

(1997) 05 AHC CK 0187

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 2877 of 1996

Smt. Qamar Jahan and Others

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 16-05-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(1), 138, 248, 482

Citation : (1997) 21 ACR 706 : (1997) 4 RCR(Criminal) 706

Hon'ble Judges : O.P. Garg, J

Bench : Single Bench

Advocate : S.A.S. Abidi, for the Appellant; Ajit Kumar, S.N. Misra, Viresh Mishra and A.G. A, for the Respondent

Final Decision : Dismissed

Judgement

O.P. Garg, J.—The order dated July 11, 1996 passed by City Magistrate, Allahabad in proceedings u/s 133 of the Code of Criminal Procedure (case No. 12 of 1996) has given rise to the present application u/s 428, Code of Criminal Procedure. The applicants are tenants of premises No. 15, Johnston Ganj, Allahabad. After taking into consideration the report dated 2.8.1995 of the Incharge, Police Station, Kotwali, Allahabad and report dated 29.11.1995 of the Nagar Abhiyanta, Nagar Nigam, Allahabad, learned City Magistrate issued the impugned notice u/s 133(1), Code of Criminal Procedure to the applicants to show-cause as to why house No. 15, Johnston Ganj, Allahabad, which is in a dilapidated and dangerous condition, be not pulled down.

2. It appears that in pursuance of the said notice, some of the applicants filed objections before the learned City Magistrate. Before any orders could be passed on the show-cause notice, the present application u/s 482, Code of Criminal Procedure has been moved with the prayer that the operation of the notice in question be stayed and further proceedings in case No. 12 of 1996 be quashed.

3. Counter and rejoinder-affidavits have been exchanged. Heard Sri S.A.S. Abidi,

learned Counsel for the applicants, learned A.G.A, on behalf of the State and Sri Ajit Kumar, learned Counsel for the opposite party No. 2, namely, Mohd. Nazim, who is owner/landlord of the premises, in question.

4. A preliminary point was raised on behalf of the opposite party No. 2 that the application u/s 482, Code of Criminal Procedure is not maintainable as all the persons, on whose joint application proceedings u/s 133, Code of Criminal Procedure were taken, have not been impleaded and that the applicants, instead of showing cause before the concerned Magistrate, have unnecessarily rushed to this Court against an order, which is merely a notice to show-cause as to why the dilapidated building be not pulled down.

5. Learned Counsel for the applicants urged that it was not necessary to implead all the persons who have filed the application before the City Magistrate as the matter primarily is between the applicants and the concerned Magistrate. It was also urged that the application by a number of persons of the locality was given at the behest of the landlord-opposite party No. 2. Learned Counsel for the applicants further urged that this Court is required to take into consideration the legal position whether resort to proceedings u/s 133, Code of Criminal Procedure can be taken to circumvent the provisions of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "the Act") and in violation of the interim order of injunction passed in a suit instituted on behalf of the applicants whereby the opposite party No. 2 has been restrained from evicting the applicants from the premises in question. It was also urged that the powers of Magistrate u/s 133, Code of Criminal Procedure cannot be invoked to settle the private dispute between the parties.

6. It is true that the opposite party No. 2, who is owner-landlord of the premises No. 15, Johnston Ganj, Allahabad, has been taking steps to evict the applicants who are in long standing possession of the same. The relations between the parties, i.e., the applicants and the opposite party No. 2, have been quite strained. Jamilur Rahman, applicant No. 2 had lodged an F.I.R. against the opposite party No. 2 in November, 1995. Applicant Nos. 1 and 2 have also filed a Civil Suit No. 1085 of 1994 in the Court of Munsif West (now Civil Judge-Junior Division) for the relief of permanent injunction against the opposite party No. 2 and two others. In the said suit, an order of injunction has been passed. The opposite party No. 2 had also filed writ petition before this Court. In the wake of the above facts, learned Counsel for the applicants maintained that the proceedings u/s 133, Code of Criminal Procedure are the outcome of the efforts of the opposite party No. 2 to circumvent the order of injunction passed in the Civil Suit and since substantially the proceedings have been launched u/s 133, Code of Criminal Procedure against the applicants by the opposite party No. 2, they are vitiated and the notice issued by learned Magistrate u/s 133(1), Code of Criminal Procedure is illegal.

7. Now the question before this Court is whether the facts and circumstances of this case, as mentioned above. Justify the invocation of Section 133 of the Code.

Section 133 of the Code reads thus:

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, considers--

(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 tree, is necessary, or

...

...

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 the order--

...

(iv) to remove, repair or support such building, tent or structure or to remove or support such trees.

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 is in such a condition that, due to failure to remove or 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 time to remove, repair or provide support to such building. Before issuing a notice u/s 133(1), it is incumbent upon the Magistrate to satisfy himself on the basis of the material available with him that initiation of proceedings u/s 133, Code of Criminal Procedure is warranted.

8. Building No. 15 Johnston Ganj, Allahabad is located at the main road on Johnston Ganj crossing. A number of residents of the area moved an application (contained in Annexure CA. 1 to the counter-affidavit) that since the building is in a dangerous condition and is likely to fall down at any time, necessary steps be taken immediately for its removal so that life, limb and property of the residents of the area and the passers-by be made safe. On this application, Sri H.N. Tripathi, S.I. Kotwali submitted a report on August 2, 1995 (contained in Annexure CA. 2 to the counter-affidavit) maintaining that the building is in a dilapidated condition and its existence is dangerous to the life of the residents of

the area as well as the passers-by. Report dated November 29, 1995 submitted by Nagar Abhiyanta, Nagar Nigam, Allahabad (contained in Annexure CA-3) was also before the learned Magistrate. Before issuing the notice u/s 133(1), Code of Criminal Procedure, learned Magistrate also issued notice to the occupants of the house (applicants) as well as opposite party No. 2.

9. Learned Counsel for the applicants urged that the reports of the local Police as well as Nagar Abhiyanta have been procured by the opposite party No. 2 and that these reports have been submitted without making a spot inspection of the building. It was also urged that the applicants approached the Mayor of Nagar Nigam who had nullified the report of the Nagar Abhiyanta. There is no document on record to show that the Mayor has set aside the report dated November 29, 1995 submitted by the Nagar Abhiyanta. It is not known under what circumstances and grounds, if any, the Mayor could set aside the report submitted by a technical person of the rank of Nagar Abhiyanta.

10. Shorn of all superfluities, it may be mentioned that the learned City Magistrate has initiated proceedings u/s 133, Code of Criminal Procedure on the application of the various residents of the locality. He issued the notice to the applicants/occupants of the building after taking into consideration the reports of the local Police as well as Nagar Abhiyanta. u/s 133(1), the Magistrate has the power to issue a notice to show-cause or to issue a conditional order. The evidence of the parties is to be taken into consideration u/s 138 of the Code to make conditional order absolute. In the instant case, the learned Magistrate has done nothing but to issue a notice to the applicants to show-cause as to why the offending constructions be not removed within a period of 15 days. The said order has not yet been made absolute. Proper remedy of the applicants is to appear before the learned Magistrate and to lead evidence including the evidence of their expert, namely, Sri G.S. Birde who has opined that the building is not in a dangerous condition and is not likely to fall down.

11. As regards the submission that the proceedings u/s 133, Code of Criminal Procedure have been initiated to circumvent the provisions of the Act or to set at naught the injunction order passed in the suit filed by the applicants, it may be observed that proceedings u/s 133, Code of Criminal Procedure are independent of the civil proceedings and proceedings under the Act. In this connection, a reference may profitably be made to *Suresh Prakash v. Krishna Swaroop* 1976 ACC 42. It is true that no person has a right to agitate in a matter u/s 133,, Code of Criminal Procedure as a private dispute; he can only bring to the notice of the Magistrate and then it is for the Magistrate to take proceedings u/s 133 of the Code, or not. After he has started the proceedings, the matter will be between the Magistrate on the one side on behalf of the public at large and the person on the other side to whom notice was issued. Therefore, there is no bar to initiate proceedings u/s 133, Code of Criminal Procedure simply because a civil suit has been filed by the applicants or because proceedings could have been taken by the owner-opposite party for ejectment of the applicants for the purpose of

demolishing the building under the provisions of the Act.

12. The proceedings u/s 133, Code of Criminal Procedure initiated in the instant case have to be brought to a logical end. In pursuance of the notice to show-cause, the applicants have to appear before the learned Magistrate. They shall be afforded reasonable opportunity to lead their evidence. After taking into consideration the evidence of both the parties, the Magistrate has to form his independent opinion whether the offending constructions, which are alleged to be dilapidated and in a dangerous condition, have to be pulled down or they should be allowed to remain in existence. At this stage of the initial notice to show-cause, it would not be proper to scuttle the proceedings u/s 133, Code of Criminal Procedure merely for the asking of the applicants.

13. The application u/s 482, Code of Criminal Procedure is devoid of any merits and substance. It is accordingly dismissed.