



CRL.P No. 100284 of 2019

IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 26TH DAY OF MAY, 2022

BEFORE

THE HON'BLE MR JUSTICE V.SRISHANANDA
CRIMINAL PETITION NO. 100284 OF 2019 (482-)

BETWEEN:

1. ACHUT D. NAYAK,

2. KASHWINI NAYAK,

3. IRU,

...PETITIONERS

(BY SRI. HARSH DESAI, ADVOCATE)

CHANDRASHEKAR
LAXMAN
KATTIMANI

AND:

1. THE SUB-DIVISIONAL MAGISTRATE
SIRSI-DIVISION, SIRSI,
OFFICE OF THE SUB-DIVISION MAGISTRATE,
SIRSI-581401, UTTARA KANNADA DISTRICT.

2. THE TAHSILDAR, HONNAVAR
OFFICE OF THE TAHSILDAR, SIRSI,
SIRSI-581401, UTTARA KANNADA DISTRICT.

...RESPONDENTS

(BY SRI. RAMESH CHIGARI, HCGP)

Digitally signed by
CHANDRASHEKAR
LAXMAN
KATTIMANI



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THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO SET ASIDE ORDER DATED 19.12.2016 PASSED BY THE SUB-DIVISIONAL MAGISTRATE, SIRSI SUB-DIVISION, SIRSI IN NO.MAG/2/ViVa/01/2016-17 (ANNEXURE-B) AND ORDER DATED 30.01.2019 PASSED BY THE COURT OF THE 1ST ADDITIONAL DISTRICT & SESSIONS JUDGE, UK KARWAR, SITTING AT SIRSI IN CRL RP NO.5072 OF 2016 (ANNEXURE-E).

THIS PETITION COMING ON FOR FURTHER HEARING THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

The present petition is filed under Section 482 of Cr.P.C with the following prayer:-

"To set aside the order dated 19.12.2016 passed by the Sub-Divisional Magistrate, Sirsi Sub-Division, Sirsi in No.MAG/2/ViVa/01/2016-17(Annexure-B) and order dated 30.01.2019 passed by the court of the 1st Additional District and Sessions Judge, UK Karwar, sitting at Sirsi in Crl.RP NO.5072 of 2016 (Annexure-E)."

2. The brief facts of the case are as under :-

The petitioners have established a poultry farm in the agricultural land belonging to them bearing survey Nos.4/1 and 4/2 of Bandal Village, Sirsi Taluk. A notice



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came to be issued by the Tahasildar directing the petitioners to close the poultry farm on the ground that the poultry farm is creating nuisance to the general public and also directed to show cause as to why the preliminary order could not be made absolute. The said notice bearing No.MAG/II/ViVa/I/2016-17 was issued on 29.11.2016.

Thereafterwards, the petitioners appeared before the Assistant Commissioner, Sirsi Sub-Division and filed their objections to the show cause notice. Without recording the evidence of the parties, the 1st respondent, who is the Sub-Divisional Magistrate, passed an order on 19.12.2016 to the effect that the preliminary order passed in the case is made absolute.

Again the said order was challenged by the petitioners herein before the 1st Additional District and Sessions Judge, UK Karwar, sitting at Sirsi, in Crl.RP No.5072/2016 and the learned District Judge, after hearing the parties, dismissed the Revision Petition, which is under challenge before this Court.



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3. In the petition the following grounds have been raised:

- i. That the Sub-Divisional Magistrate failed to apply his mind while passing impugned order as per Annexure B without recording evidence of the parties. When Section 133 of the Criminal Procedure Code is invoked, judicial discretion is mandatory. But in the case on hand, admittedly the Petitioners are engaged in agricultural work i. e. poultry farming in their agricultural lands, learned magistrate failed to record evidence and also failed to look into the root of the case, as whether the alleged complaint comes under Section 133 to 138 of the Criminal Procedure Code or not and hence the order is against the principles of law.
- ii. That the provisions of Section 133 of the Criminal Procedure Code provide a speedy and summary remedy in case of a urgent situation where there is at imminent danger to public interest or public health. In all other cases, the parties should be referred to the remedy under the ordinary law of land. The idea is that if immediate steps are not taken, irreparable injury will be done. Extraordinary powers are meant to be exercised under extra-ordinary circumstances. But in this case, without any valid reasons and without verifying the alleged reports as to whether the authorities had complied with the procedure laid down by the respective laws before preparing such reports, Respondent - 1 has proceeded under Section 133 of the Criminal Procedure Code. Admittedly, the poultry-farm in question situate over private lands in Sy. Nos. 4/1 & 4/2 of



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Bandal, surrounded by forest on three sides and by paddy fields on one side. Moreover, the impugned order is passed nearly 3 years ago by Respondent - 1 and it thus become apparent that the facts nowhere attract immediate threat or any right to exercise discretionary power for removal of existing poultry-farm which is hygienic condition, as per the report dated 02/02/2019. Hence, the impugned orders as per Annexures- B & E are liable to be set aside.

- iii. That immediately after passing ex-parte order dated 29/11/2016 under Section 133(2) of the Criminal Procedure Code, Respondent - 1 issued notice to the Petitioners. The Petitioners duly appeared with their Advocate on 05/12/2016. Without giving reasonable time, the matter listed again on 07/12/2016, and on that day the Petitioners filed their Statement of Objections and requested for leading evidence on their behalf. But the matter listed on 14/12/2016 for hearing, and on 19/12/2016 the impugned order (Annexure - B) was passed directing removal of poultry-farm on or before 26/12/2016. Such procedure is in violation of the principles of natural justice, and it clearly shows that the Sub-Divisional Magistrate without recording any evidence or conducting an enquiry has passed the final order against the spirit of the provisions of Sections 133 & 138 of the Criminal Procedure Code. It is pertinent to note that the Sub-Divisional Magistrate passed the preliminary order as per Section 133 and issued notice to the Petitioners as contemplated under Section 134 of the Criminal Procedure Code. Thereafter, the Petitioners appeared and filed their explanation. Section 138 of Code



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prescribes the procedure to be followed after appearance of the person in pursuance of the show-cause notice. It mandates that the Magistrate shall take evidence in the matter as in a summons case and thereafter, if he is satisfied with the order made originally is reasonable, he shall confirm the same or if he thinks to modify he can modify the orders earlier passed by him. If the Magistrate is not so satisfied, no further proceedings shall be taken in the case. Thus, sub-section (1) of Section 138 of the Criminal Procedure Code casts an obligation on the Magistrate to take evidence as in a summons case. The Courts of law have repeatedly observed that it is the duty of the Magistrate as and when dealing with a case under Section 133 of the Criminal Procedure Code should take evidence and satisfy himself. Even in cases the person concerned does not pursue his objections, the complainant should lead evidence on his side and should not leave the Magistrate to base his order only on materials placed before him when the preliminary order was passed. Neither the reports of the Tahsildar nor any other document produced while passing an order under Section 133 can substitute the recording of evidence under Section 138 of the Criminal Procedure Code. In the present case, no evidence is recorded and the Sub-Divisional Magistrate has made the preliminary order absolute without any evidence, and without understanding the aforesaid provisions the Sessions Court has mechanically confirmed the same. Therefore, the impugned orders (Annexures - B & E) are liable to be set aside.



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- iv. That since 2000, the Petitioners are running their poultry-farm over their own lands. Admittedly, in the jurisdiction of Bandal Panchayat, there are nearly 24 to 25 poultry-farms. At this juncture, some persons who are inimically disposed of have moved an application by misusing the provisions of Section 133 of the Criminal Procedure Code with the allegations of entire activities of Petitioners are illegal and which effects the health of the neighbouring residents. Even before the Sessions Court, certain applications were moved to prejudice the mind of the Court. It clearly shows that some persons trying to harm Petitioners' poultry-farm under the guise of removal of public nuisance that may cause injury later. But the provisions of Section 133 of the Criminal Procedure Code apply only when there are compelling immediate circumstances existing and not to potential nuisance i.e. to what may become nuisance in the future. Such orders cannot be passed on imagination of nuisance. Hence, the impugned orders are untenable in the eye of law. Respondent 1 and the Sessions Court have failed to examine the facts of case against the provisions of law on public nuisance amounting to abuse of process of law. Hence, the impugned orders are liable to be set aside.
- v. That the settled position of law is that if any sufficient material is found to proceed with the matter, Respondent 1 has to conduct spot-enquiry and collect / record evidence on such aspect and also ensure cross-examination of deponents, and then proceed ahead with the case on merits under Section 138 of the Criminal Procedure Code. Without following the prescribed procedure. Respondent 1



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has simply passed the mandatory order for removal of poultry-farm. Since he has failed to adhere to the provisions mandated under Chapter X of the Criminal Procedure Code, the impugned orders are liable to be set aside.

- vi. That Respondent - 1 has failed to consider the matter under the provisions of Sections 133 & 138 of the Criminal Procedure Code while passing impugned order, as 'nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. It is not capable of precise definition. To bring in application of Section 133 of the Code, there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse. The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately. irreparable damage would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time. Hence, the order under Section 138 of the Criminal Procedure Code which confirmed by the Sessions Court is liable to be set aside.
- vii. That the Respondents herein and the Sessions Court failed to understand that no license is required to run a poultry-farm under any law. The provisions of Section 2 of the



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Karnataka Land Reforms Act, 1961 clearly state that poultry-farming is part of agriculture. Section 2(1) of the said Act reads as under:

- (A) In this Act, unless the context otherwise requires,
(1) "Agriculture includes -
(a) aquaculture.]
(aa) horticulture,
(b) the raising of crops, grass or garden produce;
(c) dairy farming:
(d) poultry-farming:
(e) breeding of livestock;
(f) grazing.

Poultry-farming is an agricultural activity. One doesn't need a license to engage in agricultural activities. Such being the legal position, no license is required to carry on poultry-farming. Hence, there is no question of the Gram Panchayat issuing or cancelling any license to carry on agricultural activities, The provisions of the Karnataka Land Reforms Act, 1961 or Karnataka Gram Swaraj and Panchayat Raj Act, 1993 do not contemplate issue of a license for carrying on agriculture or agricultural activities. Hence, the impugned orders based on erroneous findings are liable to be set aside.

- viii. Petitioners are agriculturists carrying on agricultural activity over agricultural lands. They are not into any illegal trade or occupation. Apart from valuable agricultural land, the Petitioners have invested substantial time, money and



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energy over the past several years. They have raised big loans also and they are already under tremendous pressure to repay the same. Poultry-farming is a continuous process and if there is any interruption, the livestock will be put to peril. Poultry-farming is Petitioners' source of livelihood and they are neither qualified nor in a position to take up any other vocation at this stage of life. Article 19 of the Constitution of India guarantees their fundamental right to practice any profession or to carry on any occupation. Such lawful occupation cannot be taken away from them in this manner. The rights that are further guaranteed under Articles 14 & 21 of the Constitution are to be ensured to be made available to the Petitioners also. Poultry-farming provides health and revenue to the nation. Poultry-farming is the main source of rural employment. The State is required to promote and improve agriculture and poultry farming. Having regard to the innumerable benefits that accrue to the villagers, agriculturists and other citizens, it is the duty of the State to support. and encourage poultry-farming.

- ix. That immediately after their appearance, Petitioners filed Statement of Objections before Respondent - 1 and took a specific contention that there is no immediate threat or injury to the public at large from the poultry-farm agricultural activities as they already doing this work scientifically since from establishment as all round cleaning is undertaken every single day in the poultry-farm. Disinfectants, insecticides & pesticides are regularly used to prevent any kind of infection and human intervention is



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kept at bare minimum levels. The birds too are regularly administered with vaccinations & medication. Petitioners have put in a lot of effort, energy & money to maintain healthy 'bio security at the poultry-farm. Such being the position, there is no question of the poultry-farm causing any problem to anybody. There is absolutely no damage or injury caused by the poultry-farm either to mankind or ecology or environment. Poultry-farmers themselves are quite concerned about cleanliness & hygiene as the birds in the poultry-farm are quite sensitive. They cannot afford to compromise on cleanliness. The poultry farms, for this reason, are maintained well. There is no other discharge that arises from the poultry-farm for anybody to object. If at all there is an odour, it cannot be termed as harmful or injurious or nuisance. As already stated, the poultry-farm is far away from the village. There can be no mosquito menace due to poultry-farming. Mosquitoes breed in stagnant water and other surroundings like paddy fields. There is no scope for the mosquitoes to breed in a poultry-farm. However, every villager, every farmer is responsible to maintain cleanliness & hygiene and not just poultry-farmers. The State authorities are required to ensure that every villager maintains hygiene. If the villagers pollute their surroundings by not maintaining proper cleanliness or hygiene, the atmosphere gets vitiated and everybody will be affected. Respondent 1 and the Sessions Court have failed to consider such objections and render findings leading to miscarriage of justice.



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- x. That the Respondents failed to consider that in so far as disposal of bird droppings is concerned, the Petitioners remove the same periodically from the farm and sell to farmers as manure. The bird-droppings are willingly purchased and used by farmers as manure. Such manure is considered to be highly beneficial and it is very much in demand by the farmers. It may be noted that Petitioners spread a layer of paddy husk on the floor inside the cages. Such a step ensures elimination of moisture, smell, etc. and helps the farm to be dry & clean all the time. Even otherwise, after due verification, if the Respondents come to the conclusion that the Petitioners' farm is going wrong, they have to hear the owner/ occupier and prescribe remedial measures first. Upon notice to such an erring poultry-farm, an opportunity should be given for correction. Only in case of failure to take corrective steps, penal action can be contemplated. The Respondents cannot straightaway order closure of a poultry-farm. On the basis of unverified allegations, the Respondents cannot take action against the Petitioners. One should understand that poultry-farming, which is part of agriculture, is also very much essential for the existence of mankind and for the community / society. Poultry products are high in protein and they are the most complete food available in nature. It is an irony that though most of us consume poultry products, no one wants a poultry-farm. Having regard to the lifetime of the birds that are being reared by the Petitioners, the Respondents ought not to have ordered removal. Admittedly, there are thousands of birds in the poultry farm at present and any coercive action by the



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Respondents in closing the poultry-farm at this stage would result in mass destruction of said the birds.

- xi. That this Hon'ble High Court may be pleased to permit the Petitioners to raise any new grounds at the time of hearing.

4. Reiterating the above grounds, learned counsel for the petitioners contended that the action of the respondents is totally illegal and when the poultry farm has been established in the private land, there is no authority for the respondents to initiate action under the provisions of Sections 133, 137 and 138 of the Cr.P.C and therefore, the order passed by the respondents is without any legal authority and thus sought for allowing the petition.

5. Per contra, learned HCGP vehemently contended that the fact of establishing the poultry farm though in a private land, the respondents have got authority to initiate action under the provisions of Section 133 of Cr.P.C., if it is causing nuisance to the general public at large and therefore sought for dismissal of the petition.



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He further contended that the said aspect of the matter has been rightly considered by the authorities and the learned District Judge while considering the revision petition and sought for dismissal of the petition.

6. Perused the material on record meticulously In the light of the rival contentions of the parties.

7. It is an admitted fact that the poultry farm is established in a private land belonging to the petitioners. To fortify the said contention, learned counsel for the petitioners drew the attention of this Court to the record of rights. As could be seen from the record of rights, the land in which the poultry farm is situated belongs to the petitioners and it is an agricultural land. The term 'agriculture' in its wide connotation encompasses itself into it the activities allied to the agricultural operations. It cannot be disputed that the poultry farming is part of the agricultural operations.

8. Further, as could be seen from the material on record, the poultry farm is situated about 3 kms away from the place where the residences of the general public



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are situated. What exactly is the type of nuisance that has been caused to the general public at large by establishing such a poultry farm in the private land owned by the petitioners is not forthcoming on record. No material is forthcoming on record placed by the respondents, wherein the general public being complained about the nuisance.

9. In this regard this Court places its reliance on the decision of this Court in the case of ***Balakrishna Rao Vs. State of Mysore and Others*** reported in **1973 (1) Mysore Law Journal page 362**. In the said decision, it has been categorically held that the evidence has to be recorded by the Magistrate. It is further observed that, though the spot inspection was conducted in the said case, the evidence was not taken by the Magistrate and therefore, the decision taken by the Magistrate did not satisfy the requisite conditions to pass the order under the provisions of Section 137 Cr.P.C. In the case on hand also, the Executive Magistrate failed to record evidence and satisfy about the alleged nuisance.



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10. Under such circumstances, the action taken by the authorities without even recording the evidence of the parties, has resulted in miscarriage of justice and also abuse of process of law.

11. The power under Sections 133, 138 and 139 Cr.P.C. has to be exercised by affording sufficient opportunities to the parties and to record evidence and to arrive at a legal finding that the action of the petitioners has resulted in nuisance to the general public at large. No such material is forthcoming on record. Unfortunately, these aspects of the matter are not taken note of by the respondents and also not properly appreciated by the learned District while dismissing the revision petition of the petitioners.

12. Under the above circumstances, this Court is of the considered opinion that the impugned order passed by the respondents and the order of dismissal passed by the District Judge needs to be set aside. Accordingly, the following order:



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ORDER

The petition is ***allowed***.

The order dated 19.12.2016 passed by the Sub-Divisional Magistrate, Sirsi Sub-Division, Sirsi in No.MAG/II/ViVa/I/2016-17, which was confirmed in Crl.RP No.5072/2016 by the I Addl. District and Sessions Judge, UK Karwar, sitting at Sirsi, is hereby set aside.

**Sd/-
JUDGE**

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