
(2007) 07 CAL CK 0047

In the Calcutta High Court

Case No : C.R.R. No. 1237 of 2007 with CRAN No. 1135 of 2007

Sraban Kumar Sur

APPELLANT

Vs

State of W.B. and Others

RESPONDENT

Date of Decision : 11-07-2007

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 133

West Bengal Highways Act, 1964 — Section 10, 10(2), 10(4), 22, 23

Citation : (2008) 1 CHN 487

Hon'ble Judges : P.N. Sinha, J

Bench : Single Bench

Advocate : D.N. Batabyal and D.N. Bose, for the Appellant; R.P. Bhattacharyya, for O.P. Nos. 1-6 and 9-11, Manjuli Chowdhury, for O.P. No. 7 and Smriti Kana Mukherjee and Debjit Mukherjee for O.P. No. 8, for the Respondent

Final Decision : Allowed

Judgement

P.N. Sinha, J.—This revisional application under Article 227 of the Constitution is directed against the order dated 5.3.2007 passed by the learned Sub-Divisional Magistrate, 1st Court, Howrah in M.P. Case No. 759/06 in a proceeding u/s 133 of the Cr. PC directing removal of all unlawful obstructions on the G.T. Road. The learned Executive Magistrate by the impugned order dated 5.3.07 directed the Executive Engineer, PWD, Howrah Division to take immediate action to remove all such unlawful obstructions from the G.T. Road. Thereafter the Assistant Engineer, PWD by Memo No. 266 dated 20.3.07 informed Bina Sur to remove all unlawful obstructions with encroachment of holding No. 286 of Mouja with JL No Belur-15 in respect of 510.00 sft. After receiving such memo of the Assistant Engineer, PWD, the petitioner moved this Court in this revisional application praying for setting aside the order of the learned Executive Magistrate on the ground of illegality.

2. Mr. D.N. Batabyal, learned Advocate for the petitioner submitted that entire

proceeding started by the learned Executive Magistrate is vitiated by illegality as the impugned order dated 5.3.07 was passed by the learned Magistrate against Bina Sur who was dead by the time when the order was passed. Bina Sur expired on 19.6.06 whereas learned Magistrate passed the order on 5.3.07 without impleading the legal heirs or the legal representatives of deceased Bina Sur. The petitioner informed the Magistrate about the fact of death of Bina Sur, but the learned Magistrate paid no heed and did not hear the petitioner nor impleaded the petitioner or other legal heirs of deceased Bina Sur into the proceeding. Mr. Batabyal further contended that the Bally Municipality issued tax payment notices upon the heirs of Bina Sur which shows that names of legal heirs of Bina Sur were mutated in the assessment registrar of Bally Municipality and the legal heirs also paid tax to the Municipality.

3. Mr. Batabyal further submitted that it was a proceeding u/s 133 of the Cr. PC and not a proceeding under the West Bengal Highways Act. Initially on 9.3.06 a notice was issued u/s 10(2) of the West Bengal Highways Act against Bina Sur for removal of obstructions from the G.T. Road. Subsequently the learned Magistrate passed the order u/s 133 of the Cr. PC without following the legal procedures which are required to be observed and followed in a proceeding u/s 133 of the Cr. PC. The impugned order fails to reflect the preliminary and primary satisfaction of the learned Magistrate directing alleged removal of encroachment. In a matter of urgency preliminary order of removal may be made but, the learned Magistrate has to disclose his satisfaction into the matter before passing such preliminary order of removal. The impugned order was capricious and fails to reflect the proper mind of the Magistrate into the matter. It is also evident that the learned Magistrate confused himself into the matter and neither properly followed provisions of Section 133 of the Cr. PC nor proceeded in accordance with the provisions of the West Bengal Highways Act. The CS and RS record-of-rights reveal that the breadth of the G.T. Road recorded therein are intact at present and there was no encroachment on the G.T. Road to diminish the breadth of the G.T. Road. There was jurisdictional error by the learned Magistrate as previously notice was issued u/s 10(2) of the Highways Act but, subsequently the proceeding u/s 133 of the Cr. PC was started and the impugned order for alleged removal of obstruction was passed u/s 133 of the Cr. PC against a dead person. The order of the learned Magistrate accordingly was not in accordance with law and it should be set aside.

4. Mr. R. P. Bhattacharyya, the learned Advocate for the State and opposite party Nos. 2-6 and 9-11 submitted that the revisional application under Article 227 of the Constitution is not maintainable. The High Court in a proceeding under Article 227 of the Constitution cannot exercise powers like an Appellate Court. Scope of this Court in a proceeding under Article 227 is very limited and such jurisdiction cannot be exercised in this matter. In support of his contention Mr. Bhattacharyya placed reliance on *Surya Dev Rai Vs. Ram Chander Rai and Others*, and *Maruti Bala Raut Vs. Dashrath Babu Wathare and Others*, .

5. Mr. Bhattacharyya further submitted that G.T. Road runs from Howrah to Delhi and it is a very busy road and now-a-days there was traffic jam due to encroachment over the G.T. Road. There was a writ petition before this Court and a learned Single Judge of this Court in WP No. 13998 (W) of 2003 by orders dated 22.2.07 and 18.4.07 directed the Superintendent of Police, Howrah, the Chairman of Bally Municipality, Chairman of Howrah Municipality, Chairman of Uttarpara-Kotrang Municipality, Chairman of Serampore Municipality and the PWD to take steps for removal of unauthorised encroachment on the G.T. Road. In terms of direction of this Court the learned Executive Magistrate took necessary steps and passed the impugned order for removal of obstruction from the G.T. Road. Notice was served upon Bina Sur on 9.3.06 to that effect. Provisions of Sections 8,10,22,23 and 27 of the W.B. Highways Act are very important. There is provision of appeal u/s 10(4) of the W.B. Highways Act but, the petitioner or his predecessor-in-interest did not prefer any appeal before the District Magistrate, who is the appellate authority. Without preferring any appeal which was available to the petitioner in accordance with law, the present revisional application under Article 227 of the Constitution is not maintainable.

6. Mrs. Manjuli Chowdhury appearing for OP No. 7 adopted the submissions of Mr. Bhattacharyya, the learned Advocate for the State but also submitted that Article 227 of the Constitution has limited scope. In this matter the petitioner or other legal heirs of Bina Sur could have preferred appeal before the District Magistrate u/s 10(4) of the W.B. Highways Act, but no appeal was preferred. As the statute prescribes the scope of appeal, the revisional application in this Court under Article 227 of the Constitution without preferring the appeal before the District Magistrate, is not maintainable.

7. Mrs. Smritikana Mukherjee, learned Advocate for the OP No. 8 adopted the submissions made by Mr. R.P. Bhattacharyya.

8. I have duly considered the submissions of the learned Advocates for the respective parties and perused the revisional application, materials on record and the decisions cited by the learned Advocate for the parties. The submission of Mr. Bhattacharyya that notice was served on Bina Sur on 9.3.06 was sufficient indication to remove the unauthorised construction, is not at all acceptable in this case. I find that the Executive Magistrate and other authorities confused themselves into the matter and failed to decide whether they would proceed under the provisions of W.B. Highways Act or not, and finally, the learned Magistrate passed an order u/s 133 of the Cr. PC. The notice dated 9.3.06 which was served on Bina Sur (since deceased) was a notice u/s 10(2) of the W.B. Highways Act. It is clear that the Executive Engineers of PWD and the learned Executive Magistrate did not start any proceeding under the provisions of the W.B. Highways Act. The learned Magistrate started the proceeding being MP case No. 759/06 u/s 133 of the Cr. PC and passed the impugned order on 5.3.07 u/s 133 of the Cr. PC. The Executive Magistrate and other authorities confused themselves between W.B. Highways Act and Code of Criminal Procedure and for

that reason serving notice u/s 10(2) of the Highways Act on 9.3.06 the learned Executive Magistrate passed the impugned order u/s 133 of the Cr. PC.

9. It is evident from the materials on record that Bina Sur expired on 19.6.06. The fact of death of Bina Sur was intimated to the learned Executive Magistrate but, the learned Magistrate did not take pains to substitute or implead the legal heirs or legal representatives of deceased Bina Sur. Without following the legal procedures the learned Magistrate passed the order dated 5.3.07 against a dead person. No fresh proceeding was started against the legal heirs or legal representatives of deceased Bina Sur. The matter did not end there, and in terms of the direction passed by the learned Executive Magistrate, the Assistant Engineer, PWD, Howrah Sub-Division by memo No. 266 dated 20.3.07 informed Bina Sur to remove all unlawful obstructions from holding No. 286 of Mouja Belur, JL No. 15. The Assistant Engineer, PWD served the notice upon Bina Sur who was dead by that time. The entire procedure was accordingly vitiated as the order of the learned Magistrate was passed against a dead person and, in terms of the order of the learned Magistrate the Executive Engineer, PWD served notice upon a dead person. Without taking steps to implead the legal heirs or legal representatives of late Bina Sur the entire proceeding was vitiated. The order of the learned Executive Magistrate was accordingly illegal and void ab initio. Mr. Bhattacharyya challenged the authority of the petitioner to file the revision. I find that the petitioner is the son of deceased Bina Sur and he has a right to challenge the illegal order passed against a dead person.

10. The submission of Mr. Bhattacharyya and Mrs. Chowdhury that scope of this Court under Article 227 of the Constitution is very limited and in such a matter this Court cannot entertain the revision, is unacceptable. It is clear that the learned Executive Magistrate confused himself into the matter and issuing a notice on 9.3.06 u/s 10(2) of the W.B. Highways Act. the order was passed on 5.3.07 u/s 133 of the Cr. PC. A proceeding under the provisions of the W.B. Highways Act is completely different from a proceeding u/s 133 of the Cr. PC. The impugned order dated 5.3.07 passed by the learned Executive Magistrate totally fails to reflect the primary satisfaction of the learned Magistrate for removal of the obstruction. The learned Magistrate did not express his mind in the order that there was encroachment on the G.T. Road made by late Bina Sur and he also did not make proper enquiry into the matter, did not go through the RS and CS record-of-rights, did not go through the survey maps, plans of Moujas, of the roads, and without going through those papers simply on the report of the Executive Engineer, PWD passed the impugned order against a dead person. If a notice is issued u/s 10(2) of the W.B. Highways Act the proceeding must be initiated under the said Act which was not done.

11. The submission that the petitioner did not prefer any appeal before the District Magistrate u/s 10(4) of the W.B. Highways Act is without any foundation since the proceeding was not initiated under the provisions of the W.B. Highways Act. It is clear that there was jurisdictional error on the part of the learned

Magistrate, and accordingly, this Court can entertain the present revisional application under Article 227 of the Constitution when this Court finds that the order was passed against a dead person.

12. The W.B. Highways Act prescribes method of removal of encroachment on road, street, path, way or land declared to be a highway under Sub-section (1) of Section 3 of the Act. Section 133 of the Cr. PC lays down procedure for removal of public nuisance. A Magistrate on receipt of the report of police officer or other information and on taking such evidence (if any) as he thinks fit, may pass order for removal of unlawful obstruction or public nuisance. If the Magistrate without evidence passes order for removal of public nuisance the order must reflect grounds of passing direction for removal of public nuisance. The order must reflect that it is public nuisance on any public path or public place and it applies to existing nuisance and not to potential nuisance i.e. what may become a nuisance in future. Before passing any order of removal, the order must reflect satisfaction of the Magistrate and such satisfaction must not be capricious. Notice must be served on the person against whom an order is going to be passed, and if the person denies existence of public nuisance or denies existence of public place or public path, there must be enquiry in accordance with the law. Order of removal against a dead person is illegal which has been done in this case. The difference between a procedure under the W.B. Highways Act and a procedure u/s 133 of the Cr. PC was not realised by the learned Executive Magistrate.

13. The above discussion makes it clear that the order passed by the learned Executive Magistrate was not in accordance with law and the same is accordingly set aside. Consequently, the notice through memo No. 266 dated 20.3.07 issued by the Executive Engineer, PWD against dead Bina Sur also stands quashed. The revisional application accordingly succeeds and is allowed in the light of the observations made above.

14. This order would not curtail the right of the authorities to initiate a fresh proceeding against proper and necessary parties in accordance with law, if there are causes of action of start such proceeding.

15. As the criminal revision has been allowed no separate order requires to be passed on the application bearing number CRAN 1135 of 2007, and the said application also stands disposed of. Criminal section is directed to forward a copy of this order to the Executive Magistrate, 1st Court, Howrah for information and necessary action.

Later:

16. Let xerox certified copy of this order be given to the parties as expeditiously as possible from the date of making of such application on payment of proper fees and charges.

P.N. Sinha, J.