

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.01.2018

CORAM

THE HONOURABLE MR. JUSTICE M.S.RAMESH

W.P.No.33353 of 2017
&
W.M.P.No.36800 of 2017

Mohan Pradeep

... Petitioner

V.

1.The Revenue Divisional Officer,
Ootacamand.

2.G.Krishnakumar

... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a writ of Certiorari, calling for the records in Na.Ka.A3.4446/2017 dated 09.12.2017, on the file of the first respondent and to quash the same as illegal, incompetent and without jurisdiction and for consequential orders.

For Petitioner : Mr.V.Raghavachari

For Respondent-1 : Mr.D.Raja, AGP

For Respondent-2 : Mr.Srinath Sridevan

सत्यमेव जयते
O R D E R

Heard Mr.V.Raghavachari, learned counsel for the petitioner and Mr.D.Raja, learned Additional Government Pleader appearing on behalf of the first respondent as well as Mr.Srinath Sridevan, learned counsel for the second respondent.

2.The impugned order under challenge is purportedly issued under Section 142 of the Code of Criminal Procedure whereby an order of injunction was passed restraining the petitioner herein from running the shop in the premises bearing Door Nos.122, 123, 123A, 123C and 123D (New Door No.136) in the name of Mohan Store in Smith Building, Commissioner's Road, Ootacamand. The main ground raised by the learned counsel for the petitioner is that the order under Section 133 Cr.P.C., preceding the present

impugned order dated 09.12.2017 is in violation of the procedure contemplated under the Code of Criminal Procedure.

3.Mr.V.Raghavachari, learned counsel for the petitioner submitted that the Sub Divisional Magistrate has erred in passing the order under Section 133 Cr.P.C., without conducting any enquiry and without drawing any preliminary order. By relying on the judgment of the Hon'ble Supreme Court in C.A.Avarachan V. C.V.Sreenivasan and another reported in 1996 (7) SCC 71 and two other orders of this Court, submitted that in the absence of the preliminary order, the proceedings under Section 133 Cr.P.C., is not maintainable.

4.Mr.D.Raja, learned Additional Government Pleader appearing on behalf of the first respondent on the other hand submitted that a portion of the subject building had collapsed on 02.12.2017 and therefore, since there was imminent danger that the entire building might collapse due to its age and condition, it is absolutely necessary that the building be demolished and till such time, the petitioner should not continue with the business of running the shop therein.

5.Mr.Srinath Sridevan, learned counsel appearing for the Advocate Receiver also reiterated the submissions of the learned Additional Government Pleader and submitted that it is pertinent to bring down the building in view of the incident wherein the portion of the building has collapsed.

6.I have given careful consideration to the submissions made by the respective counsels.

7.The procedure to be adopted to initiate the proceedings under Section 133 of Cr.P.C., is provided under Section 138 of Cr.P.C. For the sake of convenience, the aforesaid Sections are reproduced as hereunder:

"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.

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 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

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

8. The language adopted in Section 138 Cr.P.C., clearly indicates that a preliminary order is required to be made before passing an order under Section 133 Cr.P.C. Section 138 Cr.P.C., mandates the Sub Divisional Magistrate to call upon the concerned person to show cause against the order passed under Section 133 Cr.P.C., and further empowers the Magistrate to make the order passed under Section 133 Cr.P.C., absolute. In other words, the order under Section 133 Cr.P.C., can only be a preliminary order since Section 138 empowers the Magistrate to hear the objections of the concerned party for the purpose of either making the order under Section 133 Cr.P.C., absolute or for modifying it.

9. In the instant case, it is seen that the order under Section 133 Cr.P.C., came to be passed on 02.12.2017 and the Revenue Divisional Officer had, in categorical terms directed for demolition of the subject building. Curiously, after about a week from the date from which the order under Section 133 Cr.P.C., came to be passed, the impugned order dated 09.12.2017 under Section 142 Cr.P.C., also was passed, injuncting the petitioner from continuing with the business of running the shop. As observed above, such an order under Section 133 Cr.P.C., without drawing a preliminary order as well as calling upon the petitioner to show cause as to why the building should not be demolished, is contrary to the procedure laid down under Section 138 of Cr.P.C. The Hon'ble Supreme Court of India in a

judgment in C.A.Avarachan V. C.V.Sreenivasan and another reported in 1996 (7) SCC 71 ventured to clarify the procedure contemplated under Section 138 Cr.P.C., and observed as follows:

"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 Code of Criminal Procedure and without following the procedure provided for by Section 138 Criminal Procedure Code, the order made by the Sub-Divisional Magistrate on 13/1/1988 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 Criminal Procedure Code. Neither the order of the High Court nor that of the Sub-Divisional Magistrate can therefore be sustained."

10. This proposition has been followed and adopted by this Court in the following orders:-

1) 2001 (2) CTC 295 [Pepsico India Holding Ltd., a Company under the companies Act, having its plaint at No.6, GST Road, Mamandur Village, Madurantakam Taluk, 603 111 rep. by its Authorised Signatory Mr. Vikas Sexana Vs. The District Revenue Officer, Additional District Magistrate, Kancheepuram and four others] and

2) In the order dated 10.09.2017 passed in CrI.R.C. (MD) No.504 of 2017 [Anno Agro Coirs rep. by its Proprietrix G. Pakkiyam, Pirandaikulam Village, Allur Panchayat, Kalayarkovil Taluk, Sivagangai District V. The Executive Manager and Revenue Divisional Officer, Sivagangai District]. The relevant portions of the said orders are as follows:

2001 (2) CTC 295:-

"8. A careful reading of the above decisions show that the principal of law insisted is that for issuing an order of injunction under Section 142, Cr.P.C. a conditional order under Section 133 is a must and that an order under Section 133, Cr.P.C. itself will not give the power for passing order under Section 142, Cr.P.C. and that the Executive Magistrate must satisfy himself that imminent and serious injury may be caused to the public. If there is no indication of such satisfaction in the order under Section 142 or somewhere in the file of the case, the order is liable to be quashed. It is also laid down that

the preliminary order under Section 133 shall be issued in Form No.20 and the order of injunction under Section 142 has to be issued as per Form No.22 of the Criminal Procedure Code. It is pointed out by the learned counsel for the petitioner in both the applications the first respondent Executive Magistrate without issuing a show cause notice or directing or giving a reasonable time to the petitioner to desist him from producing the soft drinks and also not satisfying himself that there is imminent danger to the Public Health, directed the petitioner to offer explanation within seven days from the date of the receipt of notice as to why production and sale of Pepsico items of soft drinks should not be prohibited in Kanchipuram Town by closing the production unit of Mamandur as per Section 133(1)(b)(ii) and also issued an order of injunction without following the procedure and ordered immediate closure of the production unit located at Mamandur and stopped the production and sale of the Pepsico items until satisfactory analysis reports are obtained from the Food Analysis Laboratory. The King Institute, Chennai-2, Central Food Laboratory, Mysore-3, Central Food Laboratory, Gaziabad UP. If the petitioner has not complied with the order of injunction within the time prescribed or desisted from the same, then only the Executive Magistrate ought to have ordered closure of the production unit of the petitioner. Further the orders have not been issued as per Form 20 and 22 respectively and therefore, the order of the Executive Magistrate passed under Section 133(1)(b)(ii) and Section 142 are liable to be quashed.

11. In my opinion, the defect with the impugned order is that the first respondent has not followed the procedure for passing a preliminary order under Section 133(1)(b)(ii) and also for passing order of injunction, till the disposal of the main application, as laid down in the decisions mentioned above. Even though the order passed under Section 133(1)(b)(ii) can be stated to be a preliminary order as no final order has not been passed it has not been passed as per the procedure laid down under law and prescribed in Form No.20. Likewise, the order of injunction passed

under Section 142 has not been passed under Form No.22. The first respondent has ordered immediate closure of the manufacturing unit of the petitioner which is erroneous. He should have given reasonable time to the petitioner to desist from manufacturing the cool drink bottles, and if he has failed to comply with the order, only then he should have taken steps to close the manufacturing unit of the petitioner which is not legally correct. Further as already mentioned, the order under Section 133 and under Section 142, Cr.P.C. have not been passed by the first respondent under the prescribed form Nos.20 and 22 respectively. Even though there is reason to hold that the petitioner has manufactured the bottles seized by the first respondent from the susee Corporation premises and in another shop, have been manufactured by the petitioner and he has created a health hazard to the members of the Public, I find great difficulty to uphold the order of the first respondent, as he has not followed the correct procedure prescribed under law."

and

Crl.R.C. (MD) No.504 of 2017:-

7. Section 133 of Cr.P.C., contemplates the Executive Magistrate to draw a preliminary order, then after issuing a show cause notice, and conducting an enquiry as contemplated under Section 138 of Cr.P.C., he can make a preliminary order absolute. But in the instant case, the respondent/The Executive Magistrate and Revenue Divisional Officer, Sivagangai District without drawing any preliminary order and without issuing any show cause notice and also without following the procedure contemplated under Section 138 of Cr.P.C., has straightaway passed an order preventing the petitioner from taking water for three months, which is not permissible in law. The Hon'ble Supreme Court in C.A.Avarachan V. C.V.Sreenivasan and another reported in 1996 (7) SCC 63 has held that without drawing of a preliminary order before proceeding with under Section 133 of Cr.P.C., vitiates the entire proceedings and that the Executive Magistrate should follow the procedure contemplated under Section 138 of Cr.P.C. But in the instant case, without following the mandatory

requirements, the Executive Magistrate straightaway passed an order, which is unsustainable in law and it is vitiated."

In view of the clear violation of the procedure contemplated for issuing an order either under Section 133 or 142 Cr.P.C., I am of the view that the impugned order dated 09.12.2017 cannot be sustained.

11.Nevertheless, this Court cannot turn a blind eye to the facts leading to passing of the impugned order. As submitted by the learned Additional Government Pleader, a portion of the building has already collapsed causing loss to life and valuables. This aspect is denied by the learned counsel for the petitioner stating that the portion of the building in which he is in occupation is strong enough to continue his business and there is no imminent danger and also relied upon the stability certificate dated 15.12.2017 issued from a licensed Engineer. I do not intend to go into the stability of the subject premises. However, if at all, the first respondent is of the view that coercive action is required to pull down the building or pass injunction order, it is open to him to do so by adopting the procedure contemplated under Sections 132, 138 and 142 Cr.P.C., in the light of the observations made in this order.

12.In the result, the impugned order dated 09.12.2017 on the file of the first respondent is quashed. It is open to the first respondent to initiate fresh proceedings, if he so choses to do, in the light of the above observations. Connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

DP
To

1.The Revenue Divisional Officer,
Ootacamand.

+1cc to MR.V.Raghavachari, Advocate SR.No.6495/18
+1cc to Mr.Srinath Sridaran, Advocate SR.No.6459/18

sm:1.2.2018

W.P.No.33353 of 2017
&
W.M.P.No.36800 of 2017