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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 25 OF 2021

MRS. POOJA DA GAMA ROSE

...PETITIONER

Versus

STATE OF GOA, THR. THE POLICE
INSPECTOR, OLD GOA POLICE
STATION AND 3 OTHERS

...RESPONDENTS

Mrs. A. Agni, Senior Advocate with Ms. Jay Sawaikar,
Advocate for the Petitioner.

Mr. Mahesh Amonkar, Additional Public Prosecutor *for*
Respondent Nos. 1, 2 and 4.

Mr. Rohit Bras De Sa with Ms. V. Shet, Advocates *for*
Respondent No. 3.

CORAM: MANISH PITALE, J.

RESERVED ON: 2nd December 2021.

PRONOUNCED ON: 21st January 2022.

ORDER:

1. The petitioner and respondent no. 3 are both residents of a gated Society called the Harbans Vihar Society at Ribandar in Goa and they are before this Court on the basis of proceedings initiated at the behest of respondent no. 3, under Section 133 of the Code of Criminal Procedure, 1973 (Cr.P.C.). The petitioner

is aggrieved by notices dated 26.02.2020 and 09.10.2020, issued by the respondent no. 2 i.e. the Joint Executive Magistrate. While initiating proceedings under Section 133 of Cr.P.C., the respondent no.2-Magistrate passed a conditional order dated 05.02.2021, issuing specific directions against the petitioner and another resident of the said Society, which is also subject matter of challenge.

2. The respondent no. 3, filed a complaint dated 02.12.2019, before the Collector of North Goa, claiming that there was an ongoing problem with regard to stray dogs being fed by some members of the Society inside the premises of the Society, leading to nuisance in the form of danger to the residents and in some cases, to the pets of the residents of the said Society. Respondent no. 1, called upon the Collector to take appropriate steps in the matter. In the said complaint, the respondent no. 3 referred to three earlier complaints dated 26.07.2019, 16.09.2019 and 08.11.2019, submitted in respect of the aforesaid alleged nuisance. Copies of the said earlier complaints/ applications were annexed to the aforesaid complaint dated 02.12.2019. In the earlier complaint dated 26.07.2019, the petitioner was specifically named as one of the persons, who was feeding the stray dogs within the premises of the Society, allegedly leading to nuisance. In the complaint dated 16.09.2019, six residents of the Society

had raised grievance before the Collector as well as the Health Officer and the Secretary of the Village Panchayat.

3. On 27.12.2019, the Additional District Magistrate of North Goa, issued a memorandum to the respondent no. 2-Magistrate, referring to the complaint dated 02.12.2019, submitted by respondent no. 3 and directed initiation of necessary action under Section 133 of Cr.P.C. after obtaining report from the Talathi, in accordance with law. On 07.02.2020, the Talathi submitted a report to the respondent no. 2-Magistrate, wherein it was stated that stray dogs were indeed being fed within the premises of the Society, further stating that directions were necessary to the members to refrain from feeding dogs from the street within the compound as it may cause danger to the residents of the Society.

4. On 26.02.2020, the respondent no. 2-Magistrate issued notice to the petitioner and one more resident of the said Society, referring to the complaint dated 02.12.2019, submitted by respondent no. 3 and the fact that the Additional District Magistrate directed action to be initiated under Section 133 of Cr.P.C. A reference was made to the said report of the Talathi and thereupon, the petitioner and the other resident were directed

to remain present before the respondent no. 2-Magistrate on 09.03.2020.

5. On 06.08.2020/02.09.2020, the respondent no. 3 submitted further communication to the respondent no. 2-Magistrate stating that although, dates of hearing were scheduled on 09.03.2020, 30.03.2020 and 24.07.2020, the hearing could not take place because of Covid-19 pandemic. In this communication, a specific grievance was made against another resident of the Society, Mr. Amit Chaddha, on the ground that he was allegedly indulging in the same activities as the petitioner and he was also unleashing his pet dogs. Specific instances were stated regarding dog fights in the Society and urgent action was prayed for.

6. On 09.10.2020, the respondent no. 2-Magistrate, issued notice to the petitioner and two other residents of the said Society for remaining present on 28.10.2020, in respect of the proceedings initiated against them under Section 133 of Cr.P.C. In the interregnum, the Police Inspector of Old Goa Police Station submitted a report before the respondent no. 2-Magistrate, referring to the complaints of respondent no. 3. In this report, it was stated that no offence could be said to have been made out on the basis of the complaints filed by respondent

no. 3. On 28.10.2020, the petitioner and another resident of the Society filed an application for supply of documents. On 20.11.2020, they raised preliminary objection with regard to the maintainability of the proceedings.

7. Thereafter, on 05.02.2021, the respondent no. 2-Magistrate passed an order dropping the proceedings against one of the residents of the Society i.e. Ms. Misha Chaudhary. By the same order, the preliminary objection raised on behalf of the petitioner and another resident of the Society, was rejected and it was directed that a conditional order be issued. Accordingly, on 05.02.2021, the impugned conditional order was issued by the respondent no. 2-Magistrate, directing the petitioner and another resident of the Society to stop relocating, feeding stray dogs and unleashing of pet dogs in the Society, within a period of seven days and to appear before the said respondent no. 2 on 26.02.2021, to show cause as to why the conditional order should not be made absolute.

8. At this stage, the petitioner filed the present Petition. On 17.03.2021, this Court issued notice in this Writ Petition and granted stay of the impugned conditional order dated 05.02.2021. Thereafter, the respondents entered appearance and

upon completion of the pleadings, the Petition was taken up for final disposal.

9. Ms. A. Agni, learned Senior Counsel for the petitioner submitted that, not only were the impugned notices and the impugned conditional order unsustainable, but, the entire proceedings initiated by the respondent no. 2-Magistrate under Section 133 of Cr.P.C., were also wholly misconceived. It was submitted that the initiation of the proceedings was based on erroneous interpretation of Section 133 of Cr.P.C. and therefore, the entire proceedings deserved to be quashed. By referring to Section 133 of Cr.P.C., the learned Senior Counsel submitted that as per settled law, the respondent no. 2-Magistrate was required to reach a finding as to whether, there was material placed on record to indicate that a conditional order could at all be passed in the facts and circumstances of the case. It was submitted that the disputes that were essentially private disputes, could not be made subject matter of proceedings under Section 133 of Cr.P.C. and that, in the present case, there was absence of material to show that there was imminent danger for removal of nuisance, in order to invoke Section 133 of Cr.P.C.

10. By inviting attention to the contents of the complaint dated 02.12.2019, it was submitted that the grievance sought to be

raised by respondent no. 3 was a longstanding grievance and therefore, it could not be covered under Section 133 of Cr.P.C. It was further submitted that even if, the statements made on behalf of respondent no. 3 were to be taken into consideration, sufficient material was available on record before the respondent no. 2-Magistrate to show that the petitioner was feeding the stray dogs within her parking lot, which could not be said to be a public place, thereby showing that Section 133 of Cr.P.C. was not attracted. It was further brought to the notice of this Court that the Talathi had stated in his report that there was nuisance, but, no individuals were identified and further, the report of the Police clearly stated that no offence was made out. Except this, there was no material for the respondent no. 2-Magistrate to initiate the proceedings against the petitioner and another resident of the Society.

11. The learned Senior Counsel for the petitioner relied upon the judgments of the Hon'ble Supreme Court in the case of **Kachrual Bhagirath Agrawal & Others Vs. State of Maharashtra & Others**, (2005) 9 SCC 36 and **C.A. Avarachan Vs. C.V. Sreenivasan & Another**, (1996) 7 SCC 71 to claim that the procedural requirements under Section 133 of Cr.P.C. read with Section 138 of Cr.P.C. were not satisfied when the impugned conditional order dated 05.02.2021 was issued against

the petitioner. The learned Senior Counsel for the petitioner also relied on the judgment of the Supreme Court in the case of **Anupam Tripathi Vs. Union of India & Others**, (2016) 10 SCC 684 and (2016) 2 SCC 598 in the case of **Animal Welfare Board of India Vs. People for Elimination of Stray Troubles**. The learned Senior Counsel further relied upon the judgment of the Supreme Court in the case of **State of Madhya Pradesh Vs. Kedia Leather & Liquor Ltd. & Others**, (2003) 7 SCC 389 to emphasize on the concept of nuisance interpreted by the Court under Section 133 of Cr.P.C.

12. On the other hand, Mr. Rohit Bras De Sa, learned Counsel for respondent no. 3 submitted that the impugned notices and the impugned conditional order were passed by the respondent no. 2-Magistrate in consonance with the procedure contemplated under Section 133 of Cr.P.C. It was submitted that the respondent no. 3 had placed on record sufficient material before the respondent no. 2-Magistrate alongwith his complaints dated 02.12.2019 and 06.08.2020/02.09.2020, to demonstrate that nuisance was caused by feeding the stray dogs in the premises of the Society. It was claimed that the natural habitat of the stray dogs was outside the said Society and due to the said activities of some members of the Society, there were regular incidents of attacks on residents and dog fights with the pets of the residents

of the Society, demonstrating that there was enough material available for the Magistrate to initiate proceedings under Section 133 of Cr.P.C. It was submitted that the material on record clearly indicated imminent danger, to which the residents of the Society were exposed and therefore, the impugned conditional order was justified.

13. The learned Counsel further submitted that the stage for complying with the requirements of Section 138 of Cr.P.C. had arisen after the impugned conditional order dated 05.02.2021, was passed and the petitioner and another resident of the Society were called upon to show cause as to why such an order should not be made absolute. The learned Counsel also placed reliance on the judgment of the Supreme Court in the case of **Kachrulal Bhagirath Agrawal** (supra). He further relied upon the judgment of this Court in the case of **Annaji Atmaramji Tamboli (D), through LR. Vs. State of Maharashtra, 2021 SCC OnLine BOM 2902**.

14. Mr. Mahesh Amonkar, learned Additional Public Prosecutor appeared on behalf of respondent nos. 1, 2 and 4. He defended the impugned notices and the conditional order passed by the respondent no. 2-Magistrate.

15. The contentions raised on behalf of the rival parties show that the scope of Section 133 of Cr.P.C. and the procedure contemplated under the Cr.P.C. pertaining to public nuisance, are relevant for the present case. Sections 133 to 139 of Cr.P.C., concerning public nuisance, are found in Chapter X, pertaining to maintenance of public order and tranquility. In the present case, Sections 133, 137 and 138 of the Cr.P.C. are relevant and they read as follows:

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 configuration 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.

137. Procedure where existence of public right is denied.—*(1) Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under section 138, inquire into the matter.*

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court; and, if he finds that there is no such evidence, he shall proceed as laid down in section 138.

(3) A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial.

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.

16. The Hon'ble Supreme Court in the case of **Kachrulal Bhagirath Agrawal** (supra) has laid down that the proceedings under Section 133 of Cr.P.C. are of a summary nature, concerning public nuisance, and that the same are not intended to settle private disputes between members of the public. The relevant portion reads as under:

10. The proceedings under Section 133 are more in the nature of civil proceedings than of criminal nature. Section 133(1)(b) relates to trade or occupation which is injurious to health or physical comfort. It itself deals with physical comfort to the community and not with those acts which are not in themselves nuisance but in the course of which public nuisance is committed. In order to bring a trade or occupation within the operation of this section, it must be shown that the interference with public comfort was considerable and a large section of the public was affected injuriously. The word 'community' in clause (b) of Section 133(1) cannot be taken to mean residents of a particular house. It means something wider, that is, the public at large or

the residents of an entire locality. The very fact that the provision occurs in a chapter with “Public Nuisance” is indicative of this aspect. It would, however, depend on the facts situation of each case and it would be hazardous to lay down any straitjacket formula.

11. The guns of Section 133 go into action wherever there is 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. “All power is a trust that we are accountable for its exercise - that, from the people, and for the people, all springs and all must exist”. The conduct of the trade must be injurious in presenti to the health or physical comfort of the community. There must, at any rate, be an imminent danger to the health or the physical comfort of the community in the locality in which the trade or occupation is conducted. Unless there is such imminent danger to the health or physical comfort of that community or the conduct of the trade and occupation is in fact injurious to the health or the physical comfort of that community, an order under Section 133 cannot be passed. A conjoint reading of Sections 133 and 138 of the Code discloses that it is the function of the Magistrate to conduct an enquiry and to decide as to whether there was reliable evidence or not to come to the conclusion to act under Section 133.

12. Section 133 of the Code as noted above appears in Chapter X of the Code which deals with maintenance of public order and tranquility. It is a

part of the heading "Public nuisance". The term "nuisance" as used in law is not a term capable of exact definition and it has been pointed out in Halsbury's Laws of England that:

"Even in the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort".

*13. In Vasant Manga Nikumba v. Baburao Bhikanna Naidu (1995 Supp (4) SCC 54) it was observed that nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. It is not capable of precise definition. To bring in application of Section 133 of the Code, there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc. 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 take recourse immediately irreparable danger would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time. It does not deal with all potential nuisances and on the other hand applies when the nuisance is in existence. It has to be noted that sometimes there is confusion between Section 133 and Section 144 of the Code. While the latter is a more general provision the former is more specific. While the order under the former is conditional, the order under the latter is absolute. [See **State of M.P.***

v. Kedia Leather & Liquor Ltd. and Ors. (2003 (7) SCC 389)].

17. In **C.A. Avarachan** (supra), the Supreme Court was concerned with a case where the concerned Magistrate did not draw a preliminary order while proceeding under Section 133 of Cr.P.C. and after perusing the report of the Commissioner, passed an order of permanent nature. It is in this context, that the Supreme Court held that there was misapplication of the procedure under Section 133 of Cr.P.C., thereby vitiating the order of the Magistrate. The law laid down by the Supreme Court in the case of **Kedia Leather & Liquor Ltd.** (supra) was specifically referred to in the above quoted portion of the judgment of the Supreme Court in **Kachrual Bhagirath Agrawal** (supra).

18. In the present case Section 133(1)(f)(vi) of the Cr.P.C. applies. The position of law that emerges from the above quoted provisions and the aforementioned judgments of the Supreme Court, is that the proceedings under Section 133 of Cr.P.C. can be initiated when there is public nuisance, evident from the material on record. A private dispute between individuals of the public cannot be settled under such proceedings. If a case of imminent danger is made out, the Magistrate can pass a conditional order and issue notice to the respondent to show

cause as to why such a conditional order should not be made absolute. It is at this stage that Section 138 of Cr.P.C. comes into picture. When a notice is issued to such a person, he can oppose such an order, whereupon the Magistrate is required to take evidence as in a summons case and then to either confirm or modify the conditional order or record its satisfaction that the conditional order is not reasonable and proper, as a result of which no further proceedings can take place.

19. It is also specifically contended on behalf of the petitioner that the impugned conditional order dated 05.02.2021, is bereft of any reasons and therefore, it falls foul of the settled position of law recognized and reiterated by the Supreme Court in **Kranti Associates Private Limited & Another Vs. Masood Ahmed Khan & Others, (2010) 9 SCC 496**, wherein it is laid down that even where an administrative decision is concerned, the Authorities have to record reasons, as recording of reasons provides a valid restraint on any possible arbitrary exercise of administrative power. Therefore, the question in the present case is, as to whether the respondent no. 2-Magistrate, followed the said position of law, while passing the impugned conditional order dated 05.02.2021 and as to whether the petitioner is justified in contending that the entire proceedings are without

jurisdiction or that they are vitiated due to failure to follow the procedural safeguards.

20. In order to answer the said question, it is necessary to appreciate the material placed on record and the contentions raised on behalf of the rival parties. A perusal of the complaints dated 02.12.2019 and 06.08.2020/02.09.2020, submitted by the respondent no. 3 before the respondent no. 2-Magistrate, shows that there is a reference to earlier complaints made in the year 2019. Although, there is indeed a reference made to the alleged nuisance in the Society due to feeding of the stray dogs for some period of time, there is a sense of urgency and necessity to take precipitate action is made out in the complaints submitted by respondent no. 3. It is significant that in pursuance of the complaint dated 02.12.2019, the Additional District Magistrate directed the respondent no. 2-Magistrate by a memorandum dated 27.12.2019, to initiate action under Section 133 of Cr.P.C., as a consequence of which, the respondent no. 2-Magistrate, did call for a report from the Talathi. A perusal of the report submitted by the Talathi demonstrates that there was indeed nuisance suffered by the residents of the Society, which was recorded by conducting spot inspection. Although, the report submitted by the Police recorded that the complaints did not make out a case for registering an offence, it is significant that in

the present case the respondent no. 3 was concerned with the question of public nuisance, while initiating proceedings under Section 133 of Cr.P.C. and the necessity to examine whether there were ingredients to issue conditional order under the aforesaid provision.

21. In this regard, it is significant that alongwith complaint dated 06.08.2020/02.09.2020, the respondent no. 3 had placed on record detailed material in the form of the complaint register of the Society, showing complaints by members of the Society regarding problems faced on a daily basis due to feeding of stray dogs. Respondent no. 3 also placed on record census of dogs in the Society, affidavits of the residents of the Society, complaining about the manner in which the petitioner and another resident, were feeding the stray dogs within the premises of the Society. There were details given of specific injuries suffered by the residents of the Society, as also the pets of the residents of the Society. There were copies of the complaints addressed to various Authorities in this regard and Appeals made by the residents of the Society to other residents to desist from feeding stray dogs in the premises of the Society. Certain photographs and other materials were also placed on record. In other words, the respondent no. 3 did place on record material before the

respondent no. 2-Magistrate, which included statements of grievances raised by residents of the Society.

22. On the other hand, a perusal of the material submitted on behalf of the petitioner and other residents of the Society, against whom complaints were made, shows that they have not denied the fact that they have been feeding the stray dogs. The defence taken by the petitioner is that the stray dogs are being fed in the parking lot belonging to her, which cannot be said to be a public place and hence, proceedings under Section 133 of Cr.P.C. cannot be attracted. It is further contended that the petitioner is indeed taking care of all the aspects concerning the stray dogs, whom she is feeding i.e. their vaccination and their neutering. The material on record clearly shows that there is no denial on the part of the petitioner that she is indeed feeding the stray dogs in her parking lot, although she claims that these are dogs whose natural habitat is the area of the Society.

23. Considering the material on record, the claims and the counterclaims made by the rival parties against each other, this Court finds that there was sufficient material before the respondent no. 2-Magistrate to initiate proceedings under Section 133 of Cr.P.C. The contours of the power under Section 133 of Cr.P.C., specified by the Supreme Court in the above quoted

judgment in **Kachrual Bhagirath Agrawal** (supra) and earlier judgments, indicating the definition of public nuisance, show that in the present case, the grievances raised by respondent no. 3 alongwith the material placed on record demonstrate nuisance and that too public nuisance due to the activity of feeding stray dogs within the premises of the Society. The material on record does indicate that by undertaking such activities of feeding stray dogs within the premises of the Society, there was a situation of an imminent danger of bodily injury to the residents of the Society as also pets belonging to the residents of the Society and stray dogs that may be originally having their habitat within the Society, from the stray dogs that enter the Society due to the activities of feeding being undertaken by the petitioner and some other members of the Society. This Court is not in agreement with the petitioner that because the stray dogs were being fed in her parking lot, it cannot be said to be in a public place or it cannot be a case of public nuisance. Even though the parking lot may belong to the petitioner, the entry of the stray dogs into the Society at the parking lot of the petitioner does *prima facie* create a situation of public nuisance to the residents of the Society. It cannot be said that there is a private dispute between individuals that is sought to be settled by invoking Section 133 of the Cr.P.C.

24. The respondent no. 2-Magistrate was required to take into consideration these aspects of the matter while exercising power under Section 133(1)(f)(vi) of the Cr.P.C. and issuing the conditional order. By the very nature of the proceedings under Section 133 of Cr.P.C. being summary, tuned to address a situation of imminent danger, the respondent no. 2-Magistrate was not expected to give detailed reasons while passing the impugned conditional order dated 05.02.2021. The respondent no. 2-Magistrate was expected to pass such a conditional order for, first of all, addressing the situation of public nuisance and that of imminent danger to the residents of the Society and to issue show cause notice as to why the conditional order is not to be made absolute. In the facts and circumstances of the present case, given the nature of powers being exercised by the respondent no. 2-Magistrate, it cannot be said that the impugned conditional order deserves to be set aside because it does not state detailed reasons. There cannot be any quarrel with the position of law laid down by the Supreme Court in **Kranti Associates Private Limited** (supra). As noticed above, the respondent no. 2-Magistrate is required to act under Section 133 of Cr.P.C. on the basis as to whether the material placed on record makes out a case for urgent conditional order to deal with the imminent danger made out from the material on record and then issue show cause

notice on the question as to whether such conditional order is to be made absolute.

25. It is important to note that the stage of complying with requirements of Section 138 of Cr.P.C. arises after the conditional order is passed and show cause notice is issued under Section 133 of Cr.P.C. The stage for recording of evidence by the Magistrate arises at this stage and therefore, the petitioner is not justified in contending that in the present case, the procedure under Section 138 of Cr.P.C. was not followed. In this regard, the reliance placed on the judgment in **C.A. Avarachan** (supra) on behalf of the petitioner is also found to be misplaced. This Court is of the opinion that after the impugned conditional order dated 05.02.2021 is passed, the stage has arrived of recording evidence by the Magistrate as in a summons case. It is at this stage that the petitioner and the other noticee can oppose the conditional order and place on record evidence and material to convince the Magistrate that the conditional order ought not to be made absolute. Equally, the respondent no. 3, at this stage, can place material and evidence on record to claim that the conditional order needs to be made absolute with or without modification. Hence, the contention raised on behalf of the petitioner that the entire proceedings undertaken by the respondent no. 2-Magistrate are unsustainable, cannot be accepted.

26. Although, voluminous material was placed before this Court on behalf of the petitioner, including communications and reports addressed to the Society to support her contentions, this Court is of the opinion that such material can certainly be placed before the respondent no. 2-Magistrate under Section 138 of the Cr.P.C. The petitioner sought to place on record documents to claim that she was in fact taking care of the stray dogs fed by her, including their vaccination and other such aspects, but, the same cannot be appreciated by this Court in writ jurisdiction and the same can be placed in the proceedings before the respondent no. 2-Magistrate. Similarly, letters/representations written by some of the residents of the Society in her support, can also be placed before the Magistrate. There is ample opportunity available to the petitioner to place her case before the Magistrate as per the scheme under Sections 133 to 139 of the Cr.P.C., before the impugned conditional order is made absolute. Therefore, this Court is also not dealing with the material placed on record by the rival parties in the context of the necessity to prevent cruelty against animals. The judgments placed on record in this regard are also not referred because, both, the petitioner as well as the respondent no. 3, claim to be lovers of animals and both have supported the position that there should be no cruelty against animals. But the scope of the present petition arising out of the conditional order under Section 133 of Cr.P.C. is limited to the

examination of the correctness or otherwise of the impugned order and therefore, this Court has not delved into the larger question of prevention of cruelty against animals.

27. In view of the above discussion, this Court is of the opinion that the impugned notices and the impugned conditional order do not deserve interference. The parties will be at liberty to lead evidence before the Magistrate under Section 138 of Cr.P.C. for assisting the Magistrate in reaching a conclusion as to whether the conditional order is to be made absolute or not and if so, without or with modification.

28. Accordingly, the Writ Petition is dismissed.

MANISH PITALE, J.