



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : Crl.Rev.P./22/2022

Michung Khamba
S/o Sh. Temphi Khamba,
President of Chime Yangsang Pema Kod Welfare Society having its registered office
at Tuting, PO and PS Tuting, Upper Siang District, Arunachal Pradesh.
Mobile No. 9362865029, Email Nil

VERSUS

THE STATE OF AP and 3 Ors.
Represented through the Learned Public Prosecutor.
2:The Deputy Commissioner cum District Magistrate
Age: 0
Occupation :
Upper Siang District
Yingkiong
Arunachal Pradesh.

3:Annying Boli
Age: 0
Occupation :
So Lt. Taruk Boli

Chairman of Eko Dumbing Forest Development Society

R/o Simong Village
PO and PS Yingkion
District Upper Siang
Arunachal Pradesh.

4:Asin Libang
Age: 0

Occupation :
S/o Sh. Dumten Libang

President of Simong and Himong Community Youth Association
R/o Simong Village
PO and PS Yingkion
District Upper Siang
Arunachal Pradesh

Advocate for the Petitioner : Rajesh Sonar, R. Taku, N. Singye, B. Nyaruce

Advocate for the Respondents : Mr. T. Ete, learned Addl. P.P. (A.P)

BEFORE
HONBLE MR. JUSTICE MRIDUL KUMAR KALITA

JUDGMENT & ORDER (Oral)

Date : 28.08.2024

1. Heard Mr. R. Sonar, learned counsel for the petitioner. Also heard Mr. T. Ete, learned Additional Public Prosecutor appearing for the respondent No. 1.

None has appeared for the respondent Nos. 3 & 4 in spite of due service of notice upon them.

2. This application under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973, has been filed by the petitioner, namely, *Shri Michung Khamba*, impugning the order dated 09.11.2022, bearing No. J-402/2022 passed by the learned Deputy Commissioner-cum-District Magistrate, Upper Siang District, whereby, the petitioner was directed to remove the Wooden Shelter House and Gompa constructed at Riwotala/Eko Dumbing area under Singa Circle, Upper Siang District Arunachal Pradesh within 14 (fourteen) days from the date of issuance of the impugned order.

3. Mr. R. Sonar, learned counsel for the petitioner has submitted that the petitioner is the President of *Chime Yangsang Pemakod Welfare Society*, having its head office at Tuting town of Upper Siang District of Arunachal Pradesh. It is submitted by the learned counsel for the petitioner that the said society has been found by the members of Memba and Khamba communities residing in Pemakod area of Tuting Sub-Division. The prime objective of the society is to preserve and promote Buddhist philosophy and values. It is submitted by the learned counsel for the petitioner that the petitioner's society considers the Riwotala area as holy mountain and a sacred place and pilgrimage site for the members of Memba and Khamba Communities as well as other Buddhist. It is also submitted that the members of the Memba/Khamba Community are the original inhabitants of Pemakod area and the said area has been used as a sacred area by the Memba/Khamba Community since centuries.

4. It is submitted by the learned counsel for the petitioner that in the year 2021, the village authorities of Simong village served a notice on the petitioner's association on 05.09.2021 disputing the ownership right of the land in question in favour of Memba and Khamba Communities. The members of the said communities were also directed to remove all the existing structures from the said area.

5. The learned counsel for the petitioner has also submitted that apprehending forceful removal of the existing structure i.e. Gompa, the members of Memba and Khamba Communities apprised the matter to the Deputy Commissioner and the Superintendent of Police of Upper Siang District and prayed for necessary protection. However, to utter surprise of the community members the Deputy Commissioner declared the ownership right of

the land in question, in favour of the members of Simong Village by its order dated 04.10.2021. The said order was put to challenge by filing a writ petition before this Court, which was registered as WP (C) No. 374/2021 and by an order dated 09.06.2022, the order passed on 04.10.2021 by the Deputy Commissioner was set aside.

6. The learned counsel for the petitioner has submitted that the dispute between the parties continued and some members of Simong Village had clandestinely vandalised and completely burned down the existing Gompa, the kitchen and the statue of Avaloketeshvara. In that regard, an FIR was also lodged on 28.10.2021 before the Yingkiong Police Station. However, on 24.07.2022, in view of the ensuing pilgrimage season, a new Wooden Shelter House was constructed at Riwotala at the same site where the earlier burned down structure was standing.

7. The learned counsel for the petitioner has submitted that as the dispute between the parties could not be amicably resolved, the members of Memba and Kamba Communities filed a Title Suit in respect of the disputed land before the jurisdictional Civil Court.

8. The learned counsel for the petitioner has submitted that during the pendency of the civil litigation between the parties, the Deputy Commissioner-cum-District Magistrate, Upper Siang District, has most illegally drew the proceeding under Section 133 of the Code of Criminal Procedure, 1973 and passed the impugned order dated 09.11.2022, against the petitioner, directing him to remove the new structure from the disputed site within 14 (fourteen) days from the date of the said order.

9. The learned counsel for the petitioner has submitted that the Deputy Commissioner-cum-District Magistrate, Upper Siang District, has erred in passing the impugned order in respect of the plot of land, which is the subject matter of civil dispute between the contesting parties. It is also submitted by the learned counsel for the petitioner that the impugned order has been passed in violation of the statutory provisions of Section 133 of the Code of Criminal Procedure, 1973, inasmuch as no preliminary order was drawn up in pursuance to the statutory provision nor any fair opportunity of hearing was given to the petitioner before final order was passed as mandated under Section 138 of the Code of Criminal Procedure, 1973. To support his submission, the learned counsel for the petitioner has cited a ruling of the Apex court of India in the case of **CA Avarachan vs. C.V. Sreenivasan and Anr.**, reported in **(1996) 7 SCC 71**.

10. On the other hand, Mr. T. Ete, learned Additional Public Prosecutor, State of Arunachal Pradesh, has fairly submitted that on bare perusal of the impugned order, it appears that there has been violation of mandatory provision contained in Section 133 of the Code of Criminal Procedure, 1973, in not drawing up a preliminary order, which is a *sine qua non* for drawing up a proceeding under Section 133 of the Code of Criminal Procedure, 1973.

11. I have considered the submissions made by the learned counsels for both the sides and perused the materials brought on record carefully.

12. For the sake of convenience, the impugned order is reproduced hereinbelow-

“...Government of Arunachal Pradesh
Office of the Deputy Commissioner: Upper Siang District

Yingkiong

No. J-402/2022

Dated Yingkiong the 09/11/2022.

ORDER

U/s 133 CrPC

Whereas, it has been reported that you have illegally constructed new structure at Eko Dumbing/ Riotala which could cause the disharmony between Simong and Memba- Khamba communities and thereby lead to serious law and order.

And whereas, as per the meeting minutes of HCM conference hall on 7/1/2022 alternative site is to be relocated by the DC, Upper Siang in consultation with Simong community and stakeholders for construction of Guest House and Gompa (Prayer Hall) and submit the proposal to Govt.

And whereas, in pursuance of meeting minutes of HCM conference hall vide no. CM (ARUN)-15/2021-22 dtd. 11/3/2022 a meeting was convened by DC Office Upper Siang, Yingkiong on 4/8/2022 in which it was reiterate that Simong Communities has agreed to relocate alternative site for construction of Guest House and Gompa which shall be used for pilgrimage purpose.

And whereas, the DC, Upper Siang issued order vide no. J-402/2022 dated 15/8/2022 to Memba-Khamba and Simong Communities to nominate 5 (five) members each to accompany DC, Upper Siang to Eko Dumbing/Riotala for relocating alternative site for construction of Guest House and Gompa.

And whereas, the Chairman of Eko Dumbing Forest Development Committee has submitted Kebang decision dtd. 26/8/2022 in connection with Eko Dumbing / Riotala dispute between Simong village and Chime Yangsang Pemakod Welfare Society claiming that Kebang decision is in their favour.

And whereas, the structure constructed by you in Eko Dumbing/ Riotala area is in violation of meeting minutes of HCM conference dtd. 7/1/2022 and DC Office meeting minutes on 4/8/2022. Such arbitrary act on your part is likely to cause serious law and order and disturb the age old communal harmony between the Simong and Memba- Khamba communities residing in Upper Siang District.

Therefore, taking all the above facts and circumstances, you are hereby directed to remove the said structures in 14 days from the date of issue of this order to facilitate the early relocation of alternative site in consultation with Simong communities and stakeholders for construction of Guest House and Gompa (Prayer Hall) as per the decision of the meeting dated 7/1/2022 and 4/8/2022 and to avoid any serious law and order.

Failure to comply with this order may invite further necessary action as per prevailing law.

To,
Shri Michung Khampa Sd/- Hage Lailang
President DC-cum-District Magistrate, Upper Siang
Chime Yangsang Pemakod Welfare Society Tuting..."

13. On bare perusal of the impugned order, it appears that by the said order, the petitioner was directed to remove the structures (Guest House and Gompa) from the disputed site, within 14 (fourteen) days from the date of issuance of the impugned order. It appears that no opportunity was given to the petitioner to appear before the Deputy Commissioner-cum-District Magistrate, Upper Siang District for showing cause as to why the order should not be made absolute. It appears that no preliminary order has been drawn up by the Deputy Commissioner-cum-District Magistrate, Upper Siang District, as mandated under Section 133 of the Code of Criminal Procedure, 1973.

14. The Supreme Court of India, in the case of **CA Avarachan vs. C.V. Sreenivasan and Anr.** (supra), has observed as follows:

"...4. In our opinion the omission on the part of the Sub-Divisional Magistrate to draw up a preliminary order, which is a sine qua non for initiating proceedings under Section 133 of the Code of Criminal Procedure and without following the procedure provided for by Section 138 CrPC, the order made by the Sub-Divisional Magistrate on 13-1-1988 is unsustainable and is vitiated. The High Court fell in error in not properly appreciating the effect of non-compliance with the mandatory requirements of drawing up a preliminary order before proceedings under Section 133 CrPC. Neither the order of the High Court nor that of the Sub-Divisional Magistrate can therefore be sustained."

15. Thus, it appears that no preliminary order was drawn up in this case, which is a *sine qua non* for initiating a proceeding under Section 133 of the Code of Criminal Procedure, 1973 and no adequate opportunity was provided to the petitioner by following the procedure prescribed under Section 138 of the Code of Criminal Procedure, 1973. Therefore, the entire proceeding drawn up

the District Magistrate gets vitiated and the impugned order is not sustainable in law, on that count only.

16. For the reasons stated above, the impugned order No. J -402/2022, dated 09.11.2022, passed by the learned Deputy Commissioner-cum-District Magistrate, Upper Siang District, is hereby set aside.

17. This Criminal Revision Petition is accordingly allowed and disposed of.

18. Sent back the Records of No. YKG-402/2022-23/209, dated 31st May, 2023, which was requisitioned in connection with this case, from the Office of the Deputy Commissioner, Upper Siang District, along with a copy of this judgment, immediately.

JUDGE

Comparing Assistant