

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

W.P No. 826-M/2022

With Interim Relief.

Toti Rahman & 06 others.....(Petitioners)

vs

The State & 08 others.....(Respondents)

Present:

Mr. Fazal Amin, Advocate for the petitioner.

Mr. Saeed Ahmad, learned Assistant A.G for the official respondents.

Mr. Habib-ur-Rahim, Advocate for the private respondents.

Date of hearing: 06.02.2023

JUDGMENT

Dr. Khurshid Iqbal, J.-

1. This writ petition has been filed by the petitioners, Toti Rahman and 06 other, residents of Rahim Abad, Tehsil Samarbagh, District Dir Lower. They seek the following prayer under article 199 of the Constitution:

"On acceptance of the instant petition, the order/judgment dated 29.06.2022 passed in Cr. Revision No.14/I0 of 2022 by Additional Sessions Judge/Izafi Zila Qazi, Samarbagh, Dir Lower (respondent No.8) and order/judgment dated 02.12.2021 passed by Executive Magistrate, Samarbagh, Dir Lower (respondent No.9), be quashed and complaint under section 133 Cr.P.C filed by respondents No.2 to 7 may please be dismissed.

Any other remedy which is just, efficacious may also be awarded in favour of petitioner though not specifically prayed for."

2. Facts shortly are that the respondents No.2 to 7 filed a complaint u/s. 133, Cr.P.C, against the petitioners before the learned Assistant Commissioner/Executive Magistrate, Samarbagh, District Dir Lower. They contended therein that a path leads to their houses has been constructed by the local elders some 15 years ago and to this effect, the residents of Rahim Abad have settled certain terms in the shape of a contract about the usage as well as extension of routes from it to the houses of individuals. They further averred that the petitioners were obstructing the path in dispute and have blocked it for the respondents No.2 to 7.

3. The learned Executive Magistrate sent the above-mentioned complaint to the SHO of the Police Station concerned for necessary action as per law. After making necessary investigation, the police submitted its detailed inquiry report coupled with the statements of witnesses recorded during the investigation. Pursuant to the police report, the learned trial Court passed a conditional order on 28.05.2021, whereby he directed the petitioners to remove the obstruction from the path in dispute and appear

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before him either to show cause or claim jury, failing which, further legal action will be taken against them. The petitioners through their counsel appeared before the learned trial Court and till 02.12.2021. They did not make any objection to the existence of the path. The learned trial Court vide his order dated 02.12.2021 confirmed his previous order passed on 28.05.2021, regarding removal of obstruction and its restoration to original shape for the use of residents of the locality. Being aggrieved, the petitioners assailed the aforesaid order through a revision petition before the learned Additional Sessions Judge/Izafi Zilla Qazi, Dir Lower at Samagbagh, however, which met the same fate vide his judgment passed on 29.06.2022.

4. The petitioner has thus filed the instant writ petition against the aforesaid orders.

5. I have heard arguments of learned counsel for the parties, learned Asst: A.G for the official respondents and perused the record.

6. Perusal of record transpires that a conditional order was passed by the learned Assistant Commissioner on 28.05.2021 with the

direction to open the path in dispute and appear before him and either show cause or claim jury, failing which further legal action will be taken against them. Thereafter, the petitioners continuously appeared before the learned AAC but they did not deny the existence of the path in dispute. It was on 02.12.2021, about 07 months after the conditional order that they submitted an application for dismissal of the complaint. While they denied the existence of the path in their application, their counsel stated before the learned AAC that they have not blocked the path in dispute and further that if it is found they would have no objection on its removal. The arguments of the learned counsel for the petitioners that the petitioners were summoned several times and their evidence was not recorded, is not tenable. The reason is that u/s.139-A, Cr.P.C, the petitioners were bound to have denied the existence of the disputed path at the earliest. Had they done so, the relevant procedure as laid down in Section 137, Cr.P.C would have been adopted by recording evidence in the manner as provided in section XX, Cr.P.C. Since, the petitioners failed to discharge their burden,



the learned trial Court, thus made the conditional order as absolute vide the impugned order passed on 02.12.2021 under Section 137(3), Cr.P.C.

7. Learned counsel for the petitioner submitted that in fact no show-cause notice was issued to the petitioner by the learned Assistant Commissioner. He maintained that rather the petitioner kept appearing before the Court. He relied on the case of Ghulam Mustafa v. Muhammad Ismail and 2 others, reported as 1992 MLD 67 [Azad Jammu and Kashmir]. It was held therein that it was necessary for the Magistrate to have held an inquiry into the denial of public right and given conclusive findings thereto.

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8. As discussed above in the case in hand, the complaint was lodged on 18.05.2021. Though a conditional order u/s.133, Cr.P.C should have been issued on the same day, however, the learned Assistant Commissioner forwarded it to the SHO of Police Station concerned for action as per law. On 28.05.2021, a conditional order was passed, a copy of which was placed

on the record by the complainant party vide C.M No.1544-M of 2022. It is, thus, clear that a show-cause notice as issued, to which, the petitioner did not respond at all. It has been held in numbers of cases that the passing of an order u/s. 133, Cr.P.C itself is sufficient to be considered as show-cause notice. Reference may be made to the case of Faiz Muhammad v. Civil Judge and Judicial Magistrate and 2 others, reported as 2007 YLR 256 [Sindh (Hyderabad Bench)].

It is held:

“10. I am not inclined to agree with the plea of the learned counsel for the applicant that show-cause notice was necessary to be given before passing the conditional order. The plain reading of the section 133 of the Code, nowhere, requires issuance of show-cause notice before passing a conditional order. The conditional order itself is a show-cause notice in its nature as it evident from jurisdiction, given by the Section 133 of the Code itself on satisfaction of Magistrate about fulfillment of any of the six, given categories. The same is:

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 be fixed in the order.”

Similarly, in the case of Haq Nawaz and 2 others v. Ramzan and 6 others, reported as PLD 1975 Peshawar 199 [Peshawar High Court], it is held:

"[...] the requirement of an order, which a Magistrate is required to make under section 133, Cr.P.C. would appear to be that first he must apply his mind to the complaint/information laid before him and if he is satisfied that a case has been made out for the exercise of his jurisdiction, he should then issue a notice to respondent to show cause on a specified date why he should not be made to undo the public nuisance. Now an order of this nature would be a conditional order within the meaning of section 133, Cr.P.C. for if respondent does not appear in the proceedings or else has not been able to show cause against the order, all that the Magistrate would then do is to make his order absolute to carry out which would then be the obligation of respondent failing which it can be executed by the Magistrate himself. [...]"

In the above referred case, it was further held that if the order in question was defective in some measure, it could have been cured u/s. 537, Cr.P.C. It means that the non-issuance of conditional order on a day the complaint was filed was a curable irregularity.

9. In the case of Fayyaz Hussain v. The State and 4 others, reported as 2015 YLR 194 [Lahore], in which, there was a similar complaint in respect of a public thoroughfare and a civil suit was also filed for declaration and permanent

injunction, while the complaint was dismissed, and a criminal revision petition filed was also dismissed by the learned Additional Sessions Judge and it was held that the revisional Court having passed a final order, the same could not be interfered by the High Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. The relevant portion is reads as under:

"4. It is ell established that findings of the revisional court of competent jurisdiction cannot be assailed by invoking the constitutional jurisdiction of this Court under Article 199 of the constitution of Islamic Republic of Pakistan 1973, therefore, instant writ petition is not maintainable against the order passed by the learned additional Sessions Judge in criminal revision petition. Reliance is made upon, (i) Badaruddin v. Mehr Ahmad Raza, Additional Sessions Judge Jhang and 6 others (PLD 1993 SC 399) and (ii) Muhammad Fiaz Khan v. Ajmer Khan and another (2010 SCMR 105). It may be expedient to reproduced the relevant extract from the case of Badrauddin (supra), which reads below:

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7. Second ground given by the High Court is that writ will not lie if final order is passed by the Revisional Court. There is no dispute about the fact that powers of the High Court for exercise of revisional jurisdiction under section 439, Cr.P.C. are wider in scope than powers in the writ jurisdiction. By amendment in the law now Sessions Court and High Court have concurrent revisional jurisdiction which is allowed in the normal course to be exercised first by lower forum but that does not decrease the scope of jurisdiction as mentioned above. In such circumstances it is said that if there is finding by the Court of competent jurisdiction on the revisional side then it has attained finality. On the same question writ petition would be non-maintainable because otherwise it would amount to allowing question finally

decided in one set of forums to be agitated afresh in another set of forums and that way there will be no end to the finality. In support of the proposition reference can be made to the cases of Abdul Rehman Bajwa v. Sultan and others (PLD 1981 Supreme Court 522) and Javaid Iqbal v. Muhammad Din and another (1990 SCMR 1309)."

10. In the light of above conclusion, the learned counsel for the petitioner failed to make out a case for interference by this Court under article 199 of the Constitution read with section 561-A, Cr.P.C.

11. Resultantly, the instant writ petition being bereft of merits, stands dismissed.

Announced
Dt: 06.02.2023


JUDGE

Office
17/03/23