

(2004) 06 CAL CK 0058

In the Calcutta High Court

Case No : CAN No. 3989 of 2004 and MAT No. 1470 of 2004

Lipika Bose

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 28-06-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2004) 2 CALLT 506

Hon'ble Judges : Tapan Kumar Dutt, J;Asok Kumar Ganguly, J

Bench : Division Bench

Advocate : Kallol Bose, Vikramjit Banerjee and Sanat Kumar Das, for the Appellant;Soumi Ganguly, for the Respondent No. 5, Abha Ray and Abhra Mukherjee, Joydeep Kar, Paritosh Sinha, Samrat Sen, Amitava Mitra, Monodeep Bhattacharyya and Rumpa Ghosh for the Respondent No. 6, K.P. Pandey and Sakhya Sen for the Respondent No. 7, for the Respondent

Final Decision : Dismissed

Judgement

1. As this matter was heard for a couple of days, by consent of parties, the appeal is treated as on day's list and both the appeal and application are disposed of by this judgment.

2. This is an appeal against the order dated 19.4.04 by which a learned Judge of Writ Court has been pleased to dispose of the writ petition and confirm the interim order granted by His Lordship. While disposing of the writ petition learned Judge was pleased to direct the police to see that the respondent No. 6 in the writ petition (the appellant before us) does not step into the matrimonial home of the writ petitioner at CL-173, Second Floor, Sector-II, Salt Lake City, Kolkata-700 091 (the said premises). The respondent No. 6 the appellant before us, who was staying previously at the said premises was thus restrained from staying in the same and was virtually evicted therefrom.

3. The facts of the case which have been recorded in the order of the learned Judge and also in the writ petition are as follows:

4. The writ petitioner has been suffering from various diseases and her case is that she was staying at the said premises with her husband. In the writ petition the appellant has been described as maid-servant. The writ petitioner claims that she was an actress of repute and after her marriage with the respondent No. 5, her husband, the writ petitioner and the children lived in Chennai and the respondent No. 5 at the material time was posted at Chennai as Deputy Director of the Metallurgical Department, Small Industry Service Institute. It is alleged in the writ petition, that the respondent No. 5 shifted to the said premises in 1999 and the writ petitioner shifted to the said premises in July, 2000. After coming to the said premises, the writ petitioner found the respondent No. 5 had developed a fondness for the appellant and the appellant was virtually enjoying the status of his concubine. It is, however, not disputed in the writ petition that the respondent No. 5 is the owner of the said premises. In various paragraphs of the writ petition, the substance of the allegations, which have been made are that the respondent No. 5 has developed an intimacy with the appellant and they together have caused severe torture and hardship to the writ petitioner and made it difficult for the writ petitioner to stay in the said premises. In the writ petition there is a reference to a proceeding being initiated by the petitioner u/s 144 of the Code of Criminal Procedure but the order passed in the said proceedings has not been enclosed (paragraph 12 of the writ petition). Also there is reference of a criminal case being M.P. Case No. 224 of 2002 as also Complaint Case No. 3244 of 2003 but the orders which have been passed in such criminal proceedings have not been disclosed. In paragraph 19 of the writ petition it has been stated that the matter took a strange twist when the appellant started claiming to be the wife of the petitioner's son.

5. Any reading of the averments made in the writ petition will make it amply clear that the allegations made in the writ petition centre round family disputes between private individuals, whether those disputes are true or not, it is difficult for the Writ Court to determine. In other words, those disputes do not fall within the domain of the Writ Court for decision on the basis of factual assertions and counter assertions by the parties. But the learned Judge entertained such disputes on a writ petition and even though the learned Judge proceeded on the basis that the appellant is the daughter-in-law of the writ petitioner, but the learned Judge directed the eviction of the appellant from the said premises. The learned Judge has also recorded in the order that he has not decided the status of the parties but it has been further recorded that the appellant has no right to stay in the said premises, which according to the learned Judge, is the matrimonial home of the writ petitioner.

6. Without going into the merits of the aforesaid controversy as to the right of the appellant to stay in the house or whether the appellant can claim to be the wife of the writ petitioner's son, the writ petition on- such facts, in our view, is not maintainable. As such the Court asked the learned counsel for the writ petitioner how on these objections a writ petition is maintainable. To that the learned counsel first submitted that this point was not taken by the respondent.

The learned Judge decided the writ petition on the basis of the affidavits filed by the parties. But since this question, to our mind, is fundamentally important, this Court wanted the learned counsel for the petitioner to satisfy this Court on this issue and as such, the learned counsel for the petitioner took some time to satisfy the Court and then cited various decisions in support of the contention that the writ petition is maintainable.

7. First of all, reliance was placed on a Judgment of a learned single Judge in the case of *Amal K. Bose v. State of West Bengal*, reported in (2003)3 CHN 16. In that case a learned Judge of the Writ Court entertained the grievance of a customer who purchased a car on hire purchase agreement from H.S.B.C. The grievance of the writ petitioner in that case was that on the writ petitioner's failure to honour the instalments in accordance with the hire purchase agreement, the bank obtained forcible possession of the said vehicle by engaging its own muscle men while the writ petitioner was travelling in the car with his son. Learned Judge found that such action on the part of the bank is undesirable in a civilised society.

8. Next decision relied upon by the learned counsel was rendered in the case of *Ashok Kumar Singh v. State of West Bengal and Ors.*, reported in 2003(4) CHN 496. In the said judgment, decision in the case of *Amal Kumar Bose* was relied upon.

9. In both the aforesaid cases, the factual matrix was totally different. In the first case, it was the action by H.S.B.C. which may not be a state within the meaning of Article 12 but it was a bank, an authority, which was acting under the supervision of the Reserve Bank of India and was, therefore, expected to act within the four corners of rule of law and cannot take law in its own hand for the purpose of recovery of the car in question. This seems to be the approach of the learned Judge and in the other case, the learned Judge found that the transaction between the parties viz. *Ashok Kumar Singh* and *Ashok Leyland Finance Limited* was basically a loan transaction and the Court found that the writ petitioner was the registered owner of the vehicle. In that view of the matter the learned Judge interfered with the unauthorised seizure and taking of forcible possession of the vehicle in question by engaging muscle men by the said financial institution and the Court held that no financier can take possession of the vehicle except under the due process of law. The clear factual difference between those two cases and the present one is far too prominent to bear any comparison. The ratio of these cases cannot be applied in the present case which centres round family disputes of private parties.

10. Apart from the above two judgments, learned counsel for the writ petitioner, in support of his contention that the writ petition is maintainable, placed reliance on the decision in the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, . Learned counsel for the writ petitioner very much relied on the extended view of *Mandamus* which was taken by the learned Judges of the Supreme Court in the

said judgment. But the said judgment is totally distinguishable. What happened in the said case was that a writ petition was filed by the retrenched teachers of a private aided college which is affiliated to the University and with the prayer before the Court for issuing Mandamus upon the college authority for paying them terminal benefits and arrears of salary. Learned Judges of the Supreme Court held that in absence of any plea for specific performance of contractual service or declaration for continuance in service the writ petition is maintainable. The Court found that these institutions are run on Government aid and public money plays a major role for controlling the maintenance and working of such educational institutions and such educational institutions functions as Government institutions and discharge public functions by way of imparting education to students. The activities of such institutions are closely supervised by University-authorities. Employment in such institutions are not devoid of elements of public character. The service conditions of the academic staff of such institutions are not purely of private character. For all these facts learned Judges of the Supreme Court held that Court should take a broad view and pointed out that but for certain exceptions writ will lie. Those exceptions are that if the case is of purely private nature and with private bodies Mandamus will not lie. In the instant case it has been pointed out that the case is a family dispute between the appellant, writ petitioner, her husband and son and no public element is present and as such, the ratio in the case of *Adi Mukta Sadguru* has no application.

11. Next decision relied upon by the learned counsel for the writ petitioner is the case of *Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others*, . In that case Nilabati filed a petition alleging death of her son in police custody and praying for compensation. The custodial death of her son was established. Therefore, the question before the Court was whether the Court in a proceeding under Article 226 of the Constitution can grant compensation which are normally available by filing a suit for damages. The learned Judges of the Supreme Court held that such a proceeding for compensation before the Writ Court is also maintainable. This Court fails to appreciate the applicability of the ratio of Nilabati's case in the facts of the present case.

12. The next decision relied upon by the learned counsel for the writ petitioner is the decision in the case of *C. Masilamani Mudaliar and Others Vs. The Idol of Sri Swaminathaswami Swaminathaswami Thirukoli and Others*, , In that case the facts were that the suit property was bequeathed by a Will executed by the owner in July, 1950, to his wife S and his cousin's widow J. It was stated in the Will that the testator was duty bound to provide maintenance for the said two persons and he having none else in the family, the property shall be enjoyed by them in equal shares without any right to alienate the same during their lifetime and if one of them were to die survived by the other, the surviving member shall have the right to enjoy the property in its entirety. The testator died in September, 1950 and after the legatees came into possession of the property, J died in 1960. In 1970 S appointed a power of attorney holder who alienated the suit property and the appellants purchased the same under a registered sale

deed. A suit was filed for declaration that the legatees having succeeded to limited estate under Will the alienation made by S was illegal.

13. On these facts the question which cropped up for consideration before the Supreme Court was whether or not a Hindu female acquired or possessed the property in recognition of her pre-existing right and whether or not she got the right for the first time under an instrument without any pre-existing right. The Supreme Court held that u/s 14 of the Hindu Succession Act, the Court should take a liberal view in removing gender based discrimination and for effectuating economic empowerment of Hindu females. The ratio of the said case has no application with the present case.

14. Next case on which reliance was placed by the learned counsel for the writ petitioner is the decision of Vishaka and others Vs. State of Rajasthan and Others, . In the above case the Supreme Court dealt with the rights of working woman against sexual harassment in workplaces. The Supreme Court found there is no law for safeguarding the rights of working places. The Supreme Court laid down several guidelines and held that till law is made, these guidelines will hold the field. The ratio in Vishaka also do not apply to the present case.

15. Now coming down to the present case this Court is of the view that from the averments in the writ petition and which have been recorded in order of the learned Judge, this writ petition is clearly not maintainable. In coming to this view, this Court gets support from two decisions of the Supreme Court which are noted hereinbelow:

The first decision was given in the case of Mohan Pandey and Another Vs. Smt. Usha Rani Rajgaria and Others, . In that case learned Judges of the Supreme Court, condemning the filing of writ petition in respect of private disputes held as follows:-

"It has repeatedly been held by this Court as also by various High Courts that a regular suit is the appropriate remedy for settlement of disputes relating to property rights between private persons and that the remedy under Article 226 of the Constitution shall not be available except where violation of some statutory duty on the part of a statutory authority is alleged. And in such a case, the Court will issue appropriate direction to the authority concerned. If the real grievance of the respondent is against the initiation of criminal proceedings and the orders passed and steps taken thereon, she must avail of the remedy under general law including Code of Criminal Procedure. The High Court cannot allow the constitutional Jurisdiction to be used for deciding disputes, for which remedies, under the general, civil, criminal, are available. It is not intended to replace the ordinary remedies by way of suit or application available to a litigant. The jurisdiction is special and extraordinary and should not be exercised casually or lightly."

16. Another judgment to that effect was cited by the learned counsel for the State which was delivered in the case of All India Institute of Medical Sciences

Employees" Union (Regd.) through its President Vs. Union of India (UOI) and Others, . In the said case the Court made it clear that when a police officer is not taking action on the basis of complaint to be lodged before the office there it is open to the complainant to take other steps. Reliance was placed on the following observation at para 4 of the said judgment:-

"When information is laid with the police but no action in that behalf, is taken, the complainant is given power u/s 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into the offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint u/s 203 of the Code. In case he finds that the complaint/evidence recorded prima facie, discloses an offence he is empowered to take cognizance of the offence and would issue process to the accused."

17. In the instant case, this Court finds that there are various criminal cases pending between the parties and some of the cases are pending before the Magistrate and parties have even come before the High Court in revisional jurisdiction.

18. Having regard to the pendency of these cases it is difficult for this Court to come to the conclusion that the parties have no other remedy. Keeping those remedies pending, the writ petition has been filed ultimately an order has been obtained and as a result of which the appellant cannot stay in the house which she claims to be the house where her husband stays. Whether there is any valid marriage between the parties, cannot be decided by this Court. The learned Judge has proceeded on the basis that the appellant is the daughter-in-law and even then the learned Judge directed virtual eviction of the appellant from the said premises. In our considered view, the writ Court cannot do so and especially in the context of disputes of purely civil in nature.

19. For the reasons aforesaid we set aside the order under appeal. We, therefore, dismiss the writ petition and allow this appeal. We, however, make it clear that this order will not have any effect on the pending proceedings between the parties before the civil or criminal Court. There will be no order as to costs.

20. This Court also makes it clear that nothing said in the order will prevent the parties from taking appropriate proceedings which are provided under the ordinary law and such proceedings, if necessary, can be taken in accordance with the provisions of law.

Xerox certified copy of this judgment and order, if applied for, be supplied expeditiously.