

(2015) 09 BOM CK 0108
In the Bombay High Court
Case No : Writ Petition No. 6735 of 2015

Ramkrishna Bhaskar Prabhudesai	Vs	APPELLANT
Mrinal Sushil Prabhudesai and Others		RESPONDENT

Date of Decision : 01-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21, Order 21 Rule 32(1), Order 39 Rule 2A, 2(14), 36
Constitution of India, 1950 — Article 226, 227

Citation : (2015) 09 BOM CK 0108

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : Rajesh Datar, for the Appellant; R.V. Govilkar and Aarti Kalekar instructed by P.V. Nelson, Advocates for the Respondent

Final Decision : Allowed

Judgement

R.M. Savant, J—Rule, having regard to the challenge raised made returnable forthwith and heard.

2. This Petition exemplifies the blatant and brazen manner in which the Respondent No. 1 has defied the orders passed by this Court as well as the Apex Court.

3. The above Petition filed under Article 227 of the Constitution of India takes exception to the order dated 4-7-2015 passed by the Learned Joint Civil Judge Senior Division, Thane, by which order the application Exhibit 11 filed by the Petitioner for being granted police aid for execution of the possession warrant and application Exhibit 12 for issuance of possession warrant, came to be rejected. The genesis of the said applications Exhibit 11 and Exhibit 12 lie in the order of injunction which was passed by the Lower Appellate Court dated 1-1-2014 against the Defendants i.e. the Respondent No. 1 and the Respondent No. 2, by which injunction the Respondent Nos. 1 and 2 were restrained from forcibly entering the suit premises and disturbing the peaceful possession of the

Petitioner.

4. At this stage, it is required to be noted that the original Plaintiffs i.e. the Petitioner and the Respondent No. 3 are the father-in-law and mother-in-law of the Respondent No. 1. The fact that the relations between the Respondent No. 1 and the Respondent No. 2 are strained can be seen from the fact that Hindu Marriage Petition No. A-837 of 2010 has been filed by the Respondent No. 2 husband in the family Court at Thane for divorce. The Petitioner who is the original Plaintiff No. 1 along with the Respondent No. 3 who is the Plaintiff No. 2 has filed the Suit in question for restraining the Respondent Nos. 1 and 2 from entering the premises in question and disturbing the peaceful possession of the Plaintiffs. It is not necessary to dilate further in respect of the pleadings in the Suit and the Written Statement etc. Suffice it would be to state that the Plaintiffs application for temporary injunction was rejected by the Trial Court by order dated 19-10-2013 for the reasons mentioned in the said order. The reasons revolve around the fact that the Respondent Nos. 1 and 2 have a daughter and therefore residence is required for the Respondent No. 1 and her daughter.

5. The Plaintiffs aggrieved by the said order dated 19-10-2013 filed Misc Civil Appeal No. 206 of 2013. In the context of challenge raised in the instant Petition what is relevant is that the said Appeal was allowed and the order passed by the Trial Court was set aside. The operative part of the order passed by the Lower Appellate Court i.e. the Learned District Judge-8 Thane, reads thus:

"Defendants are hereby restrained from forcibly entering and reside in the suit premises. They are further restrained from disturbing the peaceful possession of Plaintiffs in respect of suit property."

It is after the said order that the Respondent No. 1 herein filed Writ Petition No. 753 of 2014. In the said Writ Petition a statement came to be made on behalf of the Respondent No. 2 husband that he is prepared to make alternate arrangements for the residence of the Respondent No. 1 and the daughter in a housing complex, at Panchpakhadi, Thane. In the said Writ Petition, an order was passed on 23-12-2014 and in the context of the present Petition, clause (4) of the said order is material and is reproduced herein under:

"4. The above Petition was heard at some length, during the course of the hearing of the above Petition, the Respondent No. 3 herein reiterated the said arrangement of a flat in the housing complex at Panchpakahdi, Thane. The said flat is near the school of the daughter of the Petitioner and the Respondent No. 3. Upon this, the Learned Counsel appearing for the Petitioner states that the said arrangement is acceptable to the Petitioner, but the Petitioner would like to visit the said flat and would then make a statement as to within what time she would move out of the flat of the Respondent Nos. 1 and 2 and move to the said flat at Panchpakahadi, Thane. Hence the question is only as regards the time within which the Petitioner would move out of the flat owned by the Respondent Nos. 1 and 2. The said time for moving out has obviously to be reasonable."

Hence in terms of the said order dated 23-12-2014, the Petition was again placed for the limited purpose mentioned in the said order on 6-2-2015, on which day though the Petition was specifically kept only for the limited purpose of ascertaining as to within what time the Respondent No. 1 would vacate the premises in question i.e. the suit premises, contentions were sought to be raised as regards the suitability of the premises in question, though suitability was never disputed on the earlier date and in fact was accepted. This Court therefore dismissed the said Writ Petition No. 753 of 2014 by order dated 6-2-2015. Paragraphs 2, 3 and 4 of the said order dated 6-2-2015 are material and are reproduced herein under:

"2. Hence when the Petition is only kept for the said purpose and it was made clear that no further arguments would be entertained, the Learned Counsel for the Petitioner Mr. Nelson ventured to make submissions as regards the suitability of the premises in question. As indicated above, the acceptability of the premises by the Petitioner was recorded in the said order and the Petition was kept pending only for the limited purpose which has been mentioned hereinabove.

3. The Learned Counsel appearing on behalf of the Respondent No. 3 states that the Petitioner had visited the premises and communicated to the Respondent No. 3 the works which were required to be carried out by way of minor repairs. The Learned Counsel for the Respondent No. 3 states that the said works have been carried out. The Learned Counsel for the Respondent No. 3 states that the undertaking in terms of the said order dated 23-12-2014 has also been filed. In my view, it is not possible to entertain the contentions which are now sought to be urged on behalf of the Petitioner, in the light of the order dated 23-12-2014. The reluctance of the Learned Counsel to mention the time within which the Petitioner would vacate the premises is obvious. The intention of the Petitioner is to latch on to the premises of the Respondent Nos. 1 and 2. This Court is therefore required to fix the time. The Petitioner is therefore granted time up to 15-3-2015 to vacate the premises she is occupying of the Respondent Nos. 1 and 2 who are her in-laws.

4. For the reasons which have already been recorded in the order dated 23-12-2014, however subject to the time granted as above, the Writ Petition is dismissed."

6. The Respondent No. 1 thereafter carried the matter to the Apex Court by way of SLP No. 7875 of 2015. The Apex Court dismissed the said SLP, however granted time up to 31-3-2015 to the Respondent No. 1 to vacate the premises. The Order passed by the Apex Court on 16-3-2015 is reproduced hereinunder for the sake of ready reference:

"The time to vacate the premises by the Petitioner is extended upto 31st March, 2015. The Special Leave Petition is dismissed."

7. Hence though time granted by this Court i.e. up to 15-3-2015 as also the time granted by the Apex Court by its order dated 16-3-2015 i.e. upto 31-3-2015 has

long expired. The Respondent No. 1 has not vacated the premises in question. It is in the said context that this Court was constrained to make the observation that this Petition exemplifies the blatant and brazen manner in which the order passed by this Court as well as the Apex Court is sought to be defied.

8. Faced with the situation where the Respondent No. 1 has not vacated the premises in question that the Petitioner herein i.e. the original Plaintiff No. 1 filed Special Darkhast No. 43 of 2015 for execution of the said order of injunction passed by the Lower Appellate Court and in the said Darkhast filed applications Exhibit 11 and Exhibit 12 for police aid to execute the possession warrant and for issuance of possession warrant. The said applications have been rejected by the Trial Court i.e. the Learned Joint Civil Judge Senior Division Thane, by the impugned order dated 4-7-2015. The Trial Court has rejected the said applications inter alia on the ground that the Respondent No. 1 cannot be said to be in possession, that the order of which execution is sought i.e. the order passed by the Lower Appellate Court granting injunction to the original Plaintiffs is not an executable order and that since the Plaintiffs are relying upon the said order as also the order passed by this Court as well as the Apex Court, the Plaintiffs may apply under Order XXXIX Rule 2A of the Civil Procedure Code which provision according to the Trial Court can be invoked for disobedience of the said order.

9. The above Petition was moved for urgent reliefs on 14-7-2015 before a Learned Single Judge of this Court. The Learned Single Judge of this Court in the order passed on the said date i.e. 14-7-2015 reached a prima facie conclusion that the Respondent No. 1 has committed contempt of the order dated 6-2-2015 passed by this Court and thereafter posted the Petition for admission and restrained the Respondent No. 1 from creating any third party interest or part with possession of the property in dispute.

10. As indicated above, it is the said order dated 4-7-2015 which is taken exception to by way of the above Petition.

11. It is the submission of the Learned Counsel Mr. Datar appearing for the Petitioner that the Trial Court has proceeded on an erroneous premise that the Respondent No. 1 is not in possession of the premises in question. The next submission of the Learned Counsel is that the Trial Court has also erred in recording a finding that the order passed by the Lower Appellate Court is not an executable order. It is the submission of the Learned Counsel that in terms of Section 36, the provisions of Order XXI are equally applicable to the execution of orders and hence the order passed by the Lower Appellate Court was required to be executed by the Trial Court by adopting the procedure prescribed under Order XXI Rule 32(1) of the CPC.

12. Per contra, the Learned Counsel Mr. Govilkar appearing for the Respondent No. 1 made a valiant attempt to see to it that the Petition is not proceeded with by questioning the very maintainability of the above Petition. The Learned

Counsel also sought to draw a distinction between an "order" and a "decision" and the submission of the Learned Counsel was that the order passed by the Lower Appellate Court cannot be said to be an order within the meaning of Section 2(14) of the Civil Procedure Code which can be executed under Section 36. The Learned Counsel sought to question the maintainability of the above Petition by placing reliance on the judgment of the Apex Court in the matter of *Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil*, (2011) 1 CTC 854 : (2010) 7 JT 529 : (2011) 1 RCR(Rent) 1 : (2010) 7 SCALE 428 : (2010) 8 SCC 329 : (2010) 8 SCR 836 : (2010) AIRSCW 6387 which judgment is an exposition of the Apex Court on the scope of Articles 226 and 227 of the Constitution of India.

13. Having heard the Learned Counsel for the parties, I have considered the rival contentions. The facts as narrated above make a disturbing reading. The facts disclose that in spite of the order passed by this Court as well as the order extending the time passed by the Apex Court, the Respondent No. 1 is brazenly defying the said orders by not vacating the premises. It is required to be noted that it is in the said context that the applications Exhibit 11 and Exhibit 12 were filed by the original Plaintiffs. The question that is posed is whether the order passed by the Lower Appellate Court granting injunction is an executable order. A conjoint reading of Section 36 and Order XXI Rule 32(1) of the CPC makes it clear that the order of injunction passed by the Lower Appellate Court is an executable order. The attempt of Mr. Govilkar to make a fine distinction between an "order" and a "decision", can only be stated to be rejected. The Trial Court in my view has totally glossed over the fact that it is in the fact situation where the Respondent No. 1 was residing with the original Plaintiffs that the injunction was required to be granted in favour of the Plaintiffs, and it is in the said circumstances that a statement came to be made on behalf of the Respondent No. 2 that alternative arrangement would be made for residence of the Respondent No. 1 and the daughter. If the Respondent No. 1 was not residing with the original Plaintiffs then there was no occasion for the Plaintiffs to file the Suit. The Trial Court failed to appreciate that it is on account of the dispute arising out of the residence of the Respondent Nos. 1 and 2 that the Plaintiffs were constrained to file the Suit. The said finding of the Trial Court that the Respondent No. 1 is not residing in the flat in question is therefore perverse. The Trial Court has thereafter erred in adjudicating the applications without even referring to the provisions of the CPC under which the order passed by the Lower Appellate Court can be executed. The Trial Court as can be seen has refused to exercise jurisdiction on the ground that the remedy under Order XXXIX Rule 2A is available. That remedy undoubtedly is available to the Plaintiffs if they so choose but that would not mean that the Plaintiffs are not entitled to execute the order which is in their favour. Seeking punishment of the Respondent No. 1 for the alleged breach and violation of the injunction order and seeking execution of the injunction order are two different things and are governed by two different statutory provisions. The Trial Court has unfortunately missed the said aspect.

The Trial Court in the said process has failed to exercise the jurisdiction vested in it, warranting the exercise of the Writ Jurisdiction of this Court under Article 227 of the Constitution of India.

14. In my view, the submission made by Mr. Govilkar based on the Judgment in the matter of Shalini Shyam Shetty's case (supra) also cannot be accepted. This as indicated above is a case where there is an blatant and brazen violation of the orders passed by this Court as well as the Apex Court by the Respondent No. 1. The instant case for the reasons mentioned hereinabove therefore satisfies the tests laid down by the Apex Court in Shalini Shetty's case (supra) for the exercise of the power of superintendence under Article 227 of the Constitution of India. In my view therefore, the impugned order dated 4-7-2015 is required to be quashed and set aside and is accordingly quashed and set aside. The Applications Exhibit 11 and Exhibit 12 would accordingly stand allowed. The matter is remitted back to the Trial Court to monitor the further steps that are required to be taken pursuant to the instant order for the execution of the order passed by the Lower Appellate Court. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs of the Petition.