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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.06.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.17516 of 2017
and WMP No.19011 of 2017

Nanjappa Nagar Veetur Vasathi Sangam,
Rep. by its President R.Sadasivam

.. Petitioner

Vs.

1. The District Collector,
Tirupur District,
Tirupur.

2. The District Manager,
Tamil Nadu State Marketing
Corporation (TASMAC),
Angeripalayam Road,
Tirupur City.

3. The Revenue Divisional Officer,
Tirupur Division,
Tirupur-1.

4. The Tahsildar,
Tirupur North Taluk,
Kumaran Road, Tirupur-1.

5. S.Kesavan

.. Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, issuance of a Writ of Certiorari, calling for the records of the 1st respondent herein pertaining to the order dated 16.05.2017 made in Na.Ka.No.15767/2016/Kalai-2 in so far as the Wine Shop No.1964, is concerned and quash the same.

For Petitioner : Mr.P.M.Duraiswamy

For Respondents: Mr.Akhil Akbarali (for R1, R3 & R4)
Government Advocate
Mr.K.Sathishkumar (for R2)
Standing Counsel.



O R D E R

(Order of this Court was made by SUBRAMONIUM PRASAD, J.,)

President of Nanjappa Nagar Veettu Vasathi Sangam, Nanjappa Nagar, Boyampalayam, Tirupur, has filed the instant public interest litigation, praying for a writ of certiorari, to quash an order dated 16.05.2017 passed by the District Collector in Na.Ka.No.15767/2016/Kalai-2, insofar as the Wine Shop No.1964, is concerned.

2. The petitioner states that on 16.05.2017, the District Collector, Tirupur, the 1st respondent, on the proposal submitted by the District Manager, TASMAL, Tirupur, the 2nd respondent, has passed an order relocating 22 outlets of TASMAL Shops for the sale of Indian Made Foreign Liquor (IMFL) in Tirupur District. The petitioner states that the shops have been relocated following the judgment of the Hon'ble Supreme Court in Civil Appeal Nos.12164-12166 of 2016 dated 31.03.2017.

3. According to the petitioner, TASMAL Shop No.1964, which is running at Kumar Nagar, Thottipalayam Village, Tirupur-North Taluk, has been relocated to Kanchampalayam Road, in the lands comprised in S.F.No.224/1B of Thottipalayam Village, Tirupur North Taluk. According to him, the shop which has been relocated has started functioning on 21.06.2017.

4. The petitioner states that the place where the TASMAL Shop No.1964, is located is within the distance of 150 meters from Nanjappa Nagar Children Park, maintained by the Tirupur Municipal Corporation, and also very near the Nanjappa Nagar, which is a residential area. The petitioner also states that a Vinayagar Temple and Soundamman Temple are located barely about 175 meters from the place of wine shop. The petitioner also states that an Anganwadi Child Care Centre is located at about 1/2 km from the wine shop.

5. The petitioner states that the people residing in the area have given repeated representations to the respondents, but the representations have not been considered. The petitioner states that removal of TASMAL Shop No.1964 is necessary for the safety of women and children living in that area.

6. The respondents have filed a counter. They have given a table showing the distance between the wineshop and the school, temple, residential area, children's park, community hall, Printing Press, State Highway and District Road. The Table is as under.



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a	School	-	310 metres
b	Temple	-	335 metres
c	Residence	-	125.6 metres
d	Children Park	-	335 metres
e	Community Hall	-	370 metres
f	Printing Press	-	65 metres (A small printing press is located where approx 10 persons were working is located opposite to the shop after crossing the village road)
g	State Highway	-	2000 metres
h	District Road	-	370 metres

7. According to the respondents, location of TASMAC Wine Shop No.1964 was selected after considering all relevant facts and also ensuring that the conditions stipulated in Rule 8 of Tamil Nadu Liquor Retail Vending (In Shops and Bars) Rules, 2003 are not violated.

8. Heard the learned counsel for the parties and perused the materials available on record.

9. The place where TASMAC Wine Shop No.1964 is situated, is governed by Rule 8 of Tamil Nadu Liquor Retail Vending (In Shops and Bars) Rules, 2003 and Rule 8 reads as under.

8. Location of shop.-(1) No shop shall be established in Municipal Corporations and Municipalities within a distance of 50 (fifty) metres and in other areas 100 (hundred) metres from any place of worship or educational institutions:

Provided that the distance restriction shall not apply in areas designated as " Commercial" or " Industrial" by the Development or Town Planning Authorities:

Provided further that no shop shall be established within the premises of any hotel:

Provided also that if any place of worship,



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educational institution comes into existence subsequent to the establishment of the shop, the provisions of this rule shall not apply:

Provided also that no liquor shops shall be established in any tribal areas covered under Integrated Tribal Development Project and Hill Area Development Project in the Hill area of Vellore, Salem, Namakkal, Dindigul, Tirunelveli and Kanniyakumari districts.

(2) Every shop shall be housed in a pukka building and no part of the shops shall be thatched either on the sides or on the roof.

(3) The shop shall be in the location approved by the Collector before commencing the business in the shops.

10. The facts stated in the counter affidavit, have not been disputed by the petitioner. Rule 8 of Tamil Nadu Liquor Retail Vending (In Shops and Bars) Rules, 2003 has not been violated and there is also no legal impediment for locating the wine shop, at the said place.

11. Learned counsel for the petitioner would contend that the a person who consumes liquor in the area, starts creating nuisance and therefore, the liquor shop should not be located in that area.

12. Infact the issue as to whether the fact that there is apprehension of nuisance is sufficient for the Courts to entertain a public interest litigation or not, has to be answered only in the negative. There are number of provisions in Indian Penal Code and Criminal Procedure Code, which deals with nuisance and the remedy which is available under the said Act and Code.

13. Chapter X of the Criminal Procedure Code, deals with maintenance of public order and tranquility. Part-B of Chapter X of the Criminal Procedure Code deals with public nuisance. Section 133 of the Code deals with conditional order for removal of nuisance and the same is extracted.

"133. Conditional order for removal of nuisance.

(1) Whenever a District Magistrate or Sub-Divisional Magistrate or any other Executive Magistrate specially powered in this behalf 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, consider --

(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



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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 neighborhood 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 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.



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(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.

14. Another Division Bench of this Court, by judgment dated 26.08.2008 in R.Munusamy Vs. District Collector, Vellore [WP No.20494 of 2008] after extracting the various provisions, observed as under.

8. On a perusal of the aforesaid provisions, it is clear that starting from Section 133, detailed and adequate provisions have been made right up to Section 143 under the said Code and the aforesaid gamut of proceedings constitutes a complete Code for removal of encroachment or obstruction from the public land which leads to public inconvenience or public nuisance.

9. On the question what constitutes #public nuisance# under Section 133 of the Code of Criminal Procedure, the Hon#ble Supreme Court has explained the concept of public nuisance very broadly as to take within its fold the nuisance caused by obstruction and encroachment.

10. In the case of Vasanth Manga Nikumba & Others v. Baburao Bhikanna Naidu, reported in 1995 Supp (4) SCC 54 the Supreme Court held that nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. The learned Judges held that it is not capable of precise definition, but as defined under Section 268 IPC, public nuisance is an offence against public either by doing a thing, which tends to the annoyance of the whole community in general or by neglect to do anything which the common good requires. The learned Judges clarified it by saying that public nuisance is an act of omission which causes any common injury, danger and annoyance to the public or to the people in general who dwell or occupy the property in the vicinity. It causes some injury or obstruction to the person who may have occasion to use public right. In the instant case, the allegation is one of obstruction by encroachment to the use of the public road by the members of the public. In view of such alleged encroachment very project beneficial to public cannot be undertaken. Such allegations obviously bring the matter within the expression of unlawful obstruction and nuisance to the members of the public. However in Vasanth Manga (supra) it has been held that the



11. In a subsequent judgment in the case of Municipal Council v. Shri Vardichan reported in 1980 (4) SCC 162, the learned Judges of the Supreme Court point out that wherever there is #public nuisance the guns of Section 133 of the Code of Criminal Procedure go into action#. (See para-9 at page 169 of the report). The learned Judges held that the power may be discretionary, but the power given to the Magistrate under Section 133 of the Code is a #public duty# to the members of the public who are victims of the nuisance, and so the Magistrate shall exercise it when the jurisdictional facts are present. The learned Judges reiterated the principles by saying that discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise. (See para-9 of the judgment). In paragraph-13, the learned Judges further said that Section 133 is a categorical provision, though it reads discretionary. The learned Judges held that judicial discretion, when facts for its exercise are present, has a mandatory import. The learned Judges held that when the Magistrate considers that such unlawful obstruction or nuisance should be removed from any public place, which may be legitimately used by the public, #he shall act#. The learned Judges further added that this judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts. The learned Judges also held that this is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. (See para-13 at page 170 of the report)

13. In a decision of the Supreme Court in the case of State of M.P v. Kedia Leather & Liquor Limited reported in 2003 (7) SCC 389, the learned Judges of the Supreme Court held that the object and purpose of Section 133 of the Code is essentially to prevent public obstruction and nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately and before irreparable damage would be caused to the public.



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14. Now the question is whether the existence of the provisions in Local Act under which the encroachment on a public property can be removed can oust the jurisdiction of the Magistrate under Section 133 of the Code?

15. This Court has already referred to Section 13 of the Tamil Nadu Land Encroachment Act, 1905, which saves operation of other laws and which obviously includes the entire gamut of provisions from Sections 133 to 143 of the Code.

16. Almost a similar question came up for consideration before a learned Single Judge of the Madras High Court in the case of Rajagopala Chettiar v. Samdum Begum reported in AIR (30) 1943 Madras 357. In the aforesaid case, the learned Judge held that the powers of the Magistrate under Section 133 of the Code have not been curtailed by the powers conferred under the local authorities to abate nuisances under Section 44 of the Madras Public Health Act or under Section 195 of the Madras Local Boards Act. In the instant case, Section 13 of the local Act itself is a clear answer, apart from the principles which have been laid down by the Madras High Court in the aforesaid case of Rajagopala Chettiar. So it cannot be said that in view of the provisions of Tamil Nadu Land Encroachment Act, the provisions of Section 133 of the Code have become otiose.

17. Now the next question is whether in view of the provisions of Sections 133 to 143 of the Code, it is judicially prudent for this Court to exercise its jurisdiction under Article 226 of the Constitution by entertaining cases on allegation of encroachment of the public land as made in a writ petition?

18. First of all, it is extremely difficult within the circumspect nature of jurisdiction of a writ court to decide the factual correctness of such allegations. It often happens when such allegations are made the only evidence before this Court is the writ petition supported by an affidavit. The writ court normally does not take evidence nor is it possible for the writ court to assess the local situation. But in a proceeding under Section 133 of the Code the Magistrate is competent to take evidence, make local enquiry and probe the local situation relating to the allegations of obstruction or encroachment on a public land. It has been the



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experience of this Court that in many cases, on the basis of such allegation of encroachment, orders have been passed by the writ court, which are subsequently challenged by the persons who are at the receiving end of such orders, but were not impleaded. As noted earlier, in a proceeding under Article 226 of the Constitution detailed factual enquiry is not possible, but a decision whether obstruction or encroachment has been made on a public land is essentially a decision on facts and can be reached only after some factual enquiry. Therefore, this Court feels that this legal question is required to be settled as many writ petitions have been filed in this court alleging encroachment/obstruction on public and that is why this detailed judgment is delivered. Such questions should be decided by an authority which is entitled to go into the questions of fact and take evidence, hear the parties and assess the local situation, if necessary on the basis of a police report and then come to a decision.

19. It is a well-settled principle that the power under Article 226 of the Constitution has to be exercised by observing certain self-imposed limitations. One of such well-recognized limitations is when the statute provides for an efficacious remedy, writ court should not entertain a case with a grievance which can be adequately dealt with under the relevant statute. This is specially true in this case where power has been conferred under Sections 133 to 143 of the Code in very wide terms and which, in a given case, is decided in Municipal Council, Ratlam (supra), mandate a public duty on the Magistrate to be exercised for public benefit. Therefore, the remedy under the Code is an efficacious one.

20. Reference in this connection may be made to the Constitution Bench judgment of the Supreme Court in the case of Thansingh v. Superintendent of Taxes reported in AIR 1964 SC 1419. The relevant observations of Justice Shah on this point are set out herein below: - (para.7 at page 1423 of the report)

#The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by a statute. Ordinarily the Court will not entertain a petition for a writ under Art.226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again



(underlined for emphasis)

23. In view of such consistent view of the Supreme Court, the exercise of writ jurisdiction for removal of encroachment or obstruction on public land, especially when a specific efficacious remedy for the same has been provided under Sections 133 to 143 of the Code, in our



judgment, would be both
and improper.

inappropriate

24. For the reasons aforesaid, we dismiss this writ petition. However, we do not wish to make any observation on the merits of the petitioner's claim. We make it clear that if the petitioner is so advised, he is at liberty to approach the Magistrate under Section 133 of the Code since there is no limitation prescribed for invoking the jurisdiction of the Magistrate under Section 133 of the Code. No Costs. Consequently, miscellaneous petition is closed."

15. In view of the above mentioned judgment and also the fact that Rule 8 of Tamil Nadu Liquor Retail Vending (In Shops and Bars) Rules, 2003 has not been violated, this writ petition cannot be entertained, only on the ground that there is an apprehension of nuisance, by relocation of the wine shop. If the said contention is accepted, then it would amount to adding more condition in Rule 8 of Tamil Nadu Liquor Retail Vending (In Shops and Bars) Rules, 2003, which will amount to legislation by Judiciary. It is a well settled proposition that Courts cannot legislate. The writ petition is dismissed. No Costs. Consequently, the connected Writ Miscellaneous Petition is closed.

s/d-

Assistant Registrar (CS VIII)

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Sub-Assistant Registrar

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To

1. The District Collector,
Tirupur District, Tirupur.

2. The District Manager,
Tamil Nadu State Marketing
Corporation (TASMAC),
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3. The Revenue Divisional Officer,
Tirupur Division, Tirupur-1.

4. The Tahsildar,
Tirupur North Taluk,
Kumaran Road, Tirupur-1.



+1 CC to Mr.K. Sathish Kumar, Advocate sr 48898
+1 CC to The Govt. Pleader sr 50108.

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