

Court No. - 91

Case :- APPLICATION U/S 482 No. - 33964 of 2023

Applicant :- Shivram Singh

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Gaurav Kumar Shukla

Counsel for Opposite Party :- G.A.

Hon'ble Gajendra Kumar,J.

1. Heard learned counsel for the applicant and learned AGA for the State.
2. The present application u/s 482 Cr.P.C. has been filed by the applicant with the prayer to set aside the order dated 05.09.2022 as well as the entire proceeding of Case No.9765 of 2022, under Section 133 Cr.P.C., Police Station Munderwa, District Basti.
3. Learned counsel for the applicant submits that no proper inquiry into the matter has been carried out by the S.D.M. concerned as mandatory under the provisions of Cr.P.C. regarding the removal of obstruction under Section 133 Cr.P.C. as nuisance. The main submission of learned counsel for the applicant is that the S.D.M. concerned has placed reliance only on the site plan supplied by S.H.O. concerned regarding the encroachment (nuisance) on the public way. He should have made spot inspection or collected any other evidence. Further submission is that the whole inquiry has been conducted in a mechanical way, which is nothing but an abuse of process of Court, which is liable to be set aside.
4. On the other hand, learned AGA has opposed the prayer and admitted that no spot inspection has been conducted by the S.D.M. concerned before passing the impugned order.
5. The Apex Court in the case of ***Suhelkhan Khudyarkhan & Anr. v. State of Maharashtra & Ors. [2009] 5 S.C.R. 1142*** has held as under :-

"HELD : 1. 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. [Paras 11 and 12]."

6. Keeping in view the entire facts and circumstances of the case and the manner in which proceeding carried out by the trial court, it is apparent that no proper inquiry has been conducted and the order is passed without application of mind and against the principles of law, which is not sustainable in the eye of law and the impugned order is set aside with the direction to the court concerned to decide the matter afresh.

7. In view of the such facts, the impugned order dated 05.09.2022 is here by set aside.

8. Accordingly, the present application u/s 482 Cr.P.C. is ***disposed off***.

Order Date :- 1.11.2023

Sanjeet