

CHAPTER 4

PREVENTIVE ACTION UNDER THE CODE OF CRIMINAL PROCEDURE, 1973

4.1. Provision in the Code as to preventive action.

The Code of Criminal Procedure, 1973, besides providing for the procedure of criminal courts, contains certain provisions of a preventive nature. Of these provisions, sections 133-143 are of great utility in the context of preservation of the environment. Appearing under the head of "Public nuisances", these provisions empower the competent Magistrate to pass orders for the removal of such nuisances. The procedure may appear to be somewhat elaborate, but, in practice, fairly speedy action can be taken under these provisions for the removal of public nuisances.

4.2. Scope of Section 133 : situations covered.

The scope of these provisions will be best understood if, in the first instance, one takes note of the circumstances in which an order can be passed under section 133 which carries the marginal note "Conditional order for the removal of nuisance". Under section 133(1), clauses (a) to (f), the competent Magistrate can take action if he considers -

- (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 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
- (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.

4.3. Conditional order

The order to be passed in the first instance is a conditional one. The Magistrate has to call upon the person concerned to take certain steps (specified in the section) to remove the nuisance or to appear and show cause against such order. The order is thus a conditional one (order *nisi*), which will be made absolute if sufficient cause is not shown against it.

4.4. Relevance to environmental law

It will be noticed that the circumstances in which section 133(1) of the Code of Criminal procedure, 1973 can be pressed into service, as set out therein, cover quite a variety of situations which would fall within the sphere of environmental law. In particular, section 133(1) (b) is of immediate relevance to the environment. That clause becomes applicable if it is found 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. All kinds of polluting industries, and almost all kinds of injurious substances, can be regulated under this clause. Then, as regards hazardous activities, that part of section 133(1) (c)

which relates to the disposal of any substance which is likely to cause conflagration or explosion, is of considerable utility.

4.5. Measures that can be ordered

It is also relevant to note the variety of orders that can be passed. Under section 133(1), clauses (i) to (iv), the competent Magistrate may direct the person concerned within a time to be fixed in the order -

- (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, ~~text~~ 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.

No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

4.6. Public place

In this context, a "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

4.7. Service or notification or order

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.

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 (section 134).

4.8. Persons to whom order is addressed to obey or show cause

The person against whom such order is made shall --

- (a) perform, within the time in the manner specified in the order, the act directed thereby; or
- (b) appear in accordance with such order and show cause against the same (section 135).

4.9. Consequences of his failing to do so

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 (45 of 1860), and the order shall be made absolute (section 136).

4.10. Procedure where he appears to show cause

If the person, against whom an order under section 133 is made, appears and shows cause against the order, the Magistrate shall take evidence in the manner as in a summons case.

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.

If the Magistrate is not so satisfied, no further proceedings shall be taken in the case (section 138).

4.11. Power of Magistrate to direct local investigation and examination of an expert

The Magistrate may, for the purposes of an inquiry for the above purpose --

- (a) direct a local investigation to be made by such person as he thinks fit; or

- (b) summon and examine an expert (section 139).

4.12. Power of Magistrate to furnish written instructions, etc

Where the Magistrate directs a local investigation by any person under section 139, the Magistrate may --

- (a) furnish such person with such written instructions as may seem necessary for his guidance,
- (b) declare by whom the whole or any part of the necessary expenses of the local investigation shall be paid.

The report of such person may be read as evidence in the case (section 140).

4.13 Procedure on order being made absolute and consequences of disobedience

When an order has been made absolute order under section 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 as 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 (45 of 1860).

If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the cost 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.

No suit shall lie in respect of anything done in good faith under this section. (section 141).

4.14. Injunction pending inquiry

If the magistrate making an order under section 188 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.

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.

No suit shall lie in respect of anything done in good faith by a Magistrate under this section (section 142).

4.15. Magistrate may prohibit repetition or continuance of public nuisance.

A District Magistrate or Sub-divisional Magistrate, or any other Executive Magistrate empowered by the State Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code, or special or local law (section 143).