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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Crl. Rev. Pet. No. 409/2007 & Crl. M.A. No. 7052/2007 (Stay)

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Reserved on: 10th November, 2010

Decided on: 8th February, 2011

Ajit Singh and Anr.

..... Appellants

Through: Mr. Ateev Mathur, Advocate

versus

State and Anr.

..... Respondents

Through: Mr. Pawan K. Bahl, APP for Respondent No.1
Mr. V.K. Tandon, Advocate for Respondent No.2

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment?

Not necessary

2. To be referred to Reporter or not?

Yes

3. Whether the judgment should be reported
in the Digest?

Yes

MUKTA GUPTA, J.

1. The present revision petition assails the order of Sub-divisional Magistrate, Narela (hereinafter referred to as 'SDM') dated 15th June, 2007 passed under Section 133 CrPC, which reads as under:

“WHEREAS the above titled matter U/s 133 Cr.P.C. was initiated, suo-motu, on the basis of a complaint made by the residents of village Singhola regarding stacking and transportation of huge quantities of Building material thereby resulting into raising of dust and pollution.

WHEREAS the respondents were given notice of the proceedings.

WHEREAS upon considering the material on records as well as the reply of the respondents I am of the considered opinion that the activity being carried out by the Opposite Parties has potential of causing serious health hazards to the community and thus amounts to public nuisance.

NOW THEREFORE, I Vijay Dogra, S.D.M. (Narela) hereby direct the Opposite Parties to remove the stock of building material collected by them on the agricultural and other land of village Singhola within a period of 7 days from the date of this order failing which the same is directed to be removed by the SHO (Ali Pur) Delhi and compliance be reported on 25th June 2007.

Given under my hand and seal on this 15th day of June 2007.”

2. Learned counsel for the Petitioner states that in terms of Section 133 CrPC, the SDM is duty bound to pass a conditional order and issue show cause notice to the Petitioner and in case he objects, then make the order absolute or pass a final order under Section 138 CrPC after proceeding as a summons case. However, in the present case, the SDM has passed a final order under Section 133 CrPC which is contrary to the requirements of Section 133 CrPC. Reliance is placed on *C.A. Avarachan v C.V. Sreenivasan and Anr. (1996) 7 SCC 71* to contend that an

omission on the part of SDM to pass a preliminary order which is sine qua non for initiating proceedings under Section 133 CrPC and without following the procedure provided under Section 138 CrPC in directing the appellant to permanently close the quarry/operation is unsustainable and vitiated. It is also contended that the reason assigned for passing the impugned order by the SDM is that the Petitioner was using the premises contrary to the provisions of Delhi Land Reforms Act and that the SDM has no authority to take any action under the Delhi Land Reforms Act and thus, the alleged impugned order is vitiated. It is contended that by the impugned order, despite the objections of the Petitioner having not been decided, final decision has been passed and there is no proceeding pending before the SDM now.

3. Per contra, the learned counsel for Respondent No.2 who has replied by way of an affidavit states that the impugned order is only a conditional order under Section 133 CrPC and the proceedings are still pending wherein a final decision will be taken. It is stated that under Section 133 CrPC, it is not essential that on the first day of the hearing a preliminary order is required to be passed by the Magistrate. In the present case, a show cause notice to the Petitioner was issued on 23rd November, 2006 which is as per the requirement of Section 133 CrPC. Learned counsels for the Petitioner appeared on the 27th November, 2006 and sought time to file reply and thus, the matter was fixed for 11th December, 2006.

On 11th December, 2006, the reply intended to be filed was not signed by the Petitioners and further time was sought to file reply which was allowed and the matter was fixed for 19th December, 2006. On 19th December, 2006, instead of filing reply to show cause notice, an application was moved under section 256 CrPC stating that the complaint was not filed by the genuine persons and a case of forgery be registered against them. The Respondent No.2 gave further time to explain the case of public nuisance by allowing building material to be stocked on the land till 2nd February, 2007 which was subsequently extended to 30th July, 2007.

4. Learned counsel for the Respondent further contends that as there were a number of complaints being received against the Petitioner, the case was preponed to 13th June, 2007 and a notice was issued to the Petitioner for 15th June, 2007. On 15th June, 2007, learned counsel for the Petitioner was duly present when the SDM passed the impugned order observing that the agricultural land in village Singhola was being used by a number of Stockists. The plying of trucks and vehicles raised huge dust and the frequent movement of the vehicles has rendered the nearby fields incapable of producing quality crops. Besides, the residents have complained about the noise and disturbance which is faced by the people due to the movement of the vehicles. The SDM had personally visited the site and found the contents of the application to be true and on being convinced that the same amounts to public

nuisance, directed the stockists to remove the stocks of building material from the agricultural land and also from the other land of village Singhola within seven days of the service of order failing which the local police will have the stocks removed from the site. It was stated that the order is passed under Section 133 CrPC and to report compliance within a week, it was fixed for 25 July, 2007. The Petitioner in the meantime approached this Court and this Court was pleased to stay the impugned order vide its order dated 25th June, 2007.

5. It is contended that the order passed by the SDM is a preliminary order. The Petitioner has till date not filed its reply to the show cause notice and has rather filed an application under Section 256 CrPC and since he was dragging his feet, the SDM passed the impugned order to prevent nuisance. The matter is still pending before the SDM and whatever the Petitioner has to say, should be stated before the SDM so that final order can be passed in the matter. Reliance in this regard is placed on *Kachrual Bhagirath Agrawal and Ors. v State of Maharashtra and Ors.* (2005) 9 SCC 36. The order has been passed only under Section 133 CrPC and not under the provisions of Delhi Land Reforms Act. The Respondent in its affidavit has only by way of an additional averment stated that the land is being used contrary to the provisions of Delhi Land Reforms Act. It is stated that in view of the decision of the Supreme Court in *Kachrual Bhagirath (Supra)*, the Petitioner should first approach the SDM and show cause before the SDM.

6. I have heard learned counsel for the parties. The issue involved in the present petition is, whether the impugned order is a conditional or preliminary order under Section 133 CrPC or a final order under Section 138 CrPC. At this stage it would be relevant to reproduce Section 133 CrPC, which states:

“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) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or occupation or the keeping of any goods or merchandise; is injurious to the 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) that the construction of any building, or the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of,

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) to prevent or stop the construction of such building, or to alter the disposal of such substance; or
- (iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or
- (v) to fence such tank, well or excavation; or
- (vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

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

(2) No order duly made by a Magistrate under this section shall be called in question in any civil Court.

Explanation—A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes."

7. A perusal of Section 133 CrPC shows that a Magistrate may make a conditional order, and thus, it is discretionary on him to pass such an order. In the

present case as is evident from the narration above, the Petitioner was issued a show cause notice. Despite adjournments taken by the Petitioner for filing a reply, no reply was filed and what was filed was an application under Section 256 CrPC seeking quashing of the complaint on the ground that nobody on behalf of the complainants had appeared for the last two dates of hearing and thus, the complaint be quashed under Section 256 CrPC. This application is dated 19th December, 2006. The Petitioner has not replied to the show cause notice issued to it on merits.

8. In my opinion the Magistrate in terms of Section 133 CrPC is not duty bound to pass a preliminary/conditional order on the first date of hearing. The Petitioner having not objected and the only objection being that the complaint be quashed as nobody on behalf of the complainant is appearing, it cannot be said that the Magistrate should not have passed any order in terms of Section 133 CrPC. It is well settled that procedural law is a handmaid of justice and a relief to the inhabitants for causing nuisance and noise pollution cannot be denied merely because the Petitioner drags its feet in filing reply. The order passed by the learned Magistrate is under Section 133 CrPC. Though the next date fixed in the matter is for compliance of order, but if the Petitioner has any objection on merits, he should approach the SDM in terms of the decision of the Supreme Court in *Kachrulal (Supra)*. The decision rendered by the Supreme Court in *C.A. Avarachan (Supra)* has no application to the facts of the present case because in the said case there was

a direction by the High Court to the SDM to consider the objections raised by the appellant and dispose of the matter. The Magistrate when drew up the preliminary order proceeded with the inquiry and directed that the quarry industry and blasting operations should be stopped permanently. I find merit in the contention of the learned counsel for the Respondent that the order is only a preliminary order and the Petitioner should show cause before the Magistrate.

9. I do not find any merit in the present petition. The revision petition and the application are dismissed.

(MUKTA GUPTA)
JUDGE

FEBRUARY 08, 2011
‘raj’