

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO. 442/2017

Laxman S/o Baliram Amdhare,
Aged 65 years, Occ. Ex-Police Patil,
R/o. Ranala, Tah. Kamptee,
Dist. Nagpur.

....**PETITIONER**

VERSUS

1. State of Maharashtra,
through the District Collector, Nagpur,
2. Sub-Divisional Magistrate, Mouda,
Tah. Kamptee, Dist. Nagpur.
3. Commissioner of Police, Nagpur,
Nagpur.
4. Gram-panchayat of village – Ranala,
through its Sarpanch, at Ranala,
Tah. Kamptee, Dist. Nagpur.
5. Atul S/o Harihar Chorghade,
R/o. Ranala, Tah. Kamptee,
Dist. Nagpur.
6. Nagpur Improvement Trust, Nagpur,
through its Chairman, Civil Lines, Nagpur.

....**RESPONDENTS**

Mr. Omkar Ghare, Advocate for petitioner.
Ms. T. H. Khan, Additional Public Prosecutor for respondent Nos. 1 to 3.
Mr. A. J. Thakare, Advocate for respondent No. 4.
Mr. M. R. Joharpurkar, Advocate for respondent No. 5.
Mr. Anand Jaiswal, Sr. Advocate with Mr. G. A Kunte, Advocate for respondent
No. 6.

CORAM : VINAY JOSHI, J.

CLOSED FOR JUDGMENT : 14.06.2022.

DATE OF JUDGMENT : 17.06.2022.

JUDGMENT

Rule. Rule made returnable forthwith. Heard finally by consent of the learned counsel appearing for the parties.

2. The challenge in this petition is to the order dated 19.01.2017 passed by the Sub-Divisional Magistrate ('SDM'), Mouda, Tahsil Kamptee, District Nagpur in terms of Section 133 of the Code of Criminal Procedure ('Code'). By virtue of said prohibitory order, SDM has precluded the villagers from using land bearing Survey No. 6, admeasuring 0.51 H. of village Ranala, Tahsil Kamptee from using as crematorium or burial ground. Initially, the petitioner has challenged the said order in Criminal Revision No. 47/2017, however the learned Additional Sessions Judge vide order dated 31.03.2017 has confirmed the order by way of dismissing the revision petition.

3. It is the petitioner's case that land bearing Survey No. 6 was used as crematorium since the period immemorable. The said land was in the proximity of village. It is alleged that on the basis of some complaints without following mandatory procedure prescribed under Section 133 of the Code, the impugned order has been passed. Particularly, it is submitted that the SDM has neither passed preliminary order nor

conducted requisite inquiry while passing impugned order. According to the petitioner, the aggrieved parties i.e. petitioner and other villagers were not heard and as such, principles of natural justice are violated.

4. On the other hand, the State as well as respondent No. 5 at whose instance, the impugned order was came to be passed, have justified the order under challenge. It is the respondents' stand that though the land bearing Survey No. 6 was used as crematorium, however by passage of time, population of village Ranala has increased. The residential houses have been constructed in the proximity of said land. Perceiving the growing need, funds were sanctioned, and new crematorium was constructed at land bearing Survey No. 135 at Village Ranala. It is submitted that use of land bearing survey no. 6 as crematorium, many health issues cropped up. Moreover, without seeking prior permission of the Planning Authority ota and shade was constructed over land Survey No. 6, for which notice was issued by the Planning Authority. It is contended that on receipt of complaint regarding public nuisance, report of Block Development Officer ('BDO') was called. After spot inspection, the BDO has submitted report about the health hazard for the nearby locality due to use of Survey No. 6 as crematorium.

5. Learned counsel for the petitioner took first and foremost objection that due procedure was not followed. It is his submission that the SDM has not passed the preliminary order before passing the

impugned order in terms of Section 133 of the Code. To substantiate said contention, reliance is placed on the decision of the Supreme Court in case of ***C. A. Avarachan Vs. C. V. Sreenivasan and Another, (1996) 7 SCC 71***, wherein, it is ruled that non-compliance of the mandatory requirement of drawing up a preliminary order vitiates the entire proceedings. On the same line, petitioner relied on the decision of this Court in case of ***Murlidhar Bhila Patil Vs. Onkar Vyankat Patil, AIR 1961 BOMBAY 263 (V 48 C 64)*** and in case of ***Shrikant S/o Shankarrao Agnihotri Vs. Shri Rajeshwar Sansthan, Akola through Trustees & others, (Criminal Application (APL) No. 483/2017)***.

6. In view of said challenge, the principal issue is about alleged non-compliance of the procedural aspect. Learned counsel for respondents would submit that SDM has followed the procedure as contemplated under law. He would submit that show cause notice dated 08.12.2016 amounts to due compliance of preliminary step which was culminated into final order dated 19.01.2017. It is the respondents' submission that there is no necessity to pass preliminary conditional order, but the purpose would suffice if serve cause notice has been issued. It is contended that on issuance of show cause notice dated 08.12.2016, no one has appeared before the SDM on specified date and therefore, on receipt of report from the BDO, the final order was came to be passed.

7. Bear reading of Section 133 of the Code indicates that in case of public nuisance, the first step is about passing of conditional order to remove the nuisance. In case, the said conditional order was not obeyed then the objector has to be called to appear and respond the show cause notice, as to why the order should not be made absolute. In other words, show cause notice must be preceded with a conditional order for removal of nuisance. In case at hand, the respondents are unable to point out any conditional preliminary order passed by the SDM. Mere show cause notice without conditional order cannot be termed as a due compliance of the mandatory requirement contemplated under Section 133(1) of the Code.

8. Pertinent to note that a report of BDO dated 05.01.2016 precedes to the show cause notice dated 08.12.2016 and therefore, it cannot be construed as a part of inquiry. Section 138 of the Code contemplates that after passing of preliminary order followed by show cause notice, the SDM is bound to make inquiry by taking evidence in the matter, if any. On his satisfaction, the order can be altered or made absolute. There is no record to indicate that the show cause notice was served on any one or notified by proclamation so as to give an opportunity to the objectors. The Authorities have not produced any record to show as to in which manner, the inquiry was carried on. The impugned order speaks that on 08.12.2016, preliminary order was passed, however,

there is no such order nor the show cause notice dated 08.12.2016 can be termed as preliminary order. As noted above, the essential requirements of Section 133 of the Code has not been complied. It is evident that without passing the preliminary order, show cause notice was issued. There is no record to indicate that inquiry was held. In the circumstances, impugned final order dated 19.01.2017 would not sustain in the eyes of law.

9. In view of above, petition stands allowed and disposed of accordingly.

10. The impugned order dated 19.01.2017 passed by the SDM and consequential order dated 31.03.2017 passed by the Additional Sessions Judge, Nagpur in criminal revision are quashed and set aside.

11. The matter is remitted back to the SDM for its fresh consideration in accordance with law.

12. Rule is made absolute in above terms.

JUDGE

Gohane

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