

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL REVISION APPLICATION NO. 32 OF 2012

Mr. Nitin Satish Naik
s/o Mr. Satish Naik,
major, Indian National,
r/o House No. 186/A,
Palolem, Canacona, Goa. .. Petitioner

Versus

1. Mr. Nilu Sundar Naik,
S/o Sundar Krishna Naik
Major of age, Indian
r/o House No.322,
Palolem, Canacona, Goa
2. The State of Goa,
represented herein by
Mr. Abhay Bhagat,
H.C.B. No.4036,
Canacona Police Station,
Canacona, Goa. .. Respondents

Mr. Ryan Menezes, Advocate for the Petitioner.

Mr. Vivek Rodrigues, Advocate for the respondent no.1.

CORAM :- C. V. BHADANG, J.

Reserved on : 19th March, 2015.

Pronounced on : 15th April, 2015

ORAL JUDGMENT :

By this revision application, the original complainant is taking exception to the judgment and order dated 05/07/2012 passed by the learned District and Sessions Judge at Margao in

Criminal Appeal No. 100/2011. By the impugned judgment, the Criminal Appeal filed by the first respondent has been allowed, thereby setting aside the order dated 17/08/2011 passed by the learned Executive Magistrate, Canacona in Proceedings under Section 133 of the Code of Criminal Procedure (the Code, for short).

2. The brief facts, necessary for the disposal of the Criminal Revision, may be stated thus :

That on the basis of a complaint filed by the petitioner, proceedings were initiated on the file of the learned Executive Magistrate, Canacona, under Section 133 of the Code. According to the petitioner/ complainant, he is residing in house no.186/A situated in property known as 'Gharbhat', bearing Survey No. 135/5 of village Nagorcem, Palolem, belonging to Bhatkar Ramesh Bhat. The said house is an ancestral house, which was orally partitioned amongst the father of the petitioner and the original opponent no.1 Sundar Naik (since deceased), who was father of the first respondent. It was contended that on the basis of the said oral partition, the father of the complainant had obtained separate house number for purposes of house tax in Canacona Municipal Council. According to the petitioner, upon death of the father of the petitioner, the said house was transferred in the

name of elder brother of the petitioner, namely Gajanan Naik. According to the petitioner, he along with his brother are declared as mundkars of the property bearing Survey No. 135/5 of village Nagorcem and his brother has purchased the said mundkarial area and a sanad has been obtained.

3. According to the petitioner, there was an ancestral cowshed/cattle shed situated in an adjacent land bearing Survey No.135/11 of village Nagorcem, Palolem, which property was belonging to one Shantabai Nagarsekar. That cattle shed was an ancestral cattle shed of the petitioner and now deceased Sundar Naik and the respondent no.1. It was contended that Sundar Naik fraudulently recorded his name, in the other rights column and taking advantage of the said entry, sold the ancestral cattle shed to one Kulwinder Singh Birring, by a declaration before a Notary. Further, according to the petitioner, taking advantage of the entry in Form I and XIV of Survey No.135/11, now deceased Sundar Naik was not allowing the late father of the petitioner to keep his cattle in the ancestral cattle shed. In such circumstances, sometime in the year 1980, with the permission of the Bhatkar Shri Ramesh Bhat, the petitioner constructed a cattle shed in property Survey No.35/5. Sometime in the month of April, 2008, when the mutation case was decided in favour of the petitioner,

now deceased Sundar Naik trespassed into the said cattle shed and started tying his cattle, which matter was reported to Police Station, Canacona. In short, according to the petitioner, now deceased Sundar Naik and the first respondent started forcibly using the cattle shed and storing cattle shit in the corner of the said cattle shed, which is causing nuisance and is an health hazard. It was contended that the area around the cattle shed is smeared with cattle shit and stagnant urine, which is emanating foul odour, which is a health hazard to the petitioner and the family members and other neighbours. The same was also leading to mosquito spread. It was contended that the cattle shed is hardly three metres from the house of the petitioner. He, therefore, prayed for taking action under Section 133 of the Code. It appears that the learned Executive Magistrate passed a conditional order on 17/12/2010 and now deceased Sundar Naik and the first respondent (who were the opponents before the learned Executive Magistrate) were directed to stop using the cattle shed or to shift it to some other place. They were also directed to show cause as to why the conditional order should not be made absolute.

4. Now deceased Sundar Naik and the first respondent appeared and filed their reply. It was contended that the

complaint filed by the petitioner was malicious and filed with an ulterior motive to harass the opponents. It was contended that there is a civil dispute pending between the parties before this Court in a Civil Appeal. In such circumstances, the petitioner is repeatedly filing complaints against the opponents with various authorities. It was contended that the cattle shed was in existence since 1956 and was constructed by now deceased Sundar Naik. It was further contended that all reasonable care is taken to see that there is proper disposal of the cattle shit and the liquid waste and there is no health hazard or public nuisance created by the user of the cattle shed. There is no other place, where they can keep the cattle. It was contended that none of the neighbourers had ever complained of any such nuisance and this would show that the complaint was motivated.

5. Before the learned Magistrate, the petitioner examined himself. The learned Executive Magistrate also recorded the evidence of Dr. Vandana Dessai, Medical Officer, Canacona Health Centre and Investigating Officer Abhay Bhagat. The learned Magistrate, on hearing the parties, passed the following operative order :

“Order

The conditional order dated 17/12/2010 is

hereby made absolute in terms of Section 138 of Criminal Procedure Code.

The opponent is hereby directed to stop using the cattle shed situated in the property bearing survey No.135/5 of village Nagorcem-Palolem of Canacona taluka or else to shift it to some other place within a period of 1 (one) month from the date of receipt of the order, failing which he shall be liable for penalty as provided u/s 188 of Indian penal Code."

6. Feeling aggrieved, the first respondent filed Criminal Appeal No.100/2011 before the learned Sessions Judge, Margao. The learned Sessions Judge treated the same as Revision Application. By the impugned judgment, the order passed by the learned Executive Magistrate was set aside. That is how, the original complainant is before this Court.

7. I have heard Shri Ryan Menezes, the learned Counsel for the petitioner and Shri Vivek Rodrigues, the learned Counsel for the first respondent.

8. It is submitted on behalf of the petitioner that the learned Sessions Judge exceeded the revisional jurisdiction in interfering with the well reasoned order passed by the learned Magistrate. Reliance is placed on the decision of this Court in **Vijaykumar Jamnadas Wadera**, 2003 All MR (Cri) 280, to submit

that the Sessions Judge was not competent to reassess the evidence, so as to come to a different conclusion on facts, particularly when the finding recorded by the learned Executive Magistrate was not perverse and was based on proper appreciation of evidence. Reliance is also placed on the decision of this Court in ***State Represented by Urban Health Centre Vs. Jose Caesar D'Souza and others***, reported in 2008 ALL MR (Cri) 3450, to submit that parallel proceedings for abatement of public nuisance can be taken and there could always be more than one remedy for a single malady, given under different Statutes. The learned Counsel has taken me through the evidence recorded by the learned Executive Magistrate, in order to submit that the same is sufficient to conclude that there was a 'public nuisance' created by the user of the cattle shed. He, in particular, referred to the evidence of Dr. Vandana Dessai, Medical Officer, who had visited the site and had drawn a spot note. It is contended that the Medical Officer has stated that there was no proper provision made for drainage of urine and waste disposal and there was no soak pit provided for absorption of the liquid waste. She also stated that the cow dung was accumulated in an open area about 6 metres from the cattle shed, which was covered with plastic sheet. She also stated that the area was permeated with smell of cow dung and urine and the same may create nuisance and health

hazard. The report of the Medical Officer was taken on record and marked 'X'. He submitted that the proceedings under Section 133 of the Code are, summary in nature, aimed for abating of public nuisance and when it was a matter of subjective satisfaction of the Executive Magistrate, the learned Sessions Judge ought to have been slow in interfering with the order. The learned Counsel, therefore, submitted that the Revision Application be allowed as the impugned order suffers from the vice of exercise of jurisdiction with material irregularity.

9. On the contrary, the learned Counsel for the respondent has supported the impugned order. He submitted that there was a clear misreading of the evidence by the learned Executive Magistrate and once the finding recorded by the Executive Magistrate was found to be based on misappreciation of the evidence on record, the learned Sessions Judge was not only justified, but duty bound to interfere, in order to correct the error. The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in ***State of M.P. Vs. Kedia Leather and Liquor Ltd. and others***, reported in (2003)7 SCC 389 and in particular, paragraph 8 thereof, in order to submit that the learned Magistrate can exercise jurisdiction only in the face of the finding that there is a case of public nuisance made out. The

learned Counsel submitted that admittedly, the cattle shed as well as surrounding area, where the petitioner and the other neighbourers are residing, cannot be said to be a public place and thus, even assuming that there was any nuisance caused, the same cannot be termed as a public nuisance, so as to confer jurisdiction on the learned Magistrate to act under Section 133 of the Code. The learned Counsel was at pains to point out that none of the neighbourers has come forward to support the case of the petitioner that the user of the cattle shed was posing a nuisance and health hazard. He submitted that the evidence of the Medical Officer would show that the cattle shed was at a distance of about 11 metres from the house of the petitioner and the Medical Officer had opined that only if there is soak pit for disposal of the liquid waste, the alleged nuisance can be taken care of. The learned Counsel submitted that the Investigating Officer has not recorded the statements of any of the neighbourers, which would strike at the very root of the veracity of the report as also the evidence of the said witness. He, therefore, submitted that the impugned judgment passed by the learned Sessions Judge is perfectly legal and proper and does not call for any interference. On behalf of the first respondent, reliance is also placed on the decision of ***Chatrapati Shivaji Co-operative Housing Vs. The State of Maharashtra***, reported in 1968 Mh.L.J. Vol. 6, 909

10. I have considered the rival circumstances and the submissions made. On careful consideration of the same, I do not find that any case for interference is made out, in this Revision Application.

11. It is undisputed that there is a civil dispute between the parties in which the petitioner has filed Civil Appeal, which is pending before this Court. It is also undisputed that there is a cattle shed in existence in the property bearing Survey No.135/5, which is used by the first respondent and there is a house of the petitioner as also some other neighbourers staying in the same vicinity.

12. Section 133 of the Code, under which the impugned action was taken by the Executive Magistrate, falls in Chapter X of the Code, entitled "maintenance of public order and tranquility." Section 133, in particular, falls under the heading "Public Nuisance" and the same reads as under :

"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 configuration 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."

13. It can be seen that the present dispute would fall under Section 133(1)(a) of the Code. The words 'Public Nuisance' have not been defined under the Code. Explanation appended to Section 133 would show that the 'public place' includes also property belonging to State, camping grounds, grounds left unoccupied for sanitary or recreative purposes. Thus, the definition of public place is inclusive. Admittedly, the cattle shed is a private property. At this stage, it is not necessary to go into the dispute as to the ownership of the same. The area, surrounding the cattle shed, where the petitioner and the other neighbours are residing also cannot be said to be a public place inasmuch as the public would not have an unobstructed access to the same. The question is what is the meaning, which can be assigned or attributed to 'public nuisance', for purposes of Section 133 of the Code.

In the case of ***Kedia Leather & Liquor Ltd.*** (supra), the question was whether Section 133 of the Code would stand impliedly repealed by the Water Act, 1974 and Air Act, 1981. The Hon'ble Apex Court held that the purpose behind Section 133 of the Code and underlying framing of these Acts, is distinct and it

cannot be held that the said two Acts would have the effect of impliedly repealing Section 133 of the Code. It was held that provisions under Section 133 of the Code are essentially preventive in nature i.e., to prevent the public nuisance. Following observations in paragraph 8 of the judgment can be reproduced with profit :

"8. Section 133 of the Code appears in Chapter X of the Code which deals with maintenance of public order and tranquility. It is 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 at 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".

*In **Vasant Manga Nikumba and Ors. v. Baburao Bhikanna Naidu (deceased) by Lrs. and Anr. (1995 Supp.(4) SCC 54)** 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 some times there is a confusion between Section 133 and Section 144 of the Code. While the latter is 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."

14. It can thus be seen that Section 133 of the Code is a piece of conditional legislation. The finding that there is a 'public nuisance', in existence is *sine qua non* for clothing the learned Executive Magistrate to pass orders under Section 133 and Section 138 of the Code.

15. Turning to the present case, it would appear from the evidence of the petitioner that the said cattle shed was constructed sometime in the year 1980 by the father of the

petitioner, with the permission of the Bhatkar and now the first respondent is tying his cattle in the same. The evidence of Dr. Vandana Dessai would show that the cattle shed was located at a distance of 11 metres from the front of the house of the petitioner. The cattle shed is a thatched structure about 10x10 metres, with mud flooring. It is not having pakka walls. She had found that the flooring was smeared with mud and cow dung and permeated with urine. At the time of inspection, there was only one buffalo tied there. She found that there was no provision made for drainage of the urine. She specifically stated that the cow dung was accumulated in an open area about 6 metres from the cattle shed, which was covered with plastic sheet. That accumulation was recent one. She specifically stated that if the cattle shed is situated at a distance of more than 10 metres from the residential house, it would not cause any nuisance, provided soak pit is constructed for disposal of the liquid waste. The Investigating Officer Abhay Bhagat stated that there was smell of cow dung and urine emanating. He stated that he has noticed one drinking well near the cattle shed. He stated that apart from the petitioner and the first respondent, there were houses occupied by different persons. The statements of none of these persons were recorded. In my considered view, in the absence of any statements/ evidence of the other neighbourers, certainly, the finding about the

existence of a 'public nuisance' could not have been recorded. At the cost of repetition, it needs to be stated that Section 133 of the Code is not meant to cater to case of a private dispute/ nuisance. It would further appear that the Medical Officer, who is an expert witness from the Health Department, has stated that if the cattle shed is at a distance of 10 metres from the house of the petitioner (when it was found that it was at a distance of 11 metres), the same would not pose any health hazard, provided there is a soak pit for disposal of the liquid waste. I find that this part of the material evidence has not been properly considered by the learned Executive Magistrate and, therefore, no fault can be found with the learned Sessions Judge, interfering in the same. The learned Sessions Judge has noticed that the location of the disputed shed was about 60 metres from the road. The learned Sessions Judge also noticed that there is no evidence on record to show that there was any water source within the prescribed area as the Medical Officer has stated that the soak pit would be required if the source of water was within 15 metres of the cattle shed. The learned Sessions Judge has further noticed that statements of none of the persons from the locality were recorded, nor there was an enquiry made as to whether they face any problem on account of the cattle shed.

16. The reliance placed on behalf of the petitioner on the decision in the case of **Vijay Kumar Jamnadas Wadera** (supra), to my mind, is misplaced. That was a case where the nuisance was on account of the user of a godown in which large quantity of chillies were being stored. The said godown was situated in a residential locality, which was a private godown, belonging to the original non-applicant. However, the loading and unloading of the chilli bags, which were brought in several trucks, was being carried out on a public road. The learned Sub-Divisional Magistrate had passed an order under Section 133/138 of the Code for abatement of the nuisance, which was set aside by the learned Sessions Judge. When the matter came before this Court, it was held on facts that the learned Sessions Judge had exceeded his jurisdiction in interfering with the order of the learned Magistrate. There cannot be any dispute with the proposition that in the exercise of revisional jurisdiction, the Revisional Court cannot interfere, unless the finding recorded is patently erroneous and illegal or perverse and unless a failure of justice has occasioned thereby. This would depend upon facts and circumstances of each case. The legal proposition that the Revisional Court cannot reappreciate the evidence and come to a different finding on fact, is in the context, where two views are equally possible. In such a case, it is not open to the Revisional

Court to substitute its view on the ground that it is more plausible, than the one taken by the Subordinate Court. However, once it is found that the impugned order is perverse on account of misappreciation of the evidence on record or in case where the Lower Court has ignored a material piece of evidence, the Revisional Court would not only be justified, but duty bound to step in and correct the error. As noticed earlier, in the present case, the learned Executive Magistrate has not considered the fact that none of the neighbourers had come forward, which would be a strong circumstance to show that in all probability, there was no case of 'public nuisance' made out, thus probablising the case of the first respondent, that the complaint was a result of the Civil dispute between the parties.

17. In the result, there is no merit in the present Revision Application. The same is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

SMA