

**(1981) 10 BOM CK 0035**

**Bombay High Court (Nagpur Bench)**

**Case No:** Criminal Application No. 513 of 1981

Sudhakar Vithalrao Welankiwar

APPELLANT

Vs

Liberty Services and others

RESPONDENT

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**Date of Decision:** Oct. 16, 1981

**Acts Referred:**

- Constitution of India, 1950 - Article 227
- Criminal Procedure Code, 1973 (CrPC) - Section 133, 133(1)(d), 133(1)(d)(iv), 133(l)(d)

**Citation:** (1983) MhLj 676

**Hon'ble Judges:** V.V. Joshi, J

**Bench:** Single Bench

**Advocate:** G.J. Ghate, for the Appellant; V.S. Sirpurkar for respondent No. 1 and M.A. Garud, Add. Govt. Pleader, for the Respondent

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**Judgement**

V.V. Joshi, J.

This is an application filed by the petitioner under Article 227 of the Constitution and u/s 482 of the Criminal Procedure Code, 1973, praying for quashing of a preliminary order passed by the Sub-Divisional Magistrate, Chandrapur, under the provisions of section 133(1)(d) of the said Code.

2. It is not in dispute that the respondent No. 1 is a tenant in one block of a building owned by the petitioner in Chandrapur town and the respondent No. 1 is running a cloth shop in that tenanted portion. It appears, there have been disputes going on between the landlord and the tenant and it appears the landlord has been trying to evict the tenant by taking proceedings before the Rent Controller, while the tenant-respondent No. 1 has been trying to checkmate the landlord and in this respect he filed an application on 5-3-1979 u/s 16 of the C. P. and Berar Letting of Houses and Rent Control Order, 1949, before the Rent Controller, on the allegation that the roof of the shop in occupation of the applicant (in that proceedings) was

leaking due to deliberate act of the present applicant-landlord and this leakage was required to be stopped immediately. It is stated that this application has been pending since long before the Rent Controller, without any orders. Thereafter, it is not disputed that in the early hours of 13-7-1981 half portion of the roof of the block of the non-applicant No. 1 fell down. The non-applicant No. 1, thereafter, on 20-7-1981 filed an application before the Sub-Divisional Magistrate, Chandrapur, u/s 133(1)(d) of the Criminal Procedure Code, 1973, putting forth these facts and then saying further in para 3 of the application.

"3. Almost half portion of the roof towards eastern side i. e. towards the shop of Mina Soda Factory collapsed in the early hours of 13th day of July, 1981. The applicant contends that the roof collapsed because of the deliberate act of digging the roof from top by the non-applicant. Since the roof collapsed at night time, fortunately there has been no damage or injury to any person. However, property worth about Rs. 10,000 of the applicant, has been damaged because of this fall of the roof. The condition of the remaining half portion of the roof now is such that it is likely to fall and thereby cause injury to persons carrying on business in the shop and, hence, this remaining portion of the roof requires immediate repair and support. In fact the applicant submits that the entire roof of the shop requires to be constructed immediately and this can be constructed without the applicant vacating the shop. The applicant is a person who is possessing and controlling the said shop presently. The applicant, is, therefore, placing all this information before this Hon"ble Court for making a conditional order requiring the applicant, within a time fixed to be in the order to repair the roof of the building immediately or at any rate to give support to the falling half portion of the roof immediately.

3. The applicant had shown the condition of the premises to Shri Ramniklal B. Chavan, who is a reputed Architect of this town. His inspection report stating that the premises requires repairs is filed herewith. The applicant is also filing the photographs of the premises showing the present position inside and outside the shop. The necessary order of necessary repairs may be passed at the risk of the applicant.

Prayer: It is, therefore, prayed that this Hon"ble Court be pleased to issue conditional order directing the applicant to repair the roof of the building or at least to give support to the remaining half portion of the roof within the time to be fixed in the order.

It may be mentioned that the present applicant Sudhakar Welankiwar was joined as non-applicant in the application filed u/s 133(1)(d) of the Criminal Procedure Code.

3. On this application having been filed by the present non-applicant No. 1 before the Sub-Divisional Magistrate, Chandrapur, on 20-7-1981, the learned Sub-Divisional Magistrate, passed an order thereon saying that it should be put up for orders on 21-7-1981.

4. On 21-7-1981 the Sub-Divisional Magistrate, Chandrapur passed an order which is not impugned in the present application. This order addressed to the present non-applicant No. 1 only styles itself as an order u/s 133(l)(d) of the Criminal Procedure Code and is as follows:-

Whereas it has been made to appear to me that the part of the roof of the portion of the building belonging to Shri Sudhakar Vithal Welankiwar situated on plot No. 35, sheet No. 13, and block No. 50 of old Mohalla Bhanapeth (now the Bazar Ward) and occupied by you for business purposes under the name of M/S Liberty Services, Chandrapur, is in such a condition that it is likely to fall and thereby cause injury to person living therein or neighbourhood and that in consequences, the repairs of the aforesaid roof is necessary.

I do hereby direct you to repair the same at your risk within 15 days from the date of receipt of this order or to appear before me on 10-8-1981 at 11.00 A. M. and to show cause as to why the above order should not be made absolute.

It has already been observed that this order was addressed only to present respondent No. 1 and not to present applicant. However, below this order there was an endorsement.

Copy to Sudhakar, son of Vithal Welankiwar, non-applicant resident of Chandrapur, Tahsil and District Chandrapur for information.

5. It is the contention of the present applicant that thereafter the present respondent No. 1 started removing the debris and started construction work in the afternoon of 24-7-1981 when the present applicant landlord protested. He was told that the tenant-present respondent No. 1 had an order of the Sub-Divisional Magistrate in his favour. The present applicant then went to the Court of the Sub-Divisional Magistrate to find out what had happened and filed an application before the Sub-Divisional Magistrate on 24-7-1981 itself praying for a modification prohibiting the present respondent No. 1 from making any construction or putting a new roof and the work of putting new cement concrete roof be stopped. It was brought to the notice of the Sub-Divisional Magistrate by the present applicant by this application that the present non-applicant No. 1 was trying to make a reconstruction. Although this application was filed by the present applicant before the Sub-Divisional Magistrate, Chandrapur, on 24-7-1981, no orders were passed, it appears till 27-7-1981 on which day, however, the Sub-Divisional Magistrate, Chandrapur, appears to have come alive to the urgency and after hearing the counsel for the present applicant, passed an order saying:

Immediately issue instructions to M/s Liberty Services to stop the work immediately and to appear on 28-7-1981.

6. In the meanwhile, however, the present applicant landlord had already moved a revision application u/s 397 of the Criminal Procedure Code, before the Sessions

Judge, Chandrapur, challenging the preliminary order passed by the Sub-Divisional Magistrate, Chandrapur, u/s 133 (1) (d) of the Criminal Procedure Code, 1973, on 21-7-1981 and the Additional Sessions Judge, Chandrapur, had admitted the said revision application that very day (25-7-1981). The present applicant had moved another application before the Sessions Judge, Chandrapur, praying for stay of the order passed by the Sub-Divisional Magistrate, Chandrapur on 21-7-1981. On 25-7-1981 itself the learned Additional Sessions Judge, Chandrapur, after hearing the counsel for the present applicant passed an order on that application saying:

In the interest of justice and on the facts and circumstances of the case, I hereby order that the operation of the impugned order of the lower Court is stayed till 28-7-1981.

The case was fixed for hearing on 27-7-1981 and on 28-7-1981 the Additional Sessions Judge, further directed that the stay granted on 25-7-1981 shall continue until further order or till the disposal of the revision application and the status quo was to continue. Thereafter, the learned Additional Sessions Judge, by his order, dated 20-8-1981 observed that the preliminary order passed by the Sub-Divisional Magistrate, Chandrapur, on 21-7-1981 was prima facie an illegal order because the allegations in the application filed by the present respondent No. 1 before the Sub-Divisional Magistrate, Chandrapur, u/s 133 (1) (d) of the Criminal Procedure Code, 1973, prima facie did not make out a case of a public nuisance. It was also observed that the preliminary order was addressed only to the present respondent No. 1-tenant who himself had filed the application u/s 133 (1) (d) of the Criminal Procedure Code, 1973 and it would have been desirable that the preliminary order passed by the Sub-Divisional Magistrate, Chandrapur, had been addressed to the landlord i.e. the present petitioner as also the tenant the present respondent No. 1, requiring them to effect the repairs, if any, although it was not necessary to issue notice to these persons before actually passing the preliminary order. However, in spite of making these observations, the learned Additional Sessions Judge, found himself helpless in the matter of correcting the mistakes on the ground that the order passed by the Sub-Divisional Magistrate, Chandrapur, on 21-7-1981, was after all an interlocutory order and therefore, the provisions of section 397 (2) operated as a bar for the Courts exercising revisional jurisdiction in the matter. Therefore, the learned Additional Sessions Judge, eventually dismissed the revision application. Aggrieved by these orders passed by the authorities below, the landlord petitioner has filed this application challenging the preliminary order passed by the Sub-Divisional Magistrate, Chandrapur, on 21-7-1981.

6-A. I have heard counsel on both the sides. It would seem to me that no allegations regarding there being a public nuisance were made in the application filed by the respondent No. 1 before the Sub-Divisional Magistrate, at all and in that view, it would seem to me that the Sub-Divisional Magistrate could not get jurisdiction u/s 133 (1) (d) of the Criminal Procedure Code, which deals with matters of public

nuisance and not private nuisance. All that was said was:

The condition of the remaining half portion of the roof now is such that it is likely to fall and thereby cause injury to persons carrying on business in the shop and hence this remaining portion of the roof requires immediate repairs.....

The requirements of section 133 (1)(d) of the Criminal Procedure Code, 1973, are that "any building.....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....." The provisions of sections 133 to 143 of the Criminal Procedure Code, 1973, deal with cases of public nuisance as the very sub-title of that portion shows, and are not the provisions to be used either by the landlord or by the tenant, either for eviction of unwanted tenant, who cannot otherwise be got rid of, or by the tenants for getting quick repairs effected on their own instance side-tracking the landlord and the usual proceedings necessary to be taken before the Rent Controller. In the whole application there was no allegation that there was danger or injury likely to be caused by the falling of the roof, to the persons living or carrying on business in the neighbourhood, or passing by the road and therefore, this was not a case of allegation of a public nuisance at all. It was strenuously tried to be urged by Shri Sirpurkar for the respondent No. 1 that this was only an immaterial omission from the application, if it was not stated that there was danger to people living or carrying on business in the neighbourhood or those passing by and this is tried to be further reinforced from the facts that certain photographs of the shop were appended to the application which photographs made it clear that the dangerous half roof left still to fall down, spelt out a public nuisance to people living in the neighbourhood or carrying on business in the neighbourhood or passing from near the shop. It is contended very strenuously by Shri Sirpurkar that it is in that light that the learned Sub-Divisional Magistrate treated the allegations location and passed the requisite preliminary order. It is difficult to accept these contentions. Where nothing specifically was stated in the application itself spelling out a case of a public nuisance, it is clear the Sub-Divisional Magistrate would not get any jurisdiction at all to pass a preliminary order u/s 133(1)(d) of the Criminal Procedure Code, 1973.

7. What surprises me further is that although the present petitioner Sudhakar Welankiwar was shown as a non-applicant in the application filed by the present respondent No. 1 before the Sub-Divisional Magistrate, Chandrapur, u/s 133(1)(d) of the Criminal Procedure Code, it was specifically alleged in para. 3 of that application that after all it was the tenant-applicant before the Sub-Divisional Magistrate who was "a person who is possessing and controlling the said shop presently" and it was therefore, prayed that the conditional order for repairs of the roof should be passed in his favour directing him-the tenant-applicant-before the Sub-Divisional Magistrate, Chandrapur, to repair the roof or to give support to remaining half portion of the roof and all this he was prepared to do at his own risk. The intention

on the part of the tenant-applicant was clear to obtain the preliminary order in his own favour without notice to or intervention of the landlord-the present applicant and then after obtaining such conditional order to speedily effect the repairs and to see ultimately that the repairs had been completed without even letting the landlord know anything about it. In short the endeavour was to obtain by filing this application before the Sub-Divisional Magistrate, what the tenant-the present respondent-No. 1 had failed to achieve by making a similar application before the Rent Controller as far back as on 5-3-1979. It appears that respondent No. 1-tenant did really succeed in his endeavour by obtaining the preliminary order in his own favour without issuing notice to the present applicant-landlord and proceeded promptly to comply with that order by endeavouring to construct a cement concrete slab roof in place of what I am told was originally a tiled roof with lime plaster. That could hardly be called "repairing" the roof of the premises. The preliminary order merely directed the tenant-applicant before the Sub-Divisional Magistrate to repair the roof at his own risk within 15 days and surely no order was obtained by the tenant-(present respondent No. 1) for replacing the fallen roof or the falling roof by putting a cement concrete slab in its place as appears to have been done hurriedly after obtaining the preliminary order on 21-7-1981 and before the stay granted by the Additional Sessions Judge, Chandrapur, on 25-7-1981, could be communicated or the subsequent redundant stay order could be obtained from the Sub-Divisional Magistrate, Chandrapur, on 27-7-1981.

8. It is true the relevant portion of subsection (1) of section 133 of the Criminal Procedure Code, 1973 does refer to the passing of a conditional order requiring.....".....the person.....owning, possessing or controlling such building.....within a time to be fixed in the order.....(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees, or.....". The respondent No. 1 obviously did take care to mention in para 3 in the original application filed by him u/s 133(1)(d) of the Criminal Procedure Code, 1973, before the Sub-Divisional Magistrate, Chandrapur: "The applicant is a person who is possessing and controlling the said shop presently." That is how apparently the respondent No. 1 succeeded in persuading the learned Sub-Divisional Magistrate, Chandrapur, in passing the conditional order in favour of the respondent No. 1 - the applicant before the Sub-Divisional Magistrate, Chandrapur-directing him to repair the roof. On a careful perusal of the provisions of sections 133 of the Criminal Procedure Code, 1973, it would, however, appear to me that the words "the person.....owning, possessing or controlling such building" did not give the learned Sub-Divisional Magistrate, a free choice to pass the conditional order u/s 133(1)(d)(iv) of the Criminal Procedure Code, 1973, in favour of the present respondent No. 1 the tenant to the exclusion of the owner-the present petitioner who was specifically mentioned in that application presented to the Sub-Divisional Magistrate as a non-applicant and owner of the premises. A proper construction of the abovementioned words in section 133 would indicate that the three categories

of persons have to be considered in that order. The conditional order has first to be passed as against the owner of the building. However, if the owner is not available or amenable to the jurisdiction of the Court, then it could be passed in favour of the person possessing the building, which would include a tenant. Where, however, neither the owner nor the person in possession is available, as would happen where a building is vacant, and locked, not in possession of anyone, but under the control of some other person, then the order could be passed as against the person having the control of the building. Surely these provisions did not give liberty to the Sub-Divisional Magistrate to pass the conditional order as against the tenant *ad initium* as the person in possession of the building to the exclusion of the owner who is even mentioned as a non-applicant in the application filed u/s 133 of the Criminal Procedure Code, before the Sub-Divisional Magistrate.

9. It was then contended by Shri Sirpurkar that after all the work of construction of the slab of the roof is already over, nothing now remains to be done, and this application filed before this Court has virtually become infructuous. It is contended that this Court may invoke the inherent powers for quashing a proceeding or an order where it is necessary so to do to prevent abuse of process of any Court or otherwise to secure the ends of justice, which would mean doing sometimes to prevent something which is yet to take place and it would not be proper for this Court to invoke its jurisdiction u/s 482 of the Criminal Procedure Code, in a matter like the present one where everything has already been done and nothing now remains to be done which could be prevented. I am unable to accept this argument. One does not know what was the stage of completion of work at the point of time when the stay granted either by the Additional Sessions Judge, Chandrapur, or the Sub-Divisional Magistrate, Chandrapur, came effectively into operation to stop the further work. Even otherwise this Court would be loath to countenance an illegality, much less to perpetuate the same. The final order is yet to be passed by the Sub-Divisional Magistrate, Chandrapur, in pursuance of the provisions of section 133 of the Criminal Procedure Code, and unless this Court interferes at this stage, some sort of final order will have to be passed by the Sub-Divisional Magistrate, Chandrapur which in that case will present itself to parties and others as a valid order with all legal consequences flowing therefrom. This Court by interfering at this stage in exercise of its powers u/s 482 of the Criminal Procedure Code, in respect of a matter that is patently without jurisdiction and illegal, will stop at least the passing of that final order by the Sub-Divisional Magistrate, with its necessary consequences.

10. I have already discussed that since the allegations in the original application filed by the present respondent No. 1 before the Sub-Divisional Magistrate, Chandrapur, u/s 133 of the Criminal Procedure Code, did not make out a case of a public nuisance, the Sub-Divisional Magistrate, Chandrapur, did not get any jurisdiction to pass the conditional order itself. In that view the very passing of the conditional order and taking of the cognizance in the present matter by the Sub-Divisional

Magistrate, are all illegal and without jurisdiction and this Court would be well within its limits to quash the conditional order and the proceeding itself in exercise of this Court's inherent powers operative u/s 482 of the Criminal Procedure Code.

11. Before concluding, I find it necessary to state that even the learned Additional Sessions Judge, Chandrapur, could have passed an appropriate order in this case in exercise of that Court's revisional powers. A conditional order passed as against the present respondent No. 1 by the Sub-Divisional Magistrate, Chandrapur, ignoring the present applicant-the owner of the building, operated not merely as an interlocutory order so far as the present applicant was concerned, but finally and completely abrogated his rights in so far as they stood u/s 133 of the Criminal Procedure Code. It was in effect, therefore, a final order as against the present applicant and surely the learned Additional Sessions Judge, while accepting the illegality of the conditional order passed by the Sub-Divisional Magistrate, could not have found himself helpless in the matter.

12. In view of the observations in this judgment, it is clear the Sub-Divisional Magistrate, Chandrapur, had no jurisdiction to deal with this case u/s 133 of the Criminal Procedure Code, and, therefore, the conditional order passed by the Sub-Divisional Magistrate, Chandrapur, on 21-7-1981 is quashed and instead it shall be directed that the application filed by the respondent No. 1 before the Sub-Divisional Magistrate, Chandrapur, shall stand rejected.