
(1993) 11 BOM CK 0043
In the Bombay High Court
Case No : Second Appeal No. 220 of 1982

Babulal Shivlal Upadhye and Another	APPELLANT
Vs	
Dr. Yadav Atmaram Joshi and Others	RESPONDENT

Date of Decision : 26-11-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Criminal Procedure Code, 1973 (CrPC) — Section 133(2), 138

Citation : (1994) 2 BomCR 583

Hon'ble Judges : V.A. Mohta, J

Bench : Single Bench

Advocate : V.V. Divekar, for the Appellant; V.D. Govilkar, for respondent Nos. 1 and 2, R.P. Behare, for the Respondent

Final Decision : Allowed

Judgement

V.A. Mohta, J.—A suit for declaration that an absolute order passed u/s 138, Criminal Procedure Code, ordering demolition of a house property on the ground of it being a public nuisance was null and void and for permanent injunction restraining the defendants from enforcing an order u/s 141, has been dismissed on a preliminary ground that Civil Court's jurisdiction was barred and without going into merits and hence, this second Appeal.

2. The courts below have placed reliance upon section 133 sub-section (2), Criminal Procedure Code, which lays down that no order u/s 133(1) is questionable in any Civil Court. Now, section 133 deals only with conditional order of removal of public nuisance within specified time or in case of objection to do so to appear before a Magistrate and show cause why the conditional order should not be made absolute. Scheme envisaged in Chapter X - Part B of Criminal Procedure Code which deals with the subject of "Maintenance of Public Order and Tranquility - Public Nuisance" is that the Magistrates are empowered to summarily deal with cases of urgency or of imminent danger to the public interest, which cannot brook delays. The conditional order can be passed u/s

133(1) on receiving the report of the Police Officer or any other information and on taking such evidence, if any, as the Magistrate may think fit. The order is to be served on the concerned party or if service is not possible, it is to be notified by proclamation as per section 134. Section 135 enjoins an obligation to obey the order within time frame indicated therein. Consequences of failure are envisaged u/s 136. They are (i) prosecution u/s 188, I.P.C and (ii) making the order absolute. In case the party shows cause against the conditional order, the Magistrate has, u/s 137, to take evidence in the matter as in a summons case and to either drop the further proceedings or to make the order absolute depending upon his judgment and satisfaction about the reasonableness and propriety of the order. If the order is made absolute, the Magistrate shall give notice of the said order to the party and require him to comply with the same within specified time and inform him that disobedience shall be liable to penalty u/s 188, I.P.C. as required u/s 140(1). If the act ordered to be performed is not performed within time, the Magistrate is empowered to cause it to be performed and also to recover the costs in case he thinks fit as per section 140(2). No suit lies in respect of anything done in good faith under this section.

3. It is of great significance to notice that specific bar of the type specified in section 133(2) or of any other type against questioning in the Civil Court, an absolute order made u/s 137 does not exist. Chapter X-B, Cr. P.C. is not the exclusive remedy in respect of public nuisance. Many questions pertaining to valuable and complicated civil rights of parties can arise which may not be appropriately determinable in these summary proceedings, object of which is only to advert imminent danger to public. Remedies are clearly available in respect of public nuisance also in Civil Law and at best remedies under Civil and Criminal Laws could be said to be concurrent as a result pursuit of one does not necessarily bar the other. Magistrate is supposed to be on guard against tendency to use summary jurisdiction as a substitute for setting private civil disputes by-passing the Civil Courts. Civil Courts have jurisdiction to try suit of civil nature excepting those of which cognizance is barred - express or implied. Such a bar is not to be readily inferred and the provisions creating bar have to be strictly construed.

4. Viewed in this light, it seems to me that the Criminal Procedure Code creates no bar against entertaining a suit in which validity of an absolute order passed u/s 137, Cr.P.C. is challenged. The objects of conditional order and absolute order are quite different and they cannot be equated. The conclusion is, therefore, inevitable that the absolute order u/s 137, Cr.P.C., is challengeable in a Civil Court and the suit cannot be dismissed merely on the ground of want of jurisdiction. In the case of *Dulichand Vs. Emperor*, it has been held that the bar does not operate against an absolute order for removal of public nuisance. I respectfully concur with the said view.

5. The fact that civil suit is entertainable in the matter does not mean that jurisdiction should be exercised lightly. Civil Court's jurisdiction in such matters

should be exercised sparingly and only in exceptional circumstances. In this connection, useful reference may be made to a Supreme Court decision in the case of Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, . The following observations are to be point (para 29).

"It is well-known that in most of the cities building regulations and bye-laws have been framed, still it has been discovered that constructions have been made without any sanction or in contravention of the sanctioned plan, and such constructions have continued without any intervention. There cannot be two opinions that the regulations and bye-laws in respect of buildings, are meant to serve the public interest. But at the same time it cannot be held that in all circumstances, the authorities entrusted with the demolition of unauthorised constructions, have exclusive power, to the absolute exclusion of the power of the Court. In some special cases where "jurisdictional error" on the part of the Corporation is established, a suit shall be maintainable. According to us,

(1) The Court should not ordinarily entertain a suit in connection with the proceedings initiated for demolition, by the Commisioner, in terms of section 343(1) Corporation Act. The Court should direct the persons aggrieved to pursue the remedy before the Appellate Tribunal and then before the Administrator in accordance with the provisions of the said Act.

(2) The Court should entertain a suit questioning the validity of an order passed u/s 343 of the Act, only if the Court is of prima facie opinion that the order is nullity in the eyes of law because of any "jurisdictional error" in exercise of the power by the Commissioner or that the order is outside the Act."

The above observations also apply to such civil suits.

6. To conclude, this Appeal is allowed. Order passed by the Courts below are quashed and set aside. The matter is remanded back to the trial Court at Nasik for decision on merits in accordance with law. No order as to costs.

Needless to mention that interim injunction granted by this Court shall continue unless and until the trial Court passes further contrary orders because of changed circumstances.

Certified copy expedited.