

(2018) 01 CAL CK 0123
In the Calcutta High Court
Case No : 54 of 2018?with?CAN 544 of 2018

Raju Chowdhury & Ors.

APPELLANT

Vs

The State of West Bengal & Ors.

RESPONDENT

Date of Decision : 25-01-2018

Acts Referred:

Constitution of India, Article 226 -
Power of High Courts to Issue certain writs
West Bengal Highways Act, 1964, Section
10(3), Section 10(3) - Remo

Citation : (2018) 01 CAL CK 0123

Hon'ble Judges : Biswanath Somadder, Moushumi Bhattacharya

Bench : Division Benmch

Advocate : Rama Prasad Sarkar

Judgement

1. Affidavit of service filed in Court today be taken on record.
2. The instant appeal arises out of a judgment and order dated 15th December, 2017, passed by a learned Single Judge in WP 30574 (W) of 2017 (Raju Chowdhury & Ors. vs. The State of West Bengal & Ors.). By the impugned judgment and order, the writ petition was dismissed upon taking note of the fact that the case of Johar Ali vs. State of West Bengal & Ors. reported in 2013 (3) CLJ 278 had no manner of application at all in the facts of the instant case.
3. The appellants before us were the writ petitioners.
4. The issue relates to removal of encroachers from a public road by the authorities of the State following the provisions laid down under the West Bengal Highways Act, 1964.
5. While arguing the matter, the learned advocate representing the appellants, being the writ petitioners, relied upon the case of Johar Ali (supra). The learned Single Judge after hearing the matter extensively, took note of the fact that the appellants/writ petitioners had approached the writ Court in a second round of

litigation and went on to observe that the prayers in the earlier writ petition and the latter petition were the same. In such a backdrop, the following observations have been made by the learned Single Judge:- "The aforesaid text of the instant writ petition clearly shows that the notice dated August 28, 2017 has again been challenged in this writ petition for captioning the same as bad in law and so that any effect may not be given on said notice and so on and so forth.

Although within the writ jurisdiction the Code of Civil Procedure is not readily applied, but the principles laid down in the Code *mutatis mutandis* are applicable also to determine the procedure of the writ petition wherever it would be applicable. Therefore, the principle of *res judicata* of course would come into play, because the notice dated August 28, 2017 was challenged in the first round of litigation and it was dealt with, considered and finally disposed of with the direction quoted above. Therefore, the petitioners are now estopped to challenge again the same notice dated August 28, 2017, rather is bound by the order passed by this court in the first round of litigation, provided the State has complied with the directions in its turn, meaning thereby the principle of *res judicata* would apply.

At the cost of repetition, it is pertinent to mention that being aggrieved by notice (perhaps) dated December 6, 2017 the writ petitioners have taken this opportunity to come into the second round litigation, but they did not challenge said notification in this writ petition.

Nonetheless, on examining the text of the notice, even at such early stage, it reveals that in compliance with the order of the earlier writ petition the authority duly served notice dated October 17, 2017 upon all concerned to attend on October 25, 2017 which was fixed for measurement in the locality and the notice also indicates presence of the interested parties including the official persons, and after measurement, the encroachers, who were found preventing the PWD from widening the existing PWD road, were also given enough hearing and ultimately notice dated December 6, 2017 was served.

When the administration as a whole is depending upon the legislative action, judicial function and administrative action within the given limitations without encroaching upon other, and while in the previous litigation there was the direction upon the State authorities, and while it is apparent that said direction was followed, and the survey works were accordingly held on October 25, 2017, then all were performed in accordance with law to remove the encroachers.

However, there was an application under section 10(3) of the West Bengal Highways Act, 1964 presented by the writ petitioners before the concerned District Magistrate. This is settled law that even pendency of appeal or revision without stay order or order of injunction one cannot prevent the implementing agency to operate the order assailed therein, especially when there may be some other provision for restoration if the aggrieved party ultimately in appeal gets success in setting aside the impugned order. In the case on hand, the stage is

too far because several stages are yet to reach to entertain even the appeal under section 10(3) of the 1964 Act.

It is needless to mention that when any matter is placed before the court of law for adjudication, question of sympathy may have hardly any role. The writ petitioners while had been urging of violation of some Constitutional rights, the same are found absolutely absent in the facts of the case, and the writ petition would have been maintainable, provided there is violation of Constitutional or statutory right or the respondents are doing any project violating natural justice, or the respondents acted beyond jurisdiction, in that event the court would invoke the action under Article 226 of the Constitution of India. But either of the above requirements is found in want of in this case, rather as it has been indicated above that after first round of litigation notice dated December 6, 2017 which ought to have been challenged in the instant writ petition, but not challenged. Such notice was issued after compliance of the earlier order. Therefore, this court has no reason to make any interference; and no order towards any relief whatsoever can be granted in this writ petition even at this motion stage."

6. Thereafter, the learned Single Judge proceeded to hold that the facts of the Johar Ali (supra) case was completely different from the case before the Court and as such had no applicability. The learned Single Judge, thus, proceeded to dismiss the writ petition without any order as to costs.

7. The impugned judgment and order has been rendered with cogent reasons and does not warrant any interference in an Intra-Court Mandamus Appeal since we do not notice any palpable infirmities or perversities.

8. The appeal and the application for stay are, therefore, liable to be dismissed and stand accordingly dismissed without any order as to costs.

9. Urgent photostat certified copy of this judgment, if applied for, be given to the learned advocates for the parties.