

(2019) 07 BOM CK 0184

In the Bombay High Court

Case No : Criminal Writ Petition No. 198 Of 2018

Abhish Sharma

APPELLANT

Vs

Deputy Collector &SDM And Ors

RESPONDENT

Date of Decision : 17-07-2019

Acts Referred:

Goa Panchayat Raj Act, 1994 — Section 66(6), 66(7)
Code Of Criminal Procedure, 1973 — Section 133, 133(1)(a), 133(1)(b), 133(1)(c),
133(1)(d), 133(1)(e), 133(1)(f), 138
Constitution Of India, 1950 — Article 226

Citation : (2019) 07 BOM CK 0184

Hon'ble Judges : Prithviraj K. Chavan, J

Bench : Single Bench

Advocate : Shivan Desai, Nigel Costa Frias, Maria Corriea

Final Decision : Dismissed

Judgement

1. Rule. Respondents waives service
2. By consent, returnable forthwith and taken up for hearing and final disposal.
3. Petitioner is the owner in possession of the premises bearing flat nos.AF-1/2 & A/F/2 situated in Block A, of A1-Ameen Complex, Santa Cruz, Ilhas Goa by virtue of Sale Deed dated 30.5.2011. The Village Panchayat of Santa Cruz, Tiswadi vide letter bearing reference No.VPSA/219/1996-97 has issued an occupancy certificate to the said building complex for residential and commercial use on 29.8.1996.
4. The petitioner has established business of "Automotive Resource India Pvt. Ltd" pursuant to a Trade licence issued on 26. 11.2013 by the Village Panchayat, Santa Cruz.
5. Labour Inspector issued a registration certificate bearing No.C/II/YEK/899 on 9.9.2011. The petitioner had also, inter alia obtained NOC from respondent no.3. In the month of May 2018, the petitioner had agreed to give on lease the said

flat to M/s T.I. Enterprises. Lessee has undertaken some internal modification work in the said premises.

6. On 3.8.2018, the petitioner received a notice cum order under Section 66(6) of the Goa Panchayat Raj Act, 1994 (for short "the Act") from the office of Block Development Officer. Upon inquiry, it was revealed that respondent no.3 by its letter dated 31.7.2018 had made a complaint regarding internal modification with respect to the petitioner's flats. It was replied by the petitioner on 8.8.2018 by contending that no construction activities were carried out in the said flat except minor modifications. Meanwhile, the petitioner filed an appeal under Section 66(7) of the Act challenging the said notice cum order dated 3.8.2018. The Additional Director of Panchayat by an order dated 24.8.2018 stayed the order dated 3.8.2018.

7. Respondent no.1/Deputy Collector and SDO, Panaji by an order dated 28.8.2019 directed the petitioner to stop hazardous excavation and construction within seven days inter alia directing the petitioner to appear before him on 3.9.2018 at 2.00p.m to show cause why the said order passed under Section 133 of Cr.P.C. should not be enforced. It is contended by the petitioner that pursuant to a complaint by respondent no.3 on 18.8.2008 against him to the respondent no.1, the order came to be issued. Respondent no.3 had also issued a letter dated 10.9.2018 to the respondent no.1 indicating the continuation of the said work despite issuance of show cause notice. By a memorandum dated 11.9.2018 the respondent no.1 called upon the Mamlatdar of Tiswadi and respondent no.2 to make an enquiry on the complaint made by respondent no.3. Pursuant to the enquiry, it was reported that there can be a problem of law and order.

8. Respondent no.1 by an order dated 17.10.2018 confirmed his order dated 28.8.2019 by stating that the petitioner had failed to appear before the said Authority despite receipt of show cause notice and granting sufficient opportunities.

9. Feeling aggrieved with the said two communications, the petitioner has invoked extra ordinary jurisdiction of this Court inter alia seeking a writ of certiorari quashing the impugned orders.

10. I have heard Shri S. Desai, learned Counsel for the petitioner. It is contended by Mr. Desai that the parametres of Section 133 clause 1(a) to 1(f) of Cr.P.C. does not cover alleged illegal constructions by the petitioner. As a matter of fact, according to the learned Counsel for the petitioner, the respondent no.1 had no jurisdiction, in the sense he is not vested with the powers to direct the petitioner to stop or cease to construct as it is not a public place. It is contended that respondent no.3 has already invoke the provisions of Section 66(6) of the Act and by virtue of present proceedings under the Code of Criminal Procedure parallel proceedings have been invoked. It is contended that it is a private dispute and, therefore, there is no question of attracting Section 133 of Cr.P.C. as there is no public element. The learned Counsel contends that there are no

foundational facts attracting Section 133 of Cr.P.C. He drew my attention to various documents and permissions granted by respondent no.3 as well as Village Panchayat and therefore, respondent no.1 has absolutely no authority or jurisdiction to pass the impugned orders.

11. On the other hand Shri Nigel Costa Frias, learned Counsel for the respondent no.3, at the outset, contends that the petitioner has approached this Court with unclean hands and therefore, petition deserves to be dismissed in limine. It is contended that large scale illegal construction is being carried out by the petitioner in the form of excavation in a common area of the society which poses danger and risk to the members of the society at large. Respondent no.1 has, therefore, correctly exercised its powers in order to thwart a public nuisance.

12. In support of his contention the learned Counsel has placed certain photographs and documents on record in Stamp Number(Appln) No.3788/2018. It is contended that there is no cause of action shown by the petitioner to invoke jurisdiction of this Court. He, therefore, prayed for dismissal of the petition.

13. A short question which needs to be determined is as to whether the impugned orders passed by the respondent no.1 are without jurisdiction and whether this Court is required to invoke its extra ordinary jurisdiction to entertain the petition?

14. It reveals from the record that on 3.8.2018, the Block Development Officer, Tiswadi issued a notice cum order under Section 66(6) of the Goa Panchayat Raj Act to the petitioner on the basis of a complaint dated 30.7.2018 received from Respondent no.3. The Block Development Officer by the said notice cum order directed the petitioner to immediately stop the alleged illegal constructions in the land bearing survey nos. 11/7, 11/8 and 11/9 of village Santa Cruz, Tiswadi Goa. He has inter alia directed the petitioner to produce copies of the permissions/licences with plans(if any) issued by the competent authority. Copies of the said notice were also address to Dy. Director of Panchayat, Village Panchayat Secretary of Village Panchayat, Santa Cruz as well as to the Secretary of the respondent no.3.

15. Petitioner filed his reply which does not indicate the date on which it was sent. However, it appears from the reply that the petitioner had stated that it was an ego issue between the Secretary of the respondent no.3 and the petitioner. The petitioner contends that he was not doing any structural construction. He was changing his business module to suit the business. He had applied for permissions with the Village Panchayat, Santa Cruz to do the necessary work.

16. Respondent no.3 on the other hand tendered a document which is the information given to the respondent no.3 by Village Panchayat, Santa Cruz, under Right to Information Act from which it is crystal clear that no permissions was issued to the petitioner or M/s T.I. Enterprises to start a restaurant/hotel in the society of respondent no.3. A panchanama drawn by the Block Development

Officer on 28.11.2018 also confirms the said fact and it indicates that there is some illegal construction of Shed nos.1 and 2 as well as under ground tank in progress. There is a construction of illegal extension of compound wall. Respondent no.3 has tendered certain coloured photographs which speaks for themselves.

17. While exercising writ jurisdiction it is needless to go into the disputed question of facts. Section 133 of Cr.P.C. reads thus:-

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 configuration or explosion, should be prevented or stopped; or

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

18. Clause 1(b) of Section 133 of Cr.P.C. indicates that conduct of any trade or occupation, or the keeping of any goods or merchandise, if is injuries to health or physical comfort of the community, then the District Magistrate has powers for removal of said nuisance. Meaning of "Community" as per Oxford dictionary is "a group of people living together in one place, especially one practising common ownership."

19. Clause 1(c) of Section 133 of Cr.P.C. refers to construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped.....

20. From the said provision it is clear that the District Magistrate is empowered to remove such public nuisance which is injuries to health or physical comfort of the "Community" which has a wide connotation as stated herein above. I am afraid I cannot buy the arguments of the learned Counsel for the Petitioner that the District Magistrate is not vested with the jurisdiction of issuing impugned orders in order to avoid any untoward incident which would be in any manner dangerous or harmful to the members of public. Indisputably, respondent no.3 is a Co-operative Housing Society comprising several members and therefore, it is a community in terms of clause (b) of sub section 1 of Section 133 of Cr.P.C. As such, foundational facts do exist for exercising jurisdiction by respondent no.1 under the Code of Criminal Procedure.

21. Reliance is placed on a judgment of Supreme Court in the case of *Suhelkhan Khudyarkhan and ors. Vs State of Maharashtra and ors.* AIR 2009 SC 1868. The Supreme Court while dealing with an appeal discussed the scope of Section 133 of Cr.P.C. Paragraph 12 of the judgment reads thus:-

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.

22. There is indeed an imminent danger to the health and physical comfort of the community of respondent no.3 due to the act of the petitioner and therefore, I do not see any jurisdictional error on the part of respondent no.1 in issuing the impugned orders.

23. The learned Counsel for the respondent has placed reliance on a judgment of Supreme Court in case of *Arunima Baruah Vs Union of India and others* (2007)6 SCC 120. The ratio is on the aspect of maintainability of writ Petition under Article 226 of the Constitution of India. If the petitioner approaches the Court by suppression of material facts, he is not entitled to seek discretionary jurisdiction of the Court. Paragraphs 11, 18, 21 and 24 of the said judgment can be reproduced for advantage.

"11. The court's jurisdiction to determine the lis between the parties, therefore, may be viewed from the human rights concept of access to justice. The same, however, would not mean that the court will have no jurisdiction to deny equitable relief when the complainant does not approach the court with a pair of clean hands but to what extent such relief should be denied is the question.

18. There is another doctrine which cannot also be lost sight of. The court would not ordinarily permit a party to pursue two parallel remedies in respect of the same subject matter. [See *Jai Singh v. Union of India and Others*, (1977) 1 SCC (1977) 1 SCC 1] But, where one proceeding has been terminated without determination of the lis, can it be said that the disputant shall be without a remedy?

21. *Ubi jus ibi remedium* is a well known concept. The court while refusing to grant a relief to a person who comes with a genuine grievance in an arguable case should be given a hearing. [See *Bhagubhai Dhanabhai Khalasi (supra)*] In this case, however, the appellant had suppressed a material fact. It is evident that the writ petition was filed only when no order of interim injunction was passed. It was obligatory on the part of the appellant to disclose the said fact.

24. For the reasons aforementioned, while we uphold the judgment of the High Court, are of the opinion that in the event the appellant files a fresh writ application, the same may be considered on its own merits. The appeal is dismissed with the aforementioned observations. No costs."

24. The learned Counsel has contended that petitioner has suppressed the

nature of construction which has been surfaced from the photographs and correspondence dated 19.11.2018 made by the village Panchayat Santa Cruz to the Secretary of respondent no.3. Thus, it is apparent that the petitioner has suppressed these material facts from the Court. He is, therefore not entitled to invoke extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India.

25. Parties are at liberty to prosecute their respective rights before the appropriate authority which have already been initiated under the Goa Panchayat Raj Act.

26. Consequently, I find no merits in the petition which deserves to be dismissed and as such stands dismissed.

27. Rule is discharged. There shall be no order as to costs.