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Court : Kerala

Decided On : Jun-20-2005

Reported in : 2005CriLJ3262; 2005(3)KLT458

Judge : M. Sasidharan Nambiar, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 133 to 143, 251, 254, 255 and 482; Air (Prevention and Control of Pollution) Act, 1981

Appeal No. : Crl.M.C. No. 730 of 2004

Appellant : Sujatha

Respondent : Prema

Advocate for Def. : P.M. Habeeb, Public Prosecutor

Advocate for Pet/Ap. : M.R. Hariraj,; Rekha Vasudevan,; S. Suraj,;

Judgement :
ORDER

M. Sasidharan Nambiar, J.

1. The nuisance sought to be removed by invoking Section 133 of the Code of Criminal Procedure is the nuisance caused by environmental pollution. Whether the onus of proof is on the party who alleges the nuisance or on the person who

causes the alleged nuisance. It is the interesting question to be resolved.

2. Respondents are conducting a tyre reconditioning unit by name and style 'City Tyres' in building 307 and 308 of Thiruvambady Ward in Alappuzha Municipality. The building is situated in a residential area. The building is very close to the residential house of petitioner. Contending that the Unit is functioning day in and day out and large number of tyres are melted in a very high temperature and strong chemicals are used for the said purpose. Petrol, Sulpher, Rubber and other chemicals are used without any precautionary measure and it causes serious health hazardous to the members of the family of the petitioner, she approached the Sub Divisional Magistrate, Alappuzha for an appropriate order to stop the functioning of the Unit. The Sub Divisional Magistrate addressed the Environmental Engineer, Kerala Pollution Control Board to conduct an inspection and offer remarks on the complaint. The Revenue Inspector was also directed to conduct an enquiry and submit a report. On the basis of the reports indicating that unit causes nuisance, the Sub Divisional Magistrate passed a conditional order under Section 133 of the Code of Criminal Procedure to stop the functioning of the unit. They were also directed to show cause why the conditional order shall not be made absolute. Respondents 1 and 2 filed an objection disputing the allegation of causing nuisance and contending that the boiler is provided with a Chimney having a height of 18 feet and is being operated in a completely enclosed room and the Unit is situated in a purely commercial area and the petitioner herself is conducting a flour mill where chilly and corriander powder are being produced in bulk quantities and there is a distance of more than three meters from the compound wall of the unit and the residential building and the Unit is functioning only from 9 A.M. to 6 P.M. and no melting process is being carried out and tread rubber is being purchased from outside and neither petrol nor sulpher is being used in the Unit and they have complied with all the necessary formalities for functioning the Unit and therefore the conditional order is to be vacated.

3. On the basis of the objection, the Sub Divisional Magistrate directed the Pollution Control Board to ascertain whether there is air and sound pollution as alleged by the petitioner and whether the boiler is being operated from a completely enclosed room with a chimney of 18 feet and whether it causes any

nuisance and whether the process of melting rubber using sulpher and petrol is carried out in the Unit and whether the offensive odour, heat and noise generated by the process causes nuisance. Similarly the Village Officer was also directed to clarify whether the locality is a purely commercial area and whether the distance between the compound wall of the respondents and the residential house of the petitioner is having a distance of more than three metres and whether there is offensive smell and noise creating nuisance to the neighbours. On the basis of the directions, the Environmental Engineer submitted a report after inspection stating that there is inadequate space between the Unit and the residence of the petitioner and the direction given by the Pollution Control Board were not implemented by respondents and consent as provided under Air Act was refused by the Board to respondents and the only solution to solve the problem is to shift the Unit to a suitable place. The Sub Divisional Magistrate on the basis of the materials available, holding that even after giving ample opportunities respondents failed to adduce evidence or to prove that satisfactory Air Pollution Control measures as stipulated by the Pollution Control Board were taken, made the conditional order absolute under Section 138(2) of the Code of Criminal Procedure. Respondents challenged that order before the Sessions Court, in Crl.R.P.3/2000. The learned Additional Sessions Judge holding that it is for the petitioner to adduce evidence in support of the claim that there is nuisance, set aside the order of the Sub Divisional Magistrate and remitted the case back to the Sub Divisional Magistrate for fresh disposal after complying with the mandatory provisions of the Code. This petition is filed under Section 482 of the Code challenging that order. Petitioner contended that the learned Additional Sessions Judge failed to consider the fact that the onus of proof is on the respondents to show that the functioning of the Unit does not cause any air pollution or nuisance and the burden was wrongly cast on the petitioner and though Sub Divisional magistrate properly appreciated the facts, the order was set aside without any basis and therefore the order of the learned Sessions Judge has to be quashed.

4. Though notice was personally served on the second respondent, she did not appear. The first respondent was served by affixture and also by notice to her brother. She also did not appear. Respondents 1 and 2 are not represented by counsel also.

5. The learned counsel appearing for the petitioner and the learned Public Prosecutor were heard.

6. The learned counsel appearing for the petitioner relied on the decisions of the Apex Court in Vellore Citizens Welfare Forum v. Union of India and Ors., : AIR 1996 SC2715 and in A.P. Pollution Control Board v. Prof. M.V. Nayudu, : [1999]1SCR235 and argued that the precautionary principle and the burden of proof in environmental cases as laid down by the Apex Court which is the law of the land was not considered by the learned Additional Sessions Judge at all and therefore the learned Sessions Judge wrongly set aside the order of the Sub Divisional Magistrate. Learned counsel argued that eventhough petitioner did not adduce oral evidence after the conditional order was passed, the Sub Divisional Magistrate before making the conditional order absolute had called for the reports from the Revenue Inspector as well as the Environmental Engineer to find out whether the contentions raised by the respondents in their objection that precautionary measures were taken and they had complied with the conditions provided by the Pollution Control Board and the functioning of the Unit is not causing nuisance is correct and only after appreciating the said materials and holding that respondents did not adduce any evidence the conditional order was made absolute and this fact was omitted to be taken note of by the learned Additional Sessions Judge and hence the order is illegal.

7. Chapter X of the Code of Criminal Procedure (hereafter referred to as Code), deals with Maintenance of Public Order and Tranquillity. Sections 133 to 143 deals with public nuisance. Under Section 133, whenever a District Magistrate or Sub Divisional Magistrate or, an Executive Magistrate especially empowered in that behalf by the State Government considers that any unlawful obstruction or nuisance should be removed from any public place or from any river or channel which is or may, be lawfully used by the public, the Magistrate may make a conditional order requiring the person causing such obstruction or nuisance to remove such obstruction or nuisance within a time to be fixed in the order or if he objects so to do to appear before himself or some other subordinate Executive Magistrate at a time and place to show cause why the order should not be made absolute. This power is to be exercised on the information received and on taking

such evidence. When a conditional order, as provided under Section 133(1) of the Code is passed, the person against whom such order is made shall either perform within the time and in the manner specified in the order, the act directed to be performed thereby or shall appear and show cause against the same as directed in the order, as visualised, under Section 135 of the Code. Once that person appears and show cause as provided under Section 135, the learned Magistrate is bound to proceed as provided under Section 138. Sub-section (1) of Section 138 reads:-

'If the person against whom an order under Section 133 is made appears and show cause against the order, the Magistrate shall take evidence in the matter as in a summons case.'

Under Sub-section (2) of Section 138 if the Magistrate is satisfied that the order, either as originally made or to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or with such modification as the case may be. Under Sub-section (3) if the Magistrate is not satisfied, no further proceedings shall be taken.

8. Therefore the party against whom a conditional order is passed and a show cause notice was issued appears and objects to the order, the learned Magistrate is bound to take evidence in the matter as in a summons case. The procedure for trial of summons cases is provided under Chapter XX of the Code. Under Section 251, the substance of the accusation has to be stated to the accused and he shall be asked whether he pleads guilty or has any defence to make. Under Section 254, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution and also to hear the accused and take all such evidence as he produces in his defence. Under Sub-section (2) the Magistrate if he thinks fit has to issue summons to any witness directing him to attend or to produce any document on the application of the prosecution or the accused. Under Section 255, the Magistrate has to find the accused guilty or not guilty on the evidence as provided under Section 254. Therefore the Sub Divisional Magistrate is bound to follow the procedure provided under Section 254 when the respondents appeared and filed an objection showing

cause as to why the conditional order has to be vacated.

9. The question is whether the learned Magistrate has complied with the said condition. Annexure A2 order of the learned Magistrate does not show that the Sub Divisional Magistrate has followed the procedure provided under Section 138 before making the conditional order absolute. That exactly is the reason why the learned Additional Sessions Judge set aside the order and remitted the case back to the Sub Divisional Magistrate for appropriate order after following the procedure provided under the Code. If that be so, the order of the learned Additional Sessions Judge remitting the case back to the Sub Divisional Magistrate is perfectly correct and warrants no interference.

10. The argument of the learned counsel for the petitioner is that the learned Additional Sessions Judge has wrongly cast the burden on the petitioner as against the law laid down by the Apex Court. True the Precautionary Principle and the Polluter Pays Principle envisaged by the Apex Court in Vellore Citizens Welfare Forum's case, : AIR 1996 SC2715 and later held to be the law in A.P. Pollution Control Board case, : [1999]1SCR235 was omitted to be taken note of by the learned Additional Sessions Judge. The Apex Court in Vellore Citizens Welfare Forum's case propounded the principle as follows:-

We are, however, of the view that 'The Precautionary Principle' and 'The Pollutes Pays Principle' are essential features of 'Sustainable Development'. The 'Precautionary Principle' - in the context of the municipal law - means:

(i) Environmental measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The 'onus of proof' is on the actor or the developer/industrialist to show that his action is environmentally benign.

It was then held:--

The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land.

The Apex Court finally held:--

In view of the above mentioned constitutional and statutory provisions we have no hesitation in holding that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country.

The law has been further widened and emphasised in A.P. Pollution Control Board v. Prof. M.V. Nayudu, : [1999]1SCR235 . The Apex Court held:-

It is to be noticed that while the inadequacies of science have led to the 'precautionary principle', the said 'precautionary principle' in its turn, has led to the special principle of burden of proof in environmental cases where burden as to the absence of injurious effect of the actions proposed, -- is placed on those who want to change the status quo (Wynne, Uncertainty and Environmental Learning, 2 Global Environmental Change 111 (1992) at p. 123). This is often termed as a reversal of the burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the status quo by maintaining a less polluted state should not carry the burden of proof and the party who wants to alter it, must bear this burden.

11. The Precautionary Principle suggests that where there is an identifiable risk of serious or irreversible harm, including extinction of species, widespread toxic pollution in major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. So also the required standard is the risk of harm to the environment or to human health. It has to be decided in public interest and that too according to a 'reasonable persons' test.

12. When respondents 1 and 2 are functioning a Unit which is alleged to be functioning without complying the conditions provided under the Air Pollution Act

and that too even after rejection of the consent sought for under the Air Act, as shown by the report of the Environmental Engineer, the burden is definitely on the respondents to establish that the functioning of the Unit is not causing any nuisance as alleged by the petitioner and shown by the report of the Environmental Engineer. The finding of the learned Additional Sessions Judge that the burden is on the petitioner is not correct. In view of the Precautionary Principle and the onus of burden as laid down by the Apex Court, the finding of the learned Additional Sessions Judge can only be set aside.

13. The learned Sub Divisional Magistrate has to follow the procedure as provided under Section 138 of the Code and dispose the case afresh in the light of the principle laid down earlier. The Sub Divisional Magistrate has to ask and record whether the petitioner is adducing any evidence and if not respondents are to be asked whether they are adducing any evidence. The Magistrate has to hear the parties and pass an order either under Sub-section (2) or (3) of Section 138 of the Code. The Magistrate has also to bear in mind the law enunciated earlier. The parties are directed to appear before the Sub Divisional Magistrate on 6.7.2005. The Sub Divisional Magistrate is directed to dispose the case in accordance with law expeditiously.

Crl. M.C. is disposed of as above.

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