

THE COUNCIL OF HOMOEOPATHIC SYSTEM OF MEDICINE,
PUNJAB, CHANDIGARH AND ANOTHER,—Respondents.

Civil Writ Petition No. 481 of 1990.

27th March, 1991.

Punjab Homoeopathic Practitioners Act, 1965—Ss. 21(1)(b), 21(1)(d), 21(3) & 54—The Punjab Homoeopathic Practitioners Regulations 1974—Regl. 8 & 32—Punjab Homoeopathic Practitioners (First Amendment) Regulations, 1979—The Punjab Homoeopathic Practitioners (Second Amendment) Regulations, 1983—Regl. 8—The Central Council of Homoeopathic Regulations, 1983—Regls. 9, 10, 11—Procedure of conduct of Examinations—Punjab Regulations, 1979 making Central Council Regulations applicable—Central Regulations not coming into existence till May 10, 1983—Prior to 1983 and in consequence thereof, Punjab Regulations, 1983 made applicable resulting in issuance of letter dated August 2, 1983 by Punjab Council giving concession to re-appear candidates for admission to next higher class—Meanwhile, Central Regulations, 1983 coming into force on May 11, 1983 whereas letter dated August 2, 1983 withdrawn by Punjab Council by letter dated August 13, 1988, thereby denying concessions to students admitted before August 13, 1986—Prior approval of the State Government—Whether necessary—Effect of such withdrawal—Stated.