
(2008) 08 MAD CK 0094

In the Madras High Court

Case No : Writ Petition No. 20494 of 2008 and M.P. No. 1 of 2008

R. Munuswamy

APPELLANT

Vs

The District Collector, Vellore, Vellore District and Others

RESPONDENT

Date of Decision : 26-08-2008

Acts Referred:

Citation : (2008) 08 MAD CK 0094

Hon'ble Judges : A.K. Ganguly, C.J;F.M. Ibrahim Kalifulla, J

Bench : Division Bench

Advocate : R. Govindasamy, for the Appellant; J. Raja Kalifulla, G.P., for the Respondent

Final Decision : Dismissed

Judgement

A.K. Ganguly, C.J.—The Honourable The Chief Justice Heard the learned counsel for the parties.

2. This writ petition has been filed praying for a writ of mandamus directing respondents 1 to 5 to consider the petitioner's representation, dated 06.06.2008 and take appropriate action against respondents 6 to 9 by evicting them from their encroachment of the Government Kalam Poramboke land situated at Erainkadu Village Panchayat of Vellore District in Survey No. 173 measuring an extent of 0.65.5 Ares.

3. The facts pleaded in the writ petition, on the basis of which the aforesaid prayers have been made, are that there are about 1,000 families residing in the Village Panchayat and there are more than 7,600 people living in the said Panchayat. It is stated that respondents 6 to 9 have encroached the Government Kalam Poramboke land and put up the huts without any legal right. The petitioner has made several representations for evicting the encroachers from the Government Kalam Poramboke land for the welfare of the Village Panchayat people. It is also alleged that in view of the encroachments made by respondents 6 to 9, the Panchayat cannot make any construction of office building for the

welfare of the public and cannot implement any scheme for public welfare. It is also stated that there is a proposal to construct a school building library and office building under "Anna Marurnalarchi Thittam" and other schemes. But the villagers are facing severe problems because of such encroachment on public land. In paragraph 7 of the affidavit, it is stated that respondents 6 to 9 have encroached the Government Poramboke land with the intention of giving trouble to the public and the said respondents have occupied the public place without any allotment in their favour by the concerned Department. An emergent situation has therefore arisen.

4. It is claimed that the writ petition has been filed in public interest by the petitioner, who claims to be the President of Erayankadu Village Panchayat, Vellore District, for a direction upon respondents 1 to 5 to remove the encroachment by evicting respondents 6 to 9 from the aforesaid Government Poramboke land.

5. The question, which crops up before this Court, is whether a writ petition with such prayers can be filed by way of public interest litigation when there exists specific statutory provision for removal of any unlawful obstruction/encroachment from public land. It may be noted that in the State of Tamil Nadu, there is an Act called Tamil Nadu Land Encroachment Act, 1905. There is a provision for summary eviction of encroachers u/s 6 of the said Act. It has also been stated u/s 13 of the said Act that the said law will not bar the operation of other laws in force. Section 13 of the said Act is set out herein below:-

13. Saving of operations of other laws in force.-

Nothing in this Act contained shall be construed as exempting any person unauthorised occupying land from liability to be proceeded against under any other law for the time being in force:

Provided that if any penalty has been levied from any person u/s 5 or section 5-A of this Act, no similar penalty shall be levied from him under any other law in respect of such occupation.

6. This Court finds that for removing the obstruction from public land, detailed provisions have been made under Chapter X - B of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the said Code")- The aforesaid provisions also existed under the previous Code of 1898.

7. The provisions of Sections 133 to 143 of the Code are set out hereunder:

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) 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 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 neighborhood 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 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.

(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 procreative purposes.

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.

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.

136. Consequences of his failing to do so. If such person does not perform such act or appear and show cause, he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code (45 of 1860,) and the order shall be made absolute.

137. Procedure where existence of public right is denied.

(1) Where an order is made u/s 113 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way river, channel or place, and if he does so, the Magistrate shall, before proceeding u/s 138, inquire into the matter.

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent court; and if he finds that there is no such evidence he shall proceed as laid down in section 138.

(3) A person who has, on being questioned by the Magistrate under Sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial.

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.

139. Power of Magistrate to direct local investigation, examination, and examination of an expert. The Magistrate may, for the purposes of an inquiry u/s 137 or 138-

(a) Direct a local investigation to be made by such person as he thinks fit; or

(b) Summons and examine an expert.

140. Power of Magistrate to furnish written instructions, etc.

(1) Where the Magistrate directs a local investigation by any person u/s 139, the Magistrate may-

(a) Furnish such person with such written instruction as may seem necessary for his guidance;

(b) Declare by whom the whole or any part of necessary expenses of the local investigating shall be paid.

(2) The report of such person may be read as evidence in the case.

(3) Where the Magistrate summons and examines an expert u/s 139, the Magistrate may direct by whom the costs of such summoning and examination shall be paid.

141. Procedure on order being made absolute and consequences of disobedience.

(1) When an order has been made absolute u/s 136 or section 18, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code (45 of 1980.)

(2) If Such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other movable property of such person within or without such Magistrate's local, jurisdiction and if such other property is without such

jurisdiction, the order shall authorize its attachment and sale when endorsed by the Magistrate within whose local jurisdiction the property to be attached is found. (3) No suit shall lie in respect of anything done in good faith under this section.

142. Injunction pending inquiry.

(1) If a Magistrate making an order u/s 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

(2) In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

(3) No suit shall lie in respect of anything done in good faith by, a Magistrate under this section.

143. Magistrate may prohibit repetition or continuance of public nuisance.

A District Magistrate or sub-divisional Magistrate, or any other Executive Magistrate empowered by the State Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code (45 of 1860), or any special or local law.

8. From a perusal of Section 133 and the subsequent sections of the said Code, it is made very clear that under the said provisions, the Magistrate has been given sufficient power to deal with removal of obstruction on public road for dealing with public nuisances. The said power can be exercised either on receipt of a police report or on other information, and arises under the six circumstances enumerated in Section 133 and the Magistrate has been given power under the said Section 133 to pass a conditional order. Under the said Section, any unlawful obstruction or nuisance could be removed from any public place or from anywhere which is or may be lawfully used by the public. The said conditional order can be served on the person against whom it is made, as if it were a summon. This is provided u/s 134. On the service being effected, the person concerned may carry out the order, in which case the proceedings will come to an end u/s 135(a). But if the person against whom the order is made does not carry out the order, he has to show cause against the order or apply to the Magistrate in order to contend that the order which has been passed is not reasonable and proper. This is provided u/s 135(b). But, despite the passing of the conditional order, if the person, against whom the order is passed, does not comply with the same and he fails to appear before the Magistrate, the order is made absolute and the person may also be liable to the penalty prescribed u/s 188, IPC. This is provided in Section 136. But, if upon showing cause, the Magistrate finds that the cause shown is not satisfactory, the order is made

absolute u/s 138 of the Code. In the enquiry which is to be made before the Magistrate in respect of an order u/s 133 and in a case when a person appears before him, the Magistrate may direct a local investigation or summon and examine any expert. This is provided under Sections 139 and 140. If the person concerned disputes the existence of any public right on the place or the road in question, the Magistrate will hold a preliminary enquiry and if he finds that the contention which is raised by the person has some substance, the question will be left to be determined by a Civil Court. But if there is no substance in the contention, the enquiry will proceed u/s 137. However, where the order is made absolute u/s 136 or Section 138, the person against whom the order is made shall be asked to carry out the order within a specified time. But, however, if he fails to carry it out, he can be prosecuted u/s 188 IPC. This is provided u/s 141(1) of the Code. The Magistrate also can carry out the said order and recover the cost from the defaulter. This is provided u/s 141(2). In case of imminent danger or injury of a serious kind, the Magistrate has a power to forthwith issue an injunction against a person, who may commit the mischief. This is provided u/s 142.

8.1 On a perusal of the aforesaid provisions, it is clear that starting from Section 133, detailed and adequate provisions have been made right up to Section 143 under the said Code and the aforesaid gamut of proceedings constitutes a complete Code for removal of encroachment or obstruction from the public land which leads to public inconvenience or public nuisance.

9. On the question what constitutes "public nuisance" u/s 133 of the Code of Criminal Procedure, the Hon"ble Supreme Court has explained the concept of public nuisance very broadly as to take within its fold the nuisance caused by obstruction and encroachment.

10. In the case of Vasant Manga Nikumba v. Baburao Bhikanna Naidu the Supreme Court held that nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. The learned Judges held that it is not capable of precise definition, but as defined u/s 268 IPC, public nuisance is an offence against public either by doing a thing, which tends to the annoyance of the whole community in general or by neglect to do anything which the common good requires. The learned Judges clarified it by saying that public nuisance is an act of omission which causes any common injury, danger and annoyance to the public or to the people in general who dwell or occupy the property in the vicinity. It causes some injury or obstruction to the person who may have occasion to use public right. In the instant case, the allegation is one of obstruction by encroachment to the use of the public road by the members of the public. In view of such alleged encroachment very project beneficial to public can-not be undertaken. Such allegations obviously bring the matter within the expression of unlawful obstruction and nuisance to the members of the public. However in Vasanth Manga (supra) it has been held that the proceedings u/s 133 are not intended to settle private disputes or settle question of title. (See para-3

of the judgment.)

11. In a subsequent judgment in the case of *Municipal Council, Ratlam Vs. Vardichan and Others*, , the learned Judges of the Supreme Court point out that wherever there is "public nuisance the guns of Section 133 of the Code of Criminal Procedure go into action". (See para-9 at page 169 of the report). The learned Judges held that the power may be discretionary, but the power given to the Magistrate u/s 133 of the Code is a "public duty" to the members of the public who are victims of the nuisance, and so the Magistrate shall exercise it when the jurisdictional facts are present. The learned Judges reiterated the principles by saying that discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise. (See para-9 of the judgment). In paragraph-13, the learned Judges further said that Section 133 is a categorical provision, though it reads discretionary. The learned Judges held that judicial discretion, when facts for its exercise are present, has a mandatory import. The learned Judges held that when the Magistrate considers that such unlawful obstruction or nuisance should be removed from any public place, which may be legitimately used by the public, "he shall act". The learned Judges further added that this judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts. The learned Judges also held that this is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. (See para-13 at page 170 of the report)

12. The same principles have been reiterated by the Hon''ble Supreme Court in the case of *Kachrual Bhagirath Agrawal and Others Vs. State of Maharashtra and Others*, in Para-11 at page 42 of the report.

13. In a decision of the Supreme Court in the case of *State of M.P. Vs. Kedia Leather and Liquor Ltd. and Others*, , the learned Judges of the Supreme Court held that the object and purpose of Section 133 of the Code is essentially to prevent public obstruction and nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately and before irreparable damage would be caused to the public.

14. Now the question is whether the existence of the provisions in Local Act under which the encroachment on a public property can be removed can oust the jurisdiction of the Magistrate u/s 133 of the Code?

15. This Court has already referred to Section 13 of the Tamil Nadu Land Encroachment Act, 1905, which saves operation of other laws and which obviously includes the entire gamut of provisions from Sections 133 to 143 of the Code.

16. Almost a similar question came up for consideration before a learned Single Judge of the Madras High Court in the case of *Rajagopala Chettiar v. Samdum Begum* reported in AIR (30) 1943 Mad 357. In the aforesaid case, the learned Judge held that the powers of the Magistrate u/s 133 of the Code have not been

curtailed by the powers conferred under the local authorities to abate nuisances u/s 44 of the Madras Public Health Act or u/s 195 of the Madras Local Boards Act. In the instant case, Section 13 of the local Act itself is a clear answer, apart from the principles which have been laid down by the Madras High Court in the aforesaid case of Rajagopala Chettiar. So it cannot be said that in view of the provisions of Tamil Nadu Land Encroachment Act, the provisions of Section 133 of the Code have become otiose.

17. Now the next question is whether in view of the provisions of Sections 133 to 143 of the Code, it is judicially prudent for this Court to exercise its jurisdiction under Article 226 of the Constitution by entertaining cases on allegation of encroachment of the public land as made in a writ petition?

18. First of all, it is extremely difficult within the circumspect nature of jurisdiction of a writ court to decide the factual correctness of such allegations. It often happens when such allegations are made the only evidence before this Court is the writ petition supported by an affidavit. The writ court normally does not take evidence nor is it possible for the writ court to assess the local situation. But in a proceeding u/s 133 of the Code the Magistrate is competent to take evidence, make local enquiry and probe the local situation relating to the allegations of obstruction or encroachment on a public land. It has been the experience of this Court that in many cases, on the basis of such allegation of encroachment, orders have been passed by the writ court, which are subsequently challenged by the persons who are at the receiving end of such orders, but were not impleaded. As noted earlier, in a proceeding under Article 226 of the Constitution detailed factual enquiry is not possible, but a decision whether obstruction or encroachment has been made on a public land is essentially a decision on facts and can be reached only after some factual enquiry. Therefore, this Court feels that this legal question is required to be settled as many writ petitions have been filed in this court alleging encroachment/obstruction on public and that is why this detailed judgment is delivered. Such questions should be decided by an authority which is entitled to go into the questions of fact and take evidence, hear the parties and assess the local situation, if necessary on the basis of a police report and then come to a decision.

19. It is a well-settled principle that the power under Article 226 of the Constitution has to be exercised by observing certain self-imposed limitations. One of such well-recognized limitations is when the statute provides for an efficacious remedy, writ court should not entertain a case with a grievance which can be adequately dealt with under the relevant statute. This is specially true in this case where power has been conferred under Sections 133 to 143 of the Code in very wide terms and which, in a given case, is decided in Municipal Council, Ratlam (supra), mandate a public duty on the Magistrate to be exercised for public benefit. Therefore, the remedy under the Code is an efficacious one.

20. Reference in this connection may be made to the Constitution Bench judgment of the Supreme Court in the case of Thansingh Nathmal and Others Vs.

A. Mazid, Superintendent of Taxes, . The relevant observations of Justice Shah on this point are set out herein below: - (para.7 at page 1423 of the report)

The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by a statute. Ordinarily the Court will not entertain a petition for a writ under Art.226, where the petitioner has an alternative remedy, which without being unduly onerous, pro-vides an equally efficacious remedy- Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal to correct errors of fact and does not by assuming jurisdiction under Art.226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Art.226 of the Constitution the machinery created under the statue to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.

(underlined for emphasis)

21. The aforesaid formulation in Thansingh has been approved subsequently also by the Hon"ble Supreme Court in the case of Ghan Shyam Das Gupta and another Vs. Anant Kumar Sinha and others, in the context of execution of a decree of a Civil Court. Reference is made to the observations of the learned Judges in paragraph - 8 of the said judgment. Similar observations have been made by the Hon"ble Supreme Court in the case of State of U.P. and another Vs. Labh Chand, by relying on the principles in Thansingh case (See para-9 at page 501 of the report). The observation of Justice Shah in Than Singh, set out earlier, has been expressly quoted with approval. So the principles in Than Singh constitute a settled position in our jurisprudence.

22. In a Nine-Judge Bench Judgment of the Supreme Court in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , Justice Jeevan Reddy, speaking for the majority, has clearly held "that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override it. The power under Article 226 is conceived to serve the ends of law and not to transgress them." (See para.108(x) at page 635 of the report)

23. In view of such consistent view of the Supreme Court, the exercise of writ jurisdiction for removal of encroachment or obstruction on public land, especially when a specific efficacious remedy for the same has been provided under Sections 133 to 143 of the Code, in our judgment, would be both inappropriate

and improper.

24. For the reasons aforesaid, we dismiss this writ petition. However, we do not wish to make any observation on the merits of the petitioner's claim. We make it clear that if the petitioner is so advised, he is at liberty to approach the Magistrate u/s 133 of the Code since there is no limitation prescribed for invoking the jurisdiction of the Magistrate u/s 133 of the Code. No costs. Consequently, miscellaneous petition is closed.