

HIGH COURT OF CHHATTISGARH, BILASPUR**Cr.M.P.No.56 of 2014**

Dharnidhar S/o Late Narayan Patel R/o Village Farswani
P.S. & Tehsil Sarangarh District Raigarh (CG)

----- **Petitioner**

Versus

1. Ghasi Ram Patel S/o Loknath Patel Caste Aghariya R/o Village Farswani P.S. & Tehsil Sarangarh District Raigarh (CG)
2. State of Chhattisgarh Through District Magistrate Raigarh P.S. & Tehsil & District Raigarh (CG)

----- **Respondents**

For Petitioner	: Mr.S.N.Nande, Advocate
For Respondent No.1	: Mr.Ratan Pusty, Advocate
For Respondent No.2/State	: Mr.Aditya Sharma, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

21/01/2021

1. This petition under Section 482 of the CrPC is directed against the impugned order dated 17.10.2013 passed by the Additional Sessions Judge, Sarangarh, in Criminal Revision Case No.05/2013, by which the revision petition filed by the petitioner has been dismissed affirming the order passed by learned Sub-Divisional Magistrate, Sarangarh under Section 133 of the CrPC directing removal of nuisance under Section 133(1)(a) of the CrPC.
2. The essential facts necessary for adjudication of the petition are as under:-
 - 2.1 Respondent No.1 herein filed an application under

Section 133 of the CrPC before the Sub-Divisional Magistrate, Sarangarh stating inter-alia that the present petitioner has made a bore on abadi site in a land adjacent to his house and thereby caused public nuisance and sought removal under Section 133 of the CrPC, in which learned SDM issued notice to the petitioner. Reply was filed by the petitioner stating that he has made a bore on his own abadi site since long back, for supply of water inside his house and as such, he has exclusive right and further stated that no prima-facie case for taking cognizance under Section 133 of the CrPC is made out.

3. Learned SDM also called for report of revenue inspector and allowed the parties to lead evidence and came to the conclusion that the petitioner has made bore on abadi land (government land) and thereby possessed the said land recorded as abadi land, which is causing public nuisance and thereby invoked Section 133(1)(a) of the CrPC and directed the petitioner to remove the motor-pump installed on land in question. Order of the learned SDM was challenged by the petitioner before the revisional Court. The revisional Court by the impugned judgment dismissed the revision affirming the order passed by the SDM. Questioning that order, this petition under Section 482 of the

CrPC has been filed by the petitioner herein.

4. Mr.S.N.Nande, learned counsel for the petitioner, would submit that the learned SDM has not passed any conditional order as required under Section 133(1)(a) of the CrPC directing the petitioner to remove such obstruction/nuisance and only upon passing a conditional order, he could have recorded the evidence following the procedure laid down in Section 134 to 143 of the CrPC and as such, passing of final order without passing a conditional order/preliminary order under Section 133(1)(a) of the CrPC and affirming such order by the revisional Court deserve to be set aside.
5. Mr.Ratan Pusty, learned counsel for respondent No.1/complainant and Mr.Aditya Sharma, learned Panel Lawyer for respondent No.2/State, would support the impugned order and submit that at the best, it is only a procedural illegality and by that proceeding would not be rendered void and liable to be quashed.
6. I have heard learned counsel for the parties, considered their rival submissions made herein-above and also went through the records with utmost circumspection.
7. It is true that an application under Section 133 of the CrPC was filed by respondent No.1 herein for directing the petitioner herein to uninstall the bore-

well and motor-pump installed by the petitioner alleging it to be on governmental property and causing public nuisance under Section 133(1)(a) of the CrPC, in which learned SDM in March, 2010 issued notice to the petitioner herein and also called for enquiry report from revenue inspector and from time to time, the matter was adjourned and ultimately, after taking evidence of the parties, final order was passed by the SDM on 28.12.2012 directing removal of motor-pump from Government land.

8. Chapter X of the CrPC provides for maintenance of public order and tranquillity. Part 'A' provides for unlawful assemblies. Part 'B' provides for public nuisance. Proceedings under Section 133 are not intended to settle private disputes between different members of the public. They are in fact intended to protect the public as a whole against inconvenience. The proceedings under Section 133 are more in the nature of civil proceedings than of criminal nature. (See Suhelkhan Khudyarkhan and another v. State of Maharashtra and others¹).

9. Section 133 of the CrPC provides a speedy and summary remedy in case of urgency where danger to public interest or public health is concerned. In all other

¹ (2009) 5 SCC 586

cases, the parties should be referred to the remedy under the ordinary law. The idea is that if immediate steps are not taken, irreparable injury will be done. Extraordinary powers are meant to be exercised under extraordinary circumstances.

10. Section 133 of the CrPC provides for conditional order for removal of nuisance which states 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;

(b) to (f) xxx xxx xxx

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 (vi) xxx xxx xxx

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."

11. Section 134 (1) of the CrPC provides that the order shall, if practicable, be served on the person against whom it is made, in the manner herein provided for service of a summons. Section 135 CrPC provides that the person against whom such order is made shall perform, within the time and in the manner specified in the order, the act directed thereby or appear in accordance with such order and show cause against the same. Section 136 CrPC provides for consequences of his failing to do so. Section 137 CrPC provides procedure where evidence of public right is denied. Section 138 (1) CrPC provides that 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 summons-case. Section 139 CrPC provides for power of Magistrate to direct local investigation and

examination of an expert. Section 141 CrPC provides procedure on order being made absolute and consequences of disobedience which states as under:-

"141. Procedure on order being made absolute and consequences of disobedience.

-(1) When an order has been made absolute under section 136 or section 138, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code (45 of 1860).

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other movable property of such person within or without such Magistrate' s local jurisdiction and if such other property is without such jurisdiction, the order shall authorise its attachment and sale when endorsed by the Magistrate within whose local jurisdiction the property to be attached is found.

(3) No suit shall lie in respect of anything done in good faith under this section."

Section 142 CrPC provides for injunction pending inquiry and Section 143 CrPC provides that Magistrate may prohibit repetition or continuance of public nuisance.

12. As such, complete mechanism has been prescribed from Section 133 to Section 143 of the CrPC for

removal of public nuisance, which has to be initiated by passing a conditional order under Section 133(1) of the CrPC.

- 13.** The Supreme Court in the matter of **C.A. Avarachan v. C.V. Sreenivasan and another**² has clearly held that passing of preliminary order under Section 133 of the CrPC is must and non-compliance with the mandatory requirements for drawing up a preliminary order before proceedings under Section 133 of the CrPC vitiates the entire proceeding. It was observed by their Lordships as under:-

"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 CrPC, 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 CrPC. Neither the order of the High Court nor that of the Sub-Divisional Magistrate can therefore be sustained."

- 14.** Reverting to the facts of the present case in the light of the provisions contained in Section 133(1) of the CrPC and following the principle of law laid down by the Supreme Court in **C.A. Avarachan** (supra), it is quite vivid that in the instant case, learned SDM

2 (1996) 7 SCC 71

omitted to pass a conditional order for removal of nuisance under Section 133(1) of the CrPC and without passing a preliminary order, proceeded to enquire into the matter and passed final order directing removal of said motor-pump installed by the petitioner, which is in teeth of the provisions contained in Section 133(1) of the CrPC and contrary to the principle of law laid down by the Supreme Court in C.A. Avarachan (supra).

15. Accordingly, the order dated 28.12.2012 (Annexure P-3) passed by the Sub-Divisional Magistrate, Sarangarh in Misc. Criminal Case No.280/2011 as affirmed by the Additional Sessions Judge, Sarangarh in Criminal Revision Case No.05/2013 on 17.10.2013 is hereby set aside. The matter is remitted to the Sub-Divisional Magistrate, Sarangarh for proceeding in accordance with law.

16. The petition under Section 482 of the CrPC is allowed to the extent indicated hereinabove.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-