

SUPREME COURT OF INDIA

Suhelkhan Khudyarkhan

Vs.

State of Maharashtra

CrI.A.No.1039 of 2005

(Dr. Arijit Pasayat, Lokeshwar S. Panta and P. Sathasivam JJ.)

15.04.2009

JUDGEMENT

Dr. Arijit Pasayat, J.

1. Challenge in this appeal is to the judgment of a learned Single Judge of the Bombay High Court Aurangabad Bench dismissing the writ petition filed by the appellants.

2. Background facts projected by the appellant are as follows:

“Appellants are tenants on plot No.3/1120 since last 15-20 years where he has erected a tin shed and running religious bookshop known as "R.K. Kitab Ghar". Shop licence and electric connection were obtained for the said shop. Municipal Council has also recognized the shop of the appellants and had allowed the appellants to run the said shop for last many years. At the instigation of respondent No.2 i.e. J.K. Shaikh, the Municipal Council tried to remove the shop of appellants and there they filed suit bearing RCS No. 29 of 1994 before Civil Judge 9(J.D), Bhusawal. On 20.2.1995, Sub Divisional Magistrate issued a conditional order to remove the shop of the appellants on the basis of the complaint filed by respondent-J.K. Shaikh.

The appellants appeared before Sub Divisional Magistrate, Bhusawal on 8.3.1995 and made a request for dismissal of application filed by respondent No.2. The Sub Divisional Magistrate, by order dated 26.5.1995 directed the present appellants to remove the shop named as `R.K. Kitab Ghar". The appellants being aggrieved by the said order, filed Criminal Revision Application before learned III Additional Sessions Judge, Jalgaon on 31.5.1995. The said revision was dismissed after hearing the parties on 5.7.1995.”

3. Stand of the appellants was that Section 133 of the *Code of Criminal Procedure, 1973* (in short the `Code') had no application to the facts of the present case. The High Court did not accept the plea. The High Court's directions for removal of the encroachment was stated to

be without jurisdiction. The High Court did not accept the stand and dismissed the writ petition as noted above.

4. Learned counsel for the appellants submitted that there was order of status quo and therefore the direction as given is clearly without jurisdiction.

5. Learned counsel for the respondent-State on the other hand submitted that the order of status quo did not have any relevance so far as the present dispute is concerned and that it related to a different property.

6. Section 133 of the Code appears in Chapter X of the Code which deals with maintenance of public order and tranquility. It is a part of the heading "Public nuisance". The term "nuisance" as used in law is not a term capable of exact definition and it has been pointed out in Halsbury's Laws of England that:

“even in the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort.”

7. In *Vasant Manga Nikumba v. Baburao Bhikanna Naidu*¹ it was observed that nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence.

“It is not capable of precise definition. To bring in application of Section 133 of the Code, there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc. The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable damage would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time. It does not deal with all potential nuisance, and on the other hand applies when the nuisance is in existence. It has to be noted that sometimes there is confusion between Section 133 and Section 144 of the Code. While the latter is a more general provision the former is more specific. While the order under the former is conditional, the order under the latter is absolute. The proceedings are more in the nature of civil proceedings than criminal proceedings.”

8. One significant factor to be noticed is that the person against whom action is taken is not an accused within the meaning of Section 133 of the Code. He can give evidence on his own behalf and may be examined on oath. Proceedings are not the proceedings in respect of offences. The Water Act and the Air Act are characteristically special statutes.

9. The provisions of Section 133 of the Code can be called in aid to remove public nuisance caused by discharge of effluents and air discharge causing hardship to the general public. To that extent, the learned counsel for the appellant is correct in his submission.

10. The above position is highlighted in *State of M.P. v. Kedia Leather and Liquor Ltd.*².

11. A proceeding under Section 133 is of a summary nature. It appears as a part of Chapter X of the Code which relates to maintenance of public order and tranquility. The Chapter has been classified into four categories.

“Sections 129 to 132 come under the category of "unlawful assemblies".

Sections 133 to 143 come under the category of "public nuisance". Section 144 comes under the category of "urgent cases of nuisance or apprehended danger" and the last category covers Sections 145 to 149 relating to "disputes as to immovable property". Nuisances are of two kinds, i.e. (i) Public; and (ii) Private. 'Public nuisance' or 'common nuisance' as defined in Section 268 of the *Indian Penal Code, 1860* (in short the 'IPC') is an offence against the public either by doing a thing which tends to the annoyance of the whole community in general or by neglecting to do anything which the common good requires. It is an act or omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity. 'Private nuisance' on the other hand, affects some individuals as distinguished from the public at large. The remedies are of two kinds - civil and criminal. The remedies under the civil law are of two kinds. One is under Section 91 of the *Code of Civil Procedure, 1908* (in short 'CPC'). Under it a suit lies and the plaintiffs need not prove that they have sustained any special damage.

The second remedy is a suit by a private individual for a special damage suffered by him. There are three remedies under the criminal law. The first relates to the prosecution under Chapter XIV of IPC. The second provides for summary proceedings under Sections 133 to 144 of the Code, and the third relates to remedies under special or local laws. Sub-section (2) of Section 133 postulates that no order duly made by a Magistrate under this Section shall be called in question in any civil Court. The provisions of Chapter X of the Code should be so worked as not to become themselves a nuisance to the community at large. Although every person is bound to so use his property that it may not work legal damage or harm to his neighbour, yet on the other hand, no one has a right to interfere with the free and full enjoyment by such person of his property, except on clear and absolute proof that such use of it by him is producing such legal damage or harm. Therefore, a lawful and necessary trade ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community. Proceedings under Section 133 are not intended to settle private disputes between different members of the public. They are in fact intended to protect the public as a whole against inconvenience. A comparison between the provisions of Section 133 and 144 of the Code shows that while the former is more specific the latter is more general.

Therefore, nuisance specially provided in the former section is taken out of the general provisions of the latter section. The proceedings under Section 133 are more in the nature of civil proceedings than of criminal nature.

Section 133(1)(b) relates to trade or occupation which is injurious to health or physical comfort. It itself deals with physical comfort to the community and not with those acts which are not in themselves nuisance but in the course of which public nuisance is committed. In order to bring a trade or occupation within the operation of this Section, it must be shown that the interference with public comfort was considerable and a large section of the public was affected injuriously. The word 'community' in Clause (b) of Section 133(1) cannot be taken to mean residents of a particular house. It means something wider, that is, the public at large or the residents of an entire locality. The very fact that the provision occurs in a Chapter containing "Public Nuisance" is indicative of this aspect. It would, however, depend on the facts situation of each case and it would be hazardous to lay down any straitjacket formula."

12. The guns of Section 133 go into action wherever there is public nuisance. The public power of the Magistrate under the Code is a public duty to the members of the public who are victims of the nuisance, and so he shall exercise it when the jurisdictional facts are present. "All power is a trust - that we are accountable for its exercise - that, from the people, and for the people, all springs and all must exist". The conduct of the trade must be injurious in presenti to the health or physical comfort of the community. There must, at any rate, be an imminent danger to the health or the physical comfort of the community in the locality in which the trade or occupation is conducted. Unless there is such imminent danger to the health or physical comfort of that community or the conduct of the trade and occupation is in fact injurious to the health or the physical comfort of that community, an order under Section 133 cannot be passed. A conjoint reading of Sections 133 and 138 of the Code discloses that it is the function of the Magistrate to conduct an enquiry and to decide as to whether there was reliable evidence or not to come to the conclusion to act under Section 133.

13. Section 133 of the Code as noted above appears in Chapter X of the Code which deals with maintenance of public order and tranquility. It is a part of the heading "Public nuisance". The term "nuisance" as used in law is not a term capable of exact definition and it has been pointed out in Halsbury's Laws of England that: "even in the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tour".

14. In *Vasant Manga Nikumba v. Baburao Bhikanna Naidu*³ it was observed that nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence.

"It is not capable of precise definition. To bring in application of Section 133 of the Code, there must be imminent danger to the property and consequential nuisance to

the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc. The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable danger would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time. It does not deal with all potential nuisances and on the other hand applies when the nuisance is in existence. It has to be noted that sometimes there is confusion between Section 133 and Section 144 of the Code. While the latter is a more general provision the former is more specific. While the order under the former is conditional, the order under the latter is absolute.”

15. The above position was highlighted in *Kachrual Bagirath Agrawal v. State of Maharashtra*⁴.

16. In the background facts as noticed above the order passed by the High Court does not suffer from any infirmity to warrant any interference.

17. The appeal is accordingly disposed of.

¹(1995 Supp (4) SCC 54)

²(2003) 7 SCC 389

³(1995 Supp (4) SCC 54)

⁴(2005 (9) SCC 36)