

20th February,
2024
(AK)
06-07

W.P.A 26429 of 2023

Shri Nepal Chandra Ghosh
Vs.
Block Development Officer and others

With

W.P.A 109 of 2024

Sushil Kumar Poria
Vs.
Block Development Officer and others

Mr. Sardar Amjad Ali, Sr. Advocate
Mr. Samir Kumar Ghosh
...for the petitioner
in WPA 26429 of 2023.

Mr. Gopal Chandra Ghosh
Mr. Rajkrishna Mondal
...for the petitioner
in WPA 109 of 2024
and for the private respondent
in WPA 26429 of 2023.

Mr. Sk. Md. Galib
Ms. Sujata Mukherjee
...for the State.

1. The petitioner in WPA 26429 of 2023, one Nepal Chandra Ghosh, took out an application under Section 133 of the Code of Criminal Procedure before the concerned Executive Magistrate, Ghatal seeking removal of an alleged nuisance in the form of purportedly unlawful construction made by the private respondent, who is again the writ petitioner

in WPA 109 of 2024, namely, Sushil Kumar Poria (alias Porey).

2. Upon such initiation of proceeding, the Magistrate called for a report from the concerned Block Development Officer (BDO).
3. By his order dated August 29, 2023, the Magistrate observed that as per the report of the BDO, Chandrakona-I, Sushil Kumar Poria (Porey) has built a pucca construction on the plot-in-question without taking mandatory permission from the concerned Gram Panchayat, that is, the Manik Kundu Gram Panchayat.
4. Hence, the Executive Magistrate disposed of the said case directing the BDO, Chandrakona-I to take appropriate decision in accordance with law after giving opportunity of hearing to all concerned parties.
5. It was also observed that in case any illegal construction is found, the BDO, Chandrakona-I will take immediate steps as per law.
6. Learned senior counsel appearing for the petitioner, that is, Nepal Chandra Ghosh contends that despite the said specific direction, the concerned BDO has not been implementing the same, prompting the filing of the present writ petition.
7. Learned counsel appearing for the writ petitioner in the other writ, that is, WPA 109 of 2024, namely

Sushil Kumar Poria (Porey) contends that admittedly Plot no.482, on which the construction has been made, belongs to the said Sushil Kumar Poria.

8. Thus, it is argued that the Magistrate had no jurisdiction to pass an order under Section 133 of the Criminal Procedure Code, since the concerned plot of land does not come within the purview of “public place” as contemplated in Section 133 of the Code of Criminal Procedure.
9. It is argued that the common allegation in the reports submitted before the Magistrate, is at best that a pucca construction was built by the said Sushil Kumar Poria without taking mandatory permission from the concerned Gram Panchayat.
10. Although such allegation is controverted by Sushil Kumar Poria, it is argued that the said allegation does not come within the fold of Section 133, which envisages unlawful construction being made in a public place.
11. If there was any irregularity in the construction made on the private property of Sushil Kumar Poria, it is contended that appropriate proceedings could have been taken out against Sushil Kumar Poria.

12. However, the Magistrate's order under Section 133 of the Criminal Procedure Code is palpably without jurisdiction.
13. Learned counsel appearing for the State hands up copies of orders passed by the BDO, Chandrakona-I in terms of the order of the Magistrate.
14. By virtue of the said order, apparently both sides were heard and in conclusion, the BDO directed the Pradhan, Manik Kundu Gram Panchayat to take legal action against Sushil Kumar Poria (Porey) as per Section 23(6) of the West Bengal Panchayat Act, 1973.
15. Learned senior counsel appearing for Nepal Chandra Ghosh submits that the copy of the said order is being handed over in court to learned senior counsel for the first time and was never served on his client.
16. The facts of the case reveals that the Magistrate assumed jurisdiction under Section 133 of the Code of Criminal Procedure, the sine qua non for which is that there must be an unlawful obstruction or nuisance on a public place.
17. The explanation to sub-Section (2) of Section 133 stipulates that a "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

18. Thus, it is evident that the said definition is inclusive and not exhaustive.
19. However, the component of 'public' in the expression "public place" obviates any private property from being brought within the fold of Section 133.
20. In the writ petition of Nepal Chandra Ghosh, it has been admitted that Plot no.482 is the private property of Sushil Kumar Poria (Porey).
21. However, it has further been alleged by the said Nepal Chandra Ghosh that in the property adjacent to Plot no.482, a public library has been built, the access to which has been blocked by the allegedly unauthorized construction made by Sushil Kumar Poria (Porey) on his property.
22. It has also been alleged in the application under Section 133 that the said Sushil Kumar Poria (Porey) did not leave the mandatory space beside his construction as required by law, thereby encroaching on public space, which is argued to be an unlawful construction of a public place.
23. The petitioner in WPA 26429 of 2023 has also taken an objection regarding the maintainability of the other writ petition, since the same has been preferred against an order passed by the Magistrate against which there is availability of equally efficacious alternative remedy under criminal law.

24. A glance at the annexures to WPA 26429 of 2023 filed by Nepal Chandra Ghosh indicates that there are several contradictory reports annexed thereto which were apparently filed before the Executive Magistrate by different authorities.
25. In fact, the report of the BDO, on which the Magistrate relied, states that Sushil Kumar Poria (Porey) has built a pucca construction on “that plot” without taking mandatory permission from the concerned Gram Panchayat.
26. The disputed plot, in the first paragraph of the said report, has been stated to be Plot nos. 403 as well as 428.
27. Thus, the expression “that plot” refers back not only to Plot no.428, which is the private property of Sushil Kumar Poria (Porey), but also the adjacent public place.
28. The other reports filed by different authorities are rather inconclusive as to whether there has been any encroachment of public place and are more on the premise that unauthorized construction has been made by Sushil Kumar Poria (Porey) on his property.
29. It is seen from the final order of the Executive Magistrate that instead of deciding the matter himself, he directed the BDO concerned to take

appropriate steps on the basis of the report filed by the BDO himself.

30. Section 133 of the Code of Criminal Procedure envisages that whenever a District Magistrate or a sub-Divisional Magistrate or any other Executive Magistrate so empowered, on receiving the report of a police officer or other information considers that any unlawful obstruction or nuisance should be removed from any public place, such Magistrate may make a conditional order requiring the person causing such obstruction etc. to remove such obstruction or nuisance or take recourse to the other stipulations therein.
31. If the said person objects to do so, the Executive Magistrate may direct the person to show cause as to why the order should not be made absolute.
32. Ultimately, the nuisance or the unlawful construction/obstruction can be removed at the instance of the Magistrate.
33. In the present case, however, the Magistrate exceeded his jurisdiction in, instead of deciding the matter himself, relegating it to the concerned BDO and directing the BDO to take appropriate steps on the issue.
34. Such delegation of authority is not contemplated within the four corners of Section 133 of the Code of Criminal Procedure.

35. However, the question which now arises is whether the writ petitioner in WPA 109 of 2024 (Sushil Kumar Poria) is entitled to challenge the said order before a criminal court under Section 482 of the Code of Criminal Procedure.
36. Nothing in the final order of the Magistrate affects adversely the petitioner inasmuch as the petitioner has not been directed to remove any obstruction from any public place.
37. In fact, the Magistrate merely referred the matter to the BDO, which was *de hors* the scope of Section 133 and in any event without jurisdiction.
38. The peculiar circumstances of the present case, however, do not stop there.
39. Apparently in compliance of the order of the Magistrate, the BDO gave a hearing to both the parties and independently came to a *prima facie* conclusion that the petitioner in WPA 109 of 2024 has made unauthorized construction on his own plot, that is, Plot no. 428 violating Section 23(1) of the West Bengal Panchayat Act, 1973.
40. In fact, the said observation was even beyond the direction of the Magistrate and thus cannot be said to be strictly confined to the dictates of the Magistrate.
41. Upon such independent exercise having been undertaken by the concerned BDO, that too having

heard both sides, the BDO came to the *prima facie* conclusion that there was violation of Section 23(1) of the 1973 Act but instead of taking any action himself, rightly so since he did not have the authority to do so, referred the matter to the Pradhan of the Manik Kundu Gram Panchayat, directing the said Pradhan to take legal action against Sushil Kumar Poria (Porey) under Section 23(6) of the West Bengal Panchayat Act, 1973.

42. In fact, the BDO in turn did not have any jurisdiction to so direct the Pradhan as such.
43. Be that as it may, the said action of the BDO is outside the confines of the challenges preferred in both the writ petitions.
44. WPA 26429 of 2023, in any event, cannot be further sustained, having become infructuous in view of the BDO having taken some action in terms of the order of the Magistrate, although beyond the pale of the said order.
45. Insofar as WPA 109 of 2024 is concerned, even if the order of the Magistrate was *de hors* jurisdiction, the same does not affect the petitioner inasmuch as no direction under Section 133 of the Criminal Procedure was passed against him.
46. The exercise of the BDO as ultimately undertaken can be construed as an independent exercise by the BDO where the BDO gave hearing to both parties

and referred the matter to the concerned Gram Panchayat to take legal action against the petitioner in WPA 109 of 2024.

47. It is made clear that the Pradhan of the Panchayat is not bound by the observation of the BDO that there has been an unauthorized construction by Sushil Kumar Poria (Porey).
48. However, the premise of the allegations in all the reports taken by the Magistrate and which have come to the notice of this court by virtue of the writ petitions is that there is an existing allegation that Sushil Kumar Poria (Porey) has violated the Panchayat law by making allegedly unauthorized construction without any sanction plan or permission from the concerned Gram Panchayat.
49. Being a writ court, I cannot shirk my duty in shutting my eyes to such allegation.
50. Since the matter has in any event been referred to the Pradhan of the Manik Kundu Gram Panchayat for an adjudication on the issue, it is better not to interdict such action at this stage.
51. Hence, insofar as WPA 109 of 2024 is concerned, the same is disposed of by directing the Pradhan of the Manik Kundu Gram Panchayat to take appropriate action under the West Bengal Panchayat Act, 1973 by giving an opportunity of hearing to the petitioner in WPA 109 of 2024 and

all other concerned parties to ascertain whether there has been any violation of the Panchayat laws by the petitioner, that is, Sushil Kumar Poria (Porey) and take steps pursuant to his conclusion.

52. It is expected that such exercise shall be concluded as expeditiously as possible and in accordance with law.
53. The Pradhan of the Manik Kundu Gram Panchayat, it is made clear, shall independently take a decision upon such hearing, without being influenced in any manner by any of the observations made on merits either by this court or by the Executive Magistrate or any of the reports filed before the concerned Executive Magistrate and independently act in accordance with law while taking a decision on such issue.
54. WPA 26429 of 2023 is also disposed of in the light of the above observations.
55. There will be no order as to costs.

Urgent photostat copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)