

GAHC040016412023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : Crl.Petn./228/2023

Shri Angging Nangkar and 2 Ors.

S/o Late Nami Nagkar, R/o Village Gosang, P.O Yingkiong, P.S Jegging, Dist. Upper
Siang, Arunachal Pradesh. Pin 791002 2: Duggong Pangkam

Age:

Occupation :

3: Nong Patuk

Age:

Occupation

VERSUS

The State of AP and Anr.

represented through its Public Prosecutor. 2: District Magistrate

Age: 0

Occupation

Advocate for the Petitioner : Tapi Omo

Advocate for the Respondent : P P of AP

BEFORE
HONBLE MR. JUSTICE N. UNNI KRISHNAN NAIR
JUDGMENT & ORDER (Oral)

Date : 04.03.2024

Heard Mr. T. Omo, learned counsel for the petitioners. Also heard Ms. T. Jini, learned Addl. Public Prosecutor for the State respondents.

2. The petitioners, who are residents of village Gosang situated between Sirnyuk nallah to Moyinghave instituted the present proceedings, presenting a challenge to an Executive order dated 12.09.2023, issued by the District Magistrate, Yingkiong, Upper Siang District, purportedly, under the provisions of Section 133 Cr.P.C., prohibiting all kinds of unauthorized constructions and plantation/cultivation on the Right of Way(ROW) of the existing Ditte Dimme-Migging road from 53.00 km (Sirnyuk Nallah) to 92.25 (Moying).

3. The facts as requisite for determining the issue arising in the present proceeding is noted herein under: -

The petitioners are residents of different locations falling in the village Gosang between Sirnyuk nallah and Moying. The petitioners, who have arable lands in the said locations were restricted from constructing any boundary walls/cattle fence on their own land by the police and the petitioners were also denied access to their such land. It is the contention of the petitioners that they were required

to have access to their agricultural lands and were not able to attend their standing crops and fruits, which were being destroyed by the cattle (Mithun) and pests. It is further contention of the petitioners that they are being denied access to the lands, which is depriving them from carrying out plantation exercises during the plantation season. On enquiry, the petitioners were given to understand that they were so being denied access to the lands in view of the General order dated 12.09.2023, passed by the District Magistrate, Upper Siang District, Yingkiong, banning all types of unauthorized constructions and plantation/cultivation on the Right of Way (ROW) of the existing Ditte Dimme-Migging road from 53.00 km (Sirnyuk Nallah) to 92.25 (Moying), which order was purportedly, passed under Section 133 of the Cr.P.C. The petitioners thereafter, on receipt of a copy of the said order approached the District Magistrate by way of submitting a representation dated 02.11.2023 and by highlighting therein the problems faced by them on account of the said order, prayed for revocation of the said Executive order dated 12.09.2023. The said order not having been revoked and the petitioners being denied access to their agricultural land, the present proceedings have been instituted assailing the order dated 12.09.2023.

4. Mr. T. Omo, learned counsel for the petitioner, by drawing the attention of the Court to the order dated 12.09.2023 has contended that although the said order purportedly, has been stated to have been issued under Section 133 Cr.P.C., but, in reality, the said order is one issued under Section 138 of the Cr.P.C. It is contended that prior to issuance of the

order dated 12.09.2023, the petitioners were not put to notice and no opportunity of hearing whatsoever was afforded to them. Mr. Omo, learned counsel has submitted that the order dated 12.09.2023 cannot be sustained inasmuch as the same was so issued in clear violation of provisions of Section 133 and Section 138 of the Cr.P.C. In support of his submissions, Mr. Omo, learned counsel for the petitioners has placed reliance on the decision of the Apex Court in the case of *C. A. Avarachan Vs C. V. Sreenivasan & Anr.*, reported in (1996) 7 SCC 71.

5. Ms. T. Jini, learned Addl. Public Prosecutor appearing for the State respondents had placed before this Court a communication dated 08.12.2023, received from the office of the Deputy Commissioner, Upper Siang by the office of the Public Prosecutor, Guahati High Court, Itanagar Permanent Bench, wherein it has been highlighted that no order/show cause notice was issued prior to issuance of the order dated 12.09.2023 and the order dated 12.09.2023 was stated to have been so issued under Section 133 Cr.P.C., in view of the fact that if any new construction/structure/plantation etc. are allowed to mushroomed up within ROW of the proposed project, it will create public nuisance and law and order problems and would also entail loss to Government ex-chequer, which ultimately would hamper the road construction work to be taken up in public and national interest.

6. I have heard the learned counsels for the parties and also perused the materials placed on record.

7. The issue arising in the present proceedings is as to whether the Executive order dated 12.09.2023 is a final order passed under the provisions of Section 138 Cr.P.C., or, is a conditional order as made by the District Magistrate under the provisions of Section 133 Cr.P.C.

8. To appreciate the controversies as arising herein, it is required to consider the provisions of Section 133 and Section 138 of the Cr.P.C., and accordingly, the said provisions are extracted herein below: -

"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.

138. Procedure where he appears to show cause.—(1) If the person against whom an order under Section 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case.

(2) If the Magistrate is satisfied that the order, either as originally or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.

(3) If the Magistrate is not so satisfied, no further proceedings shall be taken in the case."

9. The provisions of Section 133 of the Cr.P.C., mandates that whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate, especially 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, 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; such

Magistrate may issue a Conditional order requiring the person causing such obstruction or nuisance within a time to be fixed in the order to remove such construction or nuisance or, if he objects so to do, to appear before such Magistrate or, before some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause why the Conditional order should not be made absolute.

10. The provisions of Section 138 of the Cr.P.C., mandates that any person any person against whom an order under Section 133 is made, appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case. In the event on conclusion of the process of hearing, if the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification. If the Magistrate is not so satisfied, no further proceedings shall be taken in the case.

11. The provisions of Section 133 of the Cr.P.C., mandates passing of a Conditional order requiring the person creating the nuisance and or obstruction with regard to a public place or for ROW to remove such obstruction and or nuisance or, desist from doing so and in the event the order is not complied with to show cause as to why the order should not be made absolute. It is only after the process of hearing that such Conditional order would be made absolute under the provisions of Section

138 Cr.P.C.

12. In the present case, the order dated 12.09.2023 does not reflect that the same was a Conditional notice requiring person/persons to desist from any unauthorized construction/plantation or cultivation on the aforesaid ROW of the existing Ditte Dimme-Migging road from 53.00 km (Sirnyuk Nallah) to 92.25 (Moying). Further, the said order does not require such person if he is not complying with the directions contained therein to show cause and no date has also been fixed for submission of such show cause and hearing. Accordingly, the said order dated 12.09.2023 has to be construed to be a final order passed under Section 138 Cr.P.C.

13. The order dated 12.09.2023 having been so passed without complying with the mandatory requirement of Section 133, the said order on account of the violation of the procedure as prescribed under Section 133 of the Cr.P.C., cannot stand legal scrutiny. In this connection, the decision of the Apex Court in the case of *C. A. Avarachan (supra)* is to be noted and the Apex Court in the said case has categorically laid down that the omission on the part of the Magistrate to draw up a preliminary order, which was held to be sine qua non for initiating proceedings under Section 133 of the Cr.P.C., and without following the procedure provided for under Section 138 Cr.P.C., such order of the Magistrate was held to be unsustainable. The conclusions as reached by the Hon'ble Apex Court in this connection in the said case of *C. A. Avarachan (supra)* is extracted herein below: -

"4. In our opinion the omission on the part of the Sub-Divisional Magistrate to draw up a preliminary order, which is a sine qua non for initiating proceedings under Section 133 of the Cr.P.C., and without following the procedure provided for by Section 138 Cr.P.C., the order made by the Sub-Divisional Magistrate on 13.01.1988 is unsustainable and is vitiated. The High Court fell in error in not properly appreciating the effect of non-compliance with the mandatory requirements of drawing up a preliminary order before proceedings under Section 133 Cr.P.C. Neither the order of the High Court nor that of the Sub-Divisional Magistrate can therefore be sustained."

14. The fact that there was no preliminary order/conditional order drawn up by the Magistrate before passing the final order dated 12.09.2023 is clear from the communication dated 08.12.2023 brought on record by the learned Addl. Public Prosecutor appearing for the State respondents, wherein, it has been categorically stated that no order/show cause was issued prior to issuance of the order dated 12.09.2023.

15. In view of the said position, the order dated 12.09.2023 cannot be sustained and accordingly, the same stands set aside and quashed.

16. This Court, having interfered with the order dated 12.09.2023, on the ground that the same was so issued in clear violation of the procedure

as mandated under the provisions of Section 133 read with Section 138 of the Cr.P.C., 1973, and not on merits, it is clarified that should the activity of any person/persons be a cause of public nuisance in connection with the execution of the works pertaining to the construction of the road from Ditte Dimme-Migging road from 53.00 km (Sirnyuk Nallah) to 92.25 (Moying), the directions as passed in the present proceedings shall not act as a bar for the authorities to take such appropriate action as is authorized by law by following the procedure so mandated under the law.

17. With the above observations and directions, the criminal petition stands disposed of.

JUDGE

Comparing Assistant