

(2013) 08 GAU CK 0036

Gauhati High Court

Case No: Criminal Petition No. 108 of 2012

Sri Gopal Saha

APPELLANT

Vs

Sri Uttam Saha

RESPONDENT

Date of Decision: Aug. 30, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 91
- Constitution of India, 1950 - Article 21
- Criminal Procedure Code, 1973 (CrPC) - Section 129, 130, 131, 132, 133
- Penal Code, 1860 (IPC) - Section 268

Citation: (2013) 4 GLT 990

Hon'ble Judges: Tinlianthang Vaiphei, J

Bench: Single Bench

Advocate: P. Upadhyay and Mr. D. Sarmah, for the Appellant; Mr. A Goyal, Advocate, Mr. S. Chetia, Advocate and Mr. A. Choudhury, for the Respondent

Judgement

Tinlianthang Vaiphei, J.

This criminal petition is directed against the judgment and order dated 28-11-2011 passed by the learned Additional Sessions Judge (FTC), Barpeta in Criminal Revision No. 13/2010 upholding the order dated 30-6-2010 passed by the learned Sub-Divisional Magistrate/Barpeta in Case No. 27/06 U/s. 133 of the Code of Criminal Procedure ("the Code" for short) directing the petitioner not to operate his oil mill from 7 AM to 7 PM. The facts giving rise to this petition may be noticed at the outset. The petitioner is operating a mustard oil mill near the house of the respondent No. 1. According to the respondent No. 1, this oil mill is located in a residential area and started its operation from 10 AM till late night causing inconvenience to him and other inhabitants of the area. This prompted the respondent No. 1 to file a petition before the Executive Magistrate, who, on 25-11-2005, forwarded it to the Officer-in-Charge, Sarbhog Police Station for conducting an inquiry and report, but no action was taken by the police. The respondent No. 1, therefore, informed the

Additional Deputy Superintendent of Supplies to take action in this regard since the matter is under the Department of Civil Supplies, but when no action was taken, he approached the District Magistrate, Barpeta to initiate against the petitioner U/s. 133 Cr.P.C. Accordingly, a case being No. 27/2006 U/s. 133 Cr.P.C. was registered. The petitioner contested the case and denied the allegations of the respondent No. 1. The petitioner contended in his written statement that the mill in question was established in his own land, which was not in a residential area, but is in a purely commercial area abutting NH-31 where heavy vehicles ply day and night thereby causing noise in larger volume than that of the noise produced by the sound of his oil mill. The learned Sub-Divisional Magistrate, Barpeta, after examining the witnesses produced on behalf of both the parties, passed the order dated 30-6-2010 directing the petitioner to operate the Oil Mill only between 7 AM and 7 PM. As already noticed, the revision petition preferred by the petitioner was dismissed by the learned Additional Sessions Judge, Barpeta by the impugned judgment and order.

2. Aggrieved by the decision of the learned Additional Sessions Judge (FTC), this criminal petition is filed by the petitioner. At the outset, Mr. A. Goyal, the learned counsel for the respondent No. 1, raises preliminary objection against the maintainability of this petition on the ground that this petition, though camouflaged as a criminal petition, is actually a revision petition u/s 397 Cr.P.C., which is barred by Section 397(3) Cr.P.C. He, therefore, submits that the second criminal revision under the guise of criminal petition is not maintainable and is liable to be dismissed: what cannot be done directly cannot be done indirectly. On the other hand, Mr. P. Upadhyay, the learned counsel for the petitioner, contends that even if this criminal revision is assumed to be a second criminal revision also, there is no complete prohibition of a second revision petition u/s 397(3) and in appropriate cases, the bar imposed by Section 397(3) can be lifted by the High Court by invoking Section 482 Cr.P.C. He strongly relies on the decision of the Apex Court in [Shakuntala Devi and Others Vs. Chamru Mahto and Another](#), and [Krishnan and another Vs. Krishnaveni and another](#), to buttress his contention. In my opinion, this preliminary objection need not detain us in view of the decision of the three-Judge Bench of the Apex Court in Krishnan and another (supra), the relevant paragraph whereof is at paragraph 10 of the judgment, which reads thus:

10. Ordinarily, when revision has been barred by Section 397(3) of the Code, a person ❖ accused/complainant ❖ cannot be allowed to take recourse to the revision to the High Court u/s 397(1) or under inherent powers of the High Court u/s 482 of the Code since it may amount to circumvention of the provisions of Section 397(3) or Section 397(2) of the Code. It is seen that the High Court has the suo motu power u/s 401 and continuous supervisory jurisdiction u/s 483 of the Code. So, when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of the process of courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence

imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensue. It is, therefore, to meet the ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be justified, under such circumstances, to exercise the inherent power and in an appropriate case even under revisional power u/s 397(1) read with Section 401 of the Code. As stated earlier, it may be exercised sparingly so as to avoid needless multiplicity of procedure (proceeding), unnecessary delay in trial and protraction of proceedings. The object of criminal trial is to render public justice, to punish the criminal and to see that the trial is concluded expeditiously before the memory of the witness fades out. The recent trend is to delay the trial and threaten the witness or to win over the witness by promise or inducement. These malpractices need to be curbed and public justice can be ensured only when trial is conducted expeditiously.

3. It is thus crystal clear that this Court is not denuded of the power to entertain even a second revision petition u/s 482 Cr.P.C. in appropriate/special cases. The question to be determined is whether the instant case can be held to be a special case warranting the exercise of the power u/s 482 Cr.P.C. for lifting the bar imposed by Section 397(3) Cr.P.C.? This necessarily takes me to the merit of the case. On merit, it is argued by the learned counsel for the petitioner that the order passed by the learned SDM is without jurisdiction inasmuch as no conditional order was passed by him: in the absence of conditional order passed U/s. 133(1) Cr.P.C., no final order could be passed by him. He, therefore, submits that as the learned SDM passed the final order without jurisdiction, the same is without jurisdiction and is liable to be set aside. Secondly, submits the learned counsel, lawful and necessary trade cannot be interfered with by the learned SDM unless such occupation is proved to be injurious to the health or physical comfort of the community. According to the learned counsel, in order to bring a trade or occupation within the purview of Section 133 Cr.P.C., it must be shown that the interference brought about by the trade or occupation of the petitioner to the public comfort is considerable and injuriously affecting a large section of the public i.e. a community and not to residents of a particular house and as the respondent No. 1 has failed to prove injury to the health and physical comfort of the community at large in the instant case, the learned Additional Sessions Judge (FTC) ought to have set aside the order of the learned SDM, which calls for the interference of this Court.

4. Per contra, Mr. Amit Goyal, the learned counsel for the respondent No. 1, submits that it is not mandatory for the learned SDM to pass a conditional order, and the term "may" in Section 133(1) Cr.P.C. clearly gives wide discretionary power to him to pass or not to pass any conditional order. According to the learned counsel, if the facts and circumstances of the case so warrant, he could proceed with the case and, after taking evidence, could straightaway pass a final order without passing any conditional order. On the contrary, contends the learned counsel, the learned SDM, in the instant case, has acted diligently in not passing a conditional order at the first

instance which would have affected the rights of the petitioner, and by giving ample opportunity to him to contest the case at the very beginning of the proceeding. It is also the contention of the learned counsel for the petitioner that there are sufficient evidence adduced by the respondent No. 1 to show that the oil mill operated by the petitioner at his residence during night time has disturbed the sleep of the respondent No. 1 and others. I further argued by the learned counsel for the petitioner that since the respondent No. 1 has proved that the trade and occupation carried on by the petitioner in running the oil mill at his house have caused physical discomfort to the respondent No. 1 and the local residents, the learned SDM has correctly passed the impugned order, which does not need the interference of this Court.

5. I have given my anxious consideration to the submissions advanced by the learned counsel appearing for the rival parties. I have also perused the impugned order and the materials on record with the assistance of my Private Secretary, who is well-versed in vernacular. The first question for determination in this case is whether the passing of conditional order is mandatory and even assuming that it is mandatory in nature, whether violation of this mandatory provision per se can vitiate the final order? To appreciate this controversy, it will be appropriate to refer to the relevant portion of Section 133, Cr.P.C., which is in the following terms:

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

* * *

(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 of such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated;

* * * 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

* * *

(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

* * *

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.

* * *

6. Thus, Section 133, Cr.P.C. provides for preventive jurisdiction to District Magistrate, Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, the power to deal with public nuisances. The power can be exercised either on receipt of a police report or other information, and arises under the six circumstances enumerated. In the instant case, we are dealing with public nuisance enumerated in Section 133(1)(b). The purpose and objection of this section is not intended to settle private disputes between two members of the public, but is intended to protect the public as a whole against the alleged inconvenience. The conditional order u/s 133 shall specify the time within which the obstruction or nuisance is to be removed by the person who causes the obstruction or nuisance or if he objects so to do, to appear before the Magistrate at a time and place to be fixed by the order and show cause why the order should not be made absolute.

7. But what exactly is a conditional order? A perusal of Section 133(1), Cr.P.C. will show that whenever an Executive Magistrate specified therein, on receiving a report of a Police Officer or other information and on taking such evidence (if any) as he thinks fit, considers that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which may be lawfully used by public, etc. he may make conditional order requiring the person causing the obstruction or nuisances, etc., to remove the same within the time fixed in the order, to remove the same, etc., or in case such person 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, to show cause, in the manner hereinafter provided, why the order should not be made. This provision amply makes it clear that the order being passed need not be immediately complied with by the person causing the nuisance/obstruction at the first instance, and if he objects to such direction, he has to appear before the Executive Magistrate concerned at a time and place to be fixed by the order and show cause against the order being made absolute. In other words, he may comply with the direction in question or has the right to show cause against the order being made absolute before complying with the direction. This, I think, is the reason why the kind of order passed u/s 133(1), Cr.P.C. is called a conditional order. This is evident from the provision of the subsequent Section 142, which confers power upon the Magistrate to pass injunction pending enquiry to prevent imminent danger or injury of a serious kind to the public. Thus, on the facts of this case, even if no conditional order was passed by the learned SDM, no

prejudice could have been caused to the petitioner. It is not the case of the petitioner that any prejudice was caused to him for not passing a conditional order by the learned SDM. At least in this case, no prejudice has been caused to the petitioner for the absence of conditional order. In my judgment, the omission on the part of the learned SDM to pass a conditional order U/s. 133(1), Cr.P.C., therefore, does not vitiate, or cannot have the effect, of vitiating the impugned order passed by him: such omission can at the most be an irregularity, which can be saved by Section 465, Cr.P.C.

8. Coming now to the other contention, be it noted that Section 133(1) can be invoked only where the conduct of trade or occupation is injurious to the health or physical comfort of the community. I am not oblivious of the fact that the right to live in peace, to sleep in peace and the right to repose and health are part of the right to life guaranteed under Article 21 of the Constitution. Public health cannot be allowed to suffer on account of the personal business of an individual. This principle expressed through law and culture, consistent with nature's ground rules for existence, has been recognised in Section 133 See [Madhavi Vs. Thilakan and Others](#), . It must, however, be noted that Section 133 deals with "public nuisance" in contradistinction to "private nuisance". This provision is about public nuisance and provides a cheap and summary remedy in case of urgency where danger to public interest or public health is concerned. In all other cases, the party should be referred to the remedy under the ordinary law. The ambit and scope of Section 133, Cr.P.C. came up for discussion before the Apex Court in [Kachrual Bhagirath Agrawal and Others Vs. State of Maharashtra and Others](#), wherein it was held:

10. A proceeding u/s 133 is of a summary nature. It appears as a part of Chapter X of the Code which relates to maintenance of public order and tranquility. The chapter has been classified into four categories. Sections 129 to 132 come under the category of "unlawful assemblies". Sections 133 to 143 come under the category of "public nuisance". Section 144 comes under the category of "urgent cases of nuisance or apprehended danger" and the last category covers Sections 145 to 149 relating to "disputes as to immovable property". Nuisances are of two kinds i.e. (i) public; and (i) private. "Public nuisance" or common nuisance" as defined in Section 268 of the Indian Penal Code, 1860 (in short "IPC") is an offence against the public either by doing a thing which tends to the annoyance of the whole community in general or by neglecting to do anything which the common goods requires. It is an act of omission which causes any common injury, danger or annoyance to the public or to the people in general who dwells or occupies property in the vicinity. "Private nuisance", on the other hand, affects some individuals as distinguished from the public at large. The remedies are of two kinds ♦ civil and criminal. The remedies under the civil law are of two kinds. One is u/s 91 of the Code of Civil Procedure, 1908 (in short "CPC"). Under it a suit lies and the plaintiff need not prove that they have sustained any special damage. The second remedy is a suit by a private individual for a special damage suffered by him. There are three remedies under the

criminal law. The first relates to the prosecution under Chapter XIV of IPC. The second provides for summary proceedings u/s 133 to 144 of the Code, and the third relates remedies under special or local laws. Sub-section (2) of Section 133 postulates that no order duly made by a Magistrate under this section shall be called into question in any civil court. The provisions of Chapter X of the Code should not be so worked as not to become themselves a nuisance to the community at large. Although every person is so bound to use his property that it may not work legal damage or harm to his neighbour, yet on the other hand, no one has a right to interfere with the free and full enjoyment by any such person of his property, except on clear and absolute proof that such use of it by him is producing such legal damage or harm. Therefore, a lawful or necessary trade ought not to be interfered with unless it is proved to be injurious to the health and comfort of the community. Proceedings u/s 133 are not intended to settle private dispute between different members of the public. They are in fact intended to protect the public as a whole against inconvenience. A comparison between Sections 133 and 144 of the Code shows that while the former is more specific, the latter is more general. The proceedings u/s 133 are more in the nature 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 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 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 praesenti 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 or occupation is in fact injurious to the health or the physical comfort of that community, an order u/s 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 inquiry and to decide

as to whether there was reliable evidence or not to come to the conclusion to act u/s 133.

In the instant case, the findings of the learned SDM are as follows:

From examination of the witnesses of both the parties and the statement of both the 1st party and 2nd party, it transpires that the establishment of oil mill by Gopal Saha, the 2nd party near the house of Uttam Saha, the 1st party in this case does not invite any objection from any quarters. The focal point of this case is that the timing of operation of the mill to prevent health hazard. The non-

stop operation of the three engines at the oil mill has created noise pollution and this has created sufficient amount of disturbance to the 1st party Sri Uttam Saha and his family members as they cannot sleep.

Keeping in view of the peace and tranquillity of the neighbourhood and the amount of sound pollution in the locality to a bar minimum and also to the successful venture of the oil mill operation, it is ordered that the mill should operate between 7 AM in the morning to 7 PM in the evening.

9. I have carefully examined the depositions of the witnesses adduced by both the parties with the help of my Private Secretary (Mr. Kotoky), who prepared the English translation thereof. Examination of the evidence of the witnesses produced by both the parties leaves me with no doubt in my mind that the finding of the learned SDM that the noise produced by the non-stop operation of the oil mill engines had created sufficient amount of disturbance to the respondent No. 1 and his family as they could not sleep, is certainly based on evidence. However, there is no evidence to show that the entire locality or the public at large could not sleep at night due to the nuisance produced by the oil engine operated by the petitioner. A lawful and necessary trade should not be interfered with u/s 133, Cr.P.C. unless it is proved to be injurious to the health and comfort of the community. It is by now a settled law that the term "community" in clause (b) of Section 133(1) cannot be taken to mean residents of a particular house or four/five houses. Though the distinction between the private nuisance and public nuisance may sometimes be fine, it is nevertheless a real one. A private individual cannot be allowed to abuse the provision of Section 133, Cr.P.C. to remove a purely private nuisance by attempting to take a short-cut route. If no case of public nuisance is made out by him, he is not without legal remedy for removal of private nuisance: he can always take recourse to a civil remedy under Specific Reliefs Act, 1963 read with Order 39, Rule 1 and 2 of the CPC or u/s 91 Code of Civil Procedure. In other words, a provision dealing with public nuisance cannot be taken advantage of by a private individual like the petitioner for removal of private nuisance, which does not affect the community at large. The learned SDM did come to a definite conclusion that the type of nuisance complained of by the petitioner is one of public nuisance. On careful reading of the evidence on record, I cannot persuade myself to take the view that the nuisance complained of

by the petitioner, though it may be unbearable to him and his family, can constitute "public nuisance" as contemplated by Section 133, Cr.P.C. The learned SDM has apparently overlooked this aspect of the matter, and has, in the process, assumed the jurisdiction not vested in him by law for passing the impugned order, which warrants the interference of this Court. The learned Additional Sessions Judge should not have upheld the impugned order, which is without jurisdiction. For what has been stated in the foregoing, this criminal revision succeeds. The impugned order dated 30-6-2011 passed by the learned SDM/Barpeta in Case No. 27/2006 and the judgment dated 28-11-2011 of the learned Additional Sessions Judge (FTC), Barpeta in Criminal Revision No. 13 of 2012 upholding the impugned order are hereby set aside. It shall, however, be open to the petitioner to seek civil remedy open to him under the law to ventilate his grievance.

Transmit the LC record. No costs.