

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
(CRIMINAL REVISIONAL JURISDICTION)**

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRR 117 of 2023

***MD. ABDUL RAHAMAN @ RAHAMAN HOQUE
VS.
SAI SHIVOHAM POULTRIES PRIVATE LIMITED***

For the Petitioner : Mr. Nabankur Paul, Adv.
Mr. Abhishek Sarkar, Adv.

For the O.P. : Mr. Milindo Paul, Adv.
Ms. Bedashruti Bose, Adv.
Mr. Subham Chanda, Adv.

Hearing concluded on : 30th August, 2023

Judgement on : 5th September, 2023

Siddhartha Roy Chowdhury, J.:

1. This is an application under Section 401 of the Code of Criminal Procedure read with Section 482 of the Code of Criminal Procedure which manifests the displeasure of the petitioner Md. Abdul Rahaman @ Rahaman Hoque over the judgement and order dated 21st February, 2023 passed by learned Additional District and Sessions Judge, 3rd (Special) Court, Jalpaiguri in Criminal Revision No. 144 of 2022, thereby confirming the order of learned Executive Magistrate, Jalpaiguri in Ptn/R/No. 760/2022.
2. Briefly stated, the opposite party preferred an application under Section 133 of the Code of Criminal Procedure before the learned

Sub-Divisional Magistrate, Japaiguri against the petitioner alleging, *inter alia*, that on 5th August, 2022 the petitioner blocked the public road/path way, 20 feet in breadth, for ingress and egress of the opposite party with a bamboo fence. It was alleged that the petitioner demanded a sum of Rs. 16,00,000/- towards *gunda* tax from the opposite party and also threatened him with dire consequence. Learned Executive Magistrate, Jalpaiguri after hearing the opposite party on 15th September, 2022 directed the BL & LRO, Rajganj and I.C. Rajganj to submit a report and to confirm if there was any nuisance caused by the petitioner by obstructing the public road or path way.

3. On 15th September, 2022 the petitioner appeared before the learned Executive Magistrate and prayed for some time to file written objection to answer to the petition under Section 133 of the Code of Criminal Procedure. But the learned Executive Magistrate without granting any opportunity to the petitioner, relying upon the report of the BL & LRO, Rajganj and I.C. Rajganj passed an order directing the I.C. Rajganj Police Station to take step to remove the bamboo fence. The said order was assailed by the petitioner in a proceeding under Section 397 of the Code of Criminal Procedure which was registered as Criminal Revision No. 144 of 2022 and learned Additional District and Sessions Judge, 3rd (Special) Court, Jalpaiguri in exercise of revisional jurisdiction was pleased to dismiss the said application under Section 397 of the Code of Criminal Procedure.

4. Heard Mr. Nabankur Paul and Mr. Milindo Paul, learned Counsels representing the respective parties.
5. Drawing my attention to the provision of Section 133 of the Code of Criminal Procedure Mr. Nabankur Paul, learned Counsel for the petitioner submits that statutory provision mandates that upon receiving a report from police officer or information in this regard and on taking such evidence if necessary, the Executive Magistrate finds that in any unlawful obstruction and nuisance should be removed from the path way lawfully used by public, may pass an order requiring the person causing such obstruction to remove such obstruction or nuisance as alleged or if he objects so to do, the Executive Magistrate has the obligation to allow him to appear before the learned Magistrate at a time and place to be fixed by the order and show-cause as to why the order should not be made absolute.
6. Here in this case, Mr. Paul adverted, that the opposite party appeared before the learned Executive Magistrate and filed petition seeking adjournment but the learned Executive Magistrate without granting any opportunity to the petitioner, passed the order impugned upon considering the report filed by the police, implicating the opposite party and his family members. There was gross violation of natural justice.
7. Therefore, the order impugned according to Mr. Paul, is bad in law and should be set aside. Learned Appellate Court did not appreciate this crucial point that the petitioner was denied the right of audience by the authority concerned.

8. Refuting such contention Mr. Milindo Paul submits that Section 133 of the Code of Criminal Procedure makes it obligatory on the part of learned Executive Magistrate to pass appropriate order on the basis of information through jurisdictional police station or other information and if necessary on taking such evidence, to pass the appropriate order for removal of obstruction on the public path way.
9. The opposite party was given opportunity to have his say before the learned Magistrate but he did not avail the opportunity. The report of BL & LRO as well as I.C. Rajganj police station was called for on 18th August, 2022 with a liberty to the opposite party to file written objection. On the returnable date the petitioner prayed for adjournment which was not considered. It was well within the jurisdiction of learned Executive Magistrate to accede to a request for adjournment or not to accede to such request.
10. Therefore, according to Mr. Milindo Paul, it cannot be said that the order was passed by the learned Executive Magistrate without taking into consideration the principle of natural justice. It is contended by Mr. Milindo Paul that aim of the rules of natural justice is to prevent miscarriage of justice or to secure justice. Principle of natural justice demands that no one shall be judge in his own case, no decision shall be given against party without affording him a reasonable hearing but there is another façade of natural justice which says that unless authority concerned was required by the law under which it functions to act judicially there is no room for application of the rule and natural justice. According to Mr. Milindo Paul, the requirement of

natural justice may depend on the circumstances of the case, nature of enquiry and the concerned rule under which the Executive Magistrate or the authority concerned is acting in order to ensure a fair hearing. Court can insist and require additional step if such step frustrate the apparent purpose of legislation.

11. Admittedly, competent authority received complaint regarding obstruction of path way under Section 133 of the Code of Criminal Procedure. The opposite party was directed to have his say by filing written objection but he did not consider it necessary to comply with the direction. He was not sincere enough to present his case before the learned Executive Magistrate despite having opportunity.

12. Section 133 of the Code of Criminal Procedure enunciates :-

“133. Conditional order for removal of nuisance.

(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers-

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or occupation, or the keeping of any goods of merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion configuration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree 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, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of, such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order-

(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(ii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iii) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

*(v) to fence such tank, well or excavation; or
 (iv) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the Order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.*

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation-A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes."

13. Plain reading of the provision would suggest that the learned Executive Magistrate was given the report by police and BL & LRO indicating correctness in the petition. No written objection was filed. Learned Executive Magistrate was well within his jurisdiction to consider the report of police and BL & LRO to pass order impugned.
14. Upon perusal of impugned order I find that the petitioner was served with a notice to show-cause, the petitioner had the obligation not only to appear before the learned Executive Magistrate but also to submit his written objection to answer the allegation made against him. He did not comply with the direction of the Executive Magistrate and approached the Court in a very casual manner without even executing any Vakalatnama in favour of the learned Advocate and prayed for adjournment. Learned Executive Magistrate refused to adjourn the case.

15. Non exercise of discretion of the learned Executive Magistrate in favour of the petitioner to adjourn the hearing of the proceeding cannot be called in question. There was allegation of obstruction of public path way. The police as well as BL & LRO being the public servants in course of inquiry found element of truth in the allegation made in the petition under Section 133 of the Code of Criminal Procedure. In absence of any evidence to rebut the report, learned Executive Magistrate exercised his jurisdiction and passed the order for removal of obstruction.
16. It cannot be said that opportunity was not given to Md. Abdul Rahaman, the opposite party before the learned Executive Magistrate rather Md. Abdul Rahaman being opposite party before the learned Executive Magistrate failed to avail the opportunity. Right to use the path way is the integral part of right to enjoy the property as enumerated under Article 300A of the Constitution of India.
17. Therefore, I do not find any reason to interfere with the order impugned. In absence of any claim of ownership over the property, the learned Executive Magistrate committed no jurisdictional error in passing the impugned order which was rightly affirmed by the learned Additional District and Session Judge in the order impugned. The Revisional Application does not merit any consideration and is dismissed however, without cost.
18. Let a copy of this judgement be sent down to the learned Trial Court for information and necessary compliance.

19. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)