

(2015) 06 MAD CK 0098

In the Madras High Court

Case No : Criminal R.C. (MD) NO. 215 of 2015

Romana Distillery Industries Pvt. Ltd.

APPELLANT

Vs

The District Magistrate and District Collector

RESPONDENT

Date of Decision : 11-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(1), 136, 138, 138(1)
Penal Code, 1860 (IPC) — Section 188

Citation : (2015) 06 MAD CK 0098

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : K.M. Vijayan, Senior counsel for B. Saravanan, for the Appellant; P. Kannithevan Govt. Advocate, Advocates for the Respondent

Final Decision : Allowed

Judgement

S. Nagamuthu, J.

1. The petitioner is a company known as M/s. Romana Distillery Industries Private Ltd. The said company is engaged in the manufacturing of packaged drinking water. For the said purpose, the petitioner company has dug a Well in the land comprised in S.Nos. 42/1 and 42/3A at Magilady Village, Tirunelveli District, for drawing water from the said Well for the said business purpose. The petitioner applied for No Objection Certificate from the Water Resources Department, Government of Tamil Nadu. The Chief Engineer, State Ground and Surface Water Resources Data Centre, Chennai, issued a certificate in Certificate No. 423/NOC/Chennai/2014 dated 11.09.2014 expressing no objection for drawal of a total quantity of 10,000 litres per day from the said Well for the purpose of packaged drinking water. The petitioner further claims that he also applied for consent from the Tamil Nadu Pollution Control Board for the said purpose. The District Environmental Engineer, Tamil Nadu Pollution Control Board, Tirunelveli by his proceedings in No. F.TNV1430/GS/A/2014 dated 14.11.2014 has authorised the said company to establish the industry in the site

mentioned and to operate the same. The Department of Industry and Commerce has also granted permission for the petitioner for doing the packaged drinking water manufacturing as per Form No. 2014/33/029/18659/PRDT. According to the petitioner, though he has satisfied all the legal formalities in getting either no objection or permission from the various authorities, the manufacturing process has not yet been commenced.

2. While so, the respondent issued a show cause notice under Notice No. C3/48935/14 dated 30.12.2014 purportedly under Section 133 of the Code of Criminal Procedure calling upon him to show cause as to why he should not be restrained from doing the said business by drawing water from the Well. The petitioner submitted a detailed reply on 08.01.2015, wherein, he had stated that he had already obtained all necessary orders granting permission or no objection from the various authorities and that the manufacturing had not yet been commenced. Yet another notice was subsequently issued by the District Collector on 12.01.2015 in No. C3/48935/2014 that was challenged by the petitioner before this Court by way of writ petition in W.P.(MD) No. 3093 of 2015 and this Court by order dated 09.03.2015 disposed of the said petition with a direction to the petitioner to appear before the District Collector on 10.03.2015 and submit his detailed reply and with a further direction to the authorities concerned to consider the same and to pass appropriate orders. In pursuance of the same, the petitioner appeared before the respondent and submitted relevant records such as the orders obtained from various authorities and also explained to the District Collector that he had not commenced the manufacturing. He further submitted that since drawal of water from the Well is going to be done in accordance with the orders obtained from the various authorities, it will not amount to nuisance in terms of Section 133 Cr.P.C.

3. Having considered all the above, the respondent, by his proceedings in RoC.No. C3/48935/2014 dated 18.04.2015, has passed the final order under Section 133 of the Code, thereby prohibiting drawal of ground water by the petitioner company through the new open Well or bore well or in any other manner. The District Collector has also ordered for the closure of the Unit. He has further directed the Tahsildar, Nanguneri to ensure the closure of the Unit and disconnection of electricity for the purpose of drawal of water. It is this order, which is under challenge in this revision.

4. In this revision, the learned Senior Counsel raised three grounds among other grounds.

(1) The first and foremost ground is that when the drawal of water is going to be performed in accordance with the orders issued by various authorities under atleast four enactments governing the field, the District Collector has got no jurisdiction to invoke his power under Section 133 of the Code, as the drawal of water in accordance with the above orders would not amount to nuisance in terms of Section 133 of the Code of Criminal Procedure.

(2) He would further submit that when the drawal of water had not yet been commenced, question of issuing any order under Section 133 of the Code would not arise.

(3) He would further submit that in this case, no preliminary order under Section 133(1) of the Code was passed and therefore, the impugned order, which is a final order under Section 133 of the Code is wholly without jurisdiction and the same is vitiated. For this proposition, the learned Senior counsel relies on a judgment of the Hon"ble Supreme Court in C.A. Avarachan vs. C.V. Sreenivasan and another reported in (1996) 7 SCC 71.

5. A detailed counter has been filed by the respondent, wherein, he has stated that drawal of water from the Well for the purpose of business would ruin the life of the Farmers in that area as the water in the nearby lakes would deplete. It is further stated that only after holding enquiry, the impugned order has been passed. It is also stated that it is the duty of the revenue authorities to maintain the water bodies and since in the instant case, drawal of water from the Well will result in decrease of water in the lakes, the impugned order came to be passed.

6. The learned Government Advocate (Crl. Side) for the respondent would submit that it is true that there was no preliminary order passed as required under Section 133(1) of the Code, but that would not automatically vitiate the entire subsequent proceedings including the impugned order. According to him, passing of such preliminary order, is purely a procedure and the same does not touch upon the jurisdiction of the Magistrate. He would further submit that the petitioner did not raise any objection regarding the fact that there was no preliminary order passed and instead he submitted to the jurisdiction of the Magistrate by participating in the proceedings and therefore, it is too late in the day for him to raise such objection that there was no such preliminary order as required under Section 133(1) of the Code. The learned Government Advocate would further submit that the impugned order has been passed in public interest and therefore, the same need not be interfered with by this Court.

7. I have considered the above submissions and I have also perused the records carefully.

8. As I already narrated, admittedly, the petitioner has dug a Well in the land in question and he has proposed to draw water from the Well for the purpose of manufacturing packaged drinking water. However, such drawal of water is governed by certain enactments such as Environment (Protection) Act, 1986, Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981. As rightly contended by the learned Senior Counsel, when these three enactments govern the field and when the business is going to be done after completing all the legal formalities as required under these enactments, invoking the power under Section 133 of the Code of Criminal Procedure, which is a general enactment, is not legal. When the petitioner has obtained orders under these enactments from the appropriate authorities, he has

got every right to do the business strictly in terms of these orders. If the District Collector or anybody else has got any grievance regarding these orders, it is always open for the individual or the District Collector to approach the statutory authorities or other authorities under these enactments for withdrawal of these orders. It is not as though the orders upon which reliance has been made by the petitioner have been issued by responsible statutory authorities. Unless and until, these orders are cancelled or varied, the petitioner has got every right to do the business strictly in terms of these orders. Therefore, as rightly contended by the learned counsel for the petitioner, the action of the District Collector in passing the impugned order purportedly under Section 133 of the Code of Criminal Procedure is wholly without jurisdiction and the same cannot be allowed to sustain.

9. Now turning to the next contention of the learned Senior Counsel, Sub Section (1) of Section 133 of the Code of Criminal Procedure states that the Executive Magistrate, either from a police report or from any other information and on taking such evidence, as he thinks fit, has to necessarily pass a conditional order requiring the person carrying on such trade or occupation etc., to desist from doing so, provided carrying on such trade or occupation is found to be injurious to the health or the physical comfort of the community and by fixing a time limit for obedience.

10. Under Section 136 of the Code, 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 and the order shall be made absolute.

11. For any reason, if he does not oppose the order within the time prescribed in the preliminary order and obeys the order then, the order shall be made absolute on the expiry of the said date. For any reason, if the person against whom such preliminary order has been passed raises objection, he should be afforded opportunity and thereafter as required under Section 138(1) of the Code, he should be allowed to let in further evidence, as in a summons case. On the basis of such evidence, the Executive Magistrate has to decide whether to make the preliminary order absolute with or without modification or not. Thus, both while passing the preliminary order as well as while passing the final order, the issue is one and the same. If only such a preliminary order, which is a conditional order, has been passed, question of making it absolute will arise. In the absence of a preliminary order, there will be no occasion for the Executive Magistrate to make any order absolute. In other words, in the absence of a preliminary order, no final order as required under Sections 133 and 138 of the Code could be passed.

12. In C.A. Avarachan's case, the Hon'ble Supreme Court had dealt with the issue as to whether the final order made under Section 138 of the Code will stand vitiated on account of the fact that there was no preliminary order passed under sub Section (1) of Section 133 of the Code. After making elaborate discussion in respect of the scope of a preliminary order under Section 133(1) of the Code and the consequences of the failure of the authority to pass such an

order, the Hon"ble Supreme Court in paragraph Nos. 4 and 5 has held 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 under Section 133 of the Code of Criminal Procedure and without following the procedure provided for by Section 138 Cr.P.C., the order made by the Sub Divisional Magistrate on 13.01.1988 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 under Section 133 Cr.P.C. Neither the order of the High Court nor that of the Sub-Divisional Magistrate can therefore, be sustained.

5. This appeal consequently succeeds and is allowed. The orders of the Sub Divisional Magistrate dated 13.01.1986 and of the High Court dated 2.6.1989 are hereby set aside.

13. In the instant case, admittedly, there was no such preliminary order passed at all as required under Section 133(1) of the Code. Thus, as held by the Hon"ble Supreme Court, the entire subsequent proceedings including the impugned order is wholly without jurisdiction. As held by the Hon"ble Supreme Court, passing of a preliminary order as required under Sub Section (1) of Section 133 alone gives jurisdiction to the Magistrate to proceed further to hold enquiry and to pass a final order. Since in the instant case, the impugned order is only a final order, which has been passed without being preceded by a preliminary order, the same stands vitiated.

14. The learned Government Advocate (Crl. Side) would point out that the enquiry was held and the impugned order was passed by the respondent as directed by this Court in W.P. No. 3093 of 2015. In my considered view, when the statute confers jurisdiction on an authority, on the happening of a particular event, when the same is a legislative command, the Courts of law cannot confers jurisdiction on the authority, in the absence of the said event as prescribed in the statute. Though it may be true that this Court directed the District Collector to hold enquiry, it does not mean that this Court had empowered the District Collector to pass a final order without passing a preliminary order under Section 133(1) of the Code. Therefore, this argument of the learned Government Advocate also deserves to be rejected.

15. In view of the foregoing discussions, I hold that the impugned order is not sustainable and the same is liable to be set aside.

16. In the result, the Criminal Revision Petition is allowed and the impugned order is set aside. Consequently connected Miscellaneous Petition is closed. It is made clear that the District Collector or any other aggrieved persons will be at liberty to work out their remedy against the orders passed by various authorities referred to herein above.