

Reserved

HIGH COURT OF UTTARAKHAND AT NAINITAL
Criminal Revision No. 468 of 2023

Phoolwasi

.....Revisionist

Versus

State of Uttarakhand and others

.....Respondents

Present:-

Mr. Lalit Miglani, Advocate holding brief of Mr. Pankaj Miglani,
Advocate for the revisionist.

Mr. M.A. Khan, AGA for the State.

Mr. Shashi Kant Shandilya, Advocate for the respondent no. 2.

JUDGMENT

Hon'ble Ravindra Maithani, J.

The challenge in this revision is made to an order dated 30.05.2023 passed in Criminal Revision No. 34 of 2023, Bhura v. State of Uttarakhand and others, by the court of 3rd Additional Sessions Judge, Haridwar, by which the order dated 25.01.2023 passed under Section 133 of the Code of Criminal Procedure, 1973 ("the Code") by the City Magistrate, Haridwar in Case No. 02 of 2021, State v. Bhura, has been set aside.

2. Heard learned counsel for the parties and perused the record.

3. Facts necessary to appreciate the controversy, briefly stated, are as follows.

4. A complaint was made to City Magistrate, Haridwar by various persons with the averments that in House No. 1160 and 1162, the respondent no. 2 runs welding and cutting shop due to which noise and air pollution takes place and the sharp light of the establishment also affects the eyes. It affects the students, pregnant women and the old aged person. On it, a report was sought from SI Kunwar Ram Arya, then posted at Kotwali Ranipur, District Haridwar. SI Kunwar Ram Arya submitted his report dated 19.06.2021 and confirmed public nuisance. Based on it, on 09.08.2021, a conditional order under Section 133 of the Code was issued by the City Magistrate. The respondent no. 2 filed his objections on 17.11.2021. According to the respondent no. 2, the complaint, which was filed against him was against facts and law and based on hyper-technical facts. It has been the case of the respondent no. 2 that the work, which the respondent no. 2 conducts does not create any inconvenience to any person and therefore the complaint is liable to be dismissed.

5. In evidence, on behalf of the respondent no. 2, three witnesses, namely, Bhura, the respondent no. 2 himself, Akram and Gulfaroz were examined. SI Kunwar Ram Arya, who had given the report was also examined.

6. After hearing the parties, by the order dated 25.01.2023, the City Magistrate, Haridwar passed an order under Section 133 of the Code and required the respondent no. 2 to stop the welding and cutting works in the premises. The said order was challenged in the revision. As stated, the revision has been allowed and the order of the City Magistrate has been set aside.

7. Learned counsel for the revisionist would submit that the officers of Uttarakhand Pollution Control Board did measure the noise level in the premises of the respondent no. 2 and found that it was much higher than the permissible limits. He would submit that the court in revision has wrongly held that the nuisance, which is in existence for long may not be removed under Section 133 of the Code. It is argued that the duration of the public nuisance may not deny the relief under Section 133 of the Code. Learned counsel would submit that it may happen that initially the level of noise and air pollution would be low and subsequently it had increased. It is argued that the respondent no. 2 had to establish that he has not raised air or noise pollution level throughout the period he has been working in the premises. It is also argued that in a residential area, such activity cannot be carried out.

8. Learned counsel for the revisionist has placed reliance on the principle of law as laid down in the cases of *Suhlelkhan Khudyarkhan & Anr. v. State of Maharashtra & Ors.*, (2009) 5 SCC 586; *Kachrual Bhagirath Agrawal & Ors. v. State of Maharashtra & Ors.*, (2005) 9 SCC 36, *State of M.P. v. Kedia Leather & Liquor Ltd. and others*, (2003) 7 SCC 389 and (2005) 5 SCC 733, *Noise Pollution (v), In Re*, (2005) 5 SCC 733.

9. In the case of *Suhelkhan (supra)*, a shop, which was a kind of encroachment was in existence for 15 to 20 years. In that case, an order of removal was passed, which was finally upheld by the Hon'ble Supreme Court. The Hon'ble Supreme Court referred to the case law of *Vasant Manga Nikumba v. Baburao Bhikanna Naidu*, 1995 Supp (4) SCC 54.

10. In the case of *Kachrual Bhagirath Agrawal (supra)* also, public nuisance in unloading the chillies were held causing pollution, which affected the local persons from sneezing, coughing, asthma, irritation of skin and burning sensation. Order for stopping such activity was upheld by the Hon'ble Supreme Court.

11. In the case of *Kedia Leather & Liquor Ltd. (supra)* also, the Hon'ble Supreme Court has relied upon

the principle of law as laid down in the case of Vasant Manga Nikumba (*supra*). In the said case, the issue was quite distinct. It was with regard to repealment of Section 133 of the Code in view of Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981.

12. In the case of Noise Pollution (v), in re (*supra*), the Hon'ble Supreme Court has discussed the effect of noise pollution with regard to fire crackers, loudspeakers, vehicular noise, etc. and laid down the guidelines.

13. Learned counsel for the respondent no. 2 would submit that the shop of the respondent no. 2 is in existence for last 10 years; there is no complaint of any health related problem from any resident of the area; the kind of activity, which the respondent no. 2 undertakes does not require any permission of the Pollution Control Board. It is argued that the only remedy available is a civil suit.

14. Learned counsel for the respondent no. 2 has placed reliance on the principle of law as laid down in the case of Vasant Manga Nikumba (*supra*). In the case of Vasant Manga Nikumba (*supra*), the Hon'ble Supreme Court quoted with approval the principle of law as laid

down in the case of T.K.S.M. Kalyansundaram v. Kalyani Ammal and Ors., 1975 CriLJ 1717, wherein the Hon'ble Supreme Court has held that **“there is no legal bar to seeking remedy under Section 133 where there exists a genuine emergency to have the encroachment or nuisance removed. Such an action can be taken even though the encroachment or nuisance has been in existence for a reasonably long period. But, if the obstruction has been in existence for a long period, without any change in circumstances, the removal of such obstruction cannot be said to be urgent and the remedy must be sought in a civil court.”**

15. It is a revision. The scope is quite restricted to the extent of examining the correctness, legality and propriety of the impugned judgment and order.

16. The court below has referred to the principle of law as relied upon in the case of Vasant Manga Nikumba (*supra*) and held that under Section 133 of the Code, the nuisance, which has been in existence for a long period, the orders may not be passed. On factual aspects also, the court held that the factum of public nuisance has also not been established.

17. While referring to the judgment in the case of T.K.S.M. Kalyansundaram (*supra*), the Hon'ble Supreme Court in the case of Vasant Manga Nikumba (*supra*), held that **“It is also settled law that recourse to Section 133 could not be a substitute for the civil proceedings and the parties should have recourse to the civil remedy available and should not be encourage (sic encouraged) to taking recourse to the provisions of Section 133 of the Code.”**

18. The aspect of long existence of public nuisance and recourse of civil remedy as such has not been referred to in the case of Suhelkhan (*supra*).

19. In the instant case, the local residents had given a complaint on 19.02.2021 to the City Magistrate with regard to public nuisance. On it, a report was sought from the SI Kunwar Ram Arya. The report is on record. According to it, after inquiry and site inspection, public nuisance has been confirmed. But, why and how? How could SI Kunwar Ram Arya conclude that it is a public nuisance? He has been examined also, but he has not revealed about it, though he has taken affidavits of various persons. The persons, who had given affidavits to

SI Kunwar Ram Arya have not been examined in the court.

20. The report of the Uttarakhand Pollution Control Board has been relied on by the City Magistrate. But, when such inspection was done? In whose presence the inspection was done? The report of Pollution Control Board also does not reveal about it.

21. In fact, it appears that the City Magistrate passed an order based on the information of SI Kunwar Ram Arya, which has no basis. Therefore, at the first instance, after inquiry, it was not established that any public nuisance has been caused.

22. It is the case of the respondent no. 2 that his shop is in existence for many years. The respondent no. 2 Bhura has been examined. According to him, he has been working for the last 10 years and it does not affect adversely to anybody.

23. On behalf of the respondent no. 2, one Akram has also been examined. According to him, the work being carried out by Bhura does not adversely affect anybody. Gulfaroz has also supported the statement of Akram.

24. It is established that the work, which is done by the respondent no. 2 is in existence for more than 10 years. Suddenly, what had happened that the work conducted by the respondent no. 2 falls in the category of public nuisance. On this point, learned counsel for the revisionist would argue that mere long existence of public nuisance may not deny the remedy under Section 133 of the Code. He would submit that the respondent no. 2 has to establish that he has not changed the nature of work.

25. This argument has less merit for acceptance. In fact, it was for the complainants to establish that the respondent no. 2 has changed the nature of work, which now gives rise for a cause under Section 133 of the Code. Therefore, this Court is of the view that the court in revision has rightly allowed the revision. There is no illegality, perversity or impropriety in the impugned judgement and order. Accordingly, the revision deserves to be dismissed.

26. The revision is dismissed.

(Ravindra Maithani, J.)
22.05.2024