

Kachrual Bhagirath Agrawal & Ors vs State Of Maharashtra & Ors on 22 September, 2004

Equivalent citations: AIR 2004 SUPREME COURT 4818, 2004 AIR SCW 5516, 2005 (1) UJ (SC) 85, 2005 (9) SCC 36, 2005 SCC(CRI) 1191, 2005 FAJ 65, 2004 (2) FAC 119, 2004 CRI(AP)PR(SC) 742, 2004 (7) ACE 464, 2004 (6) SLT 88, 2004 (8) SCALE 107, 2005 UJ(SC) 1 85, 2004 CRILR(SC MAH GUJ) 886, 2004 CRILR(SC&MP) 886, (2004) 22 ALLINDCAS 72 (SC), 2004 (10) SRJ 63, (2004) 7 SUPREME 72, (2005) 1 EASTCRIC 236, (2004) 2 FAC 119, (2004) 4 MAH LJ 963, (2005) 1 RAJ CRI C 98, (2004) 4 RECCRIR 415, (2004) 4 CURCRIR 136, (2004) 3 ALLCRIR 2764, (2004) 8 SCALE 107, (2005) 1 GCD 883 (SC), (2005) 1 ALLCRILR 22, (2004) 4 CRIMES 99, (2004) 4 RECCRIR 589, (2005) 1 BOMCR(CRI) 756, (2004) 50 ALLCRIC 445, (2004) 3 CHANDCRIC 206, (2004) 24 INDLD 60, 2005 CHANDLR(CIV&CRI) 548, 2004 (2) ANDHLT(CRI) 436 SC, (2004) 2 ANDHLT(CRI) 436, 2004 (2) ALD(CRL) 989, 2005 (1) BOM LR 499, 2005 BOM LR 1 499

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Bench: Arijit Pasayat, C.K. Thakker

CASE NO.:

Appeal (crl.) 1350 of 2003

PETITIONER:

Kachrual Bhagirath Agrawal & Ors.

RESPONDENT:

State of Maharashtra & Ors.

DATE OF JUDGMENT: 22/09/2004

BENCH:

ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:

J U D G M E N T ARIJIT PASAYAT, J.

Legality of action taken and order passed by learned Sub- Divisional Magistrate, Sakoli (for short 'SDM') under Section 133 of the Code of Criminal Procedure, 1973 (in short the 'Code') having upheld by a learned Single Judge of the Bombay High Court, this appeal has been filed. It is of relevance to note that the appellants had filed a revision before the learned Additional Sessions

Judge, Gondia, questioning legality of the order dated 7.2.1989 passed by the SDM. The revisional authority held that the order passed by the SDM was not legal. Thereafter a revision was filed by the five of the original applicants, who had initiated action before the SDM. The High Court as noted above, by the impugned judgment held that the order passed by the SDM was legal and proper. The revisional court should not have interfered with it.

Backgrounds facts as per the complainants are as follows:

The original non-applicant M/s. Ramchand Bhagirath is a proprietary concern of Bhagirath Ramchand Agrawal (since deceased). He was a commission agent in a Kirana goods and was also a wholesale dealer in dry chillies. In Ansari Ward of Gondia city, he had a godown in a double storied building known as Vishnu Kunj where he used to store large quantity of chillies. The applicants before learned SDM are residents of Ansari Ward which is mainly a residential locality. Present appellant No.1 being a wholesale dealer in dry chillies, everyday trucks loaded with dry chillies come to his godown and then the same are unloaded and stored in the godown. Similarly, loading of dry chillies also goes on for distributing the same to his customers. This has been going on since several years and it appears to have become a routine thing. The applicants however made a grievance that on account of storing of dry chillies in the godown as well as the work of loading and unloading thereof the health and physical comfort of the residents in that locality were affected and it has become practically impossible for them to bear any further. According to them, the loading and unloading of chillies cause pollution with the result that many residents in the locality suffer from sneezing, coughing, asthma, irritation of skin and burning sensation. The applicants, therefore, moved the Municipal Council for taking necessary action in this behalf. However, since the Municipal Council did not give any response, the applicants moved learned SDM, Gondia, under Section 133 of the Code. The learned SDM, after finding that there was a prima facie case against the present applicants issued a conditional order dated 12.3.1985 under Section 133(1)(b) of the Code with a notice to them to show cause as to why the same should not be confirmed and made absolute. Pursuant to the said notice, the appellants appeared before learned SDM, Gondia, and filed reply. In the said reply, it was submitted that the building "Vishnu Kunj" was being used as godown but it was denied that the loading and unloading of dry chillies pollutes the atmosphere and causes physical injury or discomfort to the residents of the locality. It was pointed out that the godown is a pakka construction and that whenever loading and unloading is required to be done, water is sprinkled to avoid pollution. This has been going on for about 20 years and nobody ever made any complaint in that behalf. Learned SDM, Gondia, allowed the parties to lead evidence in support of their respective contentions. He recorded part of the evidence and thereafter the case was transferred to learned SDM, Sakoli, who completed the enquiry. Learned SDM, Sakoli, upon consideration of the evidence of the witnesses came to the following conclusions viz.:

- (i) People in general in the locality in sufficient number are suffering from the loading and unloading of dry chillies and its storage in the godown;
- (ii) It has resulted not only in their adverse health and discomfort but a few are permanently suffering in the sense that some of them are suffering from sickness and ailment;
- (iii) Even the witnesses of the non-applicant admitted that due to this business, there is discomfort and injury to physical health;

In this view of the matter, learned SDM, Sakoli, held that the applicants proved public nuisance and physical discomfort to them. Consequently, learned SDM, Sakoli, proceeded to pass an order under Section 133 of the Code, operative part of which reads as follows:

"The non-applicant is hereby directed that he will not keep, store and transport chillies in the godown, Vishnu Kunj as the same is injurious to the health and physical comfort of the community and he shall also remove all the goods stored therein. This order shall be given effect from 22nd February, 1989.

Notice in form No.21 be issued to the non-

applicant."

Feeling aggrieved by this order, the present appellants preferred Criminal Revision Application No.17 of 1989 in the court of the Additional Sessions Judge, Gondia. The learned Additional Sessions Judge proceeded to reassess the evidence adduced by the parties and came to the conclusion that the learned SDM, committed error in holding that the business of the non-applicant causes public nuisance. He further held that the learned SDM ignored the evidence adduced on behalf of the non-applicant and attached too much importance to the evidence of the applicants. The learned Additional Sessions Judge further held that the learned SDM had arbitrarily used his discretion in favour of the original applicants and, therefore, it was a fit case to interfere with the impugned order. In this view of the matter, the learned Additional Sessions Judge allowed the revision application filed by the original non-applicant and set aside the order passed by learned SDM. A Criminal Revision Application was filed by some of the original applicants before the High Court to set aside the revisional order.

Originally, there were ten applicants, five of whom later on had withdrawn. Therefore, five of the original applicants moved the High Court, which came to hold that the conditions requisite for passing of order under Section 133(1)(b) as well as final order under Section 138 of the Code were not fulfilled. Accordingly it set aside order of the revisional Court.

In support of the appeal, learned counsel for the appellants submitted that the scope and ambit of Section 133 has not been kept in view. The evidence was not sufficient to show that community was affected by the conduct of keeping any goods by the appellant. It has not been established that such

conduct of business was injurious to the health or physical comfort of the community. It was pointed out that learned Additional Sessions Judge had analysed the factual and legal position to hold that the basic requirements for passing an order under Section 133 of the Code were absent. Alternatively, it was submitted that the SDM had the jurisdiction to pass directions regulating conduct of the trade or keeping of the goods. This aspect has not been examined by learned SDM and the High Court. For pretty long time the appellant was carrying business without any grievance whatsoever by any member of the community. It was submitted that the appellant is a commission agent and there was no material to conclude that he was dealing in red chilly. The non-dried chillies were stored and cannot in any manner create inconvenience or injuries to the health and legal comfort of the community. There was no material to show that the community as such was affected. In fact, because of business rivalry ten applicants had filed petitions before the learned SDM. Five of them later on realized that it was not worthwhile to proceed in the matter as the ingredients of Section 133 of the Code were not satisfied and withdrew.

In response learned counsel for the respondents submitted that the learned SDM had elaborately examined the factual and legal position.

It was pointed out that while exercising revisional jurisdiction learned Sessions Judge should not have interfered with the well- reasoned and well-merited order passed by the learned SDM. The High Court, therefore, analysed the factual and legal position afresh and came to the conclusion that the order passed by the learned SDM under Section 133 of the Code was justified.

Section 133 so far as it is relevant for our purpose reads 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) xx xx xx

(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)to (f) xx xx xx 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) xx xx xx

(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 (vi) xx xx xx 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.

xx xx xx"

A proceeding under Section 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 cover Sections 145 to 149 relating to "disputes as to immovable property". Nuisances are of two kinds, i.e. (i) Public; and (ii) Private. 'Public nuisance' or 'common nuisance' as defined in Section 268 of the Indian Penal Code, 1860 (in short the '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 good requires. It is an act or omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy 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 under Section 91 of the Code of Civil Procedure, 1908 (in short 'CPC'). Under it a suit lies and the plaintiffs 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 under Sections 133 to 144 of the Code, and the third relates to 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 in question in any civil Court. The provisions of Chapter X of the Code should be so worked as not to become themselves a nuisance to the community at large. Although every person is bound to so 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 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 and necessary trade ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community. Proceedings under Section 133 are not intended to settle private disputes between different members of the public. They are in fact intended to protect the public as a whole against inconvenience. A comparison between the provisions of Section 133 and 144 of the Code

shows that while the former is more specific the latter is more general. Therefore, nuisance specially provided in the former section is taken out of the general provisions of the latter section. 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 deals with itself physical comfort to the community and not with those 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 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. 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.

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 tour".

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)].

In the background of legal principles set out above, the judgment of the High Court does not suffer from any infirmity. The residual question, however, is whether learned SDM could consider the suggestions, if any, given by the appellants, as to the manner in which goods can be stored or connected activities by passing order of a regulatory nature. This is permissible by the provisions itself which provide that SDM can regulate such activities. Therefore, without expressing any opinion on that matter for which material can be placed by the appellants before the learned SDM for appropriate orders in the matter, we direct that if any suggestion or alternative arrangement is brought to the notice of learned SDM it shall be considered in its proper perspective in accordance with law. With the aforesaid observations, the appeal is dismissed.