

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. Petn. No. 31 of 2023

Date of Decision: 07.06.2023

Shri. Ramesh Bawri

Vs.

State of Meghalaya & 4 Ors.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. S. Jindal, Adv.

For the Respondent(s) : Mr. K. Khan, AAG with
Mr. A.H. Kharwanlang, Addl. Sr. GA
Ms. S. Laloo, GA (R 1- 4)

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| i) | Whether approved for reporting in Law journals etc.: | Yes/No |
| ii) | Whether approved for publication in press: | Yes/No |

J U D G M E N T

1. A proceeding numbered as Executive Proceeding No. 2 of 2022 under Section 133 Cr.P.C is being conducted by the learned Executive Magistrate (respondent No. 3), in Ri Bhoi District of Meghalaya. The said proceeding is directed towards the petitioner herein who allegedly on a verbal

order passed by the said learned Executive Magistrate on 04.04.2023, was directed to shut down all the business operation within his premises, housing as many as 42 tenants.

2. These proceedings including the said order dated 04.04.2023 are impugned herein in this instant petition under Section 397 read with Section 482 and 401 Cr.P.C with a prayer to set aside and quash the entire proceedings.

3. Heard Mr. S. Jindal, learned counsel for the petitioner who has submitted that the genesis of the matter relates to an alleged complaint filed by the proforma respondent No. 5 in the office of the Deputy Commissioner, Ri-Bhoi District.

4. The petitioner came to know that in the said complaint, copy of which has not been supplied to the petitioner, an allegation was made that a drain adjoining the property of the petitioner was not properly maintained as a result of which, there was seepage of drain water into the land of the proforma respondent, on which stands a petrol pump, M/s River Umtrew Service Station.

5. Apparently, in response to the said complaint, being No.IOCL/RUSS/09/2022-DC-3, dated 12.09.2022, the Additional Deputy

Commissioner (Rev), Ri Bhoi District has issued a notice for spot inspection slated to be held on 20.09.2022 at 12:00 noon, which inspection is to be carried out by Shri. W.R. Massar, MCS, EAC. The notice has been directed at the petitioner and the owner of the said petrol pump.

6. The petitioner in response to the aforesaid notice has addressed a representation before the authorities giving details of all relevant and correct facts. However, the respondent No. 2 vide notice dated 03.10.2022 has directed the petitioner to construct proper drainage system as far as the said drain which is the subject matter of the dispute is concerned. It is also directed that a compliance report is to be submitted thereto within 15 days. The petitioner has accordingly complied with the said order and has submitted the report in this regard on 26.10.2022.

7. It is further submitted that the petitioner was then surprised to receive an order dated 08.12.2022 issued by respondent No. 3 in what appears to be a formal proceeding being Executive Proceeding No. 2/2022 being drawn up against the petitioner under Section 133 Cr.P.C. The petitioner was also directed to remove/clear such nuisance within 30 days from the date of the order but has also directed that an action taken report be filed within 15 days. The status report was duly filed by the petitioner on 17.01.2023.

8. Apart from the status report, the petitioner after carrying out the

direction in this regard, has finally filed a completion report on 15.02.2023. The respondent No. 3 has however passed another order dated 30.03.2023 to the effect that an observation was made that the petitioner has not filed the work completion certificate and direction to submit the same by 03.04.2023.

9. The petitioner then re-submitted the Completion Report on 03.04.2023, whereupon, the respondent No. 3 then passed an order dated 04.04.2023 with a direction for inspection of the site on the same day itself at 4:00 pm.

10. Upon inspection of the site by the respondent No. 3 along with respondent No. 4, the respondent No. 3 passed a verbal order directing that all business activities on the land of the petitioner be immediately stopped.

11. The petitioner thereafter on 05.04.2023 filed an application with the respondent No. 3 with a prayer to rescind the verbal direction to close all business activities at the site and to allow the petitioner to correct any shortcomings in the work done in the drain within a period of 1(one) month. This application was rejected by the respondent No. 3 who simply wrote the word “Rejected” on the face of the said application. However, no formal order has been passed in respect of the closure of all business activities in the land of the petitioner.

12. The learned counsel has then submitted that the petitioner in this petition has challenged the legality and maintainability of the said Executive Proceeding No. 2/2022 on the primary ground that the learned Executive Magistrate proceeding under Section 133 Cr.P.C has no jurisdiction to pass the orders and directions as has been done by way of the impugned orders.

13. Attention of this Court was drawn to the provision of Section 133 Cr.P.C to show that power under the said Section can be exercised either by a District Magistrate or a Sub-Divisional Magistrate or even an Executive Magistrate, but it should be one who is specially empowered in this behalf by the State Government. In the instant case, the proceedings under Section 133 were conducted by an Executive Magistrate who was not specially empowered in this behalf by the State Government. In fact, as was seen from the status report dated 21.04.2023 filed by the learned Executive Magistrate before this Court in these proceedings, the learned Executive Magistrate has admittedly joined proceedings on the strength of an endorsement from the Additional District Magistrate, Ri Bhoi District.

14. In this regard, the petitioner has referred to the case of *M/S. Apollo Machinery Mart & Ors. v. State of Assam & 20 Ors.: 1997 (II) GLT 213*, para 10.

15. Another limb of argument advanced by the learned counsel for the

petitioner is that, the proceedings under Section 133 Cr.P.C stems from an alleged complaint by the proforma respondent No. 5 who has complained of the flow of drainage water from the property of the petitioner into the property of the said M/s River Umtrew Service Station. This apparently is an issue of dispute between the respondent No. 5 and the petitioner, the same being civil and of a private dispute in nature, no participation or interest of the public at large is involved. Under such circumstances, no proceedings under Section 133 will lie. The case of *Vasant Manga Nikumba & Ors. v. Baburao Bhikanna Naidu & Anr.*: 1995 Supp (4) SCC 54, para 3 & 5, as well as the case of *Kachrual Bhagirath Agarwal & Ors. v. State of Maharashtra & Ors.*: (2005) 9 SCC 36, para 10 was cited in support of this contention.

16. The last submission made by the learned counsel is to refer to the provision of Section 138 Cr.P.C to say that if an order under Section 133 Cr.P.C is made against a person, he is required to appear and to file a show cause against such order, whereupon, the Magistrate shall take evidence in the matter as in a summons case. This was not done so in the case in question, since upon filing of the show cause by the petitioner on 29.09.2022, nothing has proceeded or progressed so far.

17. Mr. K. Khan, learned AAG on behalf of the State respondent has submitted that the status report filed by the respondent No. 3 dated

21.04.2023 would show that on a complaint received from the retail outlet M/s River Umtrew Service Station, a report by the In-charge, Byrnihat Police Outpost has indicated that the petitioner and his manager had failed to comply with the order of the Administration as regard the flow of dust, dirty water, human waste and garbage from the land of the petitioner to the public drain which poses serious threat to public health.

18. On 08.12.2022, the respondent No. 3 has directed the petitioner to remove the nuisance within 30 days and to submit an action taken report thereto. The petitioner has sought extension of time to comply with the said order, but in spite of that, the petitioner has failed to file the report. It was only on 04.04.2023 that the respondent No. 3 went for a spot inspection that he found the work done by the petitioner, not desirable.

19. The learned AAG has further submitted that the petitioner has filed show cause dated 26.10.2022 to the notice issued by the respondent No. 3 and that too, without having received a copy of the complaint. In this show cause he has admitted that his worker has contributed to the pollution of the said drain. This is evident from the fact that after the inspection conducted by the respondent No. 2 on 21.09.2022 the petitioner has taken up the cleaning drive to clean the said drain, which included plugging up of holes in the boundary walls on the portion of the land of the proforma respondent. This proves that

there are ingredients of public nuisance and such inconvenience is required to be removed, therefore the claim of the petitioner that the dispute is of a private nature is incorrect. The proceedings under section 133 Cr.P.C undertaken by the respondent No. 3 is accordingly valid and calls for no interference.

20. The learned AAG has submitted that the petitioner by filing the show cause has voluntarily surrendered to the jurisdiction under Section 138 Cr.P.C, that is, he has accepted the proceedings under Section 133. Therefore, if the issue of jurisdiction was never raised before the learned Magistrate, can the petitioner raise this issue now.

21. At this juncture, the learned AAG has fairly submitted that the fact that the alleged action of the respondent No. 3 who refused to accept the prayer made by the petitioner in his letter dated 05.04.2023 by simply noting the word “Rejected” on the body of the said letter may not be proper. It is, however, submitted that there is nothing on record to substantiate the contention of the petitioner that a verbal order was passed to direct closure of all business activities of the petitioner and his tenants.

22. The next point of argument raised by the learned AAG is with regard to the provision of Section 138 Cr.P.C which speaks of the stage of evidence upon a show cause being filed. The petitioner having filed his show

cause, therefore, it would be proper for the Magistrate (respondent No. 3) to proceed for evidence and to come to the final findings in the said case. This is not an exercise without jurisdiction as the same was done within the ambit of law, the petitioner, therefore, cannot question the conduct of the respondent No. 3 in this respect.

23. The case of *Embassy Property Developments Private Limited. v State of Karnataka & Ors.*: (2020) 13 SCC 308 was referred to by the learned AAG to buttress his contention in this regard, wherein the Hon'ble Supreme Court at para 15 of the same has discussed the issue of jurisdiction to distinguish between an exercise of jurisdiction not vested by law and cases in which there was a wrongful exercise of available jurisdiction. Reference was made to a decision in *Anisminic Ltd. v. Foreign Compensation Commission*, (1969) 2 AC 147 where the court has held that “... *the real question was not whether an authority made a wrong decision but whether they enquired into and decided a matter which they had no right to consider.*”

24. This Court, on the facts and circumstances detailed by the parties and their respective stand on the issue, has carefully weighed the substance of the same on the balance of facts and law.

25. At the outset, it may be relevant to bring out herein the provision of Section 133 Cr.P.C as the whole case centre around this provision as to the

right or wrong application of the same. The Section reads as follows:

“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.”

26. Section 133 Cr.P.C contemplates a situation where, in a case of complaint of public nuisance, the Magistrate acting on such information or complaint either by way of a police report or on a written complaint by an individual, can, after taking evidence and considering that there exists such nuisance, he may make a conditional order requiring the person causing such nuisance to remove the same or to desist from carrying on any act causing the said nuisance, etc.

27. The first limb of argument raised by the petitioner is that the learned Magistrate who had purportedly passed the relevant orders under Section 133 directed against the petitioner is not legally empowered to do so and as such, on this ground alone, the proceedings are vitiated. In this context, reliance has been placed on the case of Apollo Missionary Mart (supra) particularly para 10, the same is reproduced below as:

“10. ...On the plain language of sub-section (1) of section 133 Cr.P.C., it would be clear that it is not every Executive Magistrate or any other Executive Magistrate who is conferred with the power, it is only a District Magistrate or a Sub-Divisional Magistrate or any Executive Magistrate specially empowered in this behalf by the State Govt. can take action making an order thereof. Both the learned Govt. Advocate as well as the learned counsel for the

respondents were given repeated opportunities to show any such notification or order passed by the State Govt. empowering the concened Magistrate Shri Chakravarty to exercise power u/s 133 Cr.P.C., no such order, specially empowering Shri Chakravarty, or notification, despite repeated opportunities granted to both of them, was brought to our notice. Although the point was raised at the appellate stage, being essentially and purely a question of law going to the root of the matter touching the jurisdiction of the Magistrate, it was entertained and it must be said that there is no proof of Shri Chakravarty being an Executive Magistrate 'specially empowered in this behalf by the State Govt.' Therefore, the whole action collapses to the ground as one without jurisdiction. Even on facts, by interim orders made, the action substantially quashed. The interim orders dated 6.8.92 as modified by order dated 27.8.92 are confirmed. This appeal deserves to be allowed to the extent indicated above. The disputed questions of title are left out from reconsideration. The respondents are directed to restore possession of the land in question on which the factory was standing, wherefrom the obnoxious material was taken out by the police. The police shall handover possession to the appellant within a week and report compliance to the Registrar (Judl.) of this Court. The impugned order as passed by the learned Single Judge is set aside and the appeal to the extent indicated above."

28. The assertion of the petitioner on this count appears to be valid inasmuch as the State respondent has not been able to produce any relevant or specific notification empowering the respondent No. 3 to take charge of the

said proceedings. However, it is noticed that the respondent No. 3 had initiated the said proceedings under Section 133 Cr.P.C in Executive Proceeding No. 2 of 2022 and has passed the initial order dated 08.12.2022 directing the petitioner to remove the said nuisance and to file an action taken report within 15 days thereof, apparently on the basis of evidence collected in this regard, but as to how the evidence was collected was not made known.

29. In such a situation, this Court is of the considered view that the respondent No. 3 is not legally empowered to conduct the said proceedings under Section 133 and the entire proceedings is vitiated as was held at para 10 of the Apollo Missionary Mart case.

30. However, the conduct of the petitioner in taking part in the proceedings by firstly, trying to rectify the situation, by making necessary repairs and corrections to the said drain in question and the filing of the action taking report from time to time, would only cause one to assume that the petitioner has joined issue with the respondents and has submitted himself to the jurisdiction of the learned Magistrate.

31. The petitioner has corrected his stance in the matter by contending that the issue of jurisdiction can be raised at any point of time in the proceedings and in this connection, has referred to a number of authorities, some of the relevant authorities would include the case of *Harshad Chiman*

Lal Modi v. DLF Universal Ltd. & Anr.: (2005) 7 SCC 791 herein at para 30 and 32 the Hon'ble Supreme Court has observed that:

“30... The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to a subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.

32. ...neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well settled and needs no authority that “where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing....A decree passed by a court without jurisdiction is a coram non judice.”

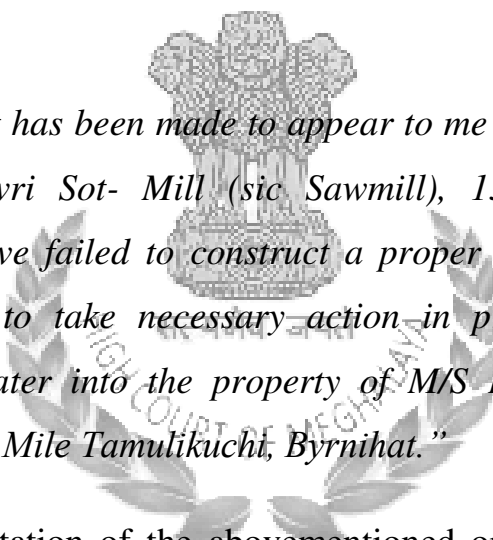
33. In the case of *Pandurang & Ors. v. State of Maharashtra*: (1986) 4 SCC 436 at para 4, the Hon'ble Supreme Court has held as follows:

“4. When a matter required to be decided by a Division Bench of the

High Court is decided by a learned Single Judge, the judgment would be a nullity, the matter having been heard by a Court which had no competence to hear the matter, it being a matter of total lack of jurisdiction. The accused was entitled to be heard by at least two learned Judges constituting a Division Bench and had a right to claim a verdict as regards his guilt or innocence at the hands of the two learned Judges. This right cannot be taken away except by amending the rules. So long as the rules are in operation it would be arbitrary and discriminatory to deny him this right regardless of whether it is done by reason of negligence or otherwise. Deliberately, it cannot be done. Negligence can neither be invoked as an alibi, nor can be the infirmity or illegality, so as to rob the accused of his right under the rules. What can be done only by at least two learned Judges cannot be done by one learned Judge. Even if the decision is right on merits, it is by a forum which is lacking in competence with regard to the subject matter. Even a 'right' decision by a 'wrong' forum is no decision. It is non-existent in the eye of law. And hence a nullity. The judgment under appeal is therefore no judgment in the eye of law. This Court in State of M.P. v. Dewadas [(1982) 3 SCR 81] has taken a view which reinforces our view. We, therefore, allow the appeal, set aside the order passed by the learned Single Judge, and send the matter back to the High Court for being placed before a Division Bench of the High Court, which will afford reasonable opportunity of hearing to both the sides and dispose it of in accordance with law, expeditiously."

34. Another aspect of the matter is the contention of the petitioner that the bone of contention between the private parties, that is, the petitioner on

the one hand and the owner of M/s River Umtrew Service Station (Petrol Pump) as regard the boundary wall separating their properties and the drain which runs in between, therefore, the alleged complaint made by M/s River Umtrew Service Station constitute a private dispute between two parties and cannot be construed as the subject matter of private defence. This is evident on perusal of the first effective order dated 08.12.2022 under the proceeding in question, wherein the respondent No. 3 in the first paragraph itself has observed as:



“Whereas, it has been made to appear to me that you, as Caretaker of Old Bawri Sot- Mill (sic Sawmill), 13th Mile Tamulikuchi, Byrnihat have failed to construct a proper drainage channel and also failed to take necessary action in preventing the flow of drainage water into the property of M/S River Umtrew Service Station, 13th Mile Tamulikuchi, Byrnihat.”

35. An interpretation of the abovementioned order would only make one to draw a conclusion that the initial dispute is private in nature. In this regard, the authority cited by the learned counsel for the petitioner in the case of Vasant Manga Nikumba (supra) at para 3 would be relevant to the facts and situation of this case wherein the Hon’ble Supreme Court has observed that:

“3...The object and public purpose behind Section 133 is to prevent

public nuisance that if the Magistrate fails to take immediate recourse to Section 133 irreparable damage would be done to the public. The exercise of the power should be one of judicious discretions objectively exercised on pragmatic consideration of the given facts and circumstances from evidence on record. The proceedings under Section 133 is not intended to settle private disputes or a substitute to settle civil disputes though the proceeding under Section 133 is more in the nature of civil proceedings in a summary nature.”

36. In the case of Kachrual Bhagirath Agarwal (supra), the proposition as regard the issue of proceeding under Section 133 vis-à-vis settlement of private disputes is similar to that as noticed in the case of Vasant Manga Nikumba.

37. Again, what is noticed in the proceeding under scrutiny herein is the fact that the effective direction passed by the respondent No. 3 is to direct for closure of all the business activities of the petitioners and his tenants, which order was passed verbally. This, indeed, has no precedent in law and cannot be countenance by this Court in any manner to legitimize the same. That the petitioner has assailed the said action is therefore justified under the circumstances.

38. Another anomaly noticed is the fact that on the petitioner filing a representation before the respondent No. 3 dated 04.04.2023 with a prayer to

rescind the said oral order whereby all activities of the petitioner's tenants was closed and further for grant of one month's time to the petitioner to complete the work towards prevention of any seepage of water, the said respondent No. 3 without assigning any reasonable ground has simply rejected the same by superscribing a one-word order "Rejected". This is nothing short but an act of arbitrariness and non-application of mind defying all well accepted norms in this regard. This is the ultimate as far as passing of a non-speaking order is concerned. To this extent, the learned AAG has fairly and candidly conceded that this action on the part of the respondent No. 3 cannot be defended.

39. On an overall consideration of the issue before this Court, it can be said that the entire proceeding under Section 133 embarked upon by the respondent No. 3 was without jurisdiction, firstly, on the ground that the said respondent No. 3 was not specifically empowered in this regard, secondly, that the manner in which the verbal or oral order passed restraining the petitioner and his tenants from carrying on with their business activities was without any legal basis and thirdly, that the curt manner in which the representation dated 05.04.2023 was dismissed reflected non-application of mind.

40. On careful analysis of the case of the parties, this Court is

convinced that the impugned proceedings under Section 133 Cr.P.C cannot be sustained. The same is accordingly set aside and quashed.

41. This petition is accordingly allowed and the interim order passed is hereby made absolute.

42. Before parting, it may be pointed out that if there is a genuine case of public nuisance as regard the afflux into the said drain, it is open to any member of the public affected by such nuisance, if at all, to initiate proceedings in a proper manner.

43. Petition disposed of. No costs.



Judge

Meghalaya
07.06.2023
"Tiprilynti-PS"