

**(2012) 04 MAD CK 0074**

**In the Madras High Court**

**Case No :** Writ Petition No. 9194 of 2012 and M.P. No. 1 of 2012

R. Kumaravel Gounder

APPELLANT

Vs

The Sub Divisional Executive Magistrate Sub Collector, Hosur,  
Krishnagiri District and The Commissioner, Hosur  
Municipality, Hosur, Krishnagiri District.

RESPONDENT

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**Date of Decision :** 18-04-2012

**Acts Referred:**

Constitution of India, 1950 — Article 38, 47

Criminal Procedure Code, 1973 (CrPC) — Section 133, 138

**Citation :** (2012) 4 CTC 661

**Hon'ble Judges :** K. Chandru, J

**Bench :** Single Bench

**Advocate :** S. Nagarajan, for the Appellant; M.C. Swamy, Spl. G.P., for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Honourable Mr. Justice K. Chandru

1. This writ petition is filed by the petitioner seeking to challenge an order passed by the first respondent Sub Divisional Executive Magistrate-cum-

Revenue Divisional Officer, Hosur, Krishnagiri District. The impugned order came to be passed in terms of Section 138 of Cr.P.C. By the

impugned order, the petitioner was prohibited from exploiting ground water for commercial use. The Sub Collector, Hosur was informed that high

noise pollution was created due to the operation of heavy vehicles in the early hours every day and large quantity of water was removed from the

residential area for commercial purpose leading to loss of ground water table causing discomfort to the residents of Appavoo Nagar. On

20.04.2006, the Sub Collector made an enquiry and also took written statement

from the petitioner. On considering all relevant materials, a notice was served on the petitioner with the conditional order passed u/s 133 Cr.P.C on 31.5.2006 by the Sub Collector asking the petitioner to stop exploiting water and to cease carrying on the trade or occupation. The petitioner was also directed to remove all the accessories from that place and to report to the Sub Divisional Magistrate. Subsequent to the conditional order made u/s 133 Cr.P.C., a final order was passed u/s 138 Cr.P.C.

2. It was at this stage, the petitioner had preferred a writ petition being W.P.No.15859 of 2011 against the conditional order dated 20.6.2011.

This court directed the respondent to consider the petitioner's explanation. Pursuant to that order, a further notice was issued to the petitioner on

27.1.2012 to appear before the Sub Collector for an enquiry on 2.2.2012 and an explanation was offered by the petitioner. Considering the same,

the Sub Divisional Magistrate had passed an order that the petitioner had dug two bore wells about 600 to 900 feet depth in his plot and had also

installed two 10 HP heavy motors to draw water from these bore wells. The petitioner also owned two water tankers which are used for

commercial supply of water drawn from these bore wells. Around 70000 litres of water has been drawn per day and he has been carrying on this

trade for the last five years. Further the operation of heavy duty motors round the clock for drawing water that too in the residential area leading to

cause public nuisance. The continuous plying of water tankers in the residential area is also posing serious threat to the safety of the residents.

3. Though the petitioner claimed that there was no complaint from the residents, the Magistrate had recorded that there were innumerable

complaints submitted by the residents of Raghavendra Lake View Colony and Appavoo Nagar over the last several years. The further contention

that there was water shortage in that area is not because of the petitioner's supply of water was also wrong. The petitioner is drawing water only

for commercial purpose. The Municipal Commissioner also confirmed that continuous use of two bore wells leading to drying up of other bore

wells in that area. The petitioner also did not have any legal permission for carrying on the trade and that the petitioner's activity creates public

nuisance. Therefore, the conditional order passed during May, 2006 was

confirmed and the impugned order is to desist the petitioner from further exploiting the water from that area.

4. The contention of the petitioner was that he is the owner of the property situated in S.No.246/1A3 in No. 40, Thally Road, Hosur. He is an agriculturist and running a poultry firm on lease basis. He has also constructed an house there and was residing with his family members. The nearby residents are using the water from his bore well. He was duty bound to supply water to the residents. He dug a bore well 12 years back and all the people are depending upon his bore well. The bore wells are being in existence even before the municipality was created for Hosur. Already, he is paying necessary charges to the municipality. Due to personal animosity, such complaints have been lodged against him. He is also supplying water to the municipality. Hardly two to three loads were drawn from the bore well.

5. However, this court is not inclined to interfere with the impugned order as the order has been passed in public interest and invoking the power under Cr.P.C to abate the public nuisance. The Supreme Court had emphasised the efficacy of a citizen using Section 133 Cr.P.C. and also the need for the Executive Magistrate to attend to such complaint and to take an active role in removing nuisance and also to grant appropriate direction to the municipality to execute the scheme for removal of nuisance vide its judgment in Municipal Council, Ratlam Vs. Vardichan reported in (1980) 4 SCC 162. It also held that the municipality cannot avoid its obligation in removing the nuisance by pleading financial incapacity. The Supreme Court also held that the dynamics of judicial process will have new dimensions even to effect changes through provisions under the Criminal law. In this context, it is necessary to refer to the following passages found in paragraphs 14,15,16,19,21 and 24, which reads as follows:

14. Although these two Codes are of ancient vintage, the new social justice orientation imparted to them by the Constitution of India makes it a remedial weapon of versatile use. Social justice is due to the people and, therefore, the people must be able to trigger off the jurisdiction vested for their benefit in any public functionary like a magistrate u/s 133 CrPC. In the exercise of such power, the judiciary must be informed by the broader principle of access to justice necessitated by the conditions of developing

countries and obligated by Article 38 of the Constitution. This brings

Indian public law, in its processual branch, in line with the statement of Prof. Kojima:<sup>3</sup> The urgent need is to focus on the ordinary man " one might

say the little man...". ACCESS TO JUSTICE by Cappelletti and B. Garth summarises the new change thus:<sup>4</sup>

The recognition of this urgent need reflects a fundamental change in the concept of "procedural justice".... The new attitude to procedural justice

reflects what Professor Adolf Homburger has called "a radical change in the hierarchy of values served by civil procedure", the paramount concern

is increasingly with "social justice", i.e., with finding procedures which are conducive to the pursuit and protection of the rights of ordinary people

While the implications of this change are dramatic " for instance, insofar as the role of the adjudicator is concerned " it is worth emphasizing at the

outset that the core values of the more traditional procedural justice must be retained. "Access to justice" must encompass both forms of

procedural justice.

15. Public nuisance, because of pollutants being discharged by big factories to the detriment of the poorer sections, is a challenge to the social

justice component of the rule of law. Likewise, the grievous failure of local authorities to provide the basic amenity of public conveniences drives

the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature's pressure bashfulness

becomes a luxury and dignity a difficult art. A responsible municipal council constituted for the precise purpose of preserving public health and

providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of

human rights and are a first charge on local self-governing bodies. Similarly, providing drainage systems " not pompous and attractive, but in

working condition and sufficient to meet the needs of the people " cannot be evaded if the municipality is to justify its existence. A bare study of the

statutory provisions make this position clear.

16. In this view, the Magistrate's approach appears to be impeccable although in places he seems to have been influenced by the fact that

"cultured and educated people" live in this area and "New Road, Ratlam is a very important road and so many prosperous and educated persons

are living on this road". In India "one man, one value" is the democracy of remedies and rich or poor, the law will call to order where people's

rights are violated. What should also have been emphasised was the neglect of the Malaria Department of the State of Madhya Pradesh to

eliminate mosquitoes, especially with open drains, heaps of dirt, public excretion by humans for want of lavatories and slums nearby, had created

an intolerable situation for habitation. An order to abate the nuisance by taking affirmative action on a time-bound basis is justified in the

circumstances. The nature of the judicial process is not purely adjudicatory nor is it functionally that of an umpire only. Affirmative action to make

the remedy effective is of the essence of the right which otherwise becomes sterile. Therefore, the court, armed with the provisions of the two

Codes and justified by the obligation u/s 123 of the Act, must adventure into positive directions as it has done in the present case. Section 133

CrPC authorises the prescription of a time-limit for carrying out the order. The same provision spells out the power to give specific directives. We

see no reason to disagree with the order of the magistrate.

19. A strange plea was put forward by the Municipal Council before the High Court which was justly repelled viz. that the owners of houses had

gone to that locality on their own choice with eyes open and, therefore, could not complain if human excreta was flowing, dirt was stinking,

mosquitoes were multiplying and health was held hostage. A public body constituted for the principal statutory duty of ensuring sanitation and

health cannot outrage the Court by such an ugly plea. Luckily, no such contention was advanced before us. The request for further time for

implementation of the Magistrate's order was turned down by the High Court since no specific time-limit was accepted by the Municipality for

fulfilment of the directions. A doleful statement about the financial difficulties of the Municipality and the assurance that construction of drains would

be taken up as soon as possible had no meaning. The High Court observed:

Such assurances, it appears, are of no avail as unfortunately these proceedings for petty little things like clearing of dirty water, closing the pits and

repairing of drains have taken more than seven years and if these seven years are not sufficient to do the needful, one could understand that by

granting some more time it could not be done.

The High Court was also right in rejecting the Additional Sessions Judge's recommendation to quash the Magistrate's order on the impression that

Section 133 CrPC did not provide for enforcement of civic rights. Wherever there is a public nuisance, the presence of Section 133 CrPC must be

felt and any contrary opinion is contrary to the law. In short, we have no hesitation in upholding the High Court's view of the law and affirmation of

the Magistrate's order.

21. Three proposals have been put forward before us in regard to the estimated cost of the scheme as directed by the magistrate. The Magistrate

had not adverted to the actual cost of the scheme nor the reasonable time that would be taken to execute it. As stated earlier, it is necessary to

ascertain how far the scheme is feasible and how heavy the cost is likely to be. The Court must go further to frame a scheme and then fix time-

limits and even oversee the actual execution of the scheme in compliance with the Court's order.

24. We are sure that the State Government will make available by way of loans or grants sufficient financial aid to the Ratlam Municipality to

enable it to fulfil its obligations under this Order. The State will realise that Article 47 makes it a paramount principle of governance that steps are

taken for the improvement of public health as amongst its primary duties". The Municipality also will slim its budget on low priority items and elitist

projects to use the savings on sanitation and public health. It is not our intention that the ward which has woken up to its rights alone need be

afforded these elementary facilities. We expect all the wards to be benefited without litigation. The pressure of the judicial process, expensive and

dilatory, is neither necessary nor desirable if responsible bodies are responsive to duties. Cappilletti holds good for India when he observes:6

Our judicial system has been aptly described as follows:

Admirable though it may be, (it) is at once slow and costly. It is a finished product of great beauty, but entails an immense sacrifice of time, money

and talent.

This "beautiful" system is frequently a luxury, it tends to give a high quality of justice only when, for one reason or another, parties can surmount the

substantial barriers which it erects to most people and to many types of claims.

Why drive common people to public interest action? Where directive principles

have found statutory expression in Do's and Dont's the court will not sit idly by and allow municipal government to become a statutory mockery. The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice. The dynamics of the judicial process has a new "enforcement" dimension not merely through some of the provisions of the criminal procedure code (as here), but also through activated tort consciousness. The officers-in-charge and even the elected representatives will have to face the penalty of the law if what the Constitution and follow up legislation direct them to do are defied or denied wrongfully. The wages of violation is punishment, corporate and personal.

6. Though the petitioner initially contended that there was no complaint, subsequently he started contending that it was due to ulterior motive.

Certainly using of water for commercial purpose cannot be allowed even if the land belonged to the petitioner. Further plying of lorries and the

petitioners" supplying of water to others is not denied in the affidavit. Under these circumstances, the respondents have followed the correct

procedure in issuing an order of abatement of nuisance. In view of the same, there is no case made out. Accordingly, the writ petition will stand

dismissed. No costs. Consequently connected miscellaneous petition stands closed.