



For Petitioner : Mr.V.Karthikeyan for Mr.S.Ramesh
 For Respondents : Mr.A.Robinson
 Government Advocate

W.P(MD).No.4742 of 2018

WEB COPY

S.Joel

... petitioner
 Vs.,

1.State rep., by
 The District Collector,
 Thoothukudi District,
 Office of the District Collector,
 Korampallam, Thoothukudi.

2.The Superintendent of Police,
 Office of the Superintendent of Police,
 Thoothukudi District,
 Thoothukudi.

3.R.Selvaraj ... Respondents

(Third respondent is impleaded vide order dated 04.03.2020 in W.M.P (MD).No.3997 of 2020)

Prayer: Petition is filed under Article 226 of Constitution of India, to issue a Writ of Mandamus, to forbear the respondents and their Sub-ordinate officers or any person or officer claiming through them from interfering with the erection of flag pole and raising of DMK party flag in the private land comprised in Survey No.53/2, Kumaragiri Village, within the jurisdiction of the office of the Sub-Registrar, Pudukottai, Thoothukudi District.

For Petitioner : Mr.V.Karthikeyan for Mr.S.Ramesh
 For Respondents : Mr.A.Robinson
 Government Advocate

COMMON ORDER

In all these petitions, what is under challenge is the proceeding issued under Section 133 of Cr.P.C by the Sub Divisional Magistrate and Sub-Collector, Thoothukudi. By the impugned conditional order, the petitioners have been directed to remove the flag poles installed by them.

2.The petitioners' counsel reiterated the various contentions projected by them in the respective petitions. He firstly pointed out that the impugned order has been issued under Section 133 (1) (a) of Cr.P.C, which reads as under:

'133.Conditional order for removal of nuisance.-

(1)

(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'



3. According to the counsel, the said provision will have no application whatsoever to the case on hand. Though the petitioners' counsel is perfectly right in his contention that Section 133 (1) (a) of Cr.P.C will not apply, as rightly pointed out by the learned Government Advocate, misquoting or non-quoting or wrong quoting a legal provision will not vitiate a statutory order, if the authority is otherwise possessed of the requisite jurisdiction. In this case, the learned Government Advocate would draw my attention to Section 133 (1) (d) of Cr.P.C., which reads as follows:

'133. Conditional order for removal of nuisance.-(1)

...

(a) ..

(b) ..

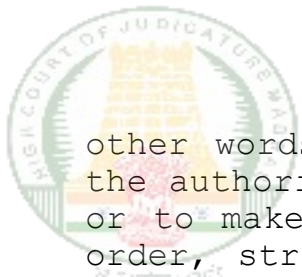
(c) ..

(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'*

4. I am of the view that *prima facie* the case on hand will fall under Section 133 (1) (d) and not 133 (1) (a) of Cr.P.C. Hence, the first contention of the petitioners' counsel has to fail. The petitioners' counsel would then argue that the petitioners have been selectively targeted. Again, there cannot be any claiming of equality in illegality. However, the authority is specifically directed to take action against similar flag poles. The authority cannot be selective while applying the legal mandate. The authority must be even handed in his approach.

5. The petitioners' counsel would then submit that the authority had already made up his mind and this shows pre-determination on his part. The petitioners' counsel would pointedly contend that even without hearing him, the authority come to several adverse conclusions.

6. Though on the face of it this contention appears to be formidable, I am afraid, it fails to take note of the statutory scheme. The authority will have to first pass a provisional order known as conditional order. It is open to the person to whom the order is addressed either to obey the same or to show-cause. In other words, the order gives choice to the noticee. If the noticee or the person to whom the order is directed, shows cause, then the authority is bound to conduct the case as in a summon case. In



other words, the noticee can also lead evidence. Only thereafter, the authority will take a decision as to whether to recall the order or to make it absolute. Thus, on the strength of the conditional order, straight away the authority cannot take any action, but of course if the noticee fails to show cause, then authority can take action. The apparent pre-determination found in the conditional order is not vitiatative.

7.The petitioners' counsel states that the petitioners herein intend to show-cause against the conditional order. The petitioners are given two weeks time from the date of receipt of a copy of this order to show-cause against the conditional order. Thereafter, the authority will follow the procedure laid down in Section 138 of the Cr.P.C., which reads as follows:-

'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.Since the petitioners have made their stand clear the authority will not take any coercive action pursuant to the impugned orders till the entire enquiry is concluded. It is made clear that the authority will have to address all the contentions raised by the petitioner herein. The authority should not proceed in a predetermined manner.

9.These Criminal Original Petitions as well as the Writ Petition are disposed of on these terms. No costs.

Sd/-

Assistant Registrar

// True Copy //

/ /2020

Sub Assistant Registrar(CS)



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To

1.The Sub Divisional Magistrate and Sub Collector,
Thoothukudi.

2.The District Collector,
Thoothukudi District,
Office of the District Collector,
Korampallam, Thoothukudi.

3.The Superintendent of Police,
Office of the Superintendent of Police,
Thoothukudi District,
Thoothukudi.

4.The Officer Incharge, Sub Registrar,
Pudukottai.

5.The Officer Incharge, Sub Registrar Joint-II,
Thoothukudi, Thoothukudi District.

6.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.K.GOVINDARAJ, Advocate (SR-10241[F] dated 05/03/2020)
+1cc to Mr.M.SATHISH KUMAR, Advocate, Sr.No.10240

Crl.O.P(MD).No.3530 of 2018
and W.P(MD).Nos.4741 and 4742 of 2018

SMA/03/07/2020/5P/9C