

(2006) 08 CAL CK 0052
In the Calcutta High Court
Case No : C.R.R. No's. 334 and 2370 of 2006

Md. Basar Ali Molla and Others	Vs	APPELLANT
State of West Bengal and Jaid Ali Molla and Others		RESPONDENT

Date of Decision : 17-08-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(1), 144

Citation : (2006) 08 CAL CK 0052

Hon'ble Judges : Tapan Mukherjee, J

Bench : Single Bench

Advocate : Sukumar Ghosh and Sandip Ghosh, for the Appellant; Sadhan Roy Chowdhury and Sujaya Ray for OP. No. 1, for the Respondent

Final Decision : Allowed

Judgement

Tapan Mukherjee, J.—The C.R.R. No. 334 of 2006 is directed against the order-dated 17.1.2006 passed by the Id. Executive Magistrate, Basirhat Court u/s 133 Cr. PC in case No. M.P. 725 of 2005 directing the petitioner No. 1 Basar Ali Molla and petitioner No. 2 Neat Ali Molla not to create any disturbance or obstruction unlawfully or destroy the path if any, remove the said unlawful obstruction within 15 days and not to disturb the teachers, students/public for using the path measuring an area of 1 decimal at plot No. 1546 and 1 decimal at plot No. 1547 of Mouja-Fakirtakia, P.S. Sandeshkhali, District: 24-Parganas (North). The C.R.R. No. 2370 of 2006 is directed against the order of the learned Executive Magistrate dated 7.7.2006 passed in the same case directing O.C., Sandeshkhali to see that no disturbance is made by the O.P. at the time of repairing the pathway which is being used by students, teachers and others of Sisu Siksha Kendra and report or compliance.

2. The respondent Nos. 1 and 2 in both the cases submitted an application u/s 133 Cr.PC before the learned Sub-Divisional Executive Magistrate registered as case No. M.P. 725 of 2005 contending that one cent of land in plot No. 1547 and one cent of land in plot No. 1546 of Mouja: Faqirtakia, P.S. Sandeshkhali used as

road so constructed by their father for use by their family members and public and on the death of their father the students, teachers, guardians of Sisu Siksha Kendra situated to the adjacent north of the path and the public have been using the said pathway for a pretty long time and they gifted the said pathway to the said Sisu Siksha Kendra. The petitioner Nos. 1 and 2 who are O.Ps" in the said case being No. M.P. 725 of 2005 constructed the fencing and cut the earth of the said pathway and closed the road and also caused inconvenience to the egress and ingress of the persons using the said pathway. The encroachment of the said pathway is to be removed otherwise the teachers, students and guardians of the students of Sisu Siksha Kendra are facing much inconvenience.

3. On consideration of the said application and inquiry reports of B.D.O., Sandeshkhali-I and BL & LRO, Sandeshkhali-I the impugned order dated 17.1.2006 was passed by the learned Executive Magistrate. Then during pendency of the said case being M.P. 725 of 2005, learned Sub-Divisional Magistrate passed the impugned order dated 7.7.2006.

4. It has been contended by the learned Lawyer on behalf of the petitioners that the disputed plot No. 1547 measuring 92 decimals belonged to Anu Molla, the father of the petitioner Nos. 1 and 2 and the O.P. No. 1 and the said Anu Molla transferred 33 decimals of land out of said plot No. 1547 to his son the petitioner No. 1, Basar Ali Molla by registered deed of sale dated 4.3.1983 and he constructed his dwelling house on the land on amicable arrangement and got his name recorded in the L.R. record and the remaining 59 decimal of land were inherited by legal heirs of late Anu Molla and they were in possession of the same by mutual partition. The plot No. 1546 in question measuring 89 decimals is a vested land and the petitioner No. 3 got patta of 37 decimals of land and petitioner No. 4 also got patta of the portion of said land in plot No. 1546 and they are possessing the same. The O.P. No. 1 transferred 10 decimal of land in plot Nos. 1505 and 1506 to Sisu Siksha Kendra and also transferred one decimal of land in plot No. 1547 for using the same by Sisu Siksha Kendra as path and Chhakat Molla, son of O.P. No. 2 also transferred one decimal of land in plot No. 1546 to Sisu Siksha Kendra for use of the same also as path though he had no transferable right. The plot Nos. 1505 and 1506 are surrounded by fishery on all the sides and there was no way to enter into the said plot so O.P. No. 1 and his son transferred two decimal of land to said Sisu Siksha Kendra. They were trying to go through the homestead land of the petitioner Nos. 1 and 2 and also the land of petitioner Nos. 4 and 5. Considering the practical difficulty in running the Sisu Siksha Kendra for want of path B.D.O., Sandeshkhali-I and other members of Gram Samshad in the meeting dated 30.11.2005 decided to shift the said Sisu Siksha Kendra to plot No. 1510 for restraining the respondent Nos. 1 and 2 for using their land. The petitioner filed a petition u/s 144 Cr.PC before the learned Executive Magistrate. Respondent Nos. 1 and 2 filed the instant petition u/s 133 Cr.PC. Both BL & LRO, Sandeshkhali-I and O.C., Sandeshkhali P.S. were directed to enquire the matter. B.D.O., Sandeshkhali-I was also directed to cause an inquiry. From the report of the BL & LRO and also the B.D.O. it appears that

there is no existence of path in plot Nos. 1546 and 1547 at present and the students of Sisu Siksha Kendra used the said land for about two and half years. Learned Lawyer for the petitioners further contended that right to way may accrue by the public in general or a group of people only after uninterrupted use of any road or path for more than 25 years but in this case, there was no such use of the so-called pathway by the public. The use of private party i.e., the students of Sisu Siksha Kendra for two and a half years cannot create any easement right in favour of the public in general and particularly the students of Sisu Siksha Kendra were not the public in general. Where there is no existence of the path at present and the said Sisu Siksha Kendra has already been shifted to the plot No. 1510 the restraint order passed by the learned Executive Magistrate is illegal and without jurisdiction and the same cannot stand. Learned Lawyer for the petitioner has further contended that order of the learned Sub-Divisional Executive Magistrate directing the O.C., Sandeshkhali P.S. to see that no disturbance was made by the O.P. at the time of repairing of the pathway which is being used by the students/teachers and other students of the Sisu Siksha Kendra is also illegal and the law does not authorise any Executive Magistrate to pass any order u/s 133 Cr.PC for repairing of any path or road. Learned Lawyer for the petitioners further contended that as per the provision of clause (d) of Sub-section (1) of Section 133 Cr. PC learned Executive Magistrate may pass an order u/s 133 Cr. PC under the situation when any building or structure or any tent is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by and that in consequence the removal, repair or support of such building, tent or structure for the removal or support of such tree is necessary. The path or road is neither building nor tent nor structure and even under clause (d) of Sub-section (1) of Section 133 Cr. PC, learned Executive Magistrate cannot pass any order for repairing of the pathway and for repairing of the same there cannot be any direction upon the O.C concerned for taking steps so that no disturbance is made by the O.P. at the time of repairing the said pathway.

5. Learned Lawyer for the respondent Nos. 1 and 2 has supported both the impugned orders of the learned Executive Magistrate passed in the said case M.P. 725 of 2005 and has contended that the said pathway was being used by the students and others and the same was the property gifted by the respondent Nos. 1 and 2 and the same has been damaged by the petitioners and so in the interest of the public using the said pathway the obstruction to use of the same should be removed and the pathway should be repaired and learned Executive Magistrate had jurisdiction to pass such order u/s 133 of the Cr.PC. The petitioners have no right to interfere with the such right of using the said pathway and both the revisions are liable to be dismissed.

6. The said pathway claimed by the respondent in the petition u/s 133 of the Cr. PC before the learned Sub-Divisional Executive Magistrate that the said pathway is over two cents of land- one cent appertaining to plot No. 1547 measuring 92 cent and one cent appertaining to plot No. 1546 measuring 66 cent of Mouja-

Fakirtakia, P.S. Sandeshkhali within the district North 24-Parganas. As per the said petition the pathway is being used by the petitioners and their co-sharers, local public, students, guardians, teachers of Chotoajgaria Sisu Siksha Kendra. In drawing up the proceeding u/s 133 Cr. PC, learned Executive Magistrate considered the inquiry reports of B.D.O., Sandeshkhali-I sent on 12.1.2006 under Memo No. 1958, report of BL & LRO, Sandeshkhali-I sent under Memo No. 20 dated 13.1.2006. The report of the BDO, Sandeshkhali-I discloses that there is still existence of Sisu Siksha Kendra over disputed plot. The pathway which was used by the students/teachers, guardians and others was not in existence at present. There is obstruction made by the opposite parties. The report of the Amin dated 6.1.2005 forwarded by BL & LRO on 30.1.2006 discloses that on spot verification it was found that there was no existence of Sisu Siksha Kendra over the disputed plot Nos. 1546 and 1547. The existing Sisu Siksha Kendra is situated over plot Nos. 1505 and 1506. It further discloses that at the time of spot inquiry Smt. Bula Sen, Head Sahayeeka was teaching in the said Sisu Siksha Kendra and it was learnt from her that she herself, the students and other teachers used to use the path of plot Nos. 1546 and 1547 from the year 2003 to last week of February, 2005. She also stated that she was not using the pathway from the last week of February, 2005 till date (6.1.2006) as the existence of the pathway had already been destroyed by O.P. and the same merged with the fishery of the O.P. Both the reports do not disclose that the disputed pathway is the public pathway and the same was ever used by the public at large. To the contrary, according to the report of the B.D.O., Sandeshkhali-I the pathway which was used by the students, teachers, guardians and others was not in existence at present. The B.D.O. does not say that others include the public. The report of the Amin forwarded by BL & LRO does not disclose the said pathway was the public pathway. To the contrary, the report discloses that the said pathway was being used by the Head Sahayeeka, Bula Sen, the students and other teachers from 2003 to last week of February, 2005 and the same was not being used from the last week of February, 2005 till date as existence of the said pathway was already destroyed by the O.P. and merged with their fishery. So, the reports considered by the learned Executive Magistrate in passing the impugned order do not disclose that the pathway in question was public pathway or road or the same was used by general public. Even the notice of the impugned order of the learned Executive Magistrate dated 17.1.2006 discloses that it appeared to the learned Executive Magistrate that teachers, students and other persons used that path for coming and going to school for a long period and the said passage was destroyed by the members at present. Learned Executive Magistrate was of the opinion that the said pathway should be made clear for being used by the children (students/teachers) for the interest of school (Sisu Siksha Kendra) and none can obstruct or destroy the said path. Learned Executive Magistrate has not observed in his order that the said pathway was used by the public at large. To the contrary, it is clear that the same was being used by the students, teachers and the same was destroyed and the same should be made clear for the students and teachers in the interest of school.

7. Section 133 Cr. PC relates to passing of order for removal of public nuisance in case of emergency. It does not apply to private nuisance and private dispute and it is never intended to settle a private dispute.

8. It has been laid down in the case reported in *Shaukat Hussain and Another Vs. Sheodayal Saksaina*, that Chapter X of the Code of Criminal Procedure deals with "Public Nuisances" and not with private nuisances. The remedy for the latter is the civil suit although what constitutes nuisance may be common to both classes. Section 133 Cr. PC provides a speedy and summary remedy in case of urgency where danger to public interest or public health is concerned. In all other cases the party should be referred to the remedy under the ordinary law.

9. Reference may also be made in the case reported in *C.V. Muthuvelas Velappan Vs. K.V. Narayanan Nair*, where it has been held that Section 133 Cr. PC can be used only where there has been an invasion of public rights. The case reported in *Rameshwar Prasad Vs. State of Bihar*, is also relevant in this case" where it has been held that Section 133 Cr. PC cannot be used as a short cut to achieve what one would like to achieve in a Civil Court. The whole object of Section 133 Cr. PC is that the public should not suffer and that such dangers or obstructions caused by the members of the public should be removed at the earliest possible moment.

10. In that case a decision of Allahabad High Court reported in *Farzand Ali Vs. Hakim Ali*, was referred. In that case it was held now it is certainly expedient that in all proceedings initiated u/s 133 of the Code of Criminal Procedure the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public and should be on his guard against tendency to use this section as substitute for litigation in the Civil Courts in order to the settlement of a private dispute.

11. In the case reported in *Ramu alias Langar through Bhairon Vs. Murli Das*, it has been stated that the proceedings u/s 133 Cr. PC is not intended to settle private dispute between two members of the public.

12. Reference can also be made in the case reported in *Tejmal Punamchand Burad Vs. State of Maharashtra and others*, where it has been held that Chapter XB of Criminal Procedure Code deals with "public nuisances" and provides a speedy and summary method for dealing with them, in cases of great emergency and where there is imminent danger to the public interest.

13. In the instant case there are no dependable materials to hold that the disputed pathway was being used by the public at large but it appears that the same was used by the students and teachers of Sisu Siksha Kendra from 2003 to last week of February, 2005 and the same was not being used from the last week of February, 2005 as existence from the said pathway was destroyed and the same merged with the fishery. So, it does not appear that the public at large is being affected and there was any obstruction of public way or public way has been destroyed and the same requires repair. So, no case of sufferance of public is made out and it does not appear that the Magistrate had to act purely in the

interest of the public. There is no invasion of public right. If it assumed that obstruction is caused to the use of the pathway in question by the students, teachers and guardians of students of Sisu Siksha Kendra by the petitioners then it is an obstruction not to the public at large but to a handful of persons and remedy for said obstruction cannot be had by resorting to provision of Section 133 Cr.PC. If there is any nuisance the same is purely a private nuisance for which Civil Court may be approached for appropriate remedy according to law. There is room for contention that Section 133 Cr.PC also does not contemplate any order for repairing of road which has been abolished and also any order in connection with such repair.

14. In view of my above discussions I hold that both the impugned orders dated 17.1.2006 and 7.7.2006 cannot stand and the same are liable to be set aside. In the result, the instant applications succeed and the same are allowed. The impugned orders passed by the learned Executive Magistrate are hereby set aside. I make no order as to costs.