

HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 176 OF 2018

1 Mr. Alexio Travasso,
of major age, Indian National,
Businessman, resident of House
No.233/2, 3rd Ward,
Colva, Salcete- Goa. Petitioner

Versus

- 1 Gisela Fernandes,
daughter of Henrique Dias Dos Gomes
Fernandes, major in age, Indian National,
resident of 'Mera Classic Galaxi, House
No.161, '3/5', Sernabatim, Salcete- Goa.
- 2 State, Through its Police Inspector, Colva
Police Station, Colva, Salcete Goa.
- 3 The Public Prosecutor,
High Court of Bombay at Goa,
Panaji – Goa. Respondents.

Shri D.D. Zaveri, Advocate for the petitioner.

The respondent No.1 present in person.

Shri Pravin Faldessai, Additional Public Prosecutor for the
respondents No.2 and 3.

Coram: NUTAN D. SARDESSAI, J.

Reserved on :- 31st January, 2019.

Pronounced on:-15th February 2019.

JUDGMENT:

1. Heard Shri D.D. Zaveri, learned advocate for the petitioner,
the respondent No.1 present in person and Shri Pravin Faldessai,
learned Additional Public Prosecutor for the respondents No.2 and
3.

2. Rule.

3. Shri Pravin Faldessai, learned Additional Public Prosecutor waives notice on behalf of the respondents No.2 and 3.

4. This petition invoking the jurisdiction of this Court under Article 227 of the Constitution of India and Section 482 of the Criminal Procedure Code takes exception to the proceedings under Section 133 of the Code of Criminal Procedure initiated before the Executive Magistrate in case No.JM-III/MAG/D2/2/2016 at the instance of the petitioner. Briefly stated it was the petitioner's case that the proceedings under Section 133 of the Code of Criminal Procedure, 1973, "Code" for short, was not tenable based on the complaint lodged by the respondent No.1 before the Village Panchayat of Sernabatim. The respondent No.1 had on 05/02/2015 filed an application before the said Village Panchayat as an attorney asserting that they were the owners of the property surveyed under No.64/30 of village Colva which was not fenced by an iron barbed wire but was a temporary one to avoid trespassers cattle to eat the plantation. Several complaints and notices were made to the police by enumerating them and on one such visit the respondent No.2 had accompanied the respondent No.1 and

thereupon the petitioner had agreed to remove the cattle and fodder from the property in two months. The Constable of the respondent No.2 had prepared a report bearing Chapter Case No.1/2015 under Section 133 of the Code wherein it came to be summarized that upon the information of the respondent No.1, the petitioner was allegedly sheltering the cattle, keeping other things of fodder in the property and creating dirtiness in her property and polluting and damaging the coconut plantation inside the property.

5. A civil suit was simultaneously filed by the respondent No.1 as an attorney of her parents before the Court of the 3rd Additional Senior Civil Judge, Margao in which she raised similar allegations and claimed the relief including that for permanent injunction to restrain the petitioner and his wife from interfering with the property, demolition of the cowshed and mesne profits. An application for temporary injunction too came to be filed seeking injunction against the petitioner and his wife from trespassing in the suit property and damaging the coconut saplings therein. The learned Executive Magistrate had issued a notice dated 15/11/2016 directing him to appear on 14/12/2016 by registering the case against him. The respondent No.1 filed an application before the Executive Magistrate stating that she was an informant who

wanted to have the copies of the additional documents submitted by the respondent No.2. In the meantime, the temporary injunction application came to be heard and an order was passed on 30/06/2017 whereby the petitioner and his wife were restrained from interfering in the said property and causing damage to it.

6. The respondent No.2 through the same Constable filed a chapter case under Section 107 of the Code against the petitioner and his wife alleging that they would commit serious type of cognizable offences and for which action under Section 107 of the Code was warranted. The petitioner responded to the notice issued under Section 107 denying its contents. The proceedings thereafter commenced and vide the order dated 09/07/2018 the Deputy Collector held that nothing adverse was found reported against the petitioner and his wife and dropped the proceedings. It was further the petitioner's case that in the meantime the respondent No.1 filed an application under Order XXXIX Rule 2A read with Section 11 of the Code of Civil Procedure alleging the contempt of the order dated 30/06/2017. Being aggrieved by the order of injunction, the petitioner and his wife preferred a miscellaneous appeal which came to be dismissed for non-

prosecution and for which they filed a Civil Misc. Application for its restoration which is still pending.

7. The respondent No.1 in the meantime sought for the amendment of the suit which came to be allowed by an order dated 19/07/2018 and in which she incorporated all the events that transpired before the respondent No.2 and relied on the documents alongwith the complaints. She also moved an application for the production of additional documents placing reliance on the various complaints filed before the respondent No.2 against the petitioner pertaining to the same subject matter. The respondent No.1 sought the production of documents before the Executive Magistrate in the 133 proceedings seeking to rely on the police complaint and also photographs. The Executive Magistrate had instructed the Health Officer to conduct a site inspection and when it was revealed that there was no breeding of the mosquitoes at the site.

8. The petitioner challenged the proceedings under Section 133 Cr.P.C. on the ground that they were illegal ab-initio and null and void and which were commenced by the notice dated 15/11/2016. The impugned proceedings could not stand the scrutiny of law and

the Executive Magistrate had exercised jurisdiction not vested in it. The Executive Magistrate was duty bound before taking cognizance under Section 133 of the Code to satisfy the existence of a public nuisance viz a viz a public place unlike the suit property which was a private property. The proceedings under Section 133 of the Code were not meant to settle private disputes between the two members of the public and where the remedy was only by way of a civil suit. The respondent No. 1 had filed a civil suit and also sought interlocutory reliefs. The proceedings initiated under section 133 of the Code were in complete contravention and dehors the statute apparent from the series of police complaints filed by the respondent no.1 and an abuse of the process of law. The petition had therefore to be allowed and the proceedings under Section 133 Cr.P.C. had to be quashed and set aside.

9. Heard Shri D. Zaveri, learned Advocate for the petitioner who contended that the proceedings under Section 133 Cr.P.C. were initiated against the petitioner at the instance of the respondent No.1 who had lodged the complaint and forwarded a copy thereof to the Colva Police Station and pursuant to which a site inspection was held. The proceedings under Section 133 Cr.P.C. of the Code did not lie unless it related to a public property and caused public

nuisance. In that context, he placed reliance in **Nitin Satish Naik v/s. Nilu Sundar Naik and Another** [2015 All M.R. (Cri) 2978]. He referred to the various documents forming an integral part of the petition, the suit filed by the respondent no.1 and submitted that the property of the respondent no.1 was a private property in respect of which she had filed the civil suit. There was also a clear admission in her reply that Survey No.64/30 was a private property. Further reliance was placed in **C.A. Avarachan v/s. C.V. Sreenivasan** [1996(7)SCC 71]. There was a duty on the Magistrate to make a conditional order only if the predicates of Section 133 Cr.P.C. were fulfilled. The proceedings were initiated in 2015 but there was no conditional order till date.

10. Shri D. Zaveri, learned Advocate for the petitioner placed further reliance in **Vyankatesh Y. Gaonkar v/s. State and another** [WPCR No.22/2006], **Kachrual Bhagirath Agrawal v/s. State of Maharashtra** [2005 (9) SCC 36] and **Dhariwal Tobacco Products Ltd. and others v/s. State of Maharashtra and another** [2009 (2) SCC 370] before pressing for the grant of the relief in his favour. The respondent no.1 place reliance on the written submissions filed by her and closed her arguments. She referred to the judgment in **Surya Dev Rai v/s. Ram Chander**

Rai and another [2003 AIR (SC) 3044] in the matter of powers of superintendence of the High Court under Article 227 of the Constitution of India, the judgment in **Dr. Monica Kumar and another v/s. State of U.P. and others** [(2008) 8SCC 781] in the context of the powers of the High Court under Section 482 Cr.P.C., that in **Municipal Council, Ratlam v/s. Vardichan and others** [(1980) AIR SC 1622], **Thaneshwar Bora v/s. Kumud Sarmah** [(1987) CriLJ 1293], **S.R. Sukumar v/s. S. Sunand Raghuram** [(2015) AIR (SCW) 4066], **M.C. Mehta v/s. Kamal Nath and Ors.** [2000(6) SCC 213], **Smt. Ajeet Mehta & Ors v/s. State of Rajasthan and Ors** [1990 CrLJ 1596] and **State of Karnataka v/s. L. Muniswami and others** [(1977) 2 SCC 699] in support of her case and pressed for the dismissal of the petition.

11. Shri Pravin Faldessai, learned Additional Public Prosecutor supported the contention of Shri Zaveri, learned Advocate and in that context referred to the report of the Respondent No.2 wherein the name of the informant was disclosed and the Magistrate had taken cognizance and issued notice to the petitioner. The proceedings under Section 133 Cr.P.C. related only to public nuisance insofar as clause 'a' thereof was concerned. In any

event, these proceedings were not tenable at the instance of the respondent No.1.

12. i would consider the submissions of Shri Zaveri, learned Advocate for the petitioner and Shri P. Faldessai, learned Additional Public Prosecutor on behalf of the State apart from the written submissions of the respondent No.1, the various relevant judgments relied upon by them and decide the petition appropriately.

13. Section 133 Cr.P.C. which is contained in Chapter X dealing with the maintenance of public order and tranquillity reads that a conditional order be made for the removal of nuisance. Sub Section 1 provides that 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) (c)(d)(e).... (f), 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)(iii) (iv) (v) or (vi) 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.

14. In other words in order to attract the predicates of sub-clause (a) of Section 133 (1) Cr.P.C., it must be shown that there is any unlawful obstruction or nuisance in a **public place** which should be removed from any public place or from any way, river or channel, which is or may be lawfully used by the **public**. It is therefore to be seen in the light of the facts at large between the parties whether the nuisance alleged in the case is in a public place and used by the public as to attract the predicates of Section 133(1) (a) Cr.P.C.

15. Admittedly in the facts of the present case, there are civil proceedings initiated by the respondent No.1 against the petitioner before the Civil Court concerning the said alleged nuisance caused by him and seeking remedy before the Civil Court and /or before the Appellate Court as the case may be either at the instance of the petitioner herein or the respondent no.1. To all intents and purposes the dispute between the parties is of a civil nature which is between the private parties relating to a private property in which the respondent no.1 is claiming right on behalf of her parents and therefore the element of public nuisance and/ or public place would not arise in the fact situation. It is otherwise clearly admitted by the respondent no.1 herself that she has initiated proceedings against the petitioner in respect of the same subject matter and that the same are pending before the Civil Court for adjudication, an order of injunction being procured by her against the petitioner and an appeal being filed by the petitioner challenging the same in appeal. Be that as it may, the lis between the parties has a civil flavour and apparently there is no element of public nuisance or involving a public property as to attract the proceedings under Section 133 Cr.P.C.

16. **Nitin Naik**(supra), the original complainant took exception to the judgment and order dated passed by the learned District and Sessions Judge at Margao pursuant to which the appeal of the first respondent had been allowed setting aside the order passed by the learned Executive Magistrate, Canacona in proceedings under Section 133 Cr.P.C. Proceedings were initiated on the basis of a complaint filed by the applicant before the Executive Magistrate, Canacona, under Section 133 of the Code. According to the applicant/ complainant, he was residing in house situated in the property known as 'Gharbhat', surveyed under 135/5 of village Nagorcem, Palolem, belonging to the Bhatkar Ramesh Bhat. The house was an ancestral house, which was orally partitioned amongst the father of the applicant and the original opponent no.1, who was the father of the first respondent. It was contended that on the basis of the said oral partition, the father of the complainant had obtained a separate house number for the purposes of house tax in Canacona Municipal Council and upon the death of the father of the applicant, the said house was transferred in the name of the elder brother of the applicant, namely Gajanan Naik alongwith. The applicant alongwith his brother were declared as mundkars of the property bearing Survey No. 135/5 of village Nagorcem and his brother had purchased the said mundkarial area and a sanad had

been obtained. There was an ancestral cowshed/cattle shed situated in an adjacent land bearing Survey No.135/11 in the property belonging to one Shantabai Nagarsekar. That cattle shed was an ancestral cattle shed of the applicant and now deceased Sundar Naik and the respondent no.1.

17. In **Nitin Naik**(supra), 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 taking advantage of the entry in the Form I and XIV of Survey No.135/11, deceased Sundar Naik was not allowing the late father of the applicant to keep his cattle in the ancestral cattle shed and therefore with the permission of the Bhatkar Shri Ramesh Bhat, the applicant constructed a cattle shed in the property bearing Survey No.35/5. After the mutation case was decided in favour of the applicant, now deceased Sundar Naik trespassed into the said cattle shed and started tying his cattle, which matter was reported to the Police Station, Canacona. 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 was causing nuisance and was a health hazard. Moreover the area

around the cattle shed was smeared with cattle shit and stagnant urine, which was emanating foul odour, a health hazard to the applicant and the family members and other neighbours leading to mosquito spread. He, therefore, prayed for taking action under Section 133 of the Code pursuant to which the Executive Magistrate passed the conditional order on 17/12/2010 and Sundar Naik, since deceased, and the first respondent No.1 were directed to stop using the cattle shed or to shift it to some other place and to show cause as to why the conditional order should not be made absolute.

18. In **Nitin Naik**(supra), he examined himself and the learned Executive Magistrate recorded the evidence of the Medical Officer and Investigating Officer and passed the order making the conditional order absolute in terms of Section 138 Cr.P.C. giving rise to an appeal at the instance of the first respondent before the learned Sessions Judge, Margao who treated the same as a Revision Application and by the order under challenge set aside the order passed by the Executive Magistrate giving rise to the revision before this Court. In that context and on a consideration of the circumstances of the case, concluding that there was a civil dispute between the parties, taking note of the predicates of Section 133

Cr.P.C. the learned Single Judge of this Court found that the cattle shed was located in a private property and it was not necessary to go into the dispute as to the ownership of the same. It was also noticed that the area surrounding the cattle shed, where the applicant and the other neighbours were residing, could not be said to be a public place inasmuch as the public would not have an unobstructed access to the same and in that view of the matter found that the Executive Magistrate had not considered the fact that none of the neighbours had come forward, which would be a strong circumstance to show that in all probability, there was no case of 'public nuisance' made out, thereby probablising the case of the first respondent, that the complaint was a result of the Civil dispute between the parties and in view thereof dismissed the revision application. Moreover in the facts of the case at large, even despite the passage of more than three years since the initiation of the proceedings under Section 133 Cr.PC., no conditional order was made by the learned Executive Magistrate as rightly contended by Shri Zaveri, learned Advocate for the petitioners.

19. In **C.A. Avarachan**(supra), the respondent had filed a petition under Section 133 of the Code against the appellant

alleging nuisance to him and others. The Sub-Divisional Magistrate summoned the appellant to appear before him and proceeded with the enquiry without drawing up a preliminary order for which the appellant approached the High Court challenging the proceedings initiated by the Sub-Divisional Magistrate. The High Court directed that the objection raised by the appellant be considered and disposed off by the Sub-Divisional Magistrate despite which the Sub-Divisional Magistrate did not draw up the preliminary order and proceeded with the enquiry in the case. During the pendency of the proceedings, a Commissioner came to be appointed by the consent of the parties to submit a fact-finding report. When the matter came up before the Sub-Divisional Magistrate on the next date none appeared on behalf of the appellant and the respondent nor any objections were filed to the report of the fact finding body. In the fact situation, the Apex Court found that the omission on the part of the Sub-Divisional Magistrate to draw up a preliminary order which was a sine qua non for initiating proceedings under Section 133 of the Code and without following the procedure provided for by Section 138 of the Code, the order made by the Sub-Divisional Magistrate was unsustainable and vitiated. The High Court too fell in error in not properly appreciating the effect of non-compliance with the mandatory requirements of drawing up a

preliminary order before proceeding under Section 133 of the Code and in that view of the matter allowed the appeal. This judgment squarely applies in the facts of the present case where despite the passage of more than three years, no conditional order was passed by the learned Sub-Divisional Magistrate in the matter.

20. In **V. Gaonkar**(supra), the informant filed an application to the Executive Magistrate alleging that the tree belonging to and situated in the property of the petitioner was leaning over the residential house of the informant and coconuts of which were damaging her roof causing her a heavy loss which she was unable to bear. A conditional order was issued to the petitioner based on the application dated 08/04/2004. An inquiry continued thereafter and on its conclusion, the learned Executive Magistrate confirmed the conditional order directing the petitioner to cut the coconut tree within 15 days therefrom. The learned Executive Magistrate observed that the coconut tree was dangerously leaning on the house of the informant thereby endangering the lives of the inmates and the petitioner had not led any evidence to prove to the contrary. Besides, the learned Magistrate also noted that alongwith the imminent danger of the likelihood of the falling of the coconut tree, there was continuous nuisance of the coconuts

and dry coconut leaves on the house of the informant thereby posing continuous danger to the lives of the inmates.

21. In **V. Gaonkar**(supra), the petitioner challenged the order in revision and the learned First Adhoc Additional District Judge relying in **Maria Jesus Fernandes v/s. Ganpat L. Naik and another** [Criminal Miscellaneous Application No. 113 of 2001] concluded that the facts of the case were akin to those in **Maria Fernandes** (supra), and proceeded to dismiss the revision at the same time making a further order that upon the failure of the petitioner in cutting the tree within 15 days from the date of his order, the informant/ State was at liberty to cut the coconut trees and consequential reliefs. It was contended on behalf of the petitioner that there was no material on record of the informant or of the Zonal Agricultural Officer to suggest even remotely that there was a likelihood of the coconut tree falling on the house of the informant and which fact has been ignored by both the learned Courts below. However, it was contended on behalf of the informant that there were concurrent finding of the facts rendered by the Courts below and therefore the High Court may not interfere therewith in exercise of its extraordinary jurisdiction.

22. In **V. Gaonkar**(supra), the learned Single Judge considered Section 133 of the Code dealing with the cutting of tree in a condition that it is likely to fall and cause injury to the persons living and carrying on business in the neighbourhood or passing by. It certainly did not provide a remedy for cutting of the tree which causes nuisance or damage. The Single Judge found that the observation from the Executive Magistrate that there existed continuous nuisance of coconuts and dry leaves on the house of the informant was irrelevant for deciding the controversy within the powers given by Section 133 of the Code and the remedy for that would be by way of a Civil Suit. The learned Single Judge was not right in coming to the conclusion that the facts of the case were similar to those in **Maria Fernandes**(supra). The learned Judge further found that from the entire evidence of the informant it was apparent that her grievance was one of damage being caused to her on account of the falling of the coconuts and leaves from the trees and the remedy for which was by way of a Civil Suit. The learned Judge further held that the proceedings under Section 133 of the Code were not intended to settle private disputes between two parties and that it provided for a summary and quick remedy in terms of Section 133 Cr.P.C. and in that context allowed the petition setting aside the orders of the Courts below. This

judgment too supports the case of the petitioner that the proceedings under Section 133 Cr.P.C. are not intended to settle the private disputes and that the remedy available to the respondent No.1 is by way of proceedings before the Civil Court and which she has pursued simultaneously alongwith the proceedings under Section 133 Cr.P.C.

23. In **Kachrual Agrawal**(supra), the Hon'ble Apex Court held that 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 make recourse immediately irreparable danger would be occasioned to the public. It applied to a condition of the nuisance at the time when the order is passed and is not intended to apply to future likelihood or what may happen at some later point of time. It was further observed at paragraph 11 that the guns of Section 133 of the Code go into action wherever there is a 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.

24. There is no dispute with the proposition laid down by the Hon'ble Apex Court in **Surya Dev Rai**(supra) that certiorari under Article 226 of the Constitution is issued for correcting gross errors of jurisdiction, i.e. when a subordinate Court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction – by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of the principles of natural justice where there is no procedure specified, and thereby occasioning a failure of justice. Further there is also no dispute with the proposition that the supervisory jurisdiction of the High court under Article 227 of the Constitution is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does have or has failed to exercise jurisdiction it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction. There is also no dispute with the proposition culled out in **Dr. Monika Kumar**(supra), that the inherent power of the High Court for quashing criminal proceedings should be exercised very sparingly

and with circumspection and that too in the rarest of rare cases.

Municipal Council of Ratlam(supra), which dealt with the public nuisance qua the municipal duty is clearly distinguishable on facts and cannot at all advance the case of the respondent No.1 in the fact situation wherein it has been clearly held that the dispute between the parties is a private dispute and that there is no public nuisance by the alleged acts of the petitioner so as to attract the applicability of Section 133 Cr.P.C.

25. Moreover unlike the contention on behalf of the respondent No.1, there was not even a conditional order made by the learned Sub-Divisional Magistrate despite the passage of more than three years in proceedings initiated under Section 133 Cr.P.C. which is a sine qua non for its progress. The judgment therefore in **Thaneswar Bora**(supra), is clearly distinguishable. The judgment in **S.R. Sukumar**(supra), has no applicability in the present case and therefore the same is not dealt with at length looking to the nature of the dispute involved in the present proceedings. The judgments in **M.C. Mehta** and **Ajeet Mehta**(supra), have no bearing in the proceedings under Section 133 Cr.P.C. nor can these judgments find applicability in the facts of the present case

wherein it is observed on an examination of the record that it is a case of private and not public nuisance.

26. In the circumstance therefore, the petition is allowed and the impugned notice and the proceedings are quashed and set aside. Rule made absolute.

NUTAN D. SARDESSAI, J.

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