

(2004) 05 CAL CK 0034
In the Calcutta High Court
Case No : E.C. No. 58 of 2003

Bonbehari Roy and Others

APPELLANT

Vs

Kolkata Metropolitan Development Authority

RESPONDENT

Date of Decision : 18-05-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 11(2)
Constitution of India, 1950 — Article 226
Contempt of Courts Act, 1971 — Section 12

Citation : AIR 2004 Cal 254 : (2004) 4 CHN 30

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Pratap Chatterjee and Abhrojit Mitra, for the Appellant; Moloy Basu and Probir Roychodhury, for the Respondent

Final Decision : Dismissed

Judgement

Jayanta Kumar Biswas, J.—This is an application under Order 21, Rule 11 (2) of the Code of Civil Procedure, 1908 (in short "the CPC), it has been filed for execution of order dated Sept. 6th passed in Writ Petition No. 2581 of 2001.

2. The facts :-- The respondent (Kolkata Metropolitan Development Authority) is the tenant of certain portions of the property at 3A, Auckland Place, Kolkata. The petitioners are the landlords. On Sept. 19th, 2000 the respondent agreed to refer the dispute regarding revision of rent to the competent authority in terms of circular dated August 3rd/11th, 1993 of the State Government. On the reference the First Land Acquisition Collector, Calcutta, gave the decision dated March 20th , 2001. He fixed the fair and reasonable rent at Rs. 2,83,389/- per month inclusive of all taxes and costs of repairs and maintenance, the determination was directed to be effective from Jan. 1st, 1997. The petitioners forwarded the draft copy of the agreement, but the respondent did not respond. On June 6th, 2001 the petitioners raised a bill for Rs. 1,33,43,616.54p. The respondent did not pay the amount. On June 29th, 2001 the respondent vacated three floors out of

seven floors it was occupying at the premises. On Dec. 30th, 2001 it surrendered two more floors. By a letter dated August 6th, 2001 the respondent increased the rent from July, 2001. The increase was at a rate much lower than the one fixed by the competent authority. Since the decision dated March 20th, 2001 given by the competent authority was not implemented by the respondent, the petitioners filed the writ-petition. By the order dated Sept. 6th, 2002 it was allowed; the respondent was directed to follow the decision dated March 20th, 2001. The respondent, however, did not comply with the direction. Hence the petitioners have filed this application for execution of the order.

3. Mr. Moloy Basu, senior advocate, appears for the respondent. He questions the maintainability of the application by making the following submissions. An order passed in a writ petition cannot be executed under Order 21 of the CPC. As provided in Section 141 of the CPC, its provisions do not apply to a proceeding under Article 226 of the Constitution of India. An order passed in a writ petition can be enforced only by initiating a contempt proceeding.

4. Mr. Basu relies on the decisions in Charanlal v. Shri Lal Bahadur Shastri Harijan Samuhik, Krishi Sahakari Sanstha (Samiti) Saliya Barodi, AIR 1990 Madh Pra 114; Puran Singh and others Vs. State of Punjab and others, and Ratanlal Nahata Vs. Nandita Bose,

5. Mr. Pratap Chatterjee, senior advocate, appears for the petitioners. His submissions in reply, are the following. The order passed in a writ petition can certainly be executed under the provisions of the CPC. Rule 53 of the writ rules of this Court provides that provisions of the CPC are applicable also to a writ petition.

6. Mr. Chatterjee relies on the decisions In Jogendra Chandra Sen v. Wazidunnissa Khatun (ILR 1907) 34 Cal 860; Kilachand Devchand and Co. v. Ajodhyaprasad Sukhanand AIR 1934 Bom 452; Sm. Moni Manjuri Dassi and Others Vs. Mrs. Razik and Others, ; Dokku Bhushayya Vs. Katragadda Ramakrishnayya, ; Rokyayabi Vs. Ismail Khan and Others, and Food Corporation of India Vs. S.N. Nagarkar,

7. For the reasons recorded hereinafter I am of the view that this execution application is not maintainable.

8. The order sought to be executed was passed by this Court in exercise of extra ordinary writ jurisdiction under Article 226 of the Constitution of India. Although the proceeding was a civil proceeding, the jurisdiction exercised was not one of a civil Court. The execution application has been filed by invoking the ordinary original civil jurisdiction of this Court. Under this jurisdiction this Court functions as a civil Court, and its procedures are governed by the Original Side Rules of this Court. While functioning as a civil Court this Court does not, of course, possess the power to entertain and decide applications under Article 226 of the Constitution of India. So the Order sought to be executed could not have been passed by this Court under this jurisdiction. There is no express provision that

empowers the civil Court to execute an order passed by the writ Court.

9. The provisions of the CPC do not give one the right to file an application before the civil Court for execution of an order passed by the High Court under Article 226 of the Constitution of India. They empower a civil Court to execute an order passed by it or transferred to it by another civil Court. The writ Court is not a civil Court. The phrase "Civil Court" has not been defined in the CPC, though it has been enacted for indicating the powers and prescribing the procedures of the Courts of civil judiciary. The classes of civil Courts were mentioned in Section 3 of the Bengal, Agra and Assam Civil Courts Act, 1887.

10. All the decisions cited at the bar, except for the three I shall presently deal with do not address the present issue in any manner.

11. The decision in Charanlal Vs. Shri Lal Bahadur Shastri Harijan Samuhik Krishi Sahakari Sanstha (Samiti) Saliya Barodi, apparently supports Mr. Basu's contention that an order passed in a writ petition cannot be executed under provisions of Order 21 of the CPC. In it the learned judge held that since an order passed in a writ petition is not a decree or an order passed in a suit, it is not executable. With great respect, I am unable to agree with the view. In my view, an order passed in a writ petition can be executed, and if necessary procedures prescribed in the CPC can be followed for the purpose. It is anomalous to suggest that the writ Court which has the power to pass an order would lack in the power to execute it. Power to execute an order, unless conferred on some other authority or forum, is always inherent in the authority or forum that passes it.

12. As a Court of plenary jurisdiction the writ Court while exercising powers under Article 226 of the Constitution of India is free to adopt its own procedures, and follow them. It cannot be compelled to follow the procedures prescribed in the CPC, this is so for the specific provision made in its Section 141. In this context it will be useful to see what the Supreme Court said in Puran Singh and others Vs. State of Punjab and others, of the report reads as under:--

"11. We have not been able to appreciate the anxiety on the part of the different Courts in judgments referred to above to apply the provisions of the Code to writ proceedings on the basis of Section 141 of the Code. When the Constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all Courts and tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction have to be traced and found in Articles 226 and 227 itself. No useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code. Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures

under the Code are based on well recognised principles for exercising of discretionary power, and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious."

13. Rules 53 and 53A of the rules framed by this Court regarding applications filed under Article 226 of the Constitution of India, being relevant in the present context, are quoted below :--

"53. Save and except as provided by these Rules and subject thereto, the provisions of the CPC (Act V of 1908) in regard to suits shall be followed, as far as it can be made applicable, in all proceedings under Article 226 and nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of this Court to make such orders may be necessary for the ends of justice or to prevent abuse of the process of the Court.

53A. The Court may in proceedings under this Chapter impose such terms as to costs and as to giving of security as it may deem fit. Where costs have been awarded by the Court in a writ petition or in an appeal from an order passed on a writ petition, any party entitled into thereto may apply to the Court for execution of the order. The application shall be accompanied by an affidavit stating the amount of costs awarded. The Court may direct the order to be sent to the District Court of the District in which the order is to be executed. The order may be executed by such Court or be transferred for execution to any subordinate Court.

Explanation : This Rule is in addition to the Rules of recovery prescribed under Article 15 to Schedule 1 to the Bengal Public Demands Recovery Act and u/s 36 of the Code of Civil Procedure, 1908."

14. In my view, while the provisions in Section 141 of the CPC remove the doubt about the writ Court's freedom to adopt its own procedures, they, however do not prohibit the writ Court from following the procedures, prescribed in the CPC. Rule 53 of its writ rules clearly shows how this Court has made its writ jurisdiction procedurally free and flexible. It has made it clear that, if necessary, while exercising its writ jurisdiction, it would follow the procedures prescribed in the CPC. In Rule 53A of its writ rules this Court has also spelt out its own power, while exercising its writ jurisdiction, to execute its own orders of certain kinds. There is, however, no reason to say that in the writ rules power to execute its all kinds of orders has not been asserted, because it does not possess such power. Power to execute its own orders is not derived by the writ Court from the relevant writ rules, it is inherent in it that derives the plenary power from Article 226 of the Constitution of India.

15. From the above discussions the following conclusions can be reached. The writ Court that does not exercise any civil jurisdiction is not a "Civil Court" within the meaning of the provisions of the CPC or the Original Side Rules of this Court. So an order passed by a writ Court cannot be executed by the Civil Court in the absence of express power conferred on it for the purpose by law. Though the writ Court is not bound by the procedures prescribed in the CPC, there is no bar to its following any of them if it is found necessary in a given case. For executing its own orders the writ Court possesses the inherent power as a Court of plenary jurisdiction, and it can adopt its own procedures for the purpose. If it is necessary it can also follow the procedures prescribed by Order 21 of the CPC.

16. I am, however, unable to agree with Mr. Chatterjee that in view of the decision in Food Corporation of India Vs. S.N. Nagarkar, as a Court of civil jurisdiction this Court can execute the order passed by this Court in exercise of its extraordinary writ jurisdiction. The decision, though supports the view that an order passed in a writ petition can be executed by following the procedures prescribed in Order 21 of the CPC, does not, however, lay down the law that orders passed by the writ Courts can be executed by the civil Courts. From the judgment (See : para 13 of SCC) it appears that there the execution application was made in the writ petition, that is to say before the writ Court that passed the order.

17. I am also unable to accept Mr. Basu's contention that orders passed by the writ Courts can be enforced only by initiating contempt proceedings. The main purpose of a contempt proceeding is to punish the person who commits contempt of the Court. The initiation of a contempt proceeding may at times bring about the wanted compliance with the order passed by the writ Court, and the event may be a mitigating factor while considering the question of sentence but in a contempt proceeding it may not be always possible to ensure execution and enforcement of the order. The various different modes of execution of orders and decrees, as recognised by law, cannot be resorted to by the Court in a contempt proceeding. On the contrary, in an execution proceeding, the Court, while pursuing the main object and following the recognised modes of execution, on its own motion can simultaneously initiate a contempt proceeding for its limited and special purpose. An execution proceeding begins solely for the benefit of the person who initiates it, the same is not the case in a contempt proceeding, which is aimed at upholding the dignity, majesty and authority of the Court, and in which the person initiating the proceeding in no time loses his identity. So a contempt proceeding can never be a substitute for an execution proceeding.

18. In view of the above this application (E.C. No. 58 of 2003) fails; and hence it is hereby dismissed as not maintainable in this ordinary original civil jurisdiction of this Court .

19. It is, however, made clear that I have not decided the matter on merit, and this order shall not prevent the petitioners from initiating a fresh proceeding for the same relief before the competent forum, if otherwise permissible in law.

20. In the facts and circumstances of the case I am not inclined to make any order for costs in favour of the respondent. Hence, there will be no order for costs in this application.

21. Urgent Certified xerox copy of this judgment and order may be supplied to the parties, if applied for.