

Law Relating to Public Nuisance in India

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ABSTRACT:

Traditionally, in India environmental problems used to be addressed through private law doctrines such as trespass, nuisance, strict liability or negligence in India or remedies available under Indian Penal Code or Criminal Procedure Code. As per section 268 of the Indian Penal Code, 1860, a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage. The object and purpose behind section 133 CrPC is essentially to prevent public nuisance which involves a sense of urgency in the sense that if the magistrate fails to take course immediately irreparable danger would be done to the public. The provisions of chapter X CrPC should be so worked as not to become themselves a nuisance to the community at large. Although, every person is bound to so use his property that it may not work legal damage or harm to his neighbor, 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 legal damage or harm.

I. MEANING

As per section 268 of the Indian Penal Code, a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right.¹

II. KINDS OF NUISANCE

Nuisances may be divided into two main headings namely, (i) private nuisances and (ii) public nuisances. This division is not exhaustive, and to some extent overlap with each other; for the same act may often cause a public nuisance and also cause special damage to individuals.²

Nuisances may be permanent, continuing, recurrent and temporary nuisances. A permanent nuisance is one of such a character and existing under such circumstances that it will be presumed to continue indefinitely, and as a rule consists of some building or structure.³

Nuisances consisting of acts done, or particular uses or property, may be properly termed continuing when they are of such a character that they may continue indefinitely, or on the other hand may be discontinued at any

¹Pillai's, P S A Criminal Law lexis Nexis 13th edition 2017 p. 537

²Debnath sukendar Legal provisions regarding Public Nuisance under section 268 of Indian Penal Code

<http://www.shareyouressays.com/knowledge/legal-provisions-regarding-public-nuisance-under-section-268-of-indian-penal-code/119043>

³*Id.*

time; recurrent when they occur from time to time but are not continuous or uninterrupted; and temporary when from their nature they will not be continued or repeated.⁴

Nuisances may be (i) nuisances per se or nuisances at law and (ii) nuisances per accidents or nuisances in fact. A nuisance at law or a nuisance per se in an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. A nuisance in fact or nuisance per accident consists of those acts, occupations, or structures which are not nuisances per se but may become nuisances by reason of the circumstances or the location and surroundings.⁵

III. PRIVATE NUISANCE

Private nuisance is the using or authorizing the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or affecting its enjoyment by interfering materially with his health, comfort or convenience. In contrast to public nuisance, private nuisance is an act affecting some particular individual or individuals as distinguished from the public at large. The remedy in an action for private nuisance is a civil action for damages or an injunction or both and not an indictment.⁶

Elements of Private Nuisance

Private nuisance is an unlawful interference and/or annoyance which cause damages to an occupier or owner of land in respect of his enjoyment of the land.

Thus the elements of private nuisance are:

1. unreasonable or unlawful interference;
2. such interference is with the use or enjoyment of land, or some right over, or in connection with the land; and
3. Damage.

IV. PUBLIC NUISANCE

Section 268 defines a doer of a public nuisance as one who: (i) does any act or is guilty of an illegal omission, (ii) which causes (a) any common injury, (b) danger or (c) annoyance to (iii) the public or to the people in general, who dwell or to occupy property in the vicinity; or (iv) causes injury, obstruction, danger or annoyance to persons who may have any occasion to use any public right. Public nuisance is an act of doing something

⁴*id.*

⁵*Id.*

⁶Das, Tanya Nuisance A Tort <http://www.legalservicesindia.com/article/825/Nuisance:-A-Tort.html>

that tends to the annoyance of the whole community in general or neglecting to do anything that the common good requires.⁷ It is an act or omission affecting the public at large, or some considerable portion of them, and interferes with rights which the members of the community might otherwise enjoy.⁸

Public nuisance is based on the principle embodied in the maxim of civil law *sic uteretur rem publicam non laedas*, which means 'enjoy your property in such a way as not to injure the rights of the public.'⁹

Meaning of Public

The term 'public' is defined in s. 12 of IPC, 1860. The word 'public' includes any class of the public or any community. Thus, a class or community residing a particular locality may come within the term 'public'.¹⁰

In popular parlance, the word 'public' means the general body of humankind or of a nation, state or community. But as defined in the IPC, it includes any class of the public even so small, but still large enough to form a class and which excludes the possibility of a mere individual. So again, the term 'community' is used here interchangeably with 'public' and as a community may consist of a sect, race or body of men united on any given principle. A class or community inhabiting a particular locality may come within the term 'public'.¹¹

Act or Illegal Omission

The words illegal omissions in this section must be construed in the light of the definition of words acts, act and illegal given in ss 32, 33 and 43, IPC, respectively. Every omission will not constitute an offence under this section. Unless the omission which causes the nuisance as an illegal omission in the above sense, there will be no public nuisance.

Public Nuisance Causing Some Advantage or Convenience

In the second paragraph of the section, it is stated that a common nuisance cannot be excused on the ground that it causes some convenience or advantage. This means that it is no defence to a charge of committing a common nuisance that the act in question was done to prevent or mitigate some harm to the accused's interest or to protect his own lands and crops.¹²

Slaughtering of cattle cannot be deemed to be a public nuisance, unless the act is done in places and in a manner where it might prove to be a public nuisance. Mere sale of meat or fish near or on a public road cannot

⁷Khachrulal Bhagirath Aggrawal vs. State of Maharashtra (2005) 9 SCC 36

⁸Supra note 2 at 538

⁹Supra note 2 at 538

¹⁰HARNANDAN LAL VS. RAMPALAKMAHATO AIR 1939 PAT 460

¹¹Gaur, Hari Singh, Penal Law Of India, vol.1, 11thedn, law publishers Allahabad, 1988 p 174

¹²Bharosapatak vs. Emperor (1912) CrLJ 183 (ALL)

be deemed a nuisance though the fact that such exposure is offensive to the religious susceptibilities may be a matter for executive action.¹³

Passive Smoking

In *k Ramakrishnan vs state of Kerala*,¹⁴ IT WAS Argued that smoking of tobacco in any form of public places makes the non-smokers 'passive smokers' and thereby causes public nuisance as defined under s 268 of the IPC. The Kerala high court, therefore, was urged to declare smoking of tobacco not only illegal as it causes public nuisance but also unconstitutional. The high court held that tobacco smoking in public places in the form of cigarettes, cigars, or beedis falls within the mischief of the penal provisions relating to public nuisance. Relying upon the right to life guaranteed under article 21 of the constitutional the high court declared that smoking of tobacco is unconstitutional.

V. REMOVAL OF PUBLIC NUISANCE

CONDITIONAL ORDER FOR REMOVAL OF NUISANCE AND CONSEQUENTIAL STEPS:

A. Conditional Order of Executive Magistrate

- **Conditional Order for Removal of Nuisance.**

- The purpose of this section is to prevent public nuisance, if a magistrate fails to take immediate recourse to section 133, irreparable damage would be done to the public. It is intended to remove public nuisance and can be invoked in urgent cases because the nuisance can sometimes be fraught with potential danger requiring immediate action.¹⁵
- An executive magistrate upon receiving a police report or other information in respect of public nuisance can exercise powers under this section in the six circumstances enumerated in sub section(1). This section empowers a magistrate to deal with specific public nuisance and it provides a summary remedy for their removal but the pre- requisite is that there must be an imminent danger to property and consequential nuisance to the public.¹⁶

Section 133, Cr.P.C. dealing with public nuisance does not stand impliedly repealed by Pollution Acts:

The area of operation in the Code and the pollution laws in question are different with wholly different aims and objects; and though they alleviate nuisance that is not of identical nature. They operate in their respective fields and there is no impediment for their existence side by side. While as noted above the provisions of Section 133 of the Code are in the nature of preventive measures, the provisions contained in the two Acts are

¹³Supra note 3

¹⁴ AIR 1999 KER 385

¹⁵ Jain, A.K. criminal law- II 2018

¹⁶*Id.*

not only curative but also preventive and penal. The provisions appear to be mutually exclusive and the question of one replacing the other does not arise. Above being the position, the High Court was not justified in holding that there was any implied repeal of Section 133 of the Cr. P.C.¹⁷

B. Service or Notification of 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.¹⁸

The order shall be served to the person against whom it is made in the manner provided for service of summons.

- 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 struck up at such place or places as may be fittest for conveying the Information to such person.¹⁹

If an order made under s. 134(1) remains unserved, the same shall be notified by proclamation, by publishing it in such a manner as is prescribed by the state government in this behalf and a copy of the same shall be stuck up at a place from where the information can be conveyed to such person against whom the order is made.

C. Person to Whom Order is Addressed to Obey or Show Cause 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.²⁰

Under this section, two alternatives are given to a person either he can come to perform the acts directed by such order within the prescribed time or he can show cause for his non-compliance with the order. For the purpose of determining the existence or non-existence of the public right, a competent civil court has to finally decide after application of judicial mind and due appraisal of the evidences.

D. 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.

¹⁷Khanalopil Removal of Public Nuisances (Section 133 of CrPc) <http://www.shareyouressays.com/knowledge/removal-of-public-nuisances-section-133-of-crpc/119538>

¹⁸ S.134(1) OF CRIMINAL PROCEDURE CODE, 1973

¹⁹ S. 134(2) OF CRIMINAL PROCEDURE CODE, 1973

²⁰ S. 135 OF CRIMINAL PROCEDURE CODE, 1973

If A Person Does Not Perform Such Act or Appear To Show Cause, He Shall Be Liable To The Penalty Prescribed Under Section 188 Of Indian Penal Code, 1860.

Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both;

And if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.²¹

Section 136 clearly shows that a preliminary order made order under section 133 can be made absolute if a person fails to appear on receipt of preliminary order. If such person appears or denies the public right and thereafter fails to appear to lead evidence the magistrate cannot invoke section 136 to make the preliminary order absolute.²²

VI. PROCEDURE WHERE EXISTENCE OF PUBLIC RIGHT IS DENIED

Section 137 of CRPC:

Where an order is made under section 113 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under section 138, inquire into the matter.

If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court; and if he finds that there is no such evidence, he shall proceed as laid down in section 138.

A person who has, on being questioned by the Magistrate under Sub-Section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial.

²¹ S. 188 OF INDIAN PENAL CODE 1860

²² PAVITHRANMADUKKANI VS. KONJUKOCHU, 1982 CriLJ 103, 104 (KER)

The section provides that where the existence of the public right is denied, the Magistrate has to make an inquiry. He has to make sure that reliable evidence actually exists in support of the denial. He need not take any evidence, where the Magistrate finds that there is no reliable evidence in support of the denial of a public right; he should proceed further under Section 138 of the Code.²³

When the Magistrate passes conditional order against the person, he shall ask him as to whether that person denies the existence of any public path. If he denies the existence of public path, the Magistrate will hold an inquiry as contemplated by Section 137, Cr. P.C. The burden of proof lies upon the party who denies the existence of public path.²⁴

However, in such an inquiry both the parties are entitled to adduce their evidence against each other so as to enable the Court to arrive at a particular finding. The Magistrate is bound to give an opportunity to the other party to lead the evidence in rebuttal under Section 137 (2). Where the Magistrate had not given opportunity to the other party to lead evidence in rebuttal, –the order of the Magistrate was bad in law. Therefore, the Sessions Judge had rightly allowed the revision.²⁵

The public nuisance was alleged to have been committed by unauthorized construction on a public path, but the person concerned denied that it was a public path.²⁶ The Magistrate, without recording a finding whether denial was correct or not, passed an order under Section 133. It was held that in the absence of such finding, removal order was erroneous and therefore, liable to be set aside.²⁷

The scope of inquiry by Magistrate under this section is limited. It is solely for the purpose of finding out whether there is any necessity for a detailed inquiry under Section 138 and this is why there is no necessity for weighing evidence at this stage. The inquiry under this section is to be confined only to decide about the denial of the existence of a public right.²⁸

Procedure Where He Appears To Show Cause

S. 138

1. 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 matter as in a summons-case.

²³Gangaraddi, Sanju Share Essay <http://www.shareyouressays.com/knowledge/section-137-of-code-of-criminal-procedure-1973-cr-p-c-explained/115056>

²⁴ Id.

²⁵ Supra note 24

²⁶ SRI RAN V. STATE OF U.P. 1975 SCC (3) 495

²⁷ Supra note 24

²⁸ Supra note 24

2. 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.
3. If the Magistrate is not so satisfied, no further proceedings shall be taken in the case.

The magistrate is not permitted to take evidence by way of an affidavit for the purpose of proceedings under section 133, he is bound to record evidence in the same manner as is recorded in a summons case. It is a mandatory provision. It is compulsory for him to take evidence in the matter and therefore, he cannot just dispose of the matter without taking any evidence. If A Preliminary Order has been passed by the magistrate under section 133 and the person appears or show cause against such conditional order, the magistrate can make the order absolute under sub-section (2). it is an obligation for the magistrate to record evidence and then after being satisfied that the order either as originally made or subject to such modification is reasonable and proper make such order absolute with or without modifications.

The order under section 138(2) shall be speaking order, i.e. it shall contain the point or points for determination of the decision, reasons for the decision and the final decision. If the magistrate is satisfied after conducting the inquiry that there is no need of taking any further proceedings, he shall take no further action.

S.139: Power of Magistrate To Direct Local Investigation And Examination of An Expert.

The Magistrate may, for the purposes of an inquiry under section 137 or section 138-

- a) direct a local investigation to be made by such person as he thinks fit; or
- b) summon and examine an expert.

The magistrate under section 139 can direct a local investigation to be made by the person as he thinks fit for the inquiry. A local investigation does not merely mean one's own observation of the things but even ascertainment of facts by recording the statement of certain witnesses.²⁹

S. 140 Power Of Magistrate To Furnish Written Instructions, Etc.

1. Where the Magistrate directs a local investigation by any person under section 139, the Magistrate may-
 - a) furnish such person with such written instruction 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 magistrate shall give written instructions to the person directed to carry out local investigation. The order shall direct as to who will bear the expenses of the investigation, whether the whole or any part of such necessary expenses.

²⁹AMAR SINGH VS. STATE OF UTTAR PRADESH, 1980 CrLJ 1350

2. The report of such person may be read as evidence in the case.

The report submitted by such person after conducting the local investigation would be read as evidence in the case.

3. Where the Magistrate summons and examines an expert under section 139, the Magistrate may direct by whom the costs of such summoning and examination shall be paid.

There may arise a situation in which the magistrate may summon and examine an expert under section 139 for the purpose of investigation. Therefore, he can also order or direct as to who will bear the expenses of calling as an expert for his opinion.

S. 141: Procedure On Order Being Made Absolute And Consequences Of Disobedience.

1. When an order has been made absolute 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 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.

The magistrate has to inform the person against whom an absolute order has been passed under section 136 and the acts that he is required to perform by such order within the prescribed time. If, the person against whom such absolute order has been passed disobeys it, he will be liable under section 188 of the Indian penal code 1860.

2. 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 authorize its attachment and sale when endorsed by the Magistrate within whose local jurisdiction the property to be attached is found.

This sub section empowers the magistrate to attach the property of a person who fails to perform a particular act within the prescribed time. The cost of performance can be recovered by sale of any building, goods or by sale and distress of any other movable property. The magistrate can attach the property within his or out of his jurisdiction for recovery of cost.

3. No suit shall lie in respect of anything done in good faith under this section.

No suit shall be instituted in respect of anything done in good faith.

S. 142: Injunction Pending Inquiry

1. If a Magistrate making an order under section 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.
2. 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.
3. No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

The order under this section shall be passed at any stage of inquiry, whether the inquiry is one under section 133 or section 137 or section 138. The order under this section can be passed. If there is an eminent danger or injury of a serious kind to the public. The person against whom order for injunction are passed must be given a reasonable opportunity of being heard and therefore, a notice for the same should be given to him.

S. 143 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 any special or local law.

The additional magistrate or sub-divisional magistrate may order any person not to repeat or continue a public nuisance as defined in the Indian penal code or any other special or local law.

VII. CONCLUSION

From the above discussion, it is evident and clear that even prior to the development of the Environment Protection Act, 1986 and the Rio Declaration the Indian judiciary has set up a new jurisprudence for the environment protection and also for the prevention of environmental pollution. If this thought is interpreted further i.e. use of criminal machinery for the protection of the environment, it is sure that the environmental problems can be solved speedily and economically, and a revolutionary change can be brought not only to safeguard the environment but also safeguard the lives of the public at large. Because in the present context as said by Justice V.R. Krishna Iyer "it is not how many laws we have, it is how effectively we implement". Hence invoking Section 133 CrPC and other relevant criminal provisions under different laws will pave a way for the better environmental governance and also for the abatement of environmental nuisance.