

(1995) 02 CAL CK 0004
In the Calcutta High Court
Case No : Matter of 1994

Monordas Shah

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 13-02-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2A, Order 39 Rule 7
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 144
Police Act, 1861 — Section 23

Citation : (1995) 2 CALLT 35

Hon'ble Judges : Shree Rang Misra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Shree Rang Misra, J.—By means of this petition, petitioner seeks a direction in the nature of mandamus commanding respondent Nos. 2 to 4 in particular respondent No. 4 to act in accordance with law and to perform their statutory duties including the duties enjoined upon them u/s 23 of the Police Act, 1861 and to restrain the respondent Nos. 5 to 7 and their associates from illegally obstructing, disturbing and interfering with the petitioner's lawful rights to carry on the business from his office-cum-enquiry centre situated on the first floor of the premises No. 9, S.N. Banerjee Road, Calcutta and also a writ directing the respondent No. 4 the Officer-in-Charge, Taltala Police Station to carry out the order passed by the Executive Magistrate and Metropolitan Magistrate whereby the respondent Nos. 5, 6 and 7 were directed not to create any obstruction to the petitioner and his partner and employees from carrying on the business from his office-cum-enquiry centre.

2. Brief facts giving rise to this writ petition are as follows :

3. Petitioner alleges that the respondent No. 7 is one of the Trustees of the Estate of Rajendra Dutta, deceased and the respondent Nos. 5 and 6 are the

illegal occupants of two separate portions of premises No. 9, S. N. Banerjee Road, a trust property.

4. Petitioner also alleges that on 14th November, 1988 the partnership firm of the petitioner entered into a written agreement with the respondent No. 7 and another being the trustees to the said Estate of Rajendra Dutta, deceased (hereinafter referred to as "the Estate") for the development of the premises No. 9, S. N. Banerjee Road, Calcutta, a trust property by demolishing the old and dilapidated building and by construction of the new building in lieu thereof. Thereafter the said trustee executed an irrecoverable power of attorney in favour of the petitioner and another, partner of M/s. Quality Builders authorising them among others to do all acts, deeds and things which would be necessary in connection with the development of the trust property in question by demolishing the said old dilapidated building and constructing a new building at the said place and site in Terms of the said agreement. Subsequently respondent No. 7 by a letter dated 8th April, 1993 authorised the said M/s. Quality Builders, the firm of the petitioner to open site office at the existing office of the trust on the first floor. Subsequently respondent No. 7 in direct connivance and collusion with the respondent Nos. 5 and 6 illegally started obstructing the said partnership firm to carry out its day to day duties. Petitioner firm filed a suit before this Court as Suit No. 183 of 1993 for a specific performance of the said agreement whereupon this Court by and interim order of injunction passed on May 28, 1993 in the said suit restrained the respondent No. 7 from preventing or obstructing the petitioner firm from carrying out its day to day business from its office-cum-enquiry centre situated on the first floor of the said premises No. 9, S. N. Banerjee Road, Calcutta by posting Darwan or any security guard. The said respondent No. 7 was further restrained from entering into any agreement with any other party in respect of the aforesaid trust property in question and also executing any power of attorney in respect of the said property. Subsequently by an order dated 1st October, 1993 this Court was pleased to make the aforesaid interim order confirmed and absolute. Thereafter the petitioner started running its day to day business on the strength of the order of this Court. However, the respondent No. 7 in connivance with respondent Nos. 5 and 6 once again started creating obstruction to the partners of M/s. Quality Builders and their office staff to use their aforesaid office-cum-enquiry centre. The said respondent also got the help of some local ruffians and antisocial elements. On 22nd June, 1994 the Manager of the petitioner firm was obstructed by the respondent Nos. 5 and 6 and four other miscreants. The respondents assaulted the Manager by fist and blows. The Manager of the firm made a complaint to the concerned Police Station requesting the Police Authorities to take appropriate action. It is further alleged that respondent Nos. 5, 6 and 7 illegally and forcibly entered into the said office and asked the Manager to stop running the business. Petitioner filed an application u/s 144 of the Criminal Procedure Code and on 6th October, 1994 Metropolitan Magistrate passed an order and drawn the proceedings u/s 144. Since the appellant was not carrying out the order of the Executive Magistrate for

which they are the duty bound petitioner approached this Court under Article 226 of the Constitution of India as the Police Authorities have failed and neglected to perform, their statutory duties and functions enjoined upon them u/s 23 of the Police Act. They have also failed to comply with and enforce the order of the Executive Magistrate and Metropolitan Magistrate and an interim order was passed by this Court (S. R. Misra, J.) Placing reliance on the stay order passed by this Court to the following effect:

"This order is still intact, and if the private respondents are trying to interfere and/or obstruct the working of the petitioner in his office, on being approached, the Executive Magistrate u/s 144 after obtaining the police report will pass an order to the similar effect. In view of this the private respondent Nos. 5, 6 and 7 are restrained from obstructing or interfering in the office accommodation of the petitioner or in any other manner pertaining to the said office during the pendency of this application subject to further orders. It goes without saying that the police is to perform their duty and to enforce the said order. For any other relief permissible to the petitioner it is open to the petitioner to approach the police for doing the needful"

5. An application for vacating the stay order has been filed in which it has been stated that the matter regarding the dispute between the parties is the subject matter of a suit pending before this Court and disputed question of fact raised in this petition is not amenable to a writ jurisdiction and 60 days having expired the order of the Executive Magistrate could not be enforced. According to them the main dispute is in respect of the premises and differences arose between the petitioner and the respondents are in respect of an agreement dated 14th November, 1988 and for the redress of the grievance the petitioner having filed a suit being Suit No. 183 of 1993 for declaration and specific performance of the said agreement and also the relief in respect of a sum of Rs. 5 lakhs. Details have been given in paragraph 11 of the affidavit-in opposition. In the said suit an injunction application was filed by the petitioner.

6. A second application was also filed u/s 144 which application is not maintainable in law. According to the O.P.'s the dispute relates to the private matters which does not have a public character. Section 144 of the Criminal Procedure has no concern or connection. The dispute giving rise to this petition is purely a dispute between the petitioner and the answering respondents on the basis of an agreement and alternative efficacious remedy available to the petitioner having been availed of by the petitioner the question of proceeding in such a matter under Article 226 is in the teeth of a decision of the Supreme Court reported in Mohan Pandey and Another Vs. Smt. Usha Rani Rajgaria and Others, ,

7. Having heard the counsel for the petitioner and the counsel appearing for the respondent as argued by Mr. Balai Roy who has extraneously urged that although 60 days have expired but since this Court has passed the interim order placing reliance on the order of the Civil Court the Police is duty bound to carry out the

orders of the Civil Court and on their failure to carry out the said order petitioner is entitled to a protection by this Court under Article 226 of the Constitution. It has also been urged on his behalf that the remedy sought in the present writ petition is not the same remedy which may be available to the petitioner in Suit No. 183 of 1993 and it has also been urged that the Police is duty bound to carry out the order of the Executive Magistrate and if a complaint is made it must be investigated and the Police is to perform the statutory duty provided under the Police Act which they have failed to perform. A perusal of the petition would go to show that the dispute between the petitioner and the answering respondents is in respect of an agreement and is purely of a civil nature and an appropriate remedy for such a dispute is a Civil Court and admittedly the petitioner having filed a suit for the redress of his grievance viz. claiming declaration and also of a specific performance and there he having obtained an order of injunction and if there is a non-compliance of such an order of injunction the remedy of the petitioner is to either approach the Court under Order 39 Rule 2A as well as Rule 7 of the Code of Civil Procedure, or under the High Court Rules (Original Side). It is not a case where the petitioner has no other alternative. Admittedly petitioner has an alternative remedy and that remedy having been availed of by the petitioner the question arises that in such a case the question of exercising an extra ordinary jurisdiction under Article 226 arise or not. It is also to be taken note of that admittedly 60 days having expired from the date of the passing of the order of the Executive Magistrate. The petition so far as the enforcement of the order of the Executive Magistrate is concerned has become infructuous. A similar controversy was the subject matter before the Apex Court and the Apex Court in Mohan Pandey and Another Vs. Smt. Usha Rani Rajgaria and Others, has observed as follows :

"We are unable to follow this argument. There is no doubt that the dispute is between two private persons with respect to an Immovable property. Further, a suit covering either directly a portion of the house property which is in dispute in the present case or in any event some other parts of the same property is already pending in the civil Court. The respondent justifies the step of her moving the High Court with a writ petition on the ground of some complaint made by the appellants and the action by the police taken thereon. We do not agree that on account of this development, the respondent was entitled to maintain a writ petition before the High Court. 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 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 the general law including the Criminal Procedure Code. The High Court cannot allow the constitutional

jurisdiction to be used for deciding disputes, for which remedies, under the general law, civil or criminal, are available. It is not intended to replace the ordinary remedies by way of a suit or application available to a litigant. The jurisdiction is special and extraordinary and should not be exercised casually or lightly. We, therefore, hold that the High Court was in error in issuing the impugned direction against the appellants by their judgment under appeal. The appeal is accordingly allowed, the impugned judgment is set aside and the writ petition of the respondents filed in the High Court is dismissed. There will be no order as to costs."

8. A perusal of the decision referred to above would go to show that a controversy regarding the dispute which is the subject matter of this writ petition the appropriate remedy is to go to the Civil Court and once the Civil Court has already been approached by a party for the redress of his grievance the question of exercising its jurisdiction under Article 226 by this Court does not arise nor it is an executing Court of an order passed by a regular Court or an Executive Magistrate. If the order of the Civil Court in the pending suit passed by this Court is already there and there is any breach of that order the CPC provides a complete remedy for the redress of such a grievance or provided under the Rules of the Original Side Rules as the case may be. Thus it is clear that when an efficacious alternative remedy is available normally this Court is not inclined to interfere or exercise its jurisdiction under Article 226 but where an alternative remedy is available and such remedy has already been availed by a party the question of interfering at that stage does not arise. It is well settled by now that this Court is not an executing court and the reliefs sought in this writ petition is in the nature of an executing of an order of the Executive Magistrate and even 60 days of the passing of the order of the Executive Magistrate having come to an end the question of enforceable such an order even otherwise on merit does not arise. I do not find any merit in the contentions raised on behalf of the petitioner as it is always open for the petitioner who has filled this suit to approach the said Court for enforcement of the said relief or for a further relief as the case may be. But a disputed question of fact including the dispute regarding the agreement between the petitioner and the respondent even on merit cannot be gone into a writ petition where disputed questions of fact are not to be determined. In case the petitioner has filed any application before the Executive Magistrate he is free to pass an order in accordance with law u/s 144(2) of the Criminal Procedure Code. It is also to be taken note of that the Apex Court has observed that CPC provides a complete Code and so the Criminal Procedure Code also provides a remedy under the same and if there is any breach or grievance against an order u/s 144 the remedy is provided under the Criminal Procedure Code itself.

In view of what has been stated above the writ petition fails and is dismissed.

Interim order passed earlier is hereby vacated.

Parties are directed to bear their own costs.