
(1989) 07 CAL CK 0038
In the Calcutta High Court
Case No : F.M.A.T. No. 3839 and 4147 of 1988

Sadhan Roy

APPELLANT

Vs

Biresw Roy and Others

RESPONDENT

Date of Decision : 26-07-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 226

Citation : (1990) 1 CALLT 238

Hon'ble Judges : P.D. Desai, C.J.; Susanta Chatterji, J

Bench : Division Bench

Advocate : Sakti Nath Mukherjee and Amiya Kumar Mukherjee, for the Appellant; J. Ghosh and Rr. Tapan Kumar Banerjee, for the Respondent

Judgement

P.D. Desai, C.J.—These two appeals are taken up for hearing by treating them as included in the day's cause list.

2. Since both the appeals involve common questions, they can be and are being disposed of by this common judgment.

3. The case has a long history which is being recounted in order to appreciate the controversy between the parties and its resolution by the present adjudication.

4. The appellant and respondent Nos. 1 and 2 (Writ Petitioners) in both these appeals are brothers. The dispute between them pertains to the plant, machinery, superstructures and a portion of land forming part of premises No. 32, Feeder Road, Calcutta. The aforesaid subject matter of dispute will be referred to as "the property in question" or "the disputed property" in the course of this judgment. The appellant claims to have acquired leasehold rights in respect of the land and superstructures from their owners under two registered Deeds both dated April 7, 1971, and also the ownership of the plant and machinery at a Court auction sale.

5. It is the case of the appellant that since respondents No. 1 and 2 were

creating disturbance in his possession and enjoyment of the disputed property, he moved two separate applications u/s 144(2) of the Code of Criminal Procedure before the Competent Court. An ex parte order was passed in one of those applications on May 19/20, 1988 directing the concerned Police Authorities to ensure that the free ingress and egress of the appellant is not obstructed and that he is given protection. In the other application, an order was made substantially to the effect that the concerned Police Authority should ensure that the nature and character of the property is not changed and that necessary protection is given.

6. On or about June 3, 1988, respondents No. 1 and 2 moved a writ petition, being Civil Order No. 5093 (W) of 1988, hereinafter referred to as "the first petition" and obtained an ex parte ad interim order on the same day restraining the appellant from causing any disturbance to their possession of the property in question.

7. During the pendency of the said writ petition, on or about June 17, 1988, Respondents No. 1 and 2 filed Title Suit No. 337 of 1988 in the Court of the Assistant District Judge at Barasat for a declaration that the business mentioned in Schedule "A" to the plaint together with the leasehold rights in respect of the property mentioned in Schedule "B" were acquired from the capital, labour and income contributed jointly by the appellant and respondents No. 1 and 2 and that the parties had joint interest in the suit business and property and for a preliminary decree declaring the shares of the parties and also for a decree for "partition" of the business and of the suit property by metes and bounds". Be it stated that the disputed property is also the subject matter of the said suit. Respondents No. 1 and 2 obtained an ex pane interim order on June 18, 1988 in the said suit directing the appellant and the other defendants to maintain status quo as to the possession and nature and character of the suit properties described in Schedules "A" and "B" to the plaint.

8. On June 21, 1988, respondents No. 1 and 2 moved an application u/s 144(2) of the Code of Criminal Procedure before the competent Court and obtained an ex parte order directing the concerned Police Authorities to ensure that no breach of peace took place at the site of the property in question and that necessary protection is given to them.

9. The first petition reached hearing before a learned Single Judge of this Court on June 23, 1988 and it was disposed of with the following observations :

.. .. "It appears that the writ petition is wholly misconceived. It is absolutely a private dispute between the brothers and the writ court is not the proper forum to adjudicate the rights of the respective parties and to make any observation as to the title of the parties. Any observation even tentative is likely to affect the interest of the petitioner and the respondent No. 10 Mr. Mukherjee has very strongly submitted that having filed a writ petition and in appropriate cases the Court passes an interim order to protect the rights of the parties and to preserve

the interest of the property, but taking advantage of an ex parte order if the position undergoes a change and thereafter the writ petition is disposed of getting that changed position as it is, the parties affected by the interim order is highly prejudiced. It is also brought to the notice of the Court that already a Civil suit has been filed for declaration and for partition and the petitioner has already obtained an interim order of injunction. It is also brought to the notice of the Court that Criminal Courts are in seisin of the matter to see that there is no breach of peace. Considering such state of affairs the writ petition is disposed of and all interim orders are vacated. It is also made clear that the order passed by this Court on June 3, 1988 will have no impact for passing any interim order either by the Civil Court or by the Criminal Court. It is made clear that the competent Civil Court and/or the Criminal Court will decide the case of their own merit and consider the facts of the case in their proper perspective. The order dated June 3, 1988 will not influence the Courts to pass any necessary interlocutory order. It is also submitted that the police is not taking any effective steps to comply with the order of the Criminal Court. Mr. Dutta appearing for the State has submitted that at all point of time the Police is taking effective steps, but in view of the order of this Court passed on 3.6.88 there is direction from the Magistrate's Court to carry out the order of the Hon'ble Court as passed on 3.6.88. It is accordingly made clear that the Police would take such step as the Criminal Court would pass order/orders effectively after hearing the parties in due course."

10. On July 18, 1988 respondents No. 1 and 2 moved an application u/s 151 of the CPC in Title Suit No. 337 of 1988 alleging that the order of status quo in respect of the possession of the property in question had been violated by the appellant and seeking the relief of implementation of the said order through the Police Authority on urgent basis. The said application is still pending consideration before the Civil Court and no order-interim or ad interim-has been passed therein.

11. On October 27, 1988 respondents No. 1 and 2 moved yet another writ petition, being Civil Order No. 11828 (W) of 1988, hereinafter referred to as "the second petition", during the Puja Vacation, and obtained an ex parte order of injunction restraining inter alia the appellant from interfering in any manner with the working of the business of the said respondents and from carrying on any illegal activities including creating disturbance and intimidation to the management and to the staff and from squatting in the factory premises. By the said order, the Police Authorities were also directed to act according to law and to render necessary assistance to respondents No. 1 and 2.

12. On November 10, 1988, once again during the Puja Vacation, another ex parte order was obtained by respondents No. 1 and 2 in the second petition, Sri Malay Kumar Singh," Advocate, was thereunder appointed as Special Officer to ensure that the business of respondents No. 1 and 2 was carried on in terms of the interim order passed on October 27, 1988 and that there was no hindrance

to the running of the said business and to take necessary steps in that regard and also to report whether the Police Authorities were carrying out the aforesaid order dated October 27, 1988. It was further directed that the factory running in the property in question should be run under the supervision of the Special Officer and that he should take the assistance of respondents No. 1 and 2, if necessary, that they would render him all necessary help.

13. Pursuant to the direction aforesaid, the Special Officer went to the property in question on November 11, 1988 along with respondent No. 1 and his advocate and, with the help of the Police Authorities, took possession from the appellant of that portion thereof in which a factory was being run at the material time in the name of M/s. Ceramo Clay and handed over its possession to respondent No. 1 despite the representation of the appellant that the clay processing machinery belonged to him. The Special Officer's report to the Court on November 12, 1988 which deals with this aspect of the matter, is quoted hereinbelow :

.. .. "Thereafter I was taken to another entrance of M/s. Ceramo Clay by the petitioner which I found also under lock and key from both side. Mr. Sadhan Roy opened the locks of the said door and Mr. Biresh Roy identified the said factory of M/s. Ceramo Clay and I took possession of the said factory. It is a clay processing unit and I found some labours are working in the Machine. I have handed over the possession of the said factory to the petitioner in presence of the persons present in the meeting. Mr. Sadhan Roy submitted that the clay processing machine belonged to him."

"During my presence in the said Factory I did not find any kind of squatting and/or any Trade Union activities inside the factory premises by anybody.

I found the respondent Nos. 13 to 17 were working inside the factory which is under occupation of Mr. Sadhan Roy, the respondent No. 10. Before putting the petitioner in the possession of M/s. Ceramo Clay by me on 11th November, 1988, I did not find any labour and/or any labour of the petitioner inside the said factory of M/s. Ceramo Clay and/or in the factory of Mr. Sadhan Roy."

Be it stated here that Sadhan Roy (also referred to as respondent No. 10 in the report) is the appellant and Biresh Roy (also referred to as the petitioner in the report) is respondent No. 1.

14. Upon an application made by the appellant for vacating the ex parte orders dated October 27, 1988 and November 10, 1988, the Trial Court which was seized of the second petition passed an order on November 29, 1988 directing that the possession of respondent Nos. 1 and 2 in respect of the property in question should not be disturbed by anyone and that they would be at liberty to carry on business in that portion which was under their possession. It was further recorded in the said order as follows :

.. .. "It is on record that a civil suit is pending and several orders were also passed by the Civil Court from time to time. It is alleged that the writ petitioners

are carrying on business in the name and style of Messrs. Sachimata Ceramics. The parties will be at liberty to take appropriate directions from the Civil Court with regard to the removal of the wall which it is alleged is obstructing the free egress and ingress of the writ petitioners. The respondents, however, are disputing the same. It is made clear that I have not decided the said question and I have left it open for determination by the Civil Court."

15. Against the order aforesaid, the appellant has preferred F.M.A.T. No. 3839 of 1988 which is now being disposed of by this judgment along with the other appeal. An order was passed in the said appeal on the stay application on December 23, 1988 staying the operation of the orders dated November 10 and 29, 1988, passed by the Trial Court and respondents No. 1 and 2 were restrained from creating any obstruction in the carrying on of business by the appellant in the factory being run in the premises in question.

16. While the Appeal Court was seized of the aforesaid matter and on the same day on which the abovementioned stay order was granted by it in the presence of the Counsel for both the parties, that is, on December 23, 1988, respondents No. 1 and 2 moved and obtained from the Trial Court an order in the second petition in the following terms:

"It is recorded by the Special Officer in his report dated 12th November, 1988 that he handed over possession of M/s. Ceramo Clay to the petitioners. No objection was ever raised with regard to the said report by the private respondents. An order was also passed by me on the 29th November, 1988 directing the Special Officer to allow the parties to carry on business in their respective possession. No objection was also raised against the said order, nor any clarification was asked for at any point of time on behalf of the respondents. It is now stated before me on behalf of the petitioner that due to inadvertence one key of another lock of the same gate of M/s. Ceramo Clay is lying with the Special Officer and the Special Officer has not handed over the same to the petitioners. It appears from the report that the Special Officer has already handed over the other key to the petitioners. The Special Officer is directed to hand over the other key kept with him of another lock of the same gate to the petitioners in. course of this day. Stay of operation of this order, as prayed for on behalf of the private respondents, is refused. Let a plain copy of this order countersigned by the officer of this Court be handed over to the petitioner for communication and compliance."

17. The aforesaid order is under challenge in F.M.A.T. No. 4147 of 1988 which is the other matter being disposed of by this judgment.

18. Be it stated that on February 1, 1989, the Appeal Court granted stay of the operation of the order dated December 23, 1988 passed by the Trial Court. The Learned Counsel for respondents No. 1 and 2 states that in view of the said stay order, the key in question has not been handed over to his clients.

19. The foregoing narration of facts reveals that the dispute between the parties

has passed through several vicissitudes. They are assiduously fighting a battle in different courts. They are using different forums and resorting to diverse remedies from time to time as suits them. Having regard to the true nature of the dispute, however, the only proper remedy and the only appropriate forum for the resolution of the dispute, in our opinion, is the pending Title Suit in the Barasat Court. Writ Jurisdiction, as already found in the judgment tendered by the learned Single Judge in the first petition, is not the proper forum for the adjudication of such a private dispute which is essentially of a Civil nature. Under these circumstances, the conduct of respondents No. 1 and 2 in moving the second petition and in obtaining certain directions therein from time to time is, to say the least, incapable of being approved or appreciated, especially when they are the plaintiffs in the Title Suit and have therein obtained an order of status quo in their favour. Even if there was any violation of the said interim order, the proper remedy was to take out proceedings for appropriate relief therein and that is what they have actually done by making before that Court an application u/s 151 of the CPC which is still pending. Against this background, their conduct in invoking the writ jurisdiction for the second time with a view to obtaining certain orders therein, which could have been legitimately claimed in the Civil Court in the pending Suit, tantamounts to meddling with due course of the said suit. It was a clear attempt on their part to overreach the Civil Court. But that is not all. Those respondents even overreached this court when, on the same day on which it was seized of the appeal against the orders dated November 10 and 29, 1988 passed by the Trial Court and actually granted an interim order which substantially nullified the effect of those orders, they moved and obtained directions from the Trial Court ordering the Special Officer to do something which was truly in the direction of further implementation of the said impugned orders. Taking an overall view of the case, in our opinion, perhaps there could not have been a more glaring example of taking undue advantage or making wrong use of a multipronged and multi-tier judicial system and of the abuse of process of Court.

20. The Trial Court also erred in entertaining the second petition against the backdrop aforesaid and in giving interim directions from time to time having a direct impact on the issue of possession of the property in question or a portion thereof. It is pertinent to mention in this connection that: (a) the main relief prayed in the second petition was for the issue of an order of direction to respondents No. 1 to 8 (State Authorities) to give immediate effect to the order passed on June 21, 1988 u/s 144(2) of the Code of Criminal Procedure which, in view of the provisions of Section 144(4), could not have remained in force for more than two months from the making thereof, and was, therefore, not in force on October 26, 1988 when the second petition was affirmed, on October 27, 1988 when it was moved and the first ex parte order was passed and on November 10, 1988 when the ex parte order appointing the Special Officer was passed ; (b) a copy of the judgment delivered by the learned Single Judge while disposing of the first petition was annexed to the memo of the second petition

and a mere perusal thereof would have shown that the writ jurisdiction is not the proper forum for the adjudication of the subject dispute ; and (c) the fact that the Title Suit was filed and that an interim order of status quo was passed therein and that for the alleged violation of the said order an application u/s 151 of the CPC was filed and pending in the Civil Court, was disclosed in the second petition and that, therefore, there was really no occasion or ground for respondents No. 1 and 2 to invoke the writ jurisdiction once again. The Trial Court, therefore, ought not to have entertained the second petition at all. In any case, even if the petition was entertained, there was no jurisdiction to issue the two consecutive ex parte orders dated October 27, 1988 and November 10, 1988 therein against the aforesaid backdrop of the case. On the facts and circumstances of the case, such orders ought not to have been passed, especially when in the memo of the second petition and the annexures thereto, there was adequate material to justify the denial of any relief.

21. The Special Officer apparently exceeded the authority vested in him by taking possession of the factory of Messrs. Ceramo Clay from the appellant and handing over the same to respondents No. 1 and 2. He did this inspite of his having been informed by the appellant that the Clay Processing Machines therein lying belonged to him and despite his having not found any labour employed by respondents No. 1 and 2 in the said factory and, in fact, having seen the persons employed by the appellant (respondents No. 12 to 18) peacefully working therein. When the Special Officer made his report dated November 12, 1988, disclosing the aforesaid facts, the Trial Court did not take any corrective steps to set at caught those actions. On the contrary, by the order passed on November 29, 1988, those actions were affirmed. Things did not, however, come to a stop at this stage. On December 23, 1988, when the Appeal Court was seized of the matter, in all probability to the knowledge of the Trial Court, a further order was passed directing the Special Officer to hand over to respondent Nos. 1 and 2 the other key. All these orders not only had the effect of taking the dispute out of the arena of the Civil Court but also of providing a weapon to a party to the suit to dictate that Court to decide, at least, the proceeding u/s 151, in a particular manner. There was a virtual pre-judgment of the issues which the Civil Court had to decide not only at the interim but also at the final stage of the suit after taking evidence and shifting the grain from the chaff.

22. The conclusion, therefore, is inevitable that the appeals must be allowed by quashing the impugned orders. The question which requires further consideration, however, is, whether the appellant should be granted any additional relief. It is unfortunate that respondents Nos. 1 and 2 exploited the writ jurisdiction not once but twice for serving their private purpose and that on the second occasion they succeeded in overreaching the Civil Court and in abusing the process of law. It is still more unfortunate that in its anxiety to do justice, the Trial Court made the aforesaid orders from time to time during the pendency of the second petition probably without conscious awareness that

ultimately they might actually work injustice to the parties by confounding further an already confused situation with respect to the possession of the property in question or a portion thereof. Under such circumstances, this Court should not feel shackled and decline to rectify that injustice. The litigants' faith in the judicial administration may well be shaken otherwise. It was said long time ago : "Actus Curiae Neminem Gravabit" an act of the Court shall prejudice no man. This maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law. (See A.R. Antulay Vs. R.S. Nayak and Another, There is no higher principle for the guidance of the Court than the one that no act of Court should harm a litigant and it is the bounden duty of Court to see that if a person is harmed by a mistake of the Court he should be restored to the position he would have occupied but for that mistake. (See Jang Singh Vs. Brijlal and Others, Following these well established principles we propose to mould the relief to suit the occasion.

23. In view of the foregoing discussion, the interest of justice requires that an order be passed in these appeals to restore the status quo as to the property in question as on the date on which the Civil Court at Barasat passed an order in those terms in Title Suit No. 337 of 1988 instituted by respondents No. 1 and 2 and we order accordingly. In order to do complete justice between the parties, a further direction is required to be issued to the effect that the dispossession of the appellant at the hands of the Special Officer as detailed in his report dated November 12, 1988 submitted to the Trial Court in the second petition should be set at naught. Accordingly, the Special Officer is directed to go to the property in question and take back the possession of the portion of the said property of which he handed over the possession to respondents No. 1 and 2 and hand over the same to the appellant. The Special Officer shall stand discharged thereafter. All other interim orders, if any, passed in the second petition (Civil Order No. 11828 (W) of 1988) are consequentially vacated.

24. We wish to make it clear that this direction will not act be construed to mean that the appellant was in lawful possession of that portion of the disputed property on the day on which he was dispossessed by the Special Officer since the allegation of respondents No. 1 and 2 is that he had taken possession forcibly in violation of the order of status quo granted by the Barasat Court in Title Suit No. 337 of 1988. Respondents No. 1 and 2 will be entitled to prosecute the application u/s 151 of the CPC filed by them in the said Title Suit alleging that the said status quo order has been violated by the appellant. While hearing and deciding the said application and/or the application for interim relief, the Barasat Court should feel free to decide the question as to who was in possession of the property in question at all material times and it will not in any manner be embarrassed or inhibited by any of the orders passed in the course of the second petition or by the order being passed this day in the course of this judgment. The entire issue is left open to be decided in the pending suit by the said Court as if the second petition or these appeals arising out of the said petition had never been instituted, entertained and decided by this Court.

25. The appeals succeed to the aforesaid extent and are allowed in terms of the foregoing order. Respondents No. 1 and 2 shall pay to the appellant the costs of the second petition are quantified at Rs. 1500/- (Rupees one thousand and five hundred only) as a condition precedent to the hearing of their application u/s 151 of the CPC by the Civil Court at Barasat.

26. Let a plain copy of the operative part of this judgment counter- signed by the Assistant Registrar (Court) be given to the Learned Counsel on record for the appellant and for respondents No. 1 and 2 and let a copy of the judgment be sent down to the Court of Assistant District Judge, Barasat, for being placed on record of the Title Suit No. 337 of 1988 within seven days of the original judgment reaching the concerned section of the Registry.

Susanta Chatterji, J.

27. I agree.