

Dwarika Prosad and ors. Vs. Dr. B.K. Roy Choudhury and ors.

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Court : Kolkata

Decided On : Feb-03-1950

Reported in : AIR1950Cal349

Judge : Sen and ; K.C. Chunder, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Section 133 and 133(1); ; [Indian Penal Code \(IPC\), 1860](#) - Section 268

Appeal No. : Criminal Revn. No. 1106 of 1949

Appellant : Dwarika Prosad and ors.

Respondent : Dr. B.K. Roy Choudhury and ors.

Advocate for Def. : Chintaharan Roy, Adv.

Advocate for Pet/Ap. : S.S. Mukherjee and ; Priti Bhusan Barman, Advs.;N.K. Sen and ; J. M. Banerjee, Advs.

Judgement :

Sen, J.

1. This rule was obtained by the petitioners against whom an order has been passed in proceedings under Section 133, Criminal P. C., by the Sub-Divisional Magistrate of Asansol directing the petitioners to refrain from working in icecream

making machine between the hours of 11 P. M. and 5 A. M.

2. The case against the petitioners briefly is as follows : The petitioners have a shop in certain premises where they make icecream. The icecream is made in a refrigerator. It is said that the noise created by the working of the refrigerator constitutes a public nuisance. The defence taken is that the noise made is not a public nuisance. The learned Magistrate, as I stated before, has passed an order restraining the petitioners from working this machine for a certain period, A motion was taken from this order to the Sessions Judge and he has confirmed it.

3. The first point raised by learned advocate appearing for the petitioners is that the alleged nuisance, if it be a nuisance at all is not a public nuisance and therefore proceedings under Section 138, Criminal P. C., to abate the nuisance are not permissible. His contention is that proceedings under Section 133, Criminal P. C., relate to public nuisance and not to private nuisance. Next, he points out that the finding of the learned Magistrate is not sufficient to show that the petitioners are creating a public nuisance.

4. Learned advocate appearing for the State contends that the evidence discloses that a number of persons occupying the other portion of the premises where this business is carried on are disturbed by the noise and that therefore the Court below was right in holding that there was a public nuisance.

5. In our opinion the contention urged on behalf of the petitioners must prevail. Section 133, Criminal P. C., appears in chap. X of that Code which is entitled 'Public Nuisance.' We realise that the title of a Chapter is not a determining factor regarding the interpretation of the provisions of a section in the Chapter but the title certainly throws considerable light upon the meaning of the section and where it is not inconsistent with the section one should presume that the title correctly describes the object of the provisions of the Chapter. As we have said before the Chapter is headed 'Public Nuisances.' Section 133 deals with various matters which constitute a public nuisance within the legal meaning of that term. We are concerned in this case with para. 3 of Sub-section (1) of Section 133, Criminal P. C., which is as follows :

'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.' It is quite clear from this paragraph that the section aims at preventing any conduct which would be injurious to the health or physical comfort of the community. The word 'community' is used and that word has a definite meaning. The word 'community' cannot be taken to mean residents of a particular house. Community means something wider than that. It means the public at large or the residents of an entire locality. If we look at Section 268, Penal Code, we find the definition of 'public nuisance.' It defines 'public nuisance' as an act or illegal omission which causes any common injury, danger or nuisance to the public or to the people in general who dwell or occupy property in the vicinity. The words 'public', 'in general' and 'vicinity' clearly indicate that there can be no public nuisance unless the general public of the locality is affected by the nuisance. In this case there is really no evidence to show that anybody was affected by the sound of this machine except some persons living in the same house. The evidence of some witnesses that the noise constituted a public nuisance is really evidence of opinion and as such is not admissible. We find further that the learned Magistrate in the last paragraph of his judgment does not find that the persons in general of the locality have been affected by the sound emanating from the machine. This is what he says:

'Taking all these various facts into consideration together with the impression I got when I made a local inspection I am of the opinion that the working of this icecream making machine at night in a congested area does constitute a nuisance to the residents of the building whose flats are adjacent to the place where the machine is running and hence order that the orders passed by the learned Magistrate under Section 133, Criminal P. C., on 20th April 1949, be made absolute with this exception that the second party should be restrained from working the machine after the hours of 11 P. M. till 5 A. M. Let my orders stand.'

He finds that the noise constitutes a nuisance to the residents of the building whose flats are adjacent to the place where the machine is running. He does not

even find that the noise of the machine constitutes a nuisance to all the residents of the building. He says that it constitutes a nuisance to the residents of the building whose flats are adjacent to the place where the machine is running. Now, a finding of this description is clearly not a finding that a public nuisance exists.

6. In these circumstances we are of opinion that Section 133, Criminal P. C., has no application and that the order of the learned Magistrate is bad.

7. We accordingly set aside the order and make the rule absolute.

K.C. Chunder J.

I agree.

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