

(2000) 05 P&H CK 0037

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous No. 4768-M of 1997

Subhash

APPELLANT

Vs

Dalbir Singh Hooda, (President) Mansarovar Colony Sudhar
Samiti 1079, Rohtak

RESPONDENT

Date of Decision : 08-05-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 397(1), 482

Citation : (2001) 3 RCR(Criminal) 162

Hon'ble Judges : K.S. Kumaran, J

Bench : Single Bench

Advocate : Mr. S.S. Narula, for the Appellant; Mr. Ramesh Hooda, for the Respondent

Judgement

K.S. Kumaran.J.—Respondent-Mansarovar Colony Sudhar Samiti through its President-Dalbir Singh Hooda moved a petition before the Sub Divisional Magistrate u/s 133 Cr.P.C. against the petitioners (1) Subhash and (2) Kushbir Chawla for abatement of the nuisance, alleging that the petitioners are running dairies in the colony with 70 buffaloes, due to which the residents of the colony are put to trouble. According to the complainant, the dairy being small, cattle are tied outside and the cow dung etc. go into the drain and block it, apart from emitting bad smell. The complainant also claims that the cattle are fed outside, creating obstructions on the way causing difficulty to the passers by, apart from breeding mosquitoes. The further claim of the complainant is that an electric machine has been installed to cut fodder which creates a loud disturbing noise. According to the complainant, the petitioners herein have no licence to run the dairies. Ultimately, the complainant prayed that the dairies should be removed.

2. The petitioners were summoned by the learned Sub Divisional Magistrate, Rohtak. Both sides were given opportunity to examine witnesses and were also heard. The contention of the present-petitioners was that their dairies are in

existence from a very longtime and that a solitary person has no right to move the Court u/s 133 Cr.P.C. The further contention of the petitioners was that in view of the fact that dairies have been in existence for a long time, the only remedy for the complainant is to move the civil Court.

3. The learned Magistrate came to the conclusion that Mansarover Colony is a residential colony and that the petitioners herein have no licence from the Municipal Council for running the dairies. He also found that pollution is caused by the cattle as also by the fodder and cow dung, that the cow dung goes into the drains, and that the entire neighbourhood is affected by the dairy. He also found that there was no permission by the Municipal Council. The learned Sub Divisional Magistrate also held that the complainant-society need not be a registered one for claiming this relief. Ultimately, the learned Sub Divisional Magistrate, by his order dated 22.1.1997 allowed the petition filed by the complainant and directed the petitioners-herein to remove their dairies within 30 days.

4. Against this order of the learned Sub-Divisional Magistrate, the petitioners herein filed Criminal Revision before the Sessions Court, Rohtak. The learned Additional Sessions Judge, Rohtak, after hearing the parties and taking note of the provisions of Section 133 Cr.P.C. that whenever the Magistrate received the information about nuisance, he can, after taking such evidence, as he thinks fit, pass appropriate orders for the removal of the nuisance, held that the fact that Mansarover Sudhar Samiti is not registered does not mean that the petition is not maintainable. After analysing the arguments put forward, the learned Additional Sessions Judge, ultimately dismissed the Revision Petition.

5. Aggrieved, the petitioners have approached this Court u/s 482 Cr.P.C. for quashing the above said orders.

6. I have heard the counsel for both the sides and perused the records on file.

7. The contention of the learned counsel for the petitioners is that annexures P-1 and P-1 /A. the copies of the receipts for payment of the licence fee by Subhash and Kushbir Chawla (petitioner-herein) for the period ending 31.3.1981 for the purposes of keeping the dairy will show that the dairy has been in existence atleast from 1981. According to him, the petitioners had started the dairy in the year 1978 itself. He also points out that the copies of receipts annexures P-3 and P-3/A for payment of water charges etc. also show that the dairies of the petitioners have been in existence even during 1996 also. Pointing out these aspects, the learned counsel for the petitioners contends that the dairies of the petitioners have been in existence atleast from 1978 onwards for a period of more than 18 years on the date when the complainant filed the petition u/s 133 Cr.P.C. in the year 1996 and, therefore, the complainant-respondent was not competent to approach the Court for abatement of the nuisance u/s 133 Cr.P.C. According to him the provisions of Section 133 Cr.P.C. can be invoked for the purpose of abating an imminent danger to health, but, the same cannot be

invoked against the alleged nuisance which has been in existence from 1978 onwards. The learned counsel for the petitioners also contends that the residents of the locality have not filed the complaint u/s 133 Cr.P.C., but only one person, claiming himself to be the President of Mansarover Colony Sudhar Samiti, has filed the complaint and such a complaint is also not maintainable.

8.1 will now deal with the contentions raised by the learned counsel for both the sides.

9. The learned Sub Divisional Magistrate, as pointed out already, has held that Mansrover Colony is a residential colony, and has also taken note of the fact that the Municipal Council has not given licence for running these dairies. He has also found that pollution is created by the cattle and by bringing of fodder and cow dung etc., that the cow dung also goes into drains and that the entire neighbourhood has been affected by the dairies. He has also given a finding that the evidence produced has substantiated (substantiated ?) the complaint, and that the work in the dairies continues for all the 24 hours. Therefore, he directed the removal of the dairies. The Revision filed by the petitioners has also been dismissed by the learned Additional Sessions Judge, by taking note of the fact that the Revisional Court has only to ascertain the correctness, legality or propriety of any finding sentence or order recorded or passed by the inferior Court. The petitioner, who has approached this Court u/s 482 Cr.P.C. will not be able to question the findings on facts already rendered by the learned Sub Divisional Magistrate. The learned counsel for the respondent, therefore, contends that the petitioners having filed a Revision against the order of the learned Sub Divisional Magistrate and failed, are not entitled to file a second Revision Petition in the garb of petition u/s 482 Cr.P.C. The learned counsel for the petitioners on the other hand contends that the petitioners can still maintain this petition u/s 482 Cr.P.C. if they are able to show that there has been a failure of justice or misuse of judicial mechanism or procedure, and that if they are able to make out the same, the High Court in exercise of the jurisdiction u/s 482 Cr.P.C. has to prove the abuse or mis-carriage of justice or even to correct irregularities committed by inferior Criminal Courts. I will deal with this aspect subsequently. Firstly, I will deal with the contention of the learned counsel for the petitioners that one of the dairies were established in 1978 while the others in 1986-87 and have been in existence for long period till the complaint u/s 133 Cr.P.C. was initiated in the year 1996, and in such circumstances, the Court will not invoke the aid of Section 133 Cr.P.C. to abate the alleged nuisance. In support of his contention, the learned counsel for the petitioners relies upon a decision of this Court in *Ram Lal v. Batti Singh* A another, 1982 Chandigarh Criminal Cases 259. That was a case where the Sub Divisional Magistrate had ordered the removal of the wheat thrasher from his house u/s 133 Cr.P.C. The petitioner challenged the order before this High Court by filing a Criminal Revision Petition. The contention of the petitioner before the High Court was that the wheat thrasher was an old one and the Sub Divisional Magistrate, had no jurisdiction to order its removal u/s 133 Cr.P.C. especially so. when the Sub Divisional

Magistrate had not given a finding to when the thrasher was installed. This Court relying upon the decision in Kaarta Ram & others v. Manglu Ram 1981 C.L.R. 371, allowed the petition; quashing the order of the learned Sub Divisional Magistrate and directing him to go into the matter afresh after satisfying himself whether (the wheat thrasher, at the time of the complaint, was a new one or not, and then to pass an order. The learned counsel for the petitioners also relies upon another decision of this Court in Madhu Singh v. StiriSadha Singh & Anr. 1986(1) R.L.R. 444. This case related to an alleged encroachment. This Court held that in the absence of a positive finding by the final Court as to when the construction was made, it would be difficult to come to a conclusion as to whether the proceedings u/s 133 Cr.P.C. was the rightful course. Therefore, this Court while setting aside the order passed by the learned Additional Sessions Judge, remitted the matter back.

10. The learned counsel for the petitioners next relies upon a decision of this Court in Rattan Siitglt v. Mohittdar Singh 1973 C.L.R. 27, wherein this Court held that Section 133 Cr.P.C. is meant to vacate only such unlawful constructions on public places which had been built lately on a public place, and that this provision cannot be allowed to be used as a substitute for litigation in civil courts. This Court also held that the speedy and summary method for dealing with public nuisance-and obstruction in cases of emergency and imminent danger to public interest are provided in Chapter 10 of the Cr.P.C. but if, the obstruction has been allowed to stand on a public place without objection for many years then it is evident that there was no such emergency or imminent "danger to the public interest and that the complainant could seek his remedy in Civil Court.

11. The learned counsel for the petitioners also relies upon the decision of this Court in Karta Ram v. Manglu Ram 1991 C.L.R. 371, wherein it was held that the jurisdiction u/s 133 Cr.P.C. cannot be invoked if the construction is old and long standing one. The learned counsel for the petitioners also relies upon another decision of this Court in Tarsem Singh v. Mukand Shtgh Mistri and another 1991 C.L.R. 640. That was a case where the thrasher and ginning machine were found to be operating already for a good number of years, and they were so functioning even before the respondent, who was complaining against the same, had purchased the land and had constructed the house thereon. Even thereafter the ginning machine and thrasher had been worked for number of years. Therefore, this Court held that provisions of Section 133 Cr.P.C. cannot be invoked for the removal of the long standing nuisance.

12. But the learned counsel for the respondent contends that these cases relied upon by the petitioners related to the request for removal for very old construction or obstructions or for the removal of a wheat thrasher, ginning machine etc. and not to a case where the offending party has a number of buffaloes and is causing nuisance not only by way of obstructions but also by way of causing injury to health. Learned counsel for the respondent points out that annexures P-1 and P" 1 /A, the receipts for the payment for the licence fees

for keeping the stables by these petitioners issued in the year 1981, show that each of the petitioners had four buffaloes and two cows only at that time whereas the number of buffaloes has grown to the extent of 70. He also points out the finding given by the Sub Divisional Magistrate that there is no licence for these dairies, and that pollution created by the catties and by bringing of the fooder and cow dung has increased manifold. Pointing out these factors, the learned counsel for the respondent contends that the case of these dairies run by the petitioners stands on a different footing than the cases of the offending constructions or the case of wheat thrasher or ginning machines. I agree with the learned counsel for the respondent in this respect and I am of the view that these dairies maintained by the petitioners in a residential colony stand on a different footing. Initially there were only 4 buffaloes and 2 calves. Now there are 70 buffaloes. By increasing their number the petitioners have given rise to fresh cause of action. Therefore, in my view, the contention that the complainant should have acted immediately or that the provisions of Section 133 Cr.P.C. could not have been invoked after a long time cannot now be accepted. But still the question that arises for consideration will be as to what is the last date on which the petitioners increased the number of the cattle. So that the Court can decide whether the respondent has come the Court soon after the increase in the number of the cattle. But, there is no evidence on this aspect and therefore the matter has to be remitted back to the Sub Divisional Magistrate for further enquiry on this point.

13. Another contention put forward by the learned counsel for the petitioners is that the residents of the locality have not been affected and it is only a single individual, who has filed the complaint, claiming himself to be the President of Mansarover Colony Sudhar Samiti, due to some enmity and, therefore, the provisions of Section 133 Cr.P.C. ought not to have been invoked by the learned Magistrate. He also contends that this Samiti is not a registered society and, therefore, it cannot act and therefore, also, this complaint is also not maintainable. But, in my view those contentions are not acceptable. Because, Section 133 Cr.P.C. provides that whenever a District Magistrate or Sub Divisional Magistrate or any other Executive Magistrate, who is empowered in this behalf by the State Government receives a report from the police officer or "other information" regarding the nuisance, such Magistrate can, on taking such evidence as he thinks fit, take action u/s 133 Cr.P.C. Therefore, it is evident from this provisions that the Magistrate can act merely on the information received by him or on a police report. Section 133 Cr.P.C. does not require that the information must be given by a registered society or a body of persons. Therefore, this contention put forward by the learned counsel for the petitioners cannot be accepted.

14. Learned counsel for the respondent, as pointed out already, also questions the maintainability of this petition u/s 482 Cr.P.C. on the ground that as against the order passed by the learned Sub Divisional Magistrate u/s 133 Cr.P.C., the petitioners had filed a Revision before the Sessions Court, but the learned

Additional Sessions Judge also dismissed the said Revisions petition filed by the petitioners and therefore, this petition u/s 482 Cr.P.C. is only a second Revision petition and is, therefore, unsustainable. But the learned counsel for the petitioners, on the other hand, relies upon a decision of the Hon''ble Supreme Court in Krishnan and another Vs. Krishnaveni and another, , wherein the Hon''ble Supreme Court held as follows:

"....In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power u/s 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities - incorrectness committed by inferior criminal Court in its judicial process or illegality or sentence or order."

15. Relying upon these observations, the learned counsel for the petitioners contends that though, a second Revision is not maintainable, this Court in exercise of its powers u/s 482 Cr.P.C. is entitled to intervene in this case, inasmuch as the complaint was lodged long time after the dairies were started and, therefore, the complaint itself was not maintainable. The learned counsel for the petitioners, therefore, contends that in the interest of justice and to prevent abuse of process of Court, this Court is entitled to intervene in this matter in exercise of its powers u/s 482 Cr.P.C.

16. I have already pointed out that the case of petitioners stands on a different footing from the cases referred to in the decision relied upon by them. The petitioners started with four buffaloes and two calves initially in 1981 and the number of cattle have grown to a large extent. Unlike the case of an offending construction of the inconvenience caused by a thrasher or ginning machine, it is seen that the number of the heads of cattle has increased many fold. It is not the same dairies that could have been in existence on the date of the petition before the learned Sub Divisional Magistrate. Therefore, it cannot be stated now that the provisions of Section 133 Cr.P.C. could not have been invoked in the case of the dairies maintained by the petitioners.

17. Therefore, in view of my finding above, the Court has to find out the last date on which the petitioners increased the number of the cattle. The petition filed by the respondent for abating the nuisance cannot be dismissed at this stage. The respondent has to be given opportunity to lead further evidence on this point.

The petition is allowed setting aside the order of the courts below and remanding the matter back to the learned Sub Divisional Magistrate, Rohtak with a direction to the parties to appear before him on 16.7.2001.

The learned S.D.M. will give both parties opportunity to lead evidence on this

point and then decide whether the petitioners had approached the Court soon after the last increase in the number of cattle and then pass appropriate orders in accordance with law. Petition is ordered accordingly.

18. Petition allowed.