

(2011) 08 MAD CK 0162

In the Madras High Court

Case No : Criminal RC. (MD) . No"s. 534, 548, 570, 571, 572 and 578 to 591 of 2011 and M.P. (MD) No"s. 2 to 2 of 2011 in Criminal R.C. (MD) No"s. 534, 548, 570 to 522 and 578 to 591 of 2011

Ind Barath Powergencom Ltd.

APPELLANT

Vs

The Revenue Divisional Officer-cum- Sub Divisional Magistrate, The Tahsildar and Dr. K. Krishnasamy, Member of Legislative Assembly

RESPONDENT

Date of Decision : 04-08-2011

Acts Referred:

Constitution of India, 1950 — Article 21, 226

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(1), 134, 134(2), 135

Penal Code, 1860 (IPC) — Section 188, 291

Citation : (2011) 08 MAD CK 0162

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : M. Ajmal Khan, in Criminal R.C. No. 534/2011, G. Prabu Rajadurai, in Criminal R.C. Nos. 548, 570 to 572/2011 and N. Sankar Ganesh, in Criminal R.C. Nos. 578 to 591/2011, for the Appellant; K. Chellapandian, A.A.G. for P. Kandasamy, Additional Public Prosecutor for Respondents 1 and 2, K. Krishnasamy, Intervenor in CrI. RC. Nos. 534 and 548/2011 and C. Mayil Vahana Rajendran for K. Krishnasamy, in CrI. R.C. Nos. 70 to 572 and 578 to 591 of 2011, for the Respondent

Final Decision : Dismissed

Judgement

S. Palanivelu, J.—Since the issue involved in all the cases is one and the same, these petitions were taken up and heard together and a common order is passed.

2. These Criminal Revisions are preferred to call for the records relating to the orders dated 10.06.2011, made in Proceedings Na.Ka.A1.7275/10, on the file of the first Respondent and set aside the same.

3. The contentions of the revision Petitioners may be summarised as follows:

3(1). The Petitioner in Criminal Revision Case No. 534 of 2011 is engaged in

generation of power. The power generated from the company is contributed to the Tamil Nadu Power Grid at Arasadi Vilage which generates 710 MWs and supplies the same to the Tamil Nadu Electricity Board for which it requires 7.5 lakh liters of water per day. It made a payment of Rs. 3.2 Crores to Tamil Nadu Water Supply and Drainage Board (hereinafter referred to as "TWAD Board") for the supply of water. However, the TWAD Board is able to supply only 2 lakh liters per day. Hence, the Petitioner's company procure water from private land owners in and around Ottapidaram Taluk and other villages in Tuticorin District. The District Collector, Tuticorin, in his proceedings Mu.A.1.2010, dated 04.03.2010 granted permission for drawal of water (7.5 lakh liters per day) from the private land owners/private parties for power generation.

3(2). The first Respondent by order dated 23.02.2010 restrained the public from drawing ground water and sell the same for commercial purpose. It was challenged by M/s. Nila Sea Foods Private Limited, Tuticorin, in W.P. No. 2953 of 2010 on the file of this Court and this Court by order dated 10.03.2010 was pleased to quash the order holding that the Tamil Nadu Ground Water (Development and Management) Act, 2003, is yet to be notified by the Government and as such, the first Respondent is not entitled to ban drawing of water from the ground and supply of the same to the private parties.

3(3). Without due regard to the above said order, the first Respondent has chosen to pass the impugned order in his proceedings Na.Ka.A1.7275/10, dated 10.06.2011, purported to have been issued u/s 133 of Code of Criminal Procedure, imposing a ban of drawal of water from the ground and supply of the same through lorries and other mode of transportation alleging that exploitation of water is a public nuisance and as such he is invoking his power u/s 133 of Code of Criminal Procedure. The order came to be issued without following the procedure contemplated u/s 133 of Code of Criminal Procedure. If the impugned order is given effect to, there will be a failure of justice and the Petitioner's power generation company will come to a grinding halt.

3(4). Before passing a final order u/s 133 of Code of Criminal Procedure, the first Respondent ought to have issued a preliminary order to sustain the impugned order. There cannot be a blanket ban on the drawal of water because the ban can be issued only by a legislation and not by an administration or quasi-judicial order. The above said Act has not been notified and as on date, as such, No. order can be issued for the ban of drawal of water from the earth. The first Respondent is required to issue a preliminary order to the parties likely to be affected by such order to show cause as to why the preliminary order passed u/s 133 of Code of Criminal Procedure shall not be made absolute so that the Petitioners and other persons, if any, affected by such preliminary order to appear before him and to submit their explanation as to why the preliminary order should not be made absolute having regard to the facts and circumstances of the case and as such the first Respondent by passing the final order u/s 133 of Code of Criminal Procedure has deprived the Petitioner and other persons

affected by the impugned order from submitting their explanation and thus violated the principles of natural justice.

3(5). The order of the first Respondent runs counter to the order passed by the District Collector as stated above. The first Respondent ought to have seen that the Petitioner is not using the water for commercial purpose and it has been used for generation of power to contribute power to the Tamil Nadu Power Grid in the larger public interest and in the event of the impugned order being given effect to, the interest of the public at large would suffer.

3(6). A Division Bench of this Court in W.A. Nos. 923 to 926 of 2009, dated 31.01.2009, has only directed the State Government not to allow any person to draw and sell the ground water till the notification is issued to give effect to the above said Act and the said order can be construed to restrain the parties from drawing and selling ground water by due procedure established by law and as such the impugned order passed by the first Respondent without following the due procedure established by law will not stand scrutiny of law.

3(7). The impugned order is not in accordance with the form prescribed under the Code of Criminal Procedure. The Sub Divisional Magistrate failed to comply with any of the procedures prescribed under the provisions of Code of Criminal Procedure for invoking the jurisdiction u/s 133 of Code of Criminal Procedure. He has not given any opportunity to any of the affected parties and the order is total denial of natural justice. Only if the final order is violated the initiation of proceedings u/s 188 Indian Penal Code, 1860 will arise. A copy of the report of Tahsildar in Na.Ka.A2 9679-2011, dated 06.06.2011 was not furnished. The first Respondent failed to consider that No. licence is required under any of the provisions of any Act to draw water from borewell. Creation of law and order situation will not be a ground for invocation of Section 133 Code of Criminal Procedure. The denial of the water to a section of public living and doing business along the coast line of the same taluk is a denial of the fundamental right to livelihood.

3(8). Some of the Petitioner's companies are undertaking major projects for development and setting up of power plants from the customers i.e. the end user of the process of sale of ground water and without supply from the private owners they cannot run their projects for even a single day. The order of the first Respondent is totally arbitrary, unilateral and baseless.

4. Dr. K.Krishnasasamy, who is Member of Legislative Assembly of Ottapidaram constituency filed applications to implead him as party/Respondent in CrI.R.C. Nos. 534, 548,570,571,572 and 578 to 591 of 2011 and they were allowed.

5. The point for consideration is, whether the impugned proceedings has satisfied the statutory requirements.

Point:

6. The learned Counsel for the revision Petitioners M/S.M. Ajmal Khan, G.Prabhu

Rajadurai and N. Sankar Ganesh contend that inasmuch as the impugned proceedings issued by the first Respondent is not conforming to the legal requirements as adumbrated in the relevant provisions of the Code of Criminal Procedure, it is not sustainable, that the order should have been addressed to specific persons, that it is a blanket order and the same would itself show that it is a final order, that without drawing up a preliminary order, No. final order shall be passed as per law, that it does not contain anything requiring the person addressed to show cause, that the order is bad in law, that the impugned order provides penal consequences u/s 188 I.P.C. against whom who defy the order which could be provided only in the final order, that the inbuilt mechanism in Section 133 Code of Criminal Procedure, has to be followed,

6(1). that the Petitioners are using the water within Ottapidaram Taluk and not taking outside the taluk, that the materials alleged to have been placed before the R.D.O are not sufficient for him to reach a conclusion that imminent necessity has arisen to pass the order, that when the Sub-Divisional Magistrate is passing order u/s 133 Code of Criminal Procedure, the same should come out in the form of "Form-20" prescribed in the Code, that the impugned order is not in accordance with the said format, that if the water is not supplied to certain revision Petitioners" companies which generate power, they would suffer a lot and numerous workers working in those companies would find much hardships and that principles of natural justice have been violated in this matter.

7. The learned Additional Advocate General Mr. K.Chellapandian would contend that the very tenor of the impugned proceedings would indicate that it is only preliminary order, that the first Respondent got satisfied himself with the materials placed before him to pass such order, that imminent necessity has arisen to pass the order, that the stipulation in the impugned order that the ban would be in force till passing of further orders would show that it is only a preliminary order and not a final order, that there has been No. procedural irregularity, that Section 188 I.P.C. does not discriminate preliminary order or final order, but only provides penalty for consequences of disobedience of any order, that the records would show that the individuals likely to be affected were called and personal hearing was given to them and that No. question of violation of principles of natural justice would arise.

8. Dr. K. Krishnasamy would say that he has filed a typed set in which proof is produced to show that the copies of the order were served upon borewell owners and the revision Petitioner companies, that the Petitioners have not obtained any licence nor permission from the Panchayats concerned to utilise the water for commercial purpose, that in Tamilnadu, Ottapidaram taluk has been identified as one of the "more exploited" areas where exploitation of water is on the higher side which would adversely affect the agriculturists who are engaged in agriculture and it would also affect the drinking water facilities to the people in this locality, that as far as the Petitioner in CrI.R.C. No. 534 of 2011 is concerned, they have to get the water from T.W.A.D. Board as per their agreement and they

cannot get water from bore well owners on commercial basis,

8(1). that when physical comfort of the public is affected, it is a public nuisance and the R.D.O has got every power to exercise his jurisdiction u/s 133 Code of Criminal Procedure, that the impugned order is only a preliminary order and not a final one, that denying water is interference with fundamental right of a citizen under Article 21 of the Constitution, that the continuous drawal of under ground water has drastically affected the nature, that if the persons are allowed to suck water every day, the locality will turn to be infertile and that the order challenged before this Court has been passed according to law. Mr. Mayilvakana Rajendran learned Counsel appearing for the intervenor Dr. K. Krishnasamy in some of the revision petitions would also contend in line with the submissions advanced by Dr. K.Krishnasamy.

9. It is argued by the intervenor that materials are available to show that certain Petitioners have been served with the copy of order and a meeting was also held by the R.D.O. on 14.6.2011 participated by the R.D.O., Tahsildar Ottapidaram Assistant Engineer (Distribution), T.N.E.B., Sub-Inspectors of Police, Ottapidaram and Puthiamputhur and also by some of the bore well owners and that the representatives of the Petitioners" companies in Crl.R.C. No. 534/2011 and 548/2011 have signed the attendance register on 14.06.2011 which was prepared for recording attendance of participants.

10. It is profitable to take stock of the gist of the impugned order for better appreciation of the case. The impugned order passed by the first Respondent dated 10.6.2011 would disclose certain facts that the objectors indulged in agitations against the bore well owners who draw underground water and sell the same to private persons on commercial basis, that bearing the same in mind, an order u/s 133 Code of Criminal Procedure was promulgated on 2.9.2010 and the same is in force in Puthiamputhur, Jambulingapuram and Kulasekaranallur villages of Ottapidaram Panchayat Union, that bore well owners sell water to some private persons and some companies through lorries in Vallaram, Kawarnagiri, Pudur, Pandiapuram, Chithalakattai, Perianatham, Mela Arasadi and Tharuvaikulam of Ottapirdaram Taluk, which cause law and order problem then and there and the objectors, public, agriculturists, voluntary organisations and politicians were engaged in various agitations, road rokos and fastings continuously, which has become a public disturbance, that at the time of surprise raid made by the Divisional Development Officer, Assistant Engineer of Tamil Nadu Electricity Board and other officials, it was found out that water was transported in lorries, that it was also learnt that the agricultural service connection given free of cost for the purpose of agriculture alone, was utilised to take water and the water is brought to wells through pipes and after filling up the wells, the water is being sucked from the wells for which service connection was obtained for commercial purpose and water taken is sold, that in Puthiamputhur and Malarkulam villages without permission, bore wells were dug, from which water is drawn and sold, that in an identical circumstance, a Division Bench of

Madras High Court on 3.2.2011 has passed a direction to the effect that till the Tamil Nadu Ground Water (Development and Management) Act 2003 is notified, nobody shall sell the ground water and the Government has to ban such selling, that on these circumstances, Ottapidaram Tahsildar has submitted his report on 6.6.2011, that taking into consideration the said report and the law and order problem which occurs often in this locality, it is necessary to pass an order preventing drawing of ground water from the bore wells and removing through lorries and selling the same lead to scarcity of ground water and hence the drawing of ground water and selling the same in any manner are banned in all the villages in Ottapidaram Panchayat Union till passing of further orders and that penal proceedings u/s 188 I.P.C will be initiated by concerned authorities and raid will be conducted then and there by the revenue officials and police.

11. It is the first and foremost contention of the revision Petitioners that the impugned order is a final order and that without drawing up preliminary order, passing a final order is bad in law. But the said contention is repelled by the learned Additional Advocate General and the Intervenor. Section 133 of Code of Criminal Procedure reads as follows:

133. Conditional order for removal of nuisance.

(1) Whenever a District Magistrate or Sub-Divisional Magistrate or any other Executive Magistrate specially powered in this behalf 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, consider ?

(a).....

(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).....

(d).....

(e).....

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 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).....

(v).....

(vi).....

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.

12. It is stated by the Petitioners side that only if it is a final order, necessary action u/s 188 I.P.C. could be invoked and inasmuch as the impugned order contains the same, it has to be treated as final order. But Section 188 I.P.C. does not make any discrimination between the preliminary order and final order. Section 188 I.P.C. goes thus:

188. Disobedience to order duly promulgated by public servant Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, Shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both;

And if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

A plain reading of Section 188 I.P.C. would show that if anybody disobeys any order duly promulgated by the public servant knowingly, he shall face the penal consequences.

13. As far as proceedings u/s 133 are concerned, two stages are contemplated. The caption for the section is "Conditional order for removal of

nuisance". So it is mandatory that the order should be a conditional one. It should require the person causing nuisance to desist from doing such nuisance within a time to be fixed in the order and in case, if he objects, he must be directed to appear before the authority or before any other executive magistrate subordinate to such authority, at a time and place to be fixed by the order to show cause why the order should not be made absolute. First stage requires the person to remove the nuisance within a stipulated time, and in the second stage, in case of objection by the said person, his appearance before the authority concerned is needed.

14. As an order u/s 133 Code of Criminal Procedure is in the nature of ex parte order, it is desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by this Section and to adduce evidence as prescribed by Section 137. Preliminary order u/s 133 cannot be made absolute unless the party aggrieved is given sufficient opportunity to meet the charge. Since the order is an ex parte one, it should be directed to particular individuals and must not be in general. At the first instance, the order must be conditional and not absolute. Every order should state the time within which and the place where the person to whom it is issued may appear and move to have it set aside. The conditional order u/s 133 Code of Criminal Procedure shall specify the time within which the obstruction or nuisance is to be removed. Where No. time is mentioned and the order directs a party to remove the nuisance forthwith, it is not an order within the meaning of Section 133 (1) Code of Criminal Procedure. The passing of conditional order is mandatory requirement. The jurisdiction is well restricted to the procedures contained in this provision.

15. There shall be following steps in the procedure, when initiation of action u/s 133 is intended:

(a) upon receiving report of Police Officer or other information and on taking such evidence (if any) the Executive Magistrate has to make a conditional order requiring the person causing obstruction or nuisance, within a time to be fixed in the order to remove the same or to desist from carrying on.

(b) if the individual objects so to do, he shall appear before the said Executive Magistrate at a time and place to be fixed in the order and show cause why the order should not be made absolute.

The impugned order is silent as to the above said procedures.

16. The order passed u/s 133 Code of Criminal Procedure ought to contain the above said two stages of procedures, so as to offer the person concerned to put forth his case or explanation as the case may be. Section 133 Code of Criminal Procedure, does not contemplate that a ban order should be passed without making conditional order or without considering for show cause by the person concerned. It is not the intention of the legislature that at the time of passing order u/s 133 Code of Criminal Procedure, the Executive Magistrate to stop the nuisance etc. The first Respondent has not passed a conditional order directing the persons to be named in the order to desist from continuing nuisance, within a fixed time, nor had he called for any objections, so as to make him to appear or to show cause within a time fixed. If such time is not fixed in the order, it is not lawful.

17. In this juncture, No. preliminary order was drawn up by the first Respondent, observing the procedure contained in Section 133 Code of Criminal Procedure

18. It is argued by the Petitioners that the order was not addressed to any specific person. In the impugned order, at the foot of the contents, the addresses

mentioned are, "concerned persons" for whom the copies to be served through Tahsildar, Ottapidaram, the Inspectors of Police in the concerned regions, the Divisional Development Officer, Ottapidaram, The District Collector, Tuticorin, the Superintendent of Police, Tuticorin and the Deputy Superintendents of Police concerned. It is also directed therein that in addition to the service of the copies of order upon the concerned persons, to make it public by beat of tom tom. Section 134 of the Code provides for the procedure as to service of notification of order which goes thus:

134. Service or notification of order.

(1) The order shall, if practicable, be served on the person against whom it is made, in the manner herein provided for service of a summons.

(2) If such order cannot be so served, it shall be notified by proclamation, published in such manner, as the State Government may, by rules, direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such persons.

19. As per Section 134 of Code of Criminal Procedure, it should be served on the person against whom it is made. The impugned order is not specific but general in nature addressed to "concerned persons". It is incumbent upon the first Respondent to show that the orders were served upon the concerned persons by name by following the procedures provided for service of the summons, as stipulated in Section 134(2) of Code of Criminal Procedure

20. In view of the above, it is held that the impugned order does not conform to the statutory requirements as mandated in Section 133 and 134 Code of Criminal Procedure

21. In this context, the learned Counsel Mr. M.Ajmalkhan placed much reliance upon a decision of the Honourable Supreme Court reported in C.A. Avarachan v. C.V. Sreenivasan and Anr., (1996) 7 SCC 71 wherein Their Lordships have observed as follows:

4. In our opinion, the omission on the part of the Sub-Divisional Magistrate to draw up a preliminary order, which is a sine qua non for initiating proceedings u/s 133 of the Code of Criminal Procedure and without following the procedure provided for by Section 138 Code of Criminal Procedure, the order made by the Sub-Divisional Magistrate on 13/1/1988 is unsustainable and is vitiated. The High Court fell in error in not properly appreciating the effect of non-compliance with the mandatory requirements of drawing up a preliminary order before proceedings u/s 133 Code of Criminal Procedure. Neither the order of the High Court nor that of the Sub-Divisional Magistrate can therefore be sustained.

22. In the above mentioned case, the Sub-Divisional Magistrate without drawing up the preliminary order, proceeded with the enquiry. By consent of the parties, he appointed a Commissioner, who filed a fact finding report. Without enquiring the parties and without affording sufficient opportunities to both, the Sub-

Divisional Magistrate proceeded to pass the order closing down the quarry permanently. Hence, the Supreme Court has held that the Sub-Divisional Magistrate, before passing the order of closure of quarrying unit, had not drawn up a preliminary order which is a sine qua non for initiating proceedings u/s 133 of Code of Criminal Procedure and since he has passed the order u/s 138 Code of Criminal Procedure without following the procedure, it is unsustainable.

23. The first Respondent should have drawn up a preliminary order u/s 133 Code of Criminal Procedure before passing the final order. Without adopting the procedures contained in Section 133 Code of Criminal Procedure and 138 Code of Criminal Procedure, he has passed the order as if it is the final one. The Executive Magistrate is bound to observe the procedures adumbrated in Section 138 of Code of Criminal Procedure before making the order absolute, as per the circumstances warranted. Section 138 reads as follows:

138. Procedure where he appears to show cause.

(1) If the person against whom an order u/s 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case.

(2) If the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be with such modification.

(3) If the Magistrate is not so satisfied, No. further proceedings shall be taken in the case.

24. In the present case also, there is No. preliminary conditional order, calling upon the persons to show cause why the ban should not be imposed on them. The first Respondent proceeded to pass the order without hearing them, banning the entire operations. In view of the law laid down by the Supreme Court, it has necessarily to be observed that the impugned order is not valid in law.

25. This Court has followed the above said decision in a judgment reported in 2001 (2) CTC 295 [Pepsico India Holding Ltd., v. District Revenue Officer] wherein K.Natarajan,J. has observed that a careful reading of the decisions on the point show that the principle of law insisted is that for issuing an order of injunction u/s 142 Code of Criminal Procedure, a conditional order u/s 133 is a must and that an order u/s 133 Code of Criminal Procedure itself will not give the power for passing order u/s 142 Code of Criminal Procedure It is also observed therein that since the orders have not been issued as per Forms-20 and 22 and u/s 133 (1)(b)(ii) and 142, they are liable to be quashed.

26. The learned Counsel also relied upon another decision of this Court in 2008 (1) MLJ 1299 [V.S.Sankaranarayanan v. Sub-Divisional Magistrate cum Revenue Divisional Officer, Tenkasi] in which T. Sundathiram,J. has observed that the Petitioner shall be given an opportunity to show cause against the conditional

order as required by Section 133(1) of Code of Criminal Procedure In the said case, the Sub-Divisional Magistrate has passed an order to the effect that within 15 days from the date of receipt of copy of the order, the trees should be removed, otherwise they would be removed at the expense of Government and the amount could be recovered from the Petitioner. In this context, the learned Judge has observed that without proper application of mind, the Sub-Divisional Magistrate has passed the impugned order in the nature of final order without giving opportunity to the Petitioner and therefore it is liable to be set aside.

27. The above said C.V. Avarachan's case has also been followed by the High Court of Uttaranchal at Nainital in a case in CrI.W.P. No. 1198 of 2007 dated 27.3.2009 [M/s. Bansal Industries v. II Additional Sessions Judge, Nainital and another] in which it is further observed that No. procedure as laid down u/s 133 Code of Criminal Procedure has been followed even after issuing of preliminary order.

28. In CDJ 1983 Cal HC 133 [Chabbila Roy v. State] it is held that the learned Magistrate proceeded to pass the final order on 10.2.1983 without following the procedure prescribed by Section 141 of Code of Criminal Procedure and that Section 142 contemplates making an order of injunction and making of an order u/s 133 when the Magistrate is satisfied that immediate measure should be taken to prevent imminent danger or injury of a serious kind to the public and such an order can be passed simultaneously with the conditional order contemplated u/s 133(1) Code of Criminal Procedure

29. The Calcutta High Court in CDJ 2007 CalHC 546 [Srabankumar Sur v. State of West Bengal] has held that if the Magistrate without evidence passes order for removal of public nuisance, the order must reflect that it is public nuisance on any public path or public place and it applies to existing nuisance and not to potential nuisance i.e., what may become a nuisance in future and that notice must be served on the person against whom an order is going to be passed and if the person denies existence of public place or public path, there must be enquiry in accordance with law.

30. The intervenor Dr. K.Krishnasamy would rely upon certain decisions of the Supreme Court. In Municipal Council, Ratlam Vs. Vardichan and Others, Their Lordships have observed as follows:

13. Section 133 Code of Criminal Procedure is categorical, although reads discretionary. Judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the sub-Divisional Magistrate, Ratlam, has, before him, information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act. Thus, his judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts. The Magistrate's responsibility u/s 133 Code of Criminal

Procedure is to order removal of such nuisance within a time to be fixed in the order

Their Lordships have categorically held that the Magistrate's responsibility u/s 133 is to order removal "within a time to be fixed in the order." But in the case on hand, the first Respondent has not fixed any time for removal of the public nuisance but he has banned the activities without fixing time.

31. In *State of M.P. Vs. Kedia Leather and Liquor Ltd. and Others*, the Supreme Court has dealt with the definition of the term "Public nuisance" as follows:

8. Section 133 of the Code appears in Chapter X of the Code which deals with maintenance of public order and tranquility. It is a part of the heading "public nuisance". The term "nuisance" as used in law is not a term capable of exact definition and it has been pointed out in Halsbury's Laws of England that

even at the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort

In *Vasant Manga Nikumba v. Baburao Bhikanna Naidu* it was 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 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 damage 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 nuisance, and on the other hand applies when the nuisance is in existence. It has to be noted that some times there is a confusion between Section 133 and Section 144 of the Code. While the latter is more general provision the former is more specific. While the order under the former is conditional, the order under the latter is absolute. The proceedings are more in the nature of civil proceedings than criminal proceedings.

Their Lordships have observed that the order u/s 133 Code of Criminal Procedure shall be a conditional one.

32. The above said decision has been referred in a later judgment of the Apex Court in *Kachrual Bhagirath Agrawal and Others Vs. State of Maharashtra and Others*, . In addition to this, Their Lordships have also laid down the principles as follows:

11. The provisions 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 u/s 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 u/s 133.

33. It is held in the above decision, that the Executive Magistrate should conduct enquiry and decide whether there was reliable evidence or not, to come to the conclusion to act u/s 133 of Code of Criminal Procedure. The Supreme Court is of the view that before concluding procedure u/s 133 Code of Criminal Procedure, the Executive Magistrate has to conduct an enquiry. The procedure for enquiry has been categorically contemplated in Section 133 Code of Criminal Procedure, i.e., by passing conditional order and requiring to show cause why the conditional order should not be made absolute. But, in the present case, the first Respondent has not conducted any enquiry to find out whether any reliable evidence was available to conclude that ban order was inevitable.

34. In *Vasant Manga Nikumba v. Baburao Bhikanna Naidu*

Baburao Bhikanna Naidu] the Supreme court has made reference as to taking of evidence to act u/s 133 Code of Criminal Procedure by the Executive Magistrate. The relevant portion of the decision is as follows: 4. A reading of Section 133 would clearly indicate that the Executive Magistrate has been empowered, on receiving a report of the police officer or other information and on taking such evidence as he thinks fit that any building, tent or structure is in such a condition that, due to failure to remove, disrepair, or without support 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 he is empowered to specify the time to remove, repair or provide support to such building, tent or structure or tree.

35. It is argued that the right to get water is part of right to life guaranteed by Article 21 of the Constitution. For this purpose the judgement of the Supreme Court in 2009 (3) CTC 412 [*M.K.Balakrishnan and Ors. v. Union of India and others*] is cited. The following is the relevant portion:

5. In our opinion, the right to get water is a part of the right to life guaranteed by Article 21 of the Constitution. In this connection, it has been observed by the Court in *Delhi Water Supply and Sewage Disposal Undertaking and another Vs. State of Haryana and others*, :

Water is a gift of nature. Human hand cannot be permitted to convert this bounty into a curse, an oppression. The primary use to which water is put being drinking, it would be mocking nature to force the people who live on the bank of a river to remain thirsty;.....

36. The above said decisions high light that the settled position is that, as adumbrated in Section 133 Code of Criminal Procedure, if the Executive Magistrate is satisfied on a report of a police officer or other information that there is any imminent danger to the public due to any public nuisance, he shall require the person causing nuisance, within a time to be fixed in the order to remove such nuisance or to desist from carrying on such trade or occupation and in case, if the individual objects to the said order he shall be directed to appear before the authority, at a time and place to be fixed and show cause why the conditional order should not be made absolute and if the said procedures are not observed in the matter of passing of Order u/s 133 Code of Criminal Procedure, it is unsustainable. It is noteworthy that the impugned order is not in consonance with Section 133 of Code of Criminal Procedure

37. The learned Counsel for the Petitioners placed reliance upon an earlier decision of the Allahabad High Court in ILR 1886 All 99[Queen-Empressv. Jokhu andAnother] wherein it is observed as follows:

5. The authority under which a Magistrate can order or enjoin a person against repeating or continuing a public nuisance is Section 143 of the Code of Criminal Procedure; and it is the infringement of this order or injunction that is punishable u/s 291 of the Indian Penal Code; and it is clear that what is contemplated is an order addressed to a particular person (see Schedule V, Form 20).

38. In the said case, the order of the Magistrate contained in the proclamation was addressed generally to the public at large. It is stated that some persons were not named, have committed a nuisance by spreading nightsoil on their fields, and that the provisions of Chapter X contemplate orders have to be directed to be served on particular person.

39. Section 134 Code of Criminal Proceduremandates the order to be made and be served on the person against whom it is made. The order u/s 133 shall be in the format in Form-20 of Code of Criminal Procedure which goes thus:

FORM No. 20

Order for the Removal of Nuisances

(See Section 133)

To (sic) (name, description and address).

WHEREAS it has been made to appear to me that you have caused an obstruction (or nuisance) to persons using the public roadway (or other public place) which, etc (sic) (describe the road or public), by, etc (sic).. (state what it is that causes the obstruction or nuisance), and that such obstruction (or

nuisance) still exists;

or

WHEREAS it has been made to appear to me that you are carrying on, as owner, or manager, the trade or occupation of (sic) (state the particular trade or occupation and the place where it is carried on), and that the same is injurious to the public health (or comfort) by reason..... (state briefly) in what manner the injurious effects are caused), and should be suppressed or removed to a different place.

or

WHEREAS it has been made to appear to me that you are the owner (or are in possession of or have the control over) a certain tank (or well or excavation), adjacent to the public way..... (describe the thoroughfare), and that the safety of the public is endangered by reason of" the said tank (or well or excavation) being without a fence (or insecurely fenced);

or

WHEREAS etc., etc., (as the case may be);

I do hereby direct and require you within. (sic) (state the time allowed).....(state what is required to be done to abate the irritation) or to appear at (sic) in the Court of (sic). on the (sic) day of (sic) next, and to show cause why this order should not be enforced;

or

I do hereby direct and require you within(sic). (state the time allowed) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same, or to remove the said trade from the place where it is now carried on, or to appear, etc;

or

I do hereby direct and require you within (sic) (state the time allowed) to put up a sufficient fence. (sic) (state the kind of fence and the part to be fenced); or to appear, etc;

I do hereby direct and require you, etc., etc., (as the case may be).

Dated this(sic) day of (sic)19?.

(Seal of court)

(Signature)

40. The opening of the form shall be with name, description and address of the person to whom it is made. It is significant to note that in all the formats the Executive Magistrate is supposed to direct and require the person named in the

top of the form. But these features are absent in the impugned order. Particularly speaking, it is not in Form-20 format as prescribed and that it is not addressed to a specific person. Hence, the impugned order does not satisfy the statutory requirements u/s 134 Code of Criminal Procedure and Form-20.

41. Procedural lapse and the non observance of mandatory provisions are also observed by this Court, as far as Section 135 Code of Criminal Procedure is concerned, which goes thus:

135. Person to whom order is addressed to obey or show cause.

The person against whom such order is made shall

(a) Perform within the time and in the manner specified in the order, the act directed thereby; or

(b) Appear in accordance with such order and show cause against the same.

42. Section 135 however clarifies and explains the procedure as enumerated in Section 133 Code of Criminal Procedure As per this provision, the person against whom the order is made shall perform within time and manner specified in the order and act or to appear and show cause the same. Since the impugned order was not addressed to a specific person and it does not contain the directions to perform the act or to appear to show cause, there could be No. scope for ventilation of grievance for the persons affected by the order. The impugned order shows that there could be No. further proceedings after banning of the activities, which is not the intent of the legislature.

43 The first Respondent had earlier passed a similar order on 23.2.2010 u/s 133 Code of Criminal Procedure banning the drawal of water and the same was challenged before this Court in Cri.L.R.C. No. 140 of 2010 by one S.Munusamy. On 21.4.2010, G.M.Akbar Ali, J. has passed an order in the said case, directing the Petitioner to approach the District Collector for appropriate order, without going into merits.

44. The propriety of the same order was challenged before this Court in W.P.(MD) No. 2953 of 2010 by M/s. Nila Sea Foods Pvt. Ltd., In the said order passed u/s 133 Code of Criminal Procedure, similar situation arose and acting on the information, the first Respondent placed ban on the persons who are indulged in drawing and selling the ground water. K.Venkataraman,J has quashed the said order on 10.3.2010 by observing that the Petitioner is drawing water from the patta land and absolutely there is No. prohibition for doing so and that even the enactment by the Tamil Nadu Government namely, Tamil Nadu Water Management Act and Rules is not notified so far and that till the Act is notified, there cannot be any restriction on the Petitioner to draw water and even it cannot be prevented from selling the same. There had been No. appeal nor revision from the said order, which has become final.

45. Earlier to the filing of the present petitions, the Petitioners moved this Court

by filing Writ Petitions in W.P.(MD) Nos. 6826, 6112 and 7458 to 7460 of 2011, challenging the present impugned order and praying for issuance of writ of certiorari for quashing the same. R.Sudhakar, J., after hearing both the parties, has dismissed the petitions observing that the competence of the impugned order could be challenged before the appropriate forum in criminal jurisprudence and not by way of the writ petition under Article 226 of the Constitution of India, that the order passed in the case of M/s. Nila Sea Foods Ltd., cannot be taken as a precedent to state that the writ petition is maintainable since the order passed on the ground that the Tamil Nadu Ground Water (Development and Management) Act 2003 and Rules were not notified. This Court does not consider the decision in M/s. Nila Sea Foods Ltd., as a precedent for disposal of the cases on hand. This Court has been guided by the well settled legal principles as formulated by the Honourable Supreme Court of India.

46. The intervenor has also relied upon observations of Division Bench of this Court in the order in W.A. Nos. 923 to 926 of 2009, dated 31.3.2011, (New Tirupur Area Development Corporation Ltd., v. K.Poomani and others) wherein it is observed as follows:

8. In view of the above, in order to protect the ground water from the persons, who are using it for commercial purpose for gaining profit from the agriculturists on the state, who in turn, are suffering for lack of water not only for agricultural purposes but also for drinking purposes and also in the interest of public, we consider it appropriate to give a direction to the government not to allow any person to draw and sell the ground water till the notification is issued. Accordingly, there shall be a direction to the government not to allow any person to draw and sell the ground water till the notification is issued. Accordingly there shall be a direction to the state government, not to allow any person to draw and sell the groundwater until the Tamil Nadu Ground Water (Development and Management) Act, 2003, is notified.

47. Mr. G.Prabu Rajadurai, the learned Counsel for the Petitioner would submit that even if the Division Bench has directed the Government not to allow any person to draw and sell the ground water till the notification is issued, those proceedings shall be taken as per the procedure laid down in the statutes. It is his contention that if there were any ban order or if any direction preventing the activities, the Government have to observe due legal proceedings to implement the orders of the Court. In support of his contention, he cites two Division Bench decision of this Court.

48. In 2005 (2) CTC 249 (The Madurai Maanagar Old Motor Spare Parts Dealers'Association v. Madurai CityMunicipal Corporation), it is held as follows:

9. For all the above reasons, while quashing the impugned Tender Notification, dated 19.01.2005, inviting tenders for grant of license for the open space in the Krishanarayar Teppakkulam East and South Streets of Madurai Town and forbearing the Respondent-Madurai Corporation from in any way leasing out or

giving any license of the open space area of the said two Streets and directing the members of Petitioner-Association themselves to remove their encroachments in front of their respective shops, we also direct the Respondent-Madurai Corporation to take all effective steps to remove all encroachments in all the public roads and streets within the jurisdiction of this Temple City, if necessary with the aid of the police, but following the due process of law. Unless and otherwise such occupants are protected by valid licence/lease granted by the Respondent/Corporation, the Respondent shall comply the above directions without any undue delay.

49. In (2008) 1 MLJ 541(R.Ponnathal andanother v.P.Lingiyar,Tahsildar, Dindigul District and others), it is observed as under:

10. Before parting with the case, we want to express our displeasure with the attitude of the officials in passing orders based on the directions of the Court without considering such orders in their entirety and especially the qualifying observations made in such orders. We have come across several instances in which a direction issued by the High Court for the removal of encroachments "by following due process of law" were responded by the officials by simply issuing an order or show cause notice, merely referring to the order of the Court and stating that the Court has directed removal of encroachment, without even referring to a particular provision of law. Such an approach is highly reprehensible.

50. The learned Judges have put a note of caution on the Government in the matter of implementing the orders of the Court. In R.Ponnathal case cited above, it is observed that though the Court has directed removal of encroachment, the authorities concerned proceeded even without referring to the provision of law and the same has been held to be unsustainable. In New Tirupur Area Development Corporation Ltd., case, though it is observed that the Government should not allow any person to draw and sell the ground water, the initiation of proceedings shall be in accordance with law. When the Executive Magistrate has taken up the job u/s 133 Code of Criminal Procedure, he is bound to follow the procedures as contained in the Code of Criminal Procedure. If the Government were to take action, necessary procedures have to be observed.

51. The present parties are not the parties in New Tirupur Area Development Corporation Ltd., case. There is a direction to the Government not to allow any person to draw ground water till the notification is issued. The Government who are Respondents in the said proceedings have not taken any steps to pass any notification nor had they initiated any steps to notify the Tamil Nadu Ground Water (Development and Management) Act 2003 and Rules. It is stated by both sides that the Act and Rules have not been notified so far.

52. A conspectus of the materials available in this proceeding in the light of the illuminating judicial pronouncements, would pave way to emerge with following points which indicate that the impugned order suffers from certain legal

infirmities:

a) as mandated by Section 133 Code of Criminal Procedure, the impugned order is not in the nature of conditional order. It has not required the person to remove the public nuisance within a time to be fixed.

b) The next stage in the procedure enumerated in Section 133 is that, if the person to whom the order is made, objects to remove the nuisance, he shall be directed to appear before the Executive Magistrate who passed the order or appear before any of the Executive Magistrates subordinate to him at a time and place which is fixed by him and show cause why the order should not be made absolute. In the present case, there is No. direction to the person, if he objects, to appear before the authority to show cause.

c) The impugned order has not been addressed to specific person as ordained in Section 134 Code of Criminal Procedure It has been issued in general and not to a specific person. Hence, there is deviation from the mandate in Section 134 Code of Criminal Procedure The impugned order has not been issued in Form-20, prescribed in Code of Criminal Procedure It should be addressed to a specific person as per the format and there shall be a specific direction to the person concerned to remove the obstruction or nuisance as the case may be.

d) The impugned order contains the direction of banning the activities without hearing the parties concerned. It is in the nature of final order which has to be passed in terms of Section 138 Code of Criminal Procedure and even if an injunction is to be granted pending the enquiry, Section 143(2) Code of Criminal Procedure has to be resorted to. To put it specifically, No. procedure has been adopted by the first Respondent and hence No. question of granting injunction pending the enquiry had arisen. The provisions in the code do not empower an Executive Magistrate to hand down a blanket ban order.

e) The Executive Magistrate shall take evidence as in a summons case in terms of Section 138, after the persons appear to show cause against the order passed u/s 133 Cr.PC and on considering the materials available, the Executive Magistrate shall make the conditional order absolute. In the present case, there is No. such recording of evidence of the parties concerned and even at the inception, a final order has been passed without taking evidence and without any enquiry.

f) No. preliminary order has been drawn up before passing the ban order u/s 133 Code of Criminal Procedure

g) When Section 135 Code of Criminal Procedure contains the procedure directing the persons, on whom the order is made, to perform within the time and in the manner specified in the order or the person to appear in accordance with such order to show cause against which, to comply with the said provision, the affected persons have No. opportunity either to appear or to show cause against the order before the first Respondent. Hence, the order gets vitiated for

violation of principles of natural justice. The scheme formulated in the provisions aforestated, has to be scrupulously followed to make the order as lawful one.

53. An indepth study of the materials on record, guided by the settled legal principles, would lead to reach a conclusion that the impugned order cannot be held to be valid in the eye of law. Hence, it is to be set aside and it is accordingly set aside. The point is answered as indicated above.

In fine, all the criminal revision petitions are allowed. The first Respondent is always at liberty to issue any order in accordance with law. Consequently, connected miscellaneous petitions are closed.