

(1991) 07 BOM CK 0096

In the Bombay High Court

Case No : Criminal Writ Petition No. 81 of 1988

Tejmal Punamchand Burad

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 02-07-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 134, 135, 136, 137
Evidence Act, 1872 — Section 56, 57
Penal Code, 1860 (IPC) — Section 268

Citation : (1992) CriLJ 379

Hon'ble Judges : B.U. Wahane, J

Bench : Single Bench

Advocate : Shri Darda, for the Appellant; Shri Sinha, Assistant Public Prosecutor, V.S. Sirpurkar and S. K. Khwaja, for the Respondent

Judgement

1. This Rule is directed against the order passed by the learned Sub-Divisional Magistrate, Malkapur, in a proceeding u/S. 133 of the Cr.P.C. i.e. for the removal of "Public Nuisance".

2. The terms "Nuisance" as used in Law of Tort is not capable of exact definition. It has been used with meaning varying in extent by the old writers, and even at the present day there is no entire agreement whether certain acts or omissions shall be classified at "nuisances" or whether they do not fall in any other divisions of the Law of Tort. The "Nuisances" may be broadly divided into;

1) Acts not warranted by Law or omissions to discharge a legal duty, which acts or omissions obstruct or cause inconvenience or damage to the public in the exercise of rights common to all people;

2) Acts or omissions which have been designated or treated as nuisance by Statute;

3) Acts or omissions generally but not always or necessarily connected with the user or occupation of land which cause damage to another person in connection

with the latter's user of land or interference with the enjoyment of land or of some right connected with the land.

"Nuisances" may also be divided into those which are public, general or common, and those which are private. A Public Nuisance is one which inflicts damage, injury or inconvenience upon all the public in general or upon all of a class who come within the sphere or neighborhood of its operation. A private nuisance is one which does not cause damage or inconvenience to the public at large, but which does interfere with a person's user or enjoyment of land or some right connected with the land.

3. In order to constitute a nuisance there must be both (1) injuria, that is the wrongful act, and (2) damnum, that is, damage actual or presumed.

4. A person is guilty of public nuisance who does;

1. Any act, or is guilty of an illegal omission;

2. Which causes any common injury, danger or annoyance;

(a) to the public, or

(b) to the people in general who dwell or occupy property in the vicinity; or

3. Which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

"Public Nuisance" shall mean a public nuisance as defined u/S. 268 of I.P.C. "Public Nuisance" is an offence against the public as it affects the public at large, or some considerable portion of them. It depends in a great measure upon the number of houses and the concourse of people in the vicinity, and the annoyance or neglect must be of a real and substantial nature. Public nuisance cannot be excused on the ground that the act complained of is convenient to a large number of the public. Acts which seriously interfere with the health, safety, comfort, or convenience of the public generally or which tend to degrade public morals have always been considered public nuisance.

5. Chapter X-B of the Code of Criminal Procedure deals with "public nuisances" and provides a speedy and summary method for dealing with them, in cases of great emergency and where there is imminent danger to the public interest. The proceedings under this Chapter are of a summary nature and intended to enable Magistrates to deal with cases of emergency and not intended to enable a complainant to obtain, by having recourse to this Chapter, relief which he should seek in the Civil Court. Proceedings under this Chapter are not proceedings in respect of offences, but orders passed in proceedings under this chapter are orders passed in a "criminal trial".

The provisions of this Chapter should be so worked as not to become themselves a nuisance to the community at large. Although every person is bound to so use that property this it may not work legal damage or harm to his neighbour, yet on

the other hand, no one has a right to interfere with the free and full enjoyment by such person of his property, except on clear and absolute proof that such use of it by him is producing such legal damage or harm.

6. The provisions of the S. 133 of Cr.P.C. should be sparingly used. The idea behind this section is that the danger should be such that if the Magistrate does not take action and only directs the public to have recourse to the ordinary Courts of law, irreparable damage would be done. A Magistrate can act under sub-sec. (1) either on "a police (report) or other information". The words are very wide and permit a Magistrate to take action on information derived from any source. Therefore, an order passed by the Magistrate cannot be considered illegal on the ground that part of the information was derived by him in another capacity.

Section 133 of Cr.P.C. is limited to injuries likely to be caused to passer-by or "to persons living or carrying on business in the neighborhood" i.e. those persons who are living actually in the alleged dangerous building or in the servant's houses in the compound belonging to it, as well as those members of the public whose ordinary avocations may take them to them to the neighborhood of the building complained of.

7. The facts and circumstances arose for the institution of the proceedings of Misc. Cri. Case No. 3131 of 1988 are as under :

The non-applicant No. 2 Hansraj Bhikamchand Parekh, r/o Malkapur submitted an application before the P.S.O., Malkapur, alleging that a building on plot No. 298, sheet No. 14, situated in Malkapur is owned by him and is in his possession. It is in dilapidated condition and, therefore, there is every likelihood that the building may collapse at any time and thereby cause injury to the persons passing by and those who are living in the neighborhood. It is a two storied building. Some portion of the upper storey as also of ground floor is already damaged and fallen. Due to rains, the other portion of the building is also damaged. One room is in possession of Bhagwan Mahavir and towards the southern side, one room is let out to Tejmal Punamchand Burad. For the last 20 to 22 years, the room which was let out to the petitioner Tejmal Punamchand Burad, is closed and there is no material in that room. Therefore, the respondent No. 2 requested the P.S.O., Malkapur to take immediate action to avoid danger, harm likely to cause to the residents. The entry was taken of this report in the Sanha Register on 5-10-87 at Sr. No. 5. P.S.O., Malkapur, directed the P.S.I. to make an enquiry and to submit report. During the enquiry, the panchanama of the building was prepared in presence of the panchas, statements of the people of the locality were recorded and some documents relevant to the enquiry were collected and thereafter, Istagasa No. 1/87 u/S. 133(d) of Cr.P.C. was filed in the Court of Sub-Divisional Magistrate, Malkapur. The proceedings registered as Misc. Cri. Case No. 314 of 87. On 27-11-1987, the learned S.D.M., Malkapur passed an order for issuance of summonses to the non-applicant i.e. Hansaraj Bhikamchand Parekh (N.A. No. 2 and according to Istagasa as N.A. No. 1) and Tejmal

Punamchand Burad (present applicant in the proceedings as N.A. No. 2).

The case was posted on 7-12-87. In pursuance of the summons issued by the learned S.D.M., Malkapur, Shri Khwaja Advocate appeared for the N.A. 1 i.e. Hansaraj and Shri Sundarani Advocate appeared for N.A. No. 2 i.e. Tejmal and submitted an application for grant of time to file reply/objections/and documents. Hansaraj Bhikamchand submitted his reply to the notice u/S. 133 of Cr.P.C. He submitted that the premises of the house being in dilapidated condition, likely to cause great harm to life and property of the neighbours and public and to the passer-by. He being the owner is ready to comply with any order passed by the Hon"ble Court to demolish the house. In his reply, he made it clear that Tejmal is a tenant in one room on the ground floor. However, for the last 20 years., the room is vacant and it is not in use of Tejmal. There is imminent danger as the house and the walls are likely to collapse at any time. He is a landlord and is unable to demolish the dilapidated house as the tenant Tejmal is obstructing demolition. He further submitted that it is necessary to demolish the premises to avoid danger to the life and the property of the neighborhood and public.

8. The case was posted on 21-12-87. The non-applicant Hansaraj was represented by an Advocate Mr. Khwaja. No reply or objections raised on behalf of the N.A. No. 2 i.e. Tejmal. The learned S.D.M., Malkapur, it being a summary and urgent proceeding, passed the conditional order. The order sheet reads as under :

"Perused the report of police, Municipal council and B. & C. Deptt. it is clear that the building is in dilapidated condition and causes public nuisance. Issue conditional order to non-applicants directing them to appear before me on 24th., if they deny existence of public nuisance with evidence. The order sheet is signed by N.A., Tejmal".

9. The order sheet dt. 24-12-87 is as under :

"Party No. 2 by Advocate Khwaja. Party No. 2 absent though called twice. Case for spot inspection. Shri Khwaja does not want to adduce any evidence and would like the Court to rely on the documents and police report. Notice is affixed on his last address". And thereby the case is posted on 18-12-87 for orders.

10. My attention has been attracted by Shri Ramesh Darda, the learned counsel for the applicant to the application dt. 24-12-87, from the file which is at page No. 109. The application speaks for grant of time to file reply. However, there is no whisper in the order sheet that the counsel of the N.A. 2 Tejmal was present before the learned S.D.M. on 24-12-87 and submitted the instant application to him. There is no endorsement either of the Presiding Officer or the read/concerned clerk working in the Court of learned S.D.M., Malkapur to show that the application was either presented by Tejmal or his counsel. Similarly, the stamp affixed on the application bears no date too. The order sheet is very clear to the effect that "the non-applicant Tejmal was absent though he was called twice". Therefore, it is difficult to say that on 24-12-87, the applicant was

present before the learned S.D.M. and submitted any application for grant of time to file reply.

11. On page 111 of the record of the lower Court, there is an application submitted by the non-applicant No. 1 Hansaraj, signed by his counsel Mr. Khwaja on 24-12-87. He specifically submitted therein that the N.A., Tejmal has already signed the order sheet dt. 21-12-87 and on two occasions he applied for filing the reply. It was his duty to remain present today in person with evidence. He is avoiding the process of the Court. The proceeding cannot be delayed being detrimental to the public interest and as the building is 100 yrs. old. Further, he prayed that the order u/S. 138 of Cr.P.C. may kindly be passed.

12. As the summons was sent to non-applicant Tejmal Punamchand Burad and it being received unserved, the learned S.D.M., Malkapur sent a letter dt. 24-12-87 to the Police Inspector, Malkapur directing him to affix the conditional order to his last known address in presence of panchas and to submit the compliance report by 28-12-87.

13. On 24-12-87 itself, the record of Misc. Cri. Case No. 314/87, State v. Hansaraj Bhikamchand Parekh and Tejmal Punamchand Burad, was sent to the District Magistrate, Buldana in pursuance of the Telegraphic Message received by him. The concerned papers which were referred to the District Magistrate, Buldana received back on 26-2-88. After receipt of the papers, the S.D.M., the respondent No. 3 directed to issue summonses to both the parties and the case was posted on 14-3-88.

14. The order sheet of 14-3-88 shows that the party No. 1 by Mr. Khwaja Advocate. Party No. 2 by Shri Sundarani Advocate. Today, I am busy with Administrative works. Case be put on 15-3-88. 15. The order sheet of 15-3-1988 reads as under;

"As per requisition from the Registrar, Sessions Court, Buldana, the record is submitted to the Sessions Judge, Buldana for reference in Revision Application No. 160/87".

16. On 20-7-88, the case papers received from the Revisional Court. Therefore, the summonses were issued to the parties to appear before him on 28-7-88.

17. On 26-7-88, the P.S.O., Malkapur submitted his report to S.D.M., Malkapur. In that report, it is specifically mentioned that the house belonging to Hansaraj Bhikamchand Parekh which is situated in the Chowk, of which the rear portion is already fallen and the doors, tin sheets bricks and wooden logs are lying. This report further speaks that only portion of the building measuring 10" x 50" double storey is only standing. But the same is tilting towards the road side. It is on the verge of falling. It can fall at any time. Besides this, the entire building is already demolished. Since many years nobody resides in the building as it is not convenient for residence. Therefore, P.S.O., Malkapur requested the learned S.D.M., Malkapur that it being an urgent and imminent danger to the building, it

will be better in the interest of justice to avoid any harm and danger to the public in general, to demolish the remaining portion of the fallen building. Along with this report, a spot panchanama and the photographs showing the condition of the building in dispute, were annexed.

18. To prevent the imminent danger or injury of a serious count to the public, the immediate measure being necessary, the respondent No. 3, passed the order dt. 26-7-88 confirming the conditional order passed by him on 21-12-87 and directed the P.S.O., Malkapur to pull down the dilapidated structure forthwith. The P.S.O. was directed that he should give reasonable opportunity to the person occupying the house to vacate the premises and also recover the cost of the operation from the owner Hansaraj Bhikamchand Parekh. The P.S.O., Malkapur after demolishing the structure which was in dilapidated condition submitted his compliance report on 28-7-88.

19. The conditional order dt. 21-12-87 was passed u/S. 133(d) of Cr.P.C. S. 133 (d) reads as under :

"1) Whenever a District Magistrate or a Sub-Divisional Magistrate or any other executive Magistrate specifically empowered in this behalf by the State on receiving the report by the Police Officer or other information and on taking such evidence (if any) as he thinks fit, (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 the 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".

20. Mr. Darda, the learned counsel for the petitioner attacked the order dt. 26-7-88 as illegal being contrary to the provisions of law. In the petition, Mr. Darda, made many prayers directing the respondent No. 2 to reconstruct the structure which was demolished on 27-6-88, to allow the petitioner to reconstruct the said structure, to recover the costs from the respondent No. 2 and so on. Except the prayer No. 1, the other reliefs sought not being under the jurisdiction of this Court, even the petition cannot be entertained in respect of those reliefs.

21. It is submitted that the respondent No. 3 - S.D.M., Malkapur did not follow the procedure at all. All steps taken, are contrary to the procedure. The respondent No. 3 passed the impugned order in collusion with the respondent No. 2. According to him, there was no evidence before the respondent No. 3, even to take the action u/S. 133 of Cr.P.C. as on such application which was made to the Municipal Council in the year 1982, no action was taken on the application filed by the N.A. No. 2. It is further submitted that the respondent No. 3 had grudge against the petitioner, as the petitioner had earlier filed a transfer application for transferring the Rent Control Proceedings from his file to the file of another Rent Controller. The petitioner also moved to transfer the proceedings from the file of respondent No. 3. Considering these facts, according

to the petitioner (Sic) makes it clear that the respondent No. 3 with ulterior motive extended helping hand to the respondent No. 2, without following the requirements of Section 133 of Cr.P.C. The impugned order is not in conformity with the principles of natural justice. Demolishing the portion which was in procession of the petitioner, he is deprived of his earnings and consequently his livelihood.

22. My attention was attracted to the police report, the basis to take cognizance and to start the proceedings u/s 133 of Cr.P.C. There is no mention in the report submitted by police on 26-7-1988 that there was incessant rain for 3 days and further there being a forecast of heavy rains. There is no material or evidence to show that the respondent No. 8 collected any material or evidence, still the impugned order dated 26-7-1988 is passed. The impugned order speaks as under :

"It is further stated in the report that some part of the house is already collapsed and whatever dilapidated structure is standing, may collapse at any moment because of continuous rains which is going on in the town for the last 3 days and there is forecast of heavy rains for coming 3 days from Metrological Deptt."

It is true that there is no whisper in the report submitted by the P.S.O., Malkapur in respect of incessant rains for last 3 days and forecast by the Metrological Department.

23. The court is empowered to take the judicial notice of the facts and the events which take place before him of which he has personal knowledge. The facts of which the court will take judicial notice, need not to be proved u/s 56 of the Evidence Act. It is well established that the judicial notice is taken for the common affairs of the life which are of general knowledge. Those matters formally known to the majority of the mankind or to those persons familiar with the particular matter in question, are properly within the concept of judicial notice. The judicial notice is continuously extended to keep pace with advent of Art, Science and General Knowledge. The respondent No. 3 was residing in the town of Malkapur in the capacity of S.D.M., Malkapur, he also being the victim of incessant rains for the last 3 days prior to 26-7-1988 as well as being S.D.M. of Malkapur, the knowledge of forecast from the Metrological Deptt. cannot be ruled out.

It is to be noted here that the petitioner has not specifically denied the aforesaid facts which are the basis for taking immediate measure to prevent imminent danger or injury of a serious count to the public.

24. Sections 56 and 57 of the Evidence Act have been discussed in a case of Lalai Singh Yadav v. State of U.P. reported in . The Division Bench of our High Court also discussed the import of Sections 56 and 57 of the Evidence Act, in a case of The Lokamanya Mills Barsi Limited Vs. Barsi Municipal Council, Barsi and Another, .

25. Their Lordships of the Supreme Court also dealt this point in a case of Shiv Nath Rai Ram Dhari and Others Vs. The Union of India (UOI), , and observed in para 7 of the Judgment as under :

"Even so, we cannot lose sight of the fact we must ascertain the amount of care which it would have been possible for the railway administration to take in the particular circumstances which obtained in August-September, 1947, in this part of the country. What was happening in this part of the country during this period is a matter of which we can take judicial notice."

26. There is no dispute about the powers of this Court u/s 482 of Cr.P.C. to take cognizance and interfere with the order passed u/s 133, if substantial injustice has been done, if a Magistrate has taken perverse view of the evidence, where there is to evidence or no reasonable evidence or record to justify the Magistrate's findings or where the findings arrived at are perverse or such as no reasonable ground (sic) would have arrived at on the evidence produced, where the Magistrate has given the decision regarding the matter which lies within the cognizance of Civil Court.

27. Shri Darda, the learned counsel for the petitioner attacked the impugned order under challenge alleging that no description of the property which alleged to be in dilapidated condition and likely to cause alarm, harm and danger to the public in general. There is on specific mention that whether the building standing on Municipal House No. 520 was entirely in dilapidated condition or a particular portion of it require to be demolished. As there was no description of the property to be demolished the impugned order is illegal.

The proceedings u/s 133(d) of Cr.P.C. were instituted on 27-11-1987 and the conditional order was passed on 21-12-1987, which reads that,

"the house owned by Hansraj Bhikamchand Parekh r/o Malkapur situated in sheet No. 14, plot No. 298 of Malkapur town is in such a condition that is likely to fall and thereby cause injury to persons living in neighborhood or passing by and that in consequence the removal is necessary."

It, thus, makes it crystal clear that the construction on the plot No. 298 belonging to Hansaraj Parekh, being in dilapidated condition needs demolition. The P.S.O. along with his report dated 26-7-1988 placed before the respondent No. 3, the spot panchanama and photographs. The spot panchanama clearly speaks about the condition of the building which is also more clear from the photographs. At a glance, one can come to the conclusion that the building in dispute as shown in the Istagasa, the report, the spot panchanama and the photographs submitted on 26-7-1988, was on dilapidated condition and likely to fall. Under the circumstances, the submissions made by Shri Darda, the learned counsel for the petitioner, do not survive.

28. Thirdly, it is submitted that no opportunity was accorded to the petitioner to refute the charges by allowing him to file written statement, leading evidence

and thereby to show that the building in question was not in dilapidated condition and not require demolition. Before passing the conditional order on 21-12-1987, the notice was served upon the petitioner who in pursuance of the notice appeared before the respondent No. 3 on 7-12-1987 and submitted an application for grant of time to file the reply. The case was, therefore, posted on 21-12-1987 to enable the applicant to file his written statement/objection, if any, and to lead evidence, thereby to deny the allegations made in the Istagasa. However, on 21-12-1987, neither the applicant filed his written statement/objection nor adduced any evidence in rebuttal or denial. Therefore, the respondent No. 3, on the basis of the evidence, considering the imminent danger, had no other go than to pass the conditional order on 21-12-1987. The applicant was present on 21-12-1987 and, therefore, he was aware of the proceedings. The order sheet dated 21-12-1987 speaks that "Issue conditional order to the non-applicants directing them to appear before me on 24th, if they deny existence of public nuisance with evidence" and the case was posted to 24-12-1987 for recording the evidence denying the existence of public nuisance.

29. On 24-12-1987, the applicant was absent though he was called twice. On behalf of the N.A. No. 2, Sh. Khawja submitted that he does not want to adduce any evidence and would like to rely on the documents and police report. It was also ordered by the respondent No. 3 that notice be affixed on the applicant's last address and the case was posted for orders on 28-12-1987.

30. Before the date of order i.e. 21-12-1987, the applicant approached the District Magistrate, Buldana to transfer the case from the file of respondent No. 3. Similarly, the applicant also preferred the revision application before the Sessions Court, Buldana against the conditional order Dated 21-12-1987. As the respondent No. 3 sent the papers to the concerned authorities, he could not proceed with the case and, therefore, it was posted on 20-7-1988 after receiving papers from the Revisional Court. Summonses were issued to the parties and the case was posted to 28-7-1988 for orders as it was earlier fixed for orders only.

31. On 26-7-1988, the P.S.O., Malkapur submitted report together with the spot panchanama, photographs and the statements to the effect that the pulling of the house is a must, in order to save life of the public in general. There was an imminent danger and it being urgent need, the impugned order was passed on 26-7-1988. Considering the facts and circumstances enumerated above, it cannot be said by any stretch of imagination that the applicant was not given an opportunity to refute or deny the allegations that there is no public nuisance.

32. Before passing a conditional order under this section, a Magistrate is not bound to take evidence, because the proceedings u/s are entirely ex parte. However, the order sheet dated 7-12-1987 and the application filed by the applicant for grant of time to file the reply/objection, makes it clear that even before passing the conditional order, an opportunity was given to the applicant to deny that there is no "Public Nuisance".

33. It is expected that the Magistrate should record the evidence u/s 133 of Cr.P.C. before making the order absolute, he must accord an opportunity to the persons concerned who are likely to be aggrieved. The proceedings u/s 133 of Cr.P.C. are more or less summary and it cannot be kept in pending for a long time. The applicant failed to file reply/objection as well as lead the evidence to show that there is no Public Nuisance. The applicant was given opportunity to deny that the construction requires demolition but he did not avail the opportunity by filing objection and leading evidence. The respondent No. 3 has accorded reasonable and sufficient opportunity to the applicant to show cause as contemplated under this section. The provisions of this chapter are stringent, because the intention is to create facilities for conditional orders, which Magistrates are authorised to pass under this chapter, becoming final without needless delay, and thereby promptly to ensure the public safety. Therefore, the order under this chapter must be passed without delay. According to me, therefore, there is no substance in the submissions of Mr. Darda, the learned counsel for the petitioner to the extent the principles of natural justice were violated.

34. Mr. Sirpurkar, the learned counsel for the respondent No. 2 submitted that the petitioner is not entitled to any benefit much less the interference with the impugned order passed by the respondent No. 3 on 26-7-1988, as he is guilty of suppression of facts. In this regard, he brought to my notice the order passed by the Rent Controller, Jalgaon, in case No. BRA/Malkapur/2/87-88, Hansaraj Parekh v. Tejmal Punamchand Burad, passed on 13-6-1987. Para 14 of the order speaks as under :

"It is contended by the applicant that the shop is in a dilapidated condition and need reconstruction which cannot be done without vacating it. The applicant has filed several documents concerning the proceedings stated by the S.D.M. Malkapur u/s 133 of Cr.P.C. On Police report that the shop is in dangerous position and is likely to fall on the public road thus causing damage and fatal injury to the public and to the neighbours. It was contended by the counsel of applicant that the premises are 100 years old and were constructed in mud and bricks and have developed cracks all over as shown in the photographs. That the shop is lying vacant and is standing in a dangerous position that nobody can even risk his life by entering it. That the N.A. is purposely asserting his occupation without using it for a moment and the N.A. is building castles in the air. It appears that the S.D.M. Malkapur has started proceedings u/s 133, Cr.P.C. for demolishing the dilapidated shop to prevent damage to the life and property of public and there cannot be two opinions about it. The N.A. cannot reap any profits from such a shop which is not in his use. Therefore, I answer this issue in the affirmative and find that the reconstruction cannot be carried out without vacating it. Moreover sketch filed by the applicant clearly shows that without including this small shop the applicant cannot reconstruct a proper shop for his own business. The photographs very well show the bad condition of the premises".

From this order it is crystal clear that the shop or the premises let out to the applicant were in dilapidated condition. Therefore, the proceedings instituted u/s 133 of Cr.P.C., the conditional order passed on 21-12-1987 and the impugned order under challenged dated 26-7-1988 pertains to the premises which were let out to him and alleged to be in his possession.

35. Similarly, it is contended before me that since 1982, the injunction order has been passed by the competent Civil Court restraining the applicant (Non-applicant ?) from interfering with the possession of the applicant in respect of the premises which were let out to him. If really so an injunction was granted in favour of the applicant and if operating, there was no need to file a regular civil suit No. 310/88. In a Reg. C.S. No. 310/88, the applicant under Order 39, Rules 1 and 2 of C.P.C. for grant of ex parte temporary injunction. It was prayed in the application that issue ad interim injunction till the decision of this application in favour of the present applicant and against the defendant whereby restraining him from disturbing the possession of the plaintiff upon the suit property either by himself or through his family members, relations, employees, labourers, contractors and agents, etc. After hearing the parties, the Civil Judge, Jr. Dn., Malkapur passed the elaborate order dated 17-8-1988 rejecting the prayer of injunction. The application for grant of injunction was filed on 5-8-1988 i.e. after the impugned order under challenge was passed.

36. It needs to be mentioned that the petitioner himself sent his reply to the letter dated 18-6-1982 issued by the Chief Officer, Municipal Council, Malkapur wherein he specifically mentioned that.

"Hansaraj has demolished the upper floor in such a way that he created a big hole in the roof and heavy cracks in the wall and, therefore, I cannot even simply sit in the shop, then what talk of about carrying out the business. Such is the condition of my shop that intentionally done by Hansaraj".

It is, thus, crystal clear from the averments that since before 1982 (June), in the premises a room was let out to him, he was not doing any business but simply it was kept locked. Even in the reply dated 23-6-1982 the applicant stated that he is not in a position to sit and do any business as the respondent No. 2 demolished the upper floor and had caused damage to the premises in the occupation of the applicant, but he has not taken any action for the illegal activities committed by respondent No. 2 HansaraJ.

37. It is submitted on behalf of the petitioner that the impugned order passed by the respondent No. 33 is passed in collusion with the respondent No. 2, and therefore, without following the procedure, the conditional order as well as the final order for demolition were passed. The learned counsel took me through the provisions commencing from Sections 133 to 142 of Cr.P.C. However, there is no prayer claiming any relief against the respondent No. 3. At the time of making submissions Mr. Darda, the learned counsel for the petitioner submitted that he has filed a criminal application No. 1230/90 for the amendment to the prayer

clause. It bears the endorsement of A.G.P. acknowledging the receipt of the copy of amendment application on 27-11-1990. Amendment application is not allowed and to that effect there is no order passed by this Court and consequently no amendment has been carried out in the petition. Similarly, it has not brought to my notice that the amended petition praying any relief against respondent No. 3, is served upon the respondent No. 3. It is true, there is substance in the submission of Mr. Darda to the effect that though the respondent No. 3 received notice of the original petition (unamended), he neither appeared in person nor he is represented by the counsel. However, the fact remains that as there is no prayer to claim any relief against the respondent No. 3, he might have chosen to remain absent, as the Govt. Pleaders are to safeguard the interest of the officers who discharge their duties for the State. Except the circumstance which already discussed in the precedent paras, no other circumstances have been brought to my notice by the learned counsel for the petitioner which will be the pointer to the circumstances that the respondents Nos. 2 and 3 had developed any relations and, therefore, the order was passed in collusion. On the contrary, it is apparent from the impugned order that there being heavy rains for 3 days and there being the forecast of heavy rains, the report submitted by P.S.O., together with the spot panchanama, statements of the persons of neighborhood and the photographs placed before him, considering the dilapidated condition of the structure, in the interest of the people in general, the respondent No. 3 rightly exercised his powers and ordered to demolish the dilapidated structure. Therefore, there is no substance in the submission of the learned counsel for the petitioner.

38. Mr. Sinha the learned A.P.P. for the State also made submissions on behalf of the respondent No. 3, as he happened to be an Officer of the State against whom the wild allegations have been levelled by the petitioner. Mr. Sinha also took me through the provisions commencing from Sections 133 to 142 of Cr.P.C. I have already expressed my opinion that the exercise of power by the respondent No. 3 is in consonance of the Scheme and I do not find any fault either in the proceedings or orders.

39. Section 134 of Cr.P.C. speaks about the service on the person against whom the order is made. Before the conditional order was passed on 21-12-1987, on the earlier date i.e. 7-12-1987 there is an appearance of respondent No. 2. Similarly, on 21-12-1987 also he was present. Therefore, the respondent No. 2 was aware of the conditional order passed by the respondent No. 3. In spite of this, the respondent No. 3 directed that the notice be affixed on his last address. Therefore, he was in know of the conditional order. Thus, the provisions of Section 134 are complied with.

The provisions of Sections 135, 136 and 137 do not attract, not being applicable.

Section 138 reads as under :

"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."

The conditional order was passed on 21-12-1987 and the respondent No. 2 was aware of the conditional order passed by respondent No. 3. Even before the conditional order, on 7-12-1987 the respondent No. 2 filed an application before the respondent No. 3 and sought time to file the reply in rebuttal. He has not filed the reply on 21-12-1987 and on 24-12-1987 and, therefore, the case was posted for orders on 28-12-1987. It is, thus, clear from the circumstances that an opportunity was accorded to the respondent No. 2, but he failed to avail the same and, therefore, he cannot agitate that there is no compliance of the provisions of Section 138 of Cr.P.C.

The provisions of Sections 139, 140 and 141 are not applicable.

40. The action was taken by the respondent No. 3 under the provisions of Section 142 of Cr.P.C. and that too to prevent an imminent danger or injuries of a serious nature to the public. The action was taken by the respondent No. 3 in a good faith and in the interest of public in general. Clause 3 of Section 142 of Cr.P.C. speaks that "No suit shall lie in respect of anything done in good faith by a Magistrate under this section". Similarly if from the proceedings and the orders if nothing had been shown that he has some soft corner for the respondent No. 2 and that though the building in dispute was not in a dilapidated condition, still he took immediate steps envisaged under the provisions of Section 142 of Cr.P.C. In spite of the notice received by the Petitioner even much earlier of passing of the conditional order, he failed even to file his reply or objection and lead evidence, specifically denying that the building in question was not in dilapidated condition, and thereby needs no action for its demolition. Therefore, the action taken by the respondent No. 3, according to me, is just and proper, it being in the interest of public in general and to prevent imminent danger or injuries to the passer-by, neighbours and the public in general. 41. Considering the submissions made on behalf of the parties concerned in the case, I do not find any substance in the Petition. The petition is, therefore, dismissed.

41. Petition dismissed.