(2013) 06 CAL CK 0002

Calcutta High Court

Case No: C.R.R. No. 217 of 2012

Rabindranath Ghosh	APPELLANT
Vs	
Bikash Kumar Biswas	RESPONDENT

Date of Decision: June 27, 2013

Citation: (2014) 1 CHN 578

Hon'ble Judges: Tarun Kumar Gupta, J

Bench: Single Bench

Judgement

Tarun Kumar Gupta, J.

This is an application under Article 227 of the Constitution of India read with sections 401 and 482 of the Code of Criminal Procedure, 1973 challenging the order dated 4th January, 2012 passed by learned Sub-Divisional Magistrate, Tehatta, Nadia in connection with case No. 577 of 2011 u/s 133 of the Code of Criminal Procedure 1973 (hereafter to be referred as Code of 1973) thereby directing the petitioner (O.P. in said case) to remove the obstruction from P.W.D. road within seven days and on its failure to do so, the Assistant Engineer (Road) Plassy Highway Sub-Division to remove the same with the help of Inspector in-charge, Tehatta police station. It is the case of the petitioner that he is occupying plot No. 871 Mouza Tehatta, J.L. No. 101 P.S. Tehatta measuring about 720 sq. feet under permissive possession of one Khodabox Thandu Mondal for last 50 years for carrying his business of a restaurant providing sweet and tea. It is his further case that for running said business he paid tax to the Panchayat Samity and also had valid food licence issued by Food Inspector Tehatta R.P.M.C. It is his specific case that though the Assistant Engineer (Road) Plassy Highway Sub-Division, Nadia issued a notice dated 10th January, 2002 alleging that the petitioner encroached the highway land and directed the petitioner to remove the encroachment u/s 10 of the West Bengal Highways Act, 1964, (hereafter to be referred as Act of 1964) but it was nowhere mentioned in said notice the plot number of the land alleged to be encroached by the petitioner being highway. It is further stated that the private respondent Bikash Kumar Biswas lodged a complaint before the Sub-Divisional Magistrate, Tehatta, Nadia alleging that the petitioner blocked the front of the shop of the O.P. by making a bamboo structure on P.W.D.

highway road which initiated said case 577 of 2011. On receipt of one notice dated 22.12.2011 in connection with said case when the petitioner appeared before the learned Court on 4th of January, 2012, learned Court passed the impugned order without giving any opportunity of hearing the petitioner and without taking any evidence. The impugned order is bad in law and should be quashed by this Court.

2. Mr. Biswaroop Biswas, appearing for the petitioner, submits that the initiation of the case being case No. 577 of 2011 u/s 133 of the Code of 1973 was not maintainable as there was an allegation of encroaching a public highway and that only a case u/s 10 of the Act of 1964 could have been initiated for removal of said alleged encroachment of highway. According to him, when there is specific statute prescribing procedure for removing encroachment on public highway then it should not have been initiated under some general proceedings like section 133 of the Code of 1973. In support of his contention he has referred case laws reported in Chandra Kishore Jha Vs. Mahavir Prasad and Others, , Manish Goel Vs. Rohini Goel, and Chief Information Commr. and Another Vs. State of Manipur and Another, . In those case laws it was laid down that when a procedure is laid down statutorily and there is no challenge to the said statutory procedure the Court should adopt the prescribed statutory procedure and no other procedure to resolve the dispute.

3. Mr. Atish Kumar Biswas, learned counsel appearing for the private O.P., on the other hand, submits that u/s 133 of the Code of 1973 there was specific provision for removal of unlawful obstruction or nuisance from any public place and hence it cannot be said that obstruction from highway can only be removed u/s 10 of the Act of 1964 and not u/s 133 of the Code of 1973.

4. I have considered the respective submissions of learned counsels of the parties. Section 10 of the Act of 1964 has laid down the procedure for removal of the encroachment on any public pathway or highway. On plain reading of section 10 of the Act of 1964 it is apparent that said provision can be applied in a particular mode as prescribed therein. But u/s 133 of the Code of 1973 any unlawful obstruction of any public place which amounted to nuisance can be removed even receiving information from a private party. In the case in hand the private O.P. of this case being the petitioner lodged a complaint of alleged encroachment of public road by the present petitioner (O.P. in that case) by obstructing his shop and thereby causing nuisance. Under these circumstances there was no legal bar to initiate proceedings u/s 133 of the Code of 1973 provided the necessary ingredients of section 133 of the code of 1973 were present.

5. Learned counsel for the petitioner next submits that on the very first date when present petitioner as O.P. appeared in the learned Lower Court on 4th January, 2012 the order impugned was passed without giving him any opportunity either to file showcause or even to give evidence in support of his defence. According to him, this not only violated rules of natural justice but also the expressed provisions of section 133 of the Code of 1973 wherein it was stated that learned Court should take such evidence as he thinks fit before

passing the order. In support of his contention he has referred a case law reported in Asit Kumar Kar Vs. State of West Bengal and Others, wherein it was held that it is a basic principle of justice that no adverse order should be passed against a party without giving him an opportunity of being heard.

6. Learned counsel for the O.P., on the other hand, submits that there was no need of recording any evidence as present petitioner being O.P. admitted that he was possessing the land wrongfully by encroaching over P.W.D. road. According to him, the order impugned does not call for any interference by this Court.

7. It appears from the enclosed papers that present petitioner was running business of sweets, cold drinks etc. through a shop standing on plot No. 871 of mouza Tehatta, J.L. No. 101 on payment of licence fee to the local panchayat samity as well as against a food licence issued by the competent authority. In the notice dated 10th of June 2002 issued by the Assistant Engineer (Road) Plassy Highway Sub-Division there was an allegation of encroachment of Tehatta Ghat Road but the alleged encroached land was not described with plot number and J.L. number etc. However, admittedly, said notice dated 10th of June, 2002 was not the basis of the initiation of the present case u/s 133 of the Code of 1973. Admittedly, on the very date of appearance of the petitioner as O.P. in said case u/s 133 of the Code of 1973 the order impugned was passed without giving any opportunity to the present petitioner to file showcause or giving any opportunity to adduce evidence in support of his defence, if any, though in section 133 of the Code of 1973 it was specifically mentioned that the order should be passed on receiving the report of the police officer or other information and on taking such evidence, if any, as the Court thinks fit. It is true that it was mentioned therein that it was admitted by O.P. (present petitioner) that he possessed the land wrongfully by encroaching over the P.W.D. road. But there is no document in support of the same. If O.P./present petitioner made any admission then the same should have been obtained in writing. No evidence of O.P. (present petitioner) was also recorded noting his alleged admission of encroaching of public road. On these scores the order impugned suffers from gross illegality. Apart from that to initiate a proceeding u/s 133 of the Code of 1973 there must be imminent danger to property and consequential nuisance to public. Provisions of section 133 of the Code of 1973 cannot be used for settlement of disputes between private parties. Such provisions can be used only for settlement of disputes in relation to public right in the general interest of the public at large. As no evidence was recorded to show that the present petitioner (O.P. in the lower Court) really made any encroachment of public road causing nuisance to the general public, the order impugned is not sustainable in law.

8. In view of the discussions as made above the order impugned is hereby set aside by exercising powers under Article 227 of the Constitution of India read with sections 401 and 482 of the Code of 1973.

9. The application stands disposed of accordingly.

10. No costs. Urgent photostat certified copy of this order be supplied to learned counsels of the parties, if applied for.