
(1998) 04 RAJ CK 0051

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 470 of 1996

Shyam Sunder

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 25-04-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 134, 135, 136, 137
Penal Code, 1860 (IPC) — Section 188, 193, 467
Rajasthan Municipalities Act, 1959 — Section 165

Citation : (1998) CriLJ 3959 : (1998) 3 RLW 1534 : (1998) 1 WLN 671

Hon'ble Judges : Amaresh Kumar Singh, J

Bench : Single Bench

Advocate : Bheem Arora, for the Appellant; D.S. Rathore, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Amaresh Kumar Singh, J.—Heard the learned counsel for the petitioner and the learned Public Prosecutor.

2. This petition u/s 482, Cr.P.C. is directed against the order dated 28th March, 1996 passed by the learned Additional Sessions Judge, Churu in Criminal Revision No. 26-A/96, whereby the order dated 3rd June, 1995 passed by the Sub-Divisional Magistrate, Churu in Criminal Original Case No. 22/95 u/s 133, Cr.P.C. was upheld.

3. The facts of the case may be summarised as below :-

On 2nd June, 1995, an application signed by Saleem and Ors. was submitted before the Sub-Divisional Magistrate, Churu. In this application, it was mentioned that the applicant's house was situated near Ramgarhia Darwaaja and about 9 ft.wide portion of the applicant's house was beyond the building line prescribed u/s 165 of the Rajasthan Municipalities Act, 1959 and the applicant had vacated that portion of his house, it was also stated in the application that adjacent to

the applicant's house, there was a house belonging to Ranglal Choudhary and Ors. and that house was in dilapidated condition and the outer portion of the house was likely to fall in case that portion of the applicant's house, which he had vacated was demolished. It was alleged in the application that so much house of the Ranglal Choudhary as was beyond the building line should be demolished as it was likely to fall. On receipt of this application, the Sub-Divisional Magistrate directed the Executive Officer of the Municipal Board to conduct a site inspection. On the same day, the Executive Officer of the Municipal Board, Churu conducted the site inspection of the house of Ranglal Choudhary and Ors.. He submitted his report on the same day and stated in the report that house was an old one and was in dilapidated condition and there were cracks in the wall. The Executive Officer further reported that it was desirable that a technical report be obtained. After perusing the report given by the Executive Officer of the Municipal Board, Churu, the Sub-Divisional Magistrate, Churu passed an order, whereby the Assistant Executive Engineer, P.W.D., Churu was directed to send the technical report after site inspection. Notices were also directed to be issued u/s 133, Cr.P.C. in Form No. XXI. The Tehsildar, Churu was further directed that the non-applicant be searched out and his correct address as well as whereabouts of the key of the house was found out and a report should be submitted. The file order ordered to be listed on 3rd June, 1995.

4. On 3rd June, 1995 when the file was placed before the Sub-Divisional Magistrate, Churu, he recorded on order-sheet that the Tehsildar, Churu had informed that the owner of the building was living at Ahmedabad and the key of the House was reported to be in possession of Narayan Prasad Mandavavala, but when Narayan Prasad was contacted, he did not give any satisfactory reply about the key and told that he was not looking after the building and, therefore, the notice was served by affixing the same on the building in presence of motbirs. The order-sheel dated 3rd June, 1995 further states that the Assistant Executive Engineer, PWD, Churu submitted a report after conducting the site inspection and reported that the building was in a dilapidated condition and was likely to fall at any time and that the house could not be inspected from inside as the same was locked and there were cracks in the walls and the house was situated by the site of the main road, it was likely to cause injuries to the passers-by. In the order-sheet dated 3rd June, 1995 it was further noted that Dugharam and some other persons had also submitted an application before the Collector," Churu and that application was forwarded by the Collector, Churu to the Sub-Divisional Magistrate. In short, in view of the report of the Executive Officer, Municipal Board, Churu, the report given by the Assistant Executive Engineer, PWD, Churu and the applications filed by Saleem and Ors., the learned Sub-Divisional Magistrate, Churu declared the house to be unsafe and directed that order be issued u/s 142, Cr.P.C. in Form No. XXI to the Executive Officer, Municipal Board, Churu to remove that portion of the building, which was declared to be unsafe. It was further directed that the work of removing the unsafe portion of the building should not be stopped till the removal was complete. The S.H.O. Kotwali, Churu

was directed to stop the traffic on the public road so that no one may be harmed by the demolition of the building and the In-charge of the Hospital was directed to keep an ambulance with a team of medical officers present at the site. The file was ordered to be listed on 5th June, 1995.

5. On 5th June, 1995 it was recorded in the order-sheet that an application had been submitted by some citizens of Churu praying that some portion of the Choudhary Building which was adjacent to the house of Madihans had become unsafe as cracks had developed in the wall and in that application, it was prayed that the remaining portion be also removed. On receipt of above-mentioned application, the. Assistant Executive Engineer, P.W.D. was directed to conduct a site inspection and submit his report, demarketing the portion of the house, which had become unsafe. The file was ordered to be listed on 8th June, 1995. On 8th June, 1995 it was recorded in the order-sheet that the Executive Officer, Municipal Board had submitted a report that a portion of Choudhary Building, which was declared to be unsafe had been demolished on 7th June, 1995, but the Debry thereof had to be removed from the site. The learned Sub-Divisional Magistrate inspected the site and found that the work of demolition of the unsafe portion of the Choudhary Building had been completed and nothing more was required to be done in the matter. He, therefore, closed the file.

6. Above facts clearly show that the entire exercise was completed within a short period from 2nd June, 1995 to 8th June, 1995, without serving a notice personally on the owner of the Choudhary Building which had been demolished in exercise of the powers conferred by Section 142, Cr.P.C.

7. The petitioner Shyam Sunder filed a Revision Petition No. 26-A/1995 in the Court of Sessions Judge, Churu against the order dated 3rd June, 1995 passed by the Sub-Divisional Magistrate, Churu. The revision petition was filed on 31 st August, 1995. In the revision petition, petitioner Shyam Sunder alleged that he was the owner of the Choudhary Building and was in possession of the same and that he was living at Ahmedabad. It was further alleged that the orders passed by the Sub-Divisional Magistrate, Churu were illegal and without jurisdiction, because no notice had been served on the petitioner. It was also alleged that Ranglal Choudhary to whom the notice was addressed had died long ago and the report that the house was in his possession was wrong and the allegations that the house was in dilapidated condition was false as the house was not in a dilapidated condition and there was no danger that the house was likely to fell. The reports submitted by the Assistant Executive Engineer, PWD, Churu was alleged to be wrong. It was prayed that the order dated 3rd June, 1995 passed by the Sub-Divisional Magistrate be quashed and those persons, who had submitted the false informations before the Sub-Divisional Magistrate and the Sub-Divisional Magistrate, Churu be proceeded against in respect of offences under Sections 193 and 467, IPC. With, his petition, the petitioner Shyam Sunder filed a photostat copy of the Special Power of Attorney, whereby he had appointed Narayan Prasad Madavavala, r/o Churu as his power of attorney

holder. The power of attorney purported to have been executed on 8th March, 1995.

8. The learned Additional District Judge, Churu vide order dated 28th May, 1996 rejected the revision petition. The learned Additional Sessions Judge held that the officer, who passed the impugned orders was posted as Sub-Divisional Magistrate, Rajgarh and on the date of passing the impugned orders, he was holding the charge of the office of Sub-Divisional Magistrate, Churu and therefore, he was competent to pass the orders. Regarding the service of notice, the learned Additional Sessions Judge held that the petitioner Shyam Sunder was not a necessary party, because the building known as Choudhary Building was reported to be the property of Ranglal Choudhary and in the notice, which was affixed on the building sufficient particulars of the building had been mentioned. It was further observed by the learned Additional Sessions Judge that Narayan Prasad in whose favour special power of attorney had been executed, by the petitioner had knowledge about the proceedings, which were commenced by the Sub-Divisional Magistrate as is evident by the fact that he got the building photographed on 4th June, 1995.

9. In short, the learned Additional Sessions Judge upheld the orders passed by the Sub-Divisional Magistrate, Churu on 2nd June, 1995 and 3rd June, 1995. It was further observed by him that the revision petition had become infructuous because the order dated 3rd June, 1995 had been executed and the unsafe portion of the Choudhary Building had been demolished as early as on 7th June, 1995.

10. Feeling aggrieved by the order passed by the learned Additional Sessions Judge on 28th May, 1996, the petitioner has filed this petition u/s 482, Cr.P.C. with the prayer that the order dated 28th May, 1996 passed by the Additional Sessions Judge, Churu and the order dated 3rd June, 1995 passed by the Sub-Divisional Magistrate, Churu be set aside.

11. The learned counsel for the petitioner has submitted that the Revision Petition No. 26-A/95 which had been filed by the petitioner in the Court of Additional Sessions Judge, Churu was maintainable notwithstanding the fact that a portion of the Choudhary Building had been demolished on 7th June, 1995 and therefore, the observation of the learned Additional Sessions Judge that the revision petition had become infructuous is not correct. Regarding the illegality of the orders dated 3rd June, 1995 passed by the Sub-Divisional Magistrate, Churu, the learned counsel for the petitioner has submitted that this order was passed in hot haste without serving any notice on the petitioner or his special power of attorney and therefore, the impugned order dated 3rd June, 1995 was without jurisdiction. It is further submitted by the learned counsel for the petitioner that notice which had been issued on 2nd June, 1995 was addressed to one Ranglal, who had died long ago and who had nothing to do with the Choudhary Building and, therefore, that notice was not in accordance with the law and the opinion that Ranglal Choudhary was looking after the Choudhary Building was false and

calculated to avoid issuance of notice to the petitioner, who is the real owner of the Choudhary Building. It is further submitted by the learned counsel for the petitioner that Choudhary Building was not unsafe in any manner. It was not in dilapidated condition and the allegations made in the applications as well as in the report submitted by the Assistant Executive Engineer, Churu regarding the poor condition of the building were false and, therefore, there was no just cause for passing the order dated 3rd June, 1995, whereby demolition of the front portion of the Choudhary Building was ordered. The learned counsel for the petitioner has, therefore, prayed that the impugned order dated 3rd June, 1995 passed by the Sub-Divisional Magistrate, Churu be quashed and set aside and the order dated 28th May, 1996 passed by the Additional Sessions Judge, Churu be also set aside.

12. The learned Public Prosecutor has supported the orders passed by the Courts below and submitted that the petitioner has become infructuous because the building was demolished before the filing of this petition.

13. I have carefully considered the arguments submitted by the learned counsel for the petitioner and the learned Public Prosecutor.

14. The preliminary objection that this petition has become infructuous because the building has already been demolished, must be rejected. Protecting a person or property from the harm or loss which may be caused by an illegal, unjust or improper act is one thing and vindication of justice by quashing and setting aside illegal, improper or unjust order is another thing and the distinction between the two is real and substantial. Harm or loss caused to a person by an illegal order is a loss or harm to a particular person but the strangulation of justice by subverting the Rule of law by ignoring the well established canons of administration of justice has far reaching consequences - the whole foundation made of Rule of law and administration of justice is shaken and exposed to destruction when illegal, acts in utter disregard of law in force are committed and lives, liberties or properties are harmed. Vindication of justice by quashing illegal order, which amounts to abuse of the process of law cannot be avoided on any ground. Neither delay, nor laches, waiver or estoppel can be pleaded for avoiding the quashing of that order which is illegal, unjust, perverse and detrimental to whole society. The preliminary objection is overruled.

15. Section 133, Cr.P.C. empowers the District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit to pass orders u/s 133, Cr.P.C.

16. Section 133, Cr.P.C. reads :-

133. Conditional order for removal of nuisance. - (1) Whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the

report of a police officer or other information and on taking such evidence (if any) as he thinks fit.

(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 neighbourhood or passing by and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such trees, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation. or owning or possessing, such animal or tree within a time to be fixed in,

(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.

17. Clause (d) of Sub-section (1) of Section 133 appears to be applicable to the present case. A bare reading of Section 133(1)(d), Cr.P.C. shows that if in the opinion "of the District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit (that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary then such Magistrate may make a conditional order requiring the person owning or possessing or controlling such building, tent or structure to remove or support such trees. The order which may be passed u/s 133(1)(d), Cr.P.C. is a conditional order in as much as the person to whom direction is given, may 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 provided, why the order should not be made absolute.

18. Section 134(1) provides that 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.

19. Section 134(2) provides that 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 person.

20. Section 135 provides that the person against whom such order is made shall perform within the time and in the manner specified in the order, the act directed thereby; or appear in accordance with such order and show cause against the same.

21. Section 136 provides that 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.

22. Section 138 provides that if the person against whom an order u/s 133 is made appears and show cause against the order, the Magistrate shall take evidence in the matter as in a summons case and 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.

23. Section 139 empowers the Executive Officer to direct local investigation and examination of an expert.

24. Section 140 provides that where the Magistrate directs a local investigation by any person u/s 139, the Magistrate may furnish such person with such written instructions as may seem necessary for his guidance; declare by whom the whole or any part of the necessary expenses of the local investigation shall be paid, 1 and that the report of such person may be read as evidence in the case.

25. Section 141 provides that when an order has been made absolute u/s 136 or Section 138, 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 and 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 authorise its attachment and sale when endorsed by the Magistrate within whose local jurisdiction the property to be attached is found.

26. Section 142 provides that 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 and 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.

27. In view of the provisions contained in Sections 133 to 142, Cr.P.C. 1973, it is obvious that in order the District Magistrate, Sub-Divisional Magistrate or any other Executive Magistrate may pass an order under Sections 133, 136, 138, 141 and 142 in respect of a building, tent or structure or any tree, which is reported to be in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, the conditions laid down in Clause(d) of Sub-section (1) of Section 133, Cr.P.C. must be fulfilled and unless the conditions laid down in Clause(d) of Section 133(1) is fulfilled the Executive Magistrate does not acquire jurisdiction to pass any order under Sections 133, 136, 138, 141 and 142, Cr.P.C.

28. It is further clear from the words used in Sections 133 to 142, Cr.P.C. that it is not the subjective satisfaction of the Executive Magistrate which is sufficient to

enable him to exercise his powers under the above mentioned Sections It is necessary that he must be satisfied on the basis of report of a police officer or other information or the evidence produced before him that the conditions laid down in Clause (d) of Section 133(1) is fulfilled. In other words, in order the Executive Magistrate may pass any order under Sections 133,136,138,141 and 142, it is necessary that it should be proved before him that any building, tent or structure or any tree is in such a condition that it is likely to fall and thereby causing injury to any person or persons mentioned in Clause (d). The Executive Magistrate has to act as a prudent man while applying his mind u/s 133(1)(d), Cr.P.C. In the instant case, it appears that on receiving the application of Saleem, the learned Sub-Divisional Magistrate was not satisfied that the condition laid down in clause(d) of Section 133(1) was fulfilled and therefore, he directed the Executive Officer of the Municipal Board, Churu to inspect the site and submit the report. The Executive Officer, Municipal Board, Churu submitted his report on 2nd June, 1995. In this report, the location of the building was mentioned and it was slated that on seeing the building, building was to be an old one and the building was in poor condition and in several portions of the building there were cracks and on account of demolition of the front portion of the house of Saleem, the support which was available to the Choudhary Building was no more available. The Executive Officer recommended that technical opinion be obtained. After perusing the report dated 2nd June, 1995 submitted by the Executive Officer, Municipal Board, Churu, the Sub-Divisional Magistrate, directed the Assistant Executive Engineer, PWD to conduct a site inspection and submit the technical report. This shows that even after perusing the report dated 2nd June, 1995 given by the Executive Officer of the Municipal Board, Churu, the learned Sub-Divisional Magistrate was not satisfied that the condition provided in Clause(d) of Section 133(1) was fulfilled. Had he been so satisfied there was not have been any necessity of directing the Assistant Executive Engineer, PWD to conduct a site inspection and submit a technical report. It appears that before passing the conditional order on 2nd June, 1995, the Sub-Divisional Magistrate did not examine any person on oath nor any affidavits were produced before him and the only material which were available on his file was the report dated 2nd June, 1995 of the Executive Officer. Municipal Board, Churu and the applications of Saleem and Patram and Ors.. I, therefore, find force in the submission that the order dated 2nd June, 1995, was improper, because on that day, there was no material before the learned Sub-Divisional Magistrate to show that the condition laid down in Section 133(1)(d), Cr.P.C. was fulfilled. In other words, on the basis of the material, which was available to the Sub-Divisional Magistrate, Churu on 2nd June, 1995. the conditional order directing the removal of the building known as Choudhary Building could not be legally passed as the condition laid down in Clause(d) of Section 133(1) could not be said to have been fulfilled.

29. The impugned order dated 3rd June, 1995 by which the conditional order dated 2nd June, 1995 was made absolute has been challenged on the ground that the notice was not served on the petitioner or his power of attorney holder.

It appears that the learned Sub-Divisional Magistrate vide order dated 2nd June, 1995 directed the issue of notice u/s 133 in Form No. XXI to the non-petitioner (Ranglal Choudhary). The notice, which was issued in pursuance of order dated 2nd June, 1995 is on record of the lower Court. On the back side of the notice, there is an endorsement to the effect that the landlord Ranglal was not living in Churu and the house was locked for a long time and therefore, a copy of the notice was affixed on the house in front of the motbirs, Jagdish and Budhmal Gurjar have put the signatures before the endorsement that the notice was affixed in their presence. A perusal of the notice dated 2nd June 1995 shows :- (1) the notice was addressed to Ranglal Choudhary r/o Churu; (2) in the notice, sufficient particulars of the house which was demolished were not given, Neither the boundaries, nor the number of the house was given in the notice. Even the words "Choudhary Building" was not mentioned in the notice. The house which was directed to be removed was described as "your one house situated in Chum near Ramgarihia Darwaja"; (3) The notice was not personally served on Ranglal Choudhary or the petitioner or the power of attorney holder; (4) the direction contained in notice was to demolish the whole house; (5) it was further mentioned in the notice that if the house was not demolished, the house will be got demolished by the Municipal Board, Churu; (6) the date of appearance was fixed on 3rd June, 1995. Which means that the time given in the notice was less than 24 hours.

30. It is not disputed that on 3rd June, 1995 when the case was taken up for hearing, neither Ranglal Choudhary nor any other person claiming to be the owner in possession of the Choudhary Building appeared before the Sub-Divisional Magistrate.

31. In the facts and circumstances of the case, the submission of the learned counsel for the petitioner that the provisions of Section 133, Cr.P.C. were not fulfilled cannot be said to be baseless. It is true that u/s 133(1), Cr.P.C. while passing the conditional order, the Executive Magistrate is permitted to fix a time and place for showing cause why the order should not be made absolute and when the discretion to fix the time and place must be exercised in a bona fide reasonable and proper manner so that the person to whom the conditional order is directed, may take proper steps for the purpose of showing cause why the order given to him should not be complied with. Section 134 provides that if practicable, the order passed u/s 133 should be served on the person against whom it is made in the manner provided in service of a summon and Sub-section (2) of Section 134 provides that if such order cannot be so served, it shall be notified by proclamation, published in such manner as the State Government may, by Rule, direct and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

32. A bare perusal of Section 135, Cr.P.C. makes it clear that the law requires that all conditional order passed u/s 133, may be served on the person against whom the order is made. In other words, the order is to be served on the person

against whom it is made personally unless such person's service is impossible. Sub-section (2) of Section 134 requires that if person's service of order be not possible, a proclamation will have to be issued and it shall be published in such manner as the State Government may, by Rule, direct and a copy of the proclamation shall be stuck up at such place or places as may be fittest for conveying the information against whom the order is made. Sub-section (2) of Section 134, Cr.P.C. clearly makes a distinction between the order passed u/s 133 and a proclamation thereof. Sub-section (1) of Section 134 requires a service of the copy of the order on the person against whom the order is made and Sub-section (2) requires the notification of order by a proclamation, which is required to be published in the manner prescribed in Sub-section (2). In the instant case, no proclamation appears to have been issued after receipt of the information that Ranglal Choudhary was not living in Churu and that the house was closed for a long time. Since, no proclamation as required by Sub-section (2) of Section 134, Cr.P.C. were issued and published, it must be said that the conditional order passed by the learned Sub-Divisional Magistrate on 2nd June, 1995 was not served in accordance with law and therefore, the order dated 3rd June, 1995 could not have been passed for making the conditional order absolute.

33. The notice which was issued by the Sub-Divisional Magistrate, Churu was addressed to one Ranglal Choudhary. There is nothing on record to show that Ranglal Choudhary was the owner of the Choudhary Building or that he was the person to whom the notice u/s 133, Cr.P.C. should have been issued. There is nothing to show that Ranglal Choudhary was alive on the date on which the notice was issued or that he was living at Churu. The learned counsel for the petitioner has submitted that without satisfying himself that Ranglal Choudhary was the owner of the Choudhary Building, the Sub-Divisional Magistrate, Churu could not have issued the notice to Ranglal Choudhary and in any case when it was brought to his notice that the notice dated 2-6-1995 was not personally served on Ranglal Choudhary and as per the report of the process server was not residing in Churu, it was necessary for the Sub-Divisional Magistrate to have ascertained whether Ranglal Choudhary was the owner of the building and whether the issue of notice to Ranglal Choudhary was proper.

34. The submission made by the learned counsel for the petitioners carries force. The order u/s 133, Cr.P.C. is issued with a view to require the person, who is responsible for the nuisance, to remove the nuisance. The expression "person" in Sub-section (i) of Section 133, Cr.P.C. means the person causing the obstruction or nuisance or carrying on the trade or occupation or keeping of 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 referred to in Sub-section (1). In the instant case, the Sub-Divisional Magistrate has not taken any care to satisfy himself whether Ranglal Choudhary to whom the notice was issued was the person responsible for the alleged nuisance and whether Ranglal Choudhary was the person to whom the notice u/s 133, Cr.P.C. could have been issued. In these circumstances, the

criticism that notice was issued to Ranglal Choudhary without ascertaining whether Ranglal was in any manner responsible for the nuisance alleged to have been caused, was improper, cannot be said to be without basis.

35. The learned counsel for the petitioner has further submitted that the notice dated 2nd June, 1995 did not contain sufficient particulars of the building, which was ordered to be demolished and, therefore, the notice was not in accordance with law, because the publication of the notice could not sufficiently indicate which building was to be demolished. On a perusal of the notice dated 2nd June, 1995 it appears that the particulars of the Choudhary Building have not been given in the notice and therefore, the notice was not proper. The particulars of the building were vague and even if the notices were served on any person personally, the person receiving the notice could not have known which building was intended to be demolished.

36. For the reasons mentioned above, I am of the opinion that the notice dated 2nd June, 1995 was not in accordance with law and it was neither addressed to the proper person nor it was served in accordance with Section 134, Cr.P.C. Since the notice dated 2nd June, 1995 was not in accordance with law and it was neither served nor published in accordance with Section 134, Cr.P.C, the jurisdiction to make the conditional order absolute could not have been exercised by the Sub-Divisional Magistrate when the file was placed before him on 3rd June, 1995.

36.1 The order dated 3rd June, 1995 appears to have been passed in hot haste without conducting any inquiry and without affording any opportunity to the owners/caretakers of the Choudhary Building to show cause why the conditional order should not be made absolute. There is yet another infirmity in the order dated 3rd June, 1995 passed by the Sub-Divisional Magistrate. u/s 133(1)(iv) provides that the Sub-Divisional Magistrate may make a conditional order for removal, repair or support such building, tent or structure or to remove or support such trees as are referred to in Clause (d) of Section 133(1). A bare perusal of Clause (iv) of Section 133(1), Cr.P.C. shows that three alternative courses are permitted by law. These are: (1) to direct the removal of the building, tent or structure; (2) to direct the repair of the building, tent or structure; and (3) to direct that support be provided to the building, tent or structure or tree, which is in such a condition as is likely to fail and thereby cause injury of any person or persons. Clause (iv) thus gives a discretion to the Executive Magistrate exercising powers u/s 133, Cr.P.C. to select one of the three courses provided in Clause (iv) of Section 133(1). The discretion, which is available to the Executive Magistrate acting u/s 133, Cr.P.C. is to be exercised in a judicial manner, keeping in view the principle that minimum possible loss or harm should be caused to the owner of the building, tent, structure or the tree. The removal of the building by demolition causes more loss to the owner than that which would be caused to him if a building, tent or structure is ordered to be repaired or provided the support, which may prevent it from falling. In the

instant case, there is nothing to show that the learned Sub-Divisional Magistrate considered it necessary to apply his mind judicially to the question as to which course he should adopt in the facts and circumstances of the case.

37. Providing support to a building, tent structure or tree, which is likely to fall, causes least possible harm to the owner of the building, tent, structure or tree. Therefore, if the object of preventing injury to the life or limbs of any person can be served by providing support to the building, tent, structure or tree, which is likely to fall, then there is no reason why this least harmful course should not be adopted. If the object of preventing injury to other persons cannot be successfully achieved by providing support to the building, tent, structure or tree, the next course of directing the repairs may be adopted, Even if the repairs involves substantial cost, the harm, which may be caused to the owner of the building, tent or structure would be far smaller than the harm which may be caused to him if the whole of the building, tent, structure is demolished or removed. The removal of the building, tent, structure or tree may be ordered u/s 133(1), Cr.P.C. in those cases only in which the first two courses namely, of providing support or repairs is not likely to serve the object of preventing injury to other persons. In otherwords, the scheme of Section 133, Cr.P.C. is this that out of the three courses mentioned in Clause(iv) of Section 133(1), that course should be adopted, which is least harmful to the owner of the property and sufficient for preventing any injury to persons living or carrying on business in the neighbourhood or the passing by mentioned in Clause(d). In the instant case, the learned Sub-Divisional Magistrate has not applied his mind judicially to the question whether the removal of the building was absolutely necessary for preventing injury to persons mentioned in Clause(d). The impugned orders dated 2nd June, 1995 and 3rd June, 1995, on account of the above infirmity suffered from lack of jurisdiction.

38. I, therefore, find force in the submission that unless the Sub-Divisional Magistrate was satisfied that removal of Choudhary Building was absolutely necessary for preventing injury to persons referred to in Clause(d), he could not have directed the removal of the building.

39. The learned counsel for the petitioner has further submitted that in the instant case, the Sub-Divisional Magistrate, Churn could not have passed any order u/s 142, Cr.P.C, as there was no urgency to prevent danger or injury of a serious kind to public or to any person and if there was no urgency, within the meaning of Section 142, Cr.P.C, the passing of orders on 2nd June, 1995 and 3rd June, 1995 without conducting any inquiry as contemplated by Sections 138, 139 and 140, Cr.P.C. must be regarded as improper and without jurisdiction as sufficient notice was not given to the petitioner or his power of attorney holder. In the facts and circumstances of the case, the submission made by the learned counsel for the petitioner cannot be said to be baseless. The learned Magistrate could not pass any order u/s 142, Cr.P.C. unless there was urgency. There was no imminent danger of injury to public or to any person. In these circumstances, it

was necessary for the Sub-Divisional Magistrate to have conducted any inquiry u/s 133(1), Cr.P.C. to find out if it was necessary for him to pass any order u/s 133(1), Cr.P.C.

40. It was further necessary for him to find out who the person was owning, possessing or controlling the Choudhary Building, which he directed to be demolished and it was further necessary for him to consider whether the removal of the building was absolutely necessary for preventing injury to person mentioned in Clause(d) of Section 133(1), Cr.P.C. It was also necessary for the Sub-Divisional Magistrate to find out whether the service of notice was sufficient in view of the provisions of Section 134, Cr.P.C. It was also necessary for him to conduct inquiry contemplated by Sections 136 to 140, Cr.P.C. to find out whether the demolition of the Choudhary Building was necessary for the purpose of preventing the injury to persons mentioned in Clause(d). The learned Sub-Divisional Magistrate did not conduct the inquiry contemplated by Sections 133, 138, 139 and 140, Cr.P.C. and the order dated 3rd June, 1995 was passed in haste without complying with the provisions of Section 134, Cr.P.C.

41. The submission made by the learned counsel for the petitioner appears to be carry weight and in the facts and circumstances, the orders dated 2nd June, 1995 and 3rd June, 1995 passed by the Sub-Divisional Magistrate, Churu must be held to be not in accordance with law. Both the orders amount to abuse of the process of the Court and they deserve to be quashed.

42. For the reasons mentioned above, the petition deserves to be allowed and is hereby allowed. The orders dated 2nd June, 1995 and 3rd June, 1995 are hereby quashed and set aside. Since, the Choudhary Building has already been demolished, no further relief can be given in this petition to the petitioners.