

M.Cr.C.No.9843/2014
(Chandra Prakash v. Anandi Lal & Ano.)

23/01/2017

Shri Ankur Maheshwari, counsel for the applicant.

Shri Prashant Sharma, Counsel for the respondent No.1.

Shri R.D. Agrawal, Counsel for the respondent No.2/State.

With the consent of the parties, the matter is heard finally.

1. The necessary facts for the disposal of this application lies in a very narrow campus. The respondent no. 1 had filed an application under Section 133 of Cr.P.C. before the S.D.M., Ashok Nagar. It was alleged by the respondent no.1 that the applicant is operating and running a wheat grinding machine as well as spices grinding machine and because of that, not only noise pollution is being caused but due to the spices dust, air pollution is also being caused. It was further mentioned that he is a heart patient.

2. The said application was partly allowed by the S.D.M., Morena after hearing the applicant and it was directed that the applicant shall not operate the grinding machine between the period 9 A.M. To 6 P.M.

3. Being aggrieved by the order of the S.D.M., the applicant filed a revision which was allowed and the matter was remanded back to the S.D.M. with a direction to decide the application afresh after

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recording evidence. It is further submitted that the S.D.M., after recording the statements of the witnesses as well as hearing both the parties, allowed the application filed by the respondent no. 1 by order dated 4-7-2014 and applicant was restrained from grinding pepper/chilli. Against the order of the S.D.M., the applicant as well as the respondent no.1 preferred revisions. By the common order dated 29-2-2014, the Revisional Court has allowed the revision filed by the respondent no.1 and dismissed the revision filed by the applicant and it was directed that the applicant shall not run the spices grinding machine. Hence, this application has been filed.

4. It is submitted by the Counsel for the applicant that in order to attract the provisions of Section 133 of Cr.P.C., it is obligatory on the part of the S.D.M. to come to a conclusion that the act of the applicant was injurious to the health or physical comfort of the community. It was submitted that the application was filed by the respondent no.1 in his individual capacity and in absence of any finding that the community is aggrieved by running of the grinding machines, no order under Section 133 of Cr.P.C. could have been passed.

5. Per contra, it is submitted by the Counsel for the respondent no. 1 that it is a matter of common knowledge that whenever the chilly or the spices are grind, then the dust of chilli or the spices cause

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discomfort to the public at large. Hence, it is submitted that the Courts below have not committed any illegality while passing the orders under challenge.

6. Heard the learned counsel for the applicants and perused the petition.

7. Before advertng to the facts of the case, it would be apposite to refer to Section 133 of Cr.P.C. which reads as under :-

“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) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(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) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or

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any tree 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, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of,

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) to remove such obstruction or nuisance; or

(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 prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such

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dangerous animal in the manner provided in the said order;

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.

Explanation.—A “public place” includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.”

8. From the plain reading of Section 133 (1) (b) of the Criminal Procedure Code, if the trade or occupation is injurious to the health or physical comfort of the community, then such trade can be prohibited. Therefore, two questions arises for determination that whether :

- (i) Whether Chilli powder dust or spices dust mixing with the air due to grinding of the same is injuries to health or physical comfort
- (ii) Whether the Community at large is affected or not.

9. The applicant has relied upon the judgment passed by the Supreme Court in the case of **Kachrual Bhagirath Agrawal Vs. State of Maharashtra (2005) 9 SCC 36** in which it is held as under :-

“10. Therefore, nuisance specially

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provided for 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 itself deals with physical comfort to the community and not with those acts which are not 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."

10. The Supreme Court in the case of **Vasant Manga Nikumba v. Baburao Bhikanna Naidu (1995) Supp 4 54** has 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

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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 later is absolute.

11. The Supreme Court in the case of **State of M.P. v. Kedia Leather & Liquor Ltd., (2003) 7 SCC 389**, has held as under :

"10.Hygienic environment is an integral facet of healthy life. Right to live with human dignity becomes illusory in the absence of humane and healthy environment."

12. It is a matter of common experience that physical discomfort is caused due to chilli powder dust or spices dust. When the grinding of the chilli or spices takes place then air pollution due to the

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mixing of the chilli powder dust or spices dust is bound to take place. When chilli powder dust or spices dust mixed air is inhaled by the person, then it certainly causes discomfort to the person inhaling such polluted air. Fresh air is one of the basic need for good health. Thus, first question is answered against the applicant and it is held that if the chilli powder dust or spices dust gets mixed with the air, then it is bound to cause discomfort to the people.

13. The next question for determination is that whether the respondent no.1 has made out a case to show that the community at large is effected or not? In the application although it is not mentioned that due to air pollution, community at large is being adversely effected and the application was based on personal discomfort, but if the effect of mixing of chilli powder dust or spices dust in the air is considered, then it can be easily inferred that it would cause discomfort to the bypassers and even the residents of the nearby area. Thus, both the questions are answered against the applicant. Even in the case **Kachrulal Bhagirath Agrawal (Supra)**, the Supreme Court has held that the word "public nuisance" is indicative of the aspect that the community at large should be effected and not the individual, however, it would, however, depend on the facts situation of each case and it would be hazardous to lay down any straitjacket formula. Thus, considering the nature of the trade which the

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applicant is carrying out it is bound to cause air pollution causing discomfort to the community at large.

14. It is then submitted by the Counsel for the applicant that the applicant is a petty trader having a small grinding machine and if he is restrained from grinding chilli and spices, then it would adversely effect his livelihood which would be violative of Article 19 of the Constitution of India.

15. The Supreme Court in the case of **Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353**, has held as under :

"62. It is now almost accepted that there are no absolute constitutional rights and all such rights are related. As per the analysis of Aharon Barak, two key elements in developing the modern constitutional theory of recognising positive constitutional rights along with its limitations are the notions of democracy and the rule of law. Thus, the requirement of proportional limitations of constitutional rights by a sub-constitutional law i.e. the statute, is derived from an interpretation of the notion of democracy itself. Insofar as the Indian Constitution is concerned, democracy is treated as the basic feature of the Constitution and is specifically accorded a constitutional status that is recognised in the Preamble of the Constitution itself. It is also unerringly accepted that this notion of democracy includes human rights which is the cornerstone of Indian democracy. Once we accept the aforesaid theory (and there cannot be any denial thereof), as a fortiori, it has also to be accepted that

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democracy is based on a balance between constitutional rights and the public interests. In fact, such a provision in Article 19 itself on the one hand guarantees some certain freedoms in clause (1) of Article 19 and at the same time empowers the State to impose reasonable restrictions on those freedoms in public interest. This notion accepts the modern constitutional theory that the constitutional rights are related. This relativity means that a constitutional licence to limit those rights is granted where such a limitation will be justified to protect public interest or the rights of others. This phenomenon—of both the right and its limitation in the Constitution—exemplifies the inherent tension between democracy's two fundamental elements. On the one hand is the right's element, which constitutes a fundamental component of substantive democracy; on the other hand is the people element, limiting those very rights through their representatives. These two constitute a fundamental component of the notion of democracy, though this time in its formal aspect. How can this tension be resolved? The answer is that this tension is not resolved by eliminating the "losing" facet from the Constitution. Rather, the tension is resolved by way of a proper balancing of the competing principles. This is one of the expressions of the multi-faceted nature of democracy. Indeed, the inherent tension between democracy's different facets is a "constructive tension". It enables each facet to develop while harmoniously coexisting with the others. The best way to achieve this peaceful coexistence is through balancing between the competing interests. Such balancing enables each facet to develop alongside

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the other facets, not in their place. This tension between the two fundamental aspects—rights on the one hand and its limitation on the other hand—is to be resolved by balancing the two so that they harmoniously coexist with each other. This balancing is to be done keeping in mind the relative social values of each competitive aspects when considered in proper context.”

16. Thus, it undisputed that to carry any trade or business is one of the fundamental rights as guaranteed under Article 19 (1)(g) of the Constitution of India, but at the same time, the fundamental rights are subject to reasonable restrictions. Thus, it cannot be said considering the interest of the general public at large, the applicant cannot be restrained from carrying out the trade of grinding of chilli and spices. However, at the same, the livelihood of the applicant is also required to be protected.

17. The grievance of the respondent no.1 is that due to running of flour mill as well as grinding machines, the noise pollution as well as air pollution was being caused. As the Courts below have not restrained the applicant from running the flour mill, therefore, there is no question of noise pollution. The applicant has been restrained from grinding chilli as well as spices because the dust was causing air pollution. If the applicant takes all precautionary measures to avoid mixing of chilli powder dust as

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well as spices dust in the air, then once, the air pollution is checked, then the restriction on carrying on the trade might be unreasonable.

18. Therefore, it is observed that in case the applicant takes all preventive measures to protect the air pollution, then he may file an application before the S.D.M., for recall of the order dated 4-7-2014. If any such application is filed after taking all preventive measures, then the S.D.M. after recording evidence as well as calling report from the expert, may recall the order dated 4-7-2014, if it comes to a conclusion that now the applicant by grinding chilli or spices is not causing air pollution and no discomfort is being caused to the public at large.

19. Hence, with these observations, the application is **disposed off**.

(ra)

(G.S.Ahluwalia)
Judge